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COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Vacant

ASSOCIATE GENERAL COUNSELS

Rollee H. Efros

Seymour Efros

Richard R. Pierson

Henry R. Wray

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[B-217350]

Contracts—Negotiation—Sole-source Basis—Competition Availability

Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(a) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs.

Contracts—Negotiations—Sole-source Basis—Justification—Inadequate

An agency may not decide to forego soliciting an offer from the incumbent for the next contract period, and instead award a sole-source contract to another firm, based on its view that deficient past performance indicates the incumbent is not responsible, since a nonresponsibility determination should follow, not precede, a competition and, in the case of a small business like the incumbent, by law is subject to review by the Small Business Administration.

Matter of: A&C Building and Industrial Maintenance Corporation, June 3, 1985:

A&C Building and Industrial Maintenance Corporation (A&C) protests the award by the Department of Housing and Urban Development (HUD) of the contract on a sole-source basis to Eastern Services, Inc. (Eastern), to perform janitorial services at the HUD building in Washington, D.C. The contract is for a 6-month period, from December 1, 1984, to May 31, 1985, with options to extend for an additional 2½ years.

We sustain the protest.

Background

A&C was incumbent contractor for the services under a contract with the General Services Administration (GSA). On October 1, 1984, GSA transferred to HUD the operation and maintenance of the HUD Headquarters Building, including janitorial services; A&C's existing contract was to expire on November 30, 1984.

In anticipation of the expiration of the existing contract and the delegation of authority from GSA, HUD determined to secure further janitorial services through the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), which authorizes the SBA to enter into contracts with government departments and to arrange for performance by letting subcontracts to socially and economically disadvantaged business concerns. The SBA, on August 31, initially approved HUD's proceeding with preliminary negotiations for a section 8(a) subcontract and authorized HUD to negotiate directly with Eastern. Accordingly, on September 19, HUD issued a solicitation package to Eastern, which responded with a proposal for the work.

Because the contract value was estimated to be $1,250,000, and Eastern's records had never been audited by a government agency, a comprehensive audit was scheduled to be conducted by the Defense Contract Audit Agency (DCAA). The existing contract with A&C was due to expire before completion of the audit, however, and HUD therefore proposed to enter into a letter contract with Eastern under the section 8(a) program, subject to SBA approval, pending completion of the audit and negotiation of a final 8(a) contract. On November 27, 3 days before the expiration of the existing contract, the SBA refused to accept the services for the 8(a) program because it had determined, in accordance with internal SBA policy, that the removal of the requirement from competition would have too adverse an impact on the incumbent contractor.

Since only 3 days remained until the expiration of the existing maintenance contract, HUD convened an emergency meeting of the HUD Procurement Review Board, which approved an emergency sole-source negotiated contract with Eastern. As originally contemplated, the contract with Eastern, executed on November 30, was to be for a period of 6 months with the option to extend the term of the contractor for 2½ more years. HUD since has requested reconsideration of SBA's decision not to enter into a section 8(a) contract.

Protest and Discussion

A&C contends that HUD has made an unjustified sole-source award at a higher price for allegedly lesser service requirements than under the contract A&C had with GSA. A&C argues that janitorial services are readily available from numerous companies that could be expected to compete for a government contract, and points out that A&C itself had offered to extend the existing contract on a month-to-month basis. Finally, A&C contends that, in any event, the public exigency did not justify entering into a sole-source contract that, with options, could extend for 3 years.

HUD responds that a sole-source award was justified by the public exigency since janitorial services must be uninterrupted and since HUD, notified only 3 days prior to the expiration of the existing contract that SBA would not approve an 8(a) contract, had insufficient time to request proposals from other possible offerors. HUD states that it did not simply extend A&C's contract, or seek a competitive offer from the firm to compare with Eastern's, because A&C's performance as the incumbent had been deteriorating steadily and was seriously deficient. HUD also states that the option provision originally contemplated will not be included in Eastern's contract; HUD advises that if SBA reverses its decision, a contract will be entered into with SBA under section 8(a), but if SBA affirms its decision, HUD will conduct a competitive procurement.

We do not believe that award to Eastern on a sole-source basis was proper.

We recognize that from August 31, when SBA initially approved HUD's request to negotiate with Eastern, until November 27, SBA gave no indication to HUD of any possibility that a contract under section 8(a) with Eastern as subcontractor would not be approved. Thus, when SBA notified HUD that it would not accept a section 8(a) contract, HUD legitimately needed to take quick action to assure its needs would be met, at least on an interim basis while it considered other procurement approaches. See *International Business Services, Inc.*, B-209279.2, Feb. 8, 1983, 83-1 C.P.D. ¶142.

Nevertheless, government procurements generally must be conducted on a competitive basis to the maximum extent practicable. *Work System Design, Inc.*, B-213451, Aug. 27, 1984, 84-2 C.P.D. ¶226. A sole-source award therefore is justified where time is of the essence only if there is no other known source that could meet the agency's needs within the required time-frame. *Id.* Where there are other available sources, the agency must make reasonable efforts to generate competition by, for example, soliciting oral offers with short response times based on as complete a set of specifications as practical, or such other short-cuts as may reasonably be necessary under the circumstances. See *Las Vegas Communications, Inc.—Reconsideration*, B-195966.2, Oct. 28, 1980, 80-2 C.P.D. ¶323. Since a services contractor already in place, like A&C, logically should be viewed as a source available to continue the same or similar services, these principles suggest that HUD should have solicited an offer from A&C, on an expedited basis, to judge against Eastern's.

We also recognize that HUD was so dissatisfied with A&C's performance as the incumbent that the agency probably would not have accepted an offer from the firm even if it were lower in price than Eastern's. The decision that a firm is incapable of providing acceptable services based on its past performance, however, constitutes a negative determination of responsibility, which is supposed to follow, not precede, the firm's participation in the procurement, and which, in the case of a small business like A&C, must by law be referred to SBA for its review before the firm can be rejected. 15 U.S.C. § 637(b)(7) (1982). Thus, if HUD considered A&C nonresponsible, the agency should have so concluded after receiving the firm's offer, and then solicited SBA input. Accordingly, it was improper for HUD not to include the protester in an expedited competition with Eastern based on what in effect constituted a prospective determination that A&C was nonresponsible.

As to the propriety of the protested option provisions in Eastern's 6-month contract, we understand that HUD has not actually deleted the option provisions, but apparently simply does not intend to extend the contract. (The agency anticipates that SBA will approve a new 8(a) contract award). On that basis, we dismiss the protest on this issue as academic. Nevertheless, we point out

that it would, in our view, be incongruous for a sole-source contract award based on the public exigency to contain option provisions like those here. See *NCR Corp.; General Systems Corp.*, B-208143, *et al.*, Apr. 14, 1983, 83-1 C.P.D. ¶403; *International Business Services, Inc.*, B-209279.2, *supra.*

The protest against the sole-source award is sustained. Since the 6-month period is practically over, however, and since the contract will not be extended, no remedial action is practicable.

[B-217462]

Officers and Employees—Transfers—Real Estate Expenses—Refinancing

A transferred employee refinanced his residence at the old duty station in order to obtain assumable financing for the purchaser. The expenses involved in refinancing are reimbursable to the extent such costs are reasonable and customary in the area and otherwise allowable under the Federal Travel Regulations.

Matter of: Marshall L. Dantzler, June 3, 1985:

An employee may be reimbursed for the reasonable and necessary costs incurred in refinancing his residence at the former duty station in order to obtain assumable financing for the purchaser.[1]

Background

Mr. Marshall L. Dantzler, an employee of the Department of Agriculture, was authorized a permanent change of station from Fairfax, Virginia, to Montgomery, Alabama, by a travel authorization dated August 1, 1983. In connection with the transfer Mr. Dantzler sold his residence in Fairfax. As part of the sales transaction he refinanced his house in order that the purchaser could assume a mortgage under more favorable terms. The refinance, assumption, and closing were part of the same transaction.

In connection with the cost of refinancing the mortgage on his old residence Mr. Dantzler has claimed reimbursement for the following expenses:

Loan Origination Fee	$794.50
Title Insurance	190.00
ERA-BPP (Buyer's protection policy)	280.00
State Revenue Stamp	165.00
Recording Fees	36.00
Power of Attorney	11.00
Insurance Binder	50.00
Total	1,526.50

[1] Mr. W. D. Moorman, an authorized certifying officer with the Department of Agriculture's National Finance Center, has requested an advance decision on the claim of Marshall L. Dantzler for certain expenses incurred in connection with the sale of his residence.

The certifying officer has requested our opinion on whether these are allowable costs since they were part of the same transaction as the assumption and sale. The certifying officer also asks whether the fact that a purchaser would normally pay some of these costs if it were a new mortgage instead of a refinancing package affects the employee's reimbursement.

DISCUSSION

The statutory and regulatory authority for reimbursement of real estate expenses incurred by a Federal civilian employee upon transfer of official station is contained in 5 U.S.C. § 5724a(a)(4) and Part 6, Chapter 2 of the Federal Travel Regulations, *incorp. by ref.*, 5 C.F.R. § 101-7.003 (1983). Under these authorities we have allowed reimbursement of the expenses incurred by an employee in obtaining a new mortgage or a second mortgage on his residence at his former duty station where the mortgage transaction on that residence was part of the "total financial package" essential to the purchase of a residence at the new duty station. *Arthur J. Kerns, Jr.*, 60 Comp. Gen. 650 (1981), and *James R. Allerton*, B-206618, March 8, 1983. In *Kerns* the second mortgage obtained by the employee was not on the residence which he was purchasing but on his old residence which he had been unable to sell. The purpose of the second mortgage transaction was to obtain funds to make the downpayment on the residence which he was purchasing at his new duty station. We viewed the second mortgage transaction as being a part of the total financial package essential to the purchase of the new residence. In *Allerton* the employee refinanced his residence at the old duty station in order to facilitate its sale and in order to obtain a downpayment for purchase of a residence at the new duty station. Costs of the refinancing were allowed. The mortgages in both *Kerns* and *Allerton* were secured by the employees' interests in the old residences and were, therefore, considered real estate transaction expense and not merely personal financing.

We have also permitted an employee to be reimbursed for the cost of refinancing his old residence in order to obtain an assumable mortgage for the new purchaser and a downpayment on his new residence. *Charles A. Onions*, B-210152, June 28, 1983. The common thread present in all of these decisions is that the financial transactions involved, a second mortgage, a new mortgage, and a refinanced mortgage, were secured by the employee's interest in his residence at the old duty station. We have disallowed claims where the financial package involved a property not located at the old or the new duty station. *Roger L. Flint*, 62 Comp. Gen. 426 (1983). Since the employee in most instances must sell his old resi-

dence or secure a second mortgage on the old residence in order to purchase a residence at the new official station, we viewed the financial transactions as being one total financial package.

In Mr. Dantzler's case the money obtained by him was not used as a downpayment on a new residence. He had already purchased a new residence before his former residence was sold. The financial transaction was solely to facilitate the sale of his former residence. However, we recognized in *Onions* that the obtaining of an assumable mortgage for a prospective purchaser was often necessary in today's real estate market. The general principle behind the case in question is that costs involved in the financing and refinancing of the old residence in order to facilitate residence transactions may be allowed. Accordingly, we find that the claimed real estate expenses may be allowed, if otherwise proper.

Reimbursement for a title insurance policy may be allowed where the title insurance is purchased primarily for the protection of the lender. *James E. King*, B-183958, April 14, 1976, and FTR, para. 2-6.2c. This is to be distinguished from a buyer's or owner's protection policy, the cost of which is not generally reimbursable. See FTR, para. 2-6.2d(2)(a). In this connection the insurance binder would be reimbursable to the extent it covered the title insurance policy. A loan origination fee of one percent is reimbursable for transfers occurring after October 1982. *Robert E. Kigerl*, 62 Comp. Gen. 534 (1983). Powers of attorney and recording fees are reimbursable under FTR paragraph 2-6.2c. State revenue stamps are reimbursable under FTR paragraph 2-6.2d(e). In summary, the $280 claim for buyer's title protection should not be allowed. The $50 insurance binder may be allowed if required by the lender. Other claimed items appear to be allowable items.

In response to the question concerning whether the seller or purchaser should pay these costs, we point out that this is a refinancing package. The party obtaining the financing is responsible for payment of the expenses as a part of the cost of the financing package and may be reimbursed under the travel regulations to the extent that the costs are reasonable and customary for the area. *Charles A. Onions*, B-210152, *supra*.

Action should be taken on Mr. Dantzler's claim in accordance with the above.

[B-217744]

Environmental Protection and Improvement—Environmental Protection Agency—Authority—Fuel Economy—Performance Testing

Environmental Protection Agency (EPA) is responsible for designing and administering fuel economy performance test and computing Corporate Average Fuel Economy (CAFE) ratings for auto makers. Request questioned EPA's handling of CAFE tests and ratings in three specific areas. Findings are: (1) EPA has broad statutory authority to refine test procedures, even if harder tests have the effect of raising

CAFE standards slightly; (2) EPA's use of informal Advisory Circulars instead of rulemaking procedures to effect test changes is improper unless test changes are "technical and clerical amendment[s]" exempted from rulemaking by statute, or unless one of the Administrative Procedure Act exceptions applies; and (3) Rulemaking proposing adjustments to CAFE ratings is a legally adequate response to a court order to address discrepancies resulting from test changes EPA made in 1979. To Rep. Dingell.

To The Honorable John D. Dingell, June 3, 1985:

Your letter of February 8, 1985, requested our views on several matters relating to the Environmental Protection Agency's (EPA) handling of its testing responsibilities under the Corporate Average Fuel Economy (CAFE) program. Specifically, your concerns are: (1) the scope of EPA's authority to modify test procedures; (2) whether test modifications may be accomplished informally; and (3) whether EPA has adequately responded to an order of the Sixth Circuit Court of Appeals to address discrepancies resulting from test modifications made in 1979. A fourth issue regarding light trucks has been deferred by agreement with your staff.

Our views are, briefly, that EPA did not exceed its broad authority to change test procedures, but changes should have been made formally, unless one of the specific limited exceptions applied to a particular change, and that EPA's proposed rulemaking adequately responded to the court order. Our reasoning is explained more fully below.

I. Background

In response to the energy crisis, the Congress created a comprehensive body of laws dealing with the production and conservation of energy resources. Among these new laws was the Energy Policy and Conservation Act, which included an amendment to the Motor Vehicle Cost Savings and Information Act. The latter amendment created the CAFE program. Pub. L. No. 94-163, § 301, 89 Stat. 871, 806, codified at, 15 U.S.C. §§ 2001-12 (1982). For the express purpose of reducing gasoline consumption by motor vehicles, Congress established average fuel economy standards. 89 Stat. 874, § 2(5). Through design improvements, technological advances, sales efforts and any other means available, each manufacturer was required on the average to meet a predetermined annual standard. Determination of a manufacturer's average fuel economy rating was based on the performance of representative vehicles on laboratory tests and computed with reference to the total sales of all vehicles of the representative type. 15 U.S.C. § 2003 (1982).

The law established the 1978-80 model year standards at 18, 19 and 20 miles per gallon, respectively. It also set the standard for 1985 and thereafter at 27.5 mpg. The Secretary of Transportation was authorized to set the 1981-84 incremental standards and to review individual manufacturer petitions for variances from the set standards.

EPA's responsibilities under the Act are to design and conduct the tests (which also measure exhaust emissions for Clean Air Act compliance), and to calculate manufacturers' CAFE ratings applying test results and sales data according to the statutory formula.

Manufacturers that fail to meet their CAFE standard face a penalty of $5 per ⅒th of an mpg per car produced by the manufacturer that year. A CAFE shortfall of ⅒th mpg for its fleet could easily cost a major manufacturer $20 million in penalties.

II. Statutory Testing Requirements

Issues presented in this case relate to EPA's execution of its authority to design and conduct the fuel economy performance tests. The main statutory provision relating to test design is as follows:

> (d)(1) Fuel economy for any model type shall be measured, and average fuel economy of a manufacturer shall be calculated, in accordance with testing and calculation procedures established by the EPA Administrator, by rule. Procedures so established with respect to passenger automobiles * * * shall be the procedures utilized by the EPA Administrator for model year 1975 (weighed 55 percent urban cycle, and 45 percent highway cycle, or procedures which yield comparable results. * * * 15 U.S.C. § 2003(d)(1) (1982)

Also relevant is subparagraph (3) of the same section, which reads:

> (3) Testing and calculation procedures applicable to a model year, and any amendment to such procedures (other than a technical or clerical amendment), shall be promulgated not less than 12 months prior to the model year to which such procedures apply. 15 U.S.C. § 2003(d)(3) (1982).

The statute also provides that persons adversely affected by actions taken under the CAFE law may seek judicial review of those actions under the Administrative Procedure Act (APA) before their enforcement. 15 U.S.C. § 2004(a) (1982). This section applies to testing decisions as well as standard setting, and determinations of credits and penalties, etc.

III. Scope of EPA's Authority To Modify Test Procedures

Several issues raised in the request relate to EPA's authority to modify the 1975 fuel economy performance test. EPA has argued that it has authority to make test changes to improve test accuracy and close loopholes. The automobile manufacturers claim that these changes make it more difficult for their cars to achieve the predetermined standard. The effect of such changes, they say, is to raise the CAFE standard contrary to the statute.

No one seriously contends that the Congress cast the 1975 test in concrete, never to be changed. The statute expressly acknowledges the possibility of amendments to the test procedures and requires only that they be promulgated a year in advance and that they yield comparable results to the 1975 test. The legislative history elaborated somewhat on EPA's authority. The House Report stated:

> The words "or procedures which yield comparable results" are intended to give EPA wide latitude in modifying the 1975 test procedures, so long as the modified

procedure does not have the effect of substantially changing the average fuel economy standards. H.R. Rep. No. 340, 94th Cong., 1st Sess. 92. (Hereafter, House Report.)

The relationship between tighter test procedures and more stringent standards was recognized. Though "comparable results" are not statutorily defined, the House Report would clearly have allowed slight changes in the fuel economy standards as a result of test procedure improvements. The provision originated in the House, and there is no other indication anywhere in the legislative history as to the proper construction of the term "comparable results," so we must assume the House Report was authoritative.

EPA also claimed authority to close loopholes in the 1975 test procedures. We think it has that authority within the limits set in the House Report cited above. It is obvious that Congress intended the CAFE law to produce dramatic reductions in fuel consumption, not just paper improvements in test results. Anticipated fuel savings were more than 3 million barrels of crude oil per day. The House Report also expressed the opinion that legally enforceable standards and penalties were indispensable to the success of the program. House Report at 86-87. Viewed in this context EPA's authority to close loopholes also seems clear.

At hearings in 1979, the Administrator of the National Highway Traffic Safety Administration testified that the gap between EPA test mileage and actual on-the-road mileage had increased significantly bewtween 1975 and 1979. *Motor Vehicle Fuel Efficiency: Hearings Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 19 (statement of Joan Claybrook) (hereafter Oversight Hearings). Given the statutory mandate to produce results comparable to the 1975 test and to reduce actual fuel consumption, we think EPA could have legitimately made test changes designed to narrow the gap between EPA test mileage and actual on-the-road mileage to its 1975 level. In other words, EPA could justify closing the loopholes that allowed such discrepancies to increase after 1975.

We are not in a position to analyze the efficacy of the test changes that have actually been made, or to evaluate their impact on the CAFE ratings of any specific manufacturer, but we think test changes are clearly authorized.

IV. Need for Rulemaking to Accomplish Changes in Test Procedures

Prior Test Changes

In the past, EPA used Advisory Circulars to notify automakers of proposed test changes and to seek their input. Advisory Circulars are informal and, according to EPA, nonbinding. Oversight Hearings at 93. EPA characterized its decisions made by Advisory Circular as supplementary to the existing regulations. *Id.* at 91-93. EPA also maintained that only minor changes to the test procedures

were made by Advisory Circulars. However, EPA officials acknowledged that what constituted a "minor" change was essentially a judgment call on the agency's part. We cannot assess the technical aspects of the test items handled by Advisory Circular, but it seems fairly clear that some changes informally authorized affected manufacturers' CAFE ratings.

Legal Requirements for Changes

The CAFE statute provides that test procedures shall be "established by the [EPA] Administrator, by rule." 15 U.S.C § 2003(d)(1) (1982). Additionally, the statute provides that except for "technical and clerical amendment[s]" changes to test procedures shall be "promulgated not less than 12 months prior to the model year to which [they] apply." 15 U.S.C. § 2003(d)(3).

The statute expressly requires rulemaking in section 2003(d)(1) and reinforces the requirement for formal rulemaking in section 2003(d)(3) by using the word "promulgated" to describe the publication requirement. The statute allows only one exception to rulemaking, and that is for "technical and clerical amendment[s]" to the rules. The statute does not distinguish between "minor" and other changes, as EPA has argued it is entitled to do.

EPA has never claimed that the changes that the changes accomplished by Advisory Circular were only technical and clerical amendments, and the burden would be on the agency both to claim that exemption and to prove it if challenged. However, since a statutory exception exists, we are not prepared to rule out completely the possibility that EPA's past actions fall within the exception. If the changes accomplished by Circular were not "technical and clerical" matters, rulemaking was required by the statute, no matter how cumbersome it might have been to conduct.

Future Use of Advisory Circulars

In a Notice of Proposed Rulemaking (NPRM), discussed more fully below, EPA proposed to continue the use of Advisory Circulars for so-called "minor" test changes. 48 Fed. Reg. 56526–36 at 56533. In a later related NPRM, EPA attempted to define a "significant CAFE penalty" as occurring when a test change or changes would likely have a negative CAFE impact of .10 mpg or more. 49 Fed. Reg. 48024. Logically, that would imply that "minor test changes" are those with an anticipated impact of −.10 mpg or less. *See also* 48 Fed. Reg. 56528 at note 14.

As to future test changes, the applicability of the rulemaking requirement depends on whether proposed test changes are "technical and clerical" pursuant to the statute. This does not neatly translate into a mileage equivalent, but rather relates to both the purpose and effect of the change.

In addition to the statutory exception, there are also exceptions to the notice and comment requirements of the APA, 5 U.S.C. § 553

(1982) which might provide a legitimate basis for informal action on test changes. Again, if challenged, EPA would have to prove the applicability of these exceptions.

Interpretative rules need not be subjected to formal rulemaking. EPA's explanations of its use for Advisory Circulars at the 1979 Oversight Hearing might be construed as an argument that the changes it discussed were only interpretative rules. Oversight Hearings at 91–93. However, EPA has not yet claimed that this exception applies.

The second broad exception comes into play "when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1982). EPA mentioned the "good cause" exception in the same NPRM in which it announced its intention to continue Advisory Circulars. 48 Fed. Reg. 56533 at note 19. However, the APA exception requires that to claim it, the agency must state its findings and incorporate "a brief statement of the reasons therefor in the rules issued." 5 U.S.C. § 553(b)(B) (1982). This latter prerequisite to the exception has not yet been accomplished.

The exceptions to formal rulemaking discussed above should obviously be employed on a case-by-case basis. They are not amenable to a blanket advance approval by rule as EPA has attempted in 48 Fed. Reg. 56533. Since these reasonable exceptions do exist, we are not prepared to state categorically that all future test changes must be done by rulemaking. However, we do think that EPA should clearly state its legal basis for choosing informal procedures any time it elects to issue a test change by Advisory Circular and that it should be prepared to defend its claim to an exception if challenged.

V. The GM Decision and EPA's Response

In 1979 General Motors and Ford petitioned EPA for relief from changes the agency made to the 1979 test procedures. The questioned changes had been made by Advisory Circular. When EPA denied the petition and reconsideration, the companies filed suit in the Sixth Circuit Court of Appeals.

In its order, dated January 26, 1982, the Court's finding was:

> The EPA has made certain changes in the relevant [test] procedures. Now both Ford and General Motors seek adjustments so that current testing is comparable to the 1975 test procedures. They contend that the EPA made the proposed adjustments without complying with the Administrative Procedure Act, 5 U.S.C.A. § 551, *et seq.*, (1978) as 15 U.S.C.A. § 2004 (1980 Supp.) dictates it must.
>
> We deem it appropriate to remand this case to the EPA so that it may initiate a proper rulemaking proceeding concerning procedures for establishing an adjustment factor for current tests to determine the corporate average fuel economy of manufactured vehicles covered by this statute. *General Motors v. Costle,* Nos. 80-3271, 80-3272, 80-3655 (6th Cir. Jan. 26, 1982).

A narrow, but reasonable, reading of the order is that EPA was obligated to consider in a formal rulemaking the issue of CAFE ad-

justments to compensate for informal test changes. The court made no decision on the merits. This left unresolved the substantive issues of the validity of Advisory Circulars, their application by EPA to "minor" test changes, and the meaning of "comparable results." However it left EPA almost total discretion as to how to deal with the consequences of its 1979 test changes.

EPA responded by issuing an NPRM on December 21, 1983, almost 2 years after the court order was entered.[1] 48 Fed. Reg. 56526-36. The NPRM requested comments on three alternative proposals: netting of test change results; manufacturer specific adjustments to CAFE ratings; and an industry-wide average CAFE rating adjustment. These proposals seem logically to proceed from an assumption that manufacturers were damaged in their CAFE ratings by EPA's 1979 changes to the test procedures.

We are not in a position to analyze the validity of the technical judgments which underlie any of the proposed alternatives. Nor do we feel we should endorse or criticize any of the proposals, since the rulemaking is still open. We do not want to substitute our judgment for that of the agency. However, we do feel that the NPRM generally was a legally adequate response to the Sixth Circuit's mandate to address possible adjustment factors in a rulemaking.

We also thoroughly examined the statute and legislative history to determine whether there was any legislative mandate to make specific CAFE adjustments. While the statute directs the method for the original CAFE calculation and for the computation of CAFE credits, it does not address the possibility of corrections to the CAFE ratings because of deficiencies in the test procedures. The legislative history likewise provides no guidance. A statutory injunction to compute the CAFE adjustment in any particular way would only be by analogy to the other computation procedures. Absent a firm statutory basis, we are not persuaded that the Administrator's discretion to fashion a remedy for past test procedure inadequacies should be in any way curtailed.

VI. Conclusion

Because we are unaware of possible technical or clerical reasons which might justify EPA's past handling of the CAFE testing program or the proposed CAFE adjustments, we are not in a position to raise legal objections to those changes. We do think that in the future, EPA should use formal rulemaking to accomplish test changes, unless a specific exception ("technical and clerical amendment[s]" or APA exception) applies. Furthermore, decisions about exceptions should be made on a case-by-case basis.

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[1] This same NPRM also contained EPA's announcement that it would continue the Advisory Circular system, and was discussed in that context on p. 5 above.

We hope the foregoing information is useful to you. Unless you release it earlier, this opinion will be available to the public 30 days from today.

[B-218541]

Contracts—Protests—Interested Party Requirement—Potential Contractors, etc. Not Submitting Bids, etc.

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A manufacturer which supplies equipment to potential bidders or offerors in a federal procurement, but which is not a potential bidder or offeror in its own right, is not an interested party.

Matter of: ADB-ALNACO, Inc., June 3, 1985:

ADB-ALNACO, Inc., protests as overly restrictive the specifications of solicitation No. N62864-85-R-0139 issued by the Naval Facilities Engineering Command. The basis for protest is that the solicitation requires the use of a particular manufacturers's products by brand name, part number, and other proprietary specifications which restrict competition to a sole source. The Navy reports that ADB-ALNACO is neither a bidder nor, according to the protester's sales engineer, a prospective bidder; ADB-ALNACO was provided a copy of the Navy's report and has not disputed this statement.

Under 31 U.S.C. § 3551 *et seq.*, as added by section 2741(a), of Pub. L. 98-369, title VII (the Competition in Contracting Act of 1984 (CICA)), an interested party is defined as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract." This statutory definition of an "interested party" is reflected in the language of our Bid Protest Regulations which implement the CICA. 4 C.F.R. § 21.0(a)(1985). Accordingly, with respect to all bid protests filed on or after January 15, 1985, the effective date of this authority, only protest involving a direct federal procurement filed by a party that comes within the statutory definition of an interested party can be considered. *See PolyCon Corp.*, B-218304; B-218305, May 17, 1985, 64 Comp. Gen. 523, 85-1 CPD ¶567. Under CICA and our implementing Bid Protest Regulations, ADB-ALNACO's interest as a manufacturer of equipment to be supplied to potential bidders is not sufficient for it to be considered an interested party.

We dismiss the protest.

[B-218209]

Contracts—Modification—Beyond Scope Of Contract—Subject To GAO Review

While contract modifications generally are the responsibility of the procuring agency in administering the contract, the General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes.

Contracts—Modification—Additional Work Or Quantities—Within Scope Of Contract Requirement

Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original contract for supplies and technical assistance exceeds the contract's scope and cannot be justified on a sole-source basis where both the modification and the original contract should have been competed.

Matter of: Devils Lake Sioux Manufacturing Corporation, June 4, 1985:

Devils Lake Sioux Manufacturing Corporation (DLS) protests a decision of Federal Prison Industries, Inc. (FPI), Department of Justice, to fill its needs for uncured helmet shell assemblies manufactured from kevlar ballistic aramid cloth by modifying an existing contract with Gentex Corporation rather than procuring the assemblies competitively. The assemblies are used for the production of military helmets. DLS also protests the original sole-source award. While FPI announced in the *Commerce Business Daily* on November 20, 1984, that it intended to competitively acquire the aramid cloth, a solicitation was never issued because a mutually satisfactory agreement was concluded between FPI and Gentex for continued delivery under the existing contract. DLS challenges several aspects of FPI's decision not to procure the assemblies competitively, insisting that the modification went beyond the scope of the original contract. We sustain the protest.

As a preliminary matter, Gentex questions our continued jurisdiction concerning protests of procurements by FPI under the Competition in Contracting Act of 1984 (Act), Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199. We have consistently exercised jurisdiction over protests of FPI acquisitions, see, e.g., *Niagara Machine & Tool Works,* B-214288, July 16, 1984, 84-2 CPD ¶48, and we believe that we have continued authority to do so. Under the Act, our jurisdiction extends to "Federal agencies" which term includes wholly owned government corporations such as FPI. *See* 40 U.S.C. § 472 (1982); 31 U.S.C. § 9101 (1982). Moreover, although FPI does not receive annual appropriations from Congress, FPI has an operating fund which we have found to constitute a continuing appropriation for authorized expenditures of FPI. *See* 60 Comp. Gen. 323

(1981). Accordingly, we have authority over protests of procurements by FPI.

Generally, we do not review protests concerning contract modifications because they involve contract administration which is primarily the responsibility of the contracting agency and outside the scope of our bid protest function. *Sierra Pacific Airlines,* B-205439, July 19, 1982, 82-2 CPD ¶54. We will consider such a protest, however, where it is alleged that the modification is beyond the scope of the original procurement and should have been the subject of a new procurement. *Nucletronix Inc.,* B-213559, July 23, 1984, 84-2 CPD ¶82. In this regard, we have stated that if a contract as modified is materially different from the original contract, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. *Department of the Interior—Request for an Advance Decision,* B-207389, June 15, 1982, 82-1 CPD ¶589. In so stating, we express our concern so that improper contract modifications tantamount to unjustified sole-source awards, in lieu of competitive procurements, will not adversely impact upon the integrity of the competitive procurement process. See *American Air Filter Co.—DLA Request for Reconsideration,* 57 Comp. Gen. 567 (1978), 78-1 CPD ¶443.

Background

FPI, beginning in 1982, was awarded contracts by the Department of Defense (DOD) for the production and delivery of military helmets. These ballistic helmets are manufactured from fabric woven from kevlar yarn, a trade-mark of E.I. DuPont and Company.[1] Since FPI does not have the capability of manufacturing ballistic cloth, it purchases the cloth from outside sources. After having been awarded these contracts by DOD, FPI issued a solicitation for the cloth and several interested sources responded, including Gentex which was ultimately awarded the contract under this solicitation. However, Gentex also presented FPI, outside the framework of this procurement, with a proposal that it asserted would significantly improve FPI's ability to manufacture military helmets. The proposal contained what Gentex considered to be a "unique and revolutionary process" for manufacturing the military helmets that was especially attractive to FPI since the process would not appreciably reduce use of convict labor but would virtually eliminate convict handling of kevlar cloth scrap, a potentially dangerous situation. Further, it was claimed that the use of this process would also significantly reduce FPI's capital expenditures.

[1] In order to be assembled into a helmet shell, the ballistic cloth is coated with resinous materials, cut into appropriate pattern, layered to the desired thickness and sealed into a "lay-up." Proprietary technology may be used in cutting, layering, and sealing the cloth and resin into the lay-up. FPI, under the original contract, used its own equipment to mold this lay-up into a shell. Accessories are then added to complete the helmet.

A sole-source negotiated contract was entered into between Gentex and FPI on July 8, 1983, which was subsequently modified on October 21, 1983.

The contract, as originally awarded to Gentex, provided that the contractor would provide uncured helmet shell subassemblies consisting of numerous plies of kevlar cloth "layed up" in a certain configuration for subsequent molding by FPI. Gentex further provided technical assistance and processing advice, under a non-disclosure agreement, required to fabricate the helmet. The entire manufacturing process employed by Gentex is proprietary and a trade secret with a patent application pending. The contract was modified on October 21, 1983, under which Gentex agreed to further disclose art and intellectual property to enable FPI "to more efficiently and effectively * * * convert the [helmet shell]" into the finished helmet assembly. Further, in consideration of the disclosure of this proprietary information, FPI agreed to purchase all of this proprietary information, FPI agreed to purchase all of its requirements for shell material from Gentex for a 5-year period.

Under the current modification, Gentex agrees to further disclosures of intellectual property relating to the process of manufacturing, and also agrees to provide testing and certification. Further, delaying quantities are established based upon awards by DOD to FPI for the year, and certain required government clauses not at issue here are added to the contract. However, under the modification, Gentex, for the first time, also provides significant manufacturing and production machinery and equipment, such as presses and joiners. Also, for the first time, instead of Gentex merely supplying uncured helmet shells, actual preform manufacturing of the shells is not performed at FPI's facilities. We questioned these provisions and requested further information from FPI on this matter. FPI insists that the Gentex machinery is part of an integrated system which includes customized dies central to the Gentex proprietary process. Further, FPI states that it could not have modified generic manufacturing equipment without use of Gentex proprietary data which is barred by the non-disclosure agreement. FPI is therefore arguing, in essence, that a sole-source modification was justified because data was unavailable to permit a competitive procurement.

GAO Analysis

As stated previously, if a contract as modified is materially different from the original contract, the subject of the modification should have been competitively procured unless a sole-source award was appropriate. *Department of the Interior—Request for an Advance Decision, supra.* The agency argues that the acquisition of manufacturing machinery and extended on-site production capabilities are a natural extension of a valid sole-source contract based on the sharing of technology of a unique manufacturing process.

Specifically, the agency states that the "machinery could not have been purchased separately from anyone else [because] the machinery is part of an integrated system which includes the attachment of customized dies, which are central to the proprietary Gentex process."

First, we note that even a cursory review of the original contract and the modification reveals that delivery of production equipment and on-site preform manufacturing were never contemplated by the parties under the original agreement. It was only after experience showed that FPI's manufacturing "was not being enhanced by Gentex's processes as anticipated," that FPI issued the November 20, 1984 CBD announcement for a solicitation to acquire the aramid cloth assemblies from another source for the purpose of protecting FPI's ability to continue operations. FPI's manufacturing was not being enhanced because Gentex was not delivering kelvar material that met specifications, and there was apparently no improvement in FPI's manufacturing capability. As we indicated earlier, the competitive solicitation was not issued, but instead, the amendment in issue was negotiated with Gentex. In our view, then, the modification is beyond the scope of the original contract.

Second, even if we accept the agency's argument that the modification represents a justifiable sole-source procurement because it is a legitimate addition to the original purchase, it follows that the modification is only valid if the initial sole-source award was valid. In this connection, while the protest over the original award appears to be untimely, the agency is attempting to justify a further expanision of a sole-source contract that itself has been challenged as illegally awarded. Under these circumstances, we think the propriety of the initial sole-source award must be examined to determine the propriety of the current modification.

In support of its argument concerning the validity of the initial sole-source award, the agency states that at the time there were no other firms capable of "doing any more than providing the raw kevlar material in rolls or sheets." The record simply does not support this factual assertion. There were then and there are currently other producers of helmets for DOD, each ostensibly with its own proprietary manufacturing process. In this regard, manufacturing technology is an appropriate subject of competitive procurement. See *AVCO Corporation, System Division,* B-216015, Feb. 27, 1985, 85-1 CPD ¶245. Thus, regardless of the bona fide proprietary nature of the manufacturing process employed by Gentex, the record shows that other suppliers, using their own methods, can potentially deliver satisfactory material and processes. While Gentex's proprietary process, utilizing its machinery, may best fill FPI's requirements for its manufacturing operations, that proposition ought to be tested competitively.

We therefore believe that both the modification and the initial sole-source awards were improper. We recommend that the pro-

curement be reopened, that other firms be allowed to compete, and that if ultimately the most advantageous proposal or offer is received from another firm, the Gentex contract be terminated for the convenience of the government.

The protest is sustained.

[B-203681]

Grants—Federal—Administration of Grant Programs

United States Information Agency (USIA), in providing statutory grant funds to National Endowment for Democracy, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. General Accounting Office finds that language and legislative history of authorizing legislation do not support Endowment's view that USIA was not intended to have any substantial role in seeing that grant monies are expended for authorized purposes.

Matter of: United States Information Agency: National Endowment for Democracy Grant Administration, June 6, 1985:

This responds to a request from Thomas E. Harvey, General Counsel and Congressional Liaison, United States Information Agency (USIA), for our opinion as to USIA's role in administering grants provided to the National Endowment for Democracy under authority of the National Endowment for Democracy Act, title V of Public Law 98-164. Both USIA and the Endowment have widely divergent views as to USIA's responsibility for overseeing the Endowment's disposition of funds provided under the Act. They have, however, agreed to submit the question to GAO.

As discussed in further detail below, it is our view that USIA, in its relationship with the Endowment, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. We reject the Endowment's contention that it is not required to account to the agency for its use of grant funds, or that the agency has no right of access to the Endowment's records of its activities.

BACKGROUND

The National Endowment for Democracy was established on November 18, 1983, as a private nonprofit District of Columbia corporation. It was created to promote democratic institutions abroad, particularly through the provision of assistance to third-party organizations such as the two major American political parties, labor, and business. The existence of the Endowment was statutorily recognized 4 days after its creation in the National Endowment for Democracy Act. Pub. L. No. 98-164, tit. V, 97 Stat. 1017, 1039-42 (1983) (22 U.S.C.A. § 4411-4413 (West Supp. 1984)).

Section 503(a) of the Endowment's authorizing legislation provides as follows:

> The Director of the United States Information Agency shall make an annual grant to the Endowment to enable the Endowment to carry out its purposes as specified in section 502(b). Such grants shall be made with funds specifically appropriated for grants to the Endowment or with funds appropriated to the Agency for the "Salaries and Expenses" account. Such grants shall be made pursuant to a grant agreement between the Director and the Endowment which requires that grant funds will only be used for activities which the Board of Directors of the Endowment determines are consistent with the purposes described in section 502(b), that the Endowment will allocate funds in accordance with subsection (e) of this section, and that the Endowment will otherwise comply with the requirements of this title. *The grant agreement may not require the Endowment to comply with requirements other than those specified in this title.* 22 U.S.C.A. § 4412(a). [Italic supplied.]

Subsection (e) of section 503 specifies earmarks for two labor and business sub-grantees. *See* B-214585, March 22, 1985, 64 Comp. Gen. 388. Other requirements specifically delineated in the Act are that: (1) the Endowment and its grantees are subject to "appropriate" Congressional oversight (§ 503(d)); (2) grants to the Endowment are conditional upon its agreement to comply with the provisions of the Act, and its use of funds must be consistent with the purposes set out in the Act (§ 504(a) and (b)(2)); (3) the Endowment may not carry out programs directly, must abide by certain restrictions on the compensation of its officers and Board of Directors, and must not issue stock or dividends (§ 504(b)(1), (c), (d)(1)); (4) the Endowment's accounts are to be audited annually by certified public accountants, with reports from such audits provided as part of an annual report to the Congress (§ 504(e)); and (5) the Endowment's financial transactions may be audited by the Comptroller General, who is to have access to all records of the Endowment and its sub-grantees (§ 504(f)). In addition to these provisions, section 503(b) of the Act states that "otherwise applicable limitations on the purposes for which funds appropriated to the United States Information Agency may be used shall not apply to funds granted to the Endowment." 22 U.S.C.A. § 4412(b).

The Endowment has cited three principal factors in support of its view that USIA has little or no role in seeing how its grant to the Endowment is administered. First, the Endowment notes the absence in the language of its authorizing legislation of specific authority permitting review by USIA. Second, the Endowment states that nothing in the language or legislative history of the enactment indicates that USIA was intended to have such a role in administering the grant. Third (and most important) the Endowment states that the explicit language of the grant authorization—specifically the underlined portion of section 503(a) quoted above—prohibits USIA from taking on such a role in the absence of specific statutory authority.

DISCUSSION

The Federal Government uses a number of different methods to provide financial assistance to private organizations, or to State

and local governments. The type of funding device chosen determines the Federal Government's relationship with the recipient.

In some cases, there may be almost no ongoing relationship between the two. Where, for example, assistance is provided through a gift or direct unconditional appropriation, funds are to be used at the discretion of the recipient, subject only to review by the Congress. *See* 42 Comp. Gen. 289, 293 (1962). Two more commonly-used forms of financial assistance are cooperative agreements and traditional grant agreements. Cooperative agreements are to be used when substantial involvement is expected to be required between the recipient and the applicable Federal agency; grant agreements are to be used when little involvement between the two is anticipated. *See* 31 U.S.C. §§ 6304-6305 (1982). Both types of funding mechanisms, however, involve the establishment of an ongoing relationship between Federal agency and recipient, with the precise terms of that relationship established by the agreement itself.

An agency must ordinarily have statutory authority to utilize a grant mechanism to further its authorized policies or functions. 59 Comp. Gen. 1, 8 (1979). That provision of statutory authority, however, may take one of many forms. In many cases, the authority simply consists of a specification that an agency head may make grants for a specified purpose. *See, e.g.*, USIA's general authority to make grants under title II of the United States Information Educational Exchange Act of 1948, as amended, 22 U.S.C. §1471(1) (1982). It is frequently the case that the authorizing legislation does not specifically state that the grantor agency has the right to oversee the expenditure of funds under the grant, or that the grantee must account to the grantor agency for its use of grant monies. Those requirements, however, are implicit in the creation of the grantor-grantee relationship, and are ordinarily carried out through the administration of the applicable grant agreement.[1] Thus, we do not find it legally relevant in the present case that no specific oversight authority was specified for the USIA in its relationship to the Endowment. We find that authority to be implicit in the Congress' selection of a grant agreement as the funding mechanism to be used to support the Endowment's activities.[2]

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[1] *Compare*, B-203681, September 27, 1982, which described the indirect cost accounting method specified in the applicable grant agreement as a tool for fulfilling the grantee's responsibility to account for its use of grant monies. In that case, we considered the grantee's responsibilities to be inherent in the creation of the grantor-grantee relationship. There, as here, the applicable authorizing language did not specify that the grantee had to account to the grantor agency for its use of funds, or that the grantor agency had a right to oversee the grantee's use of funds.

[2] The Endowment's authorizing legislation should be contrasted with that of the Corporation for Public Broadcasting (CPB), contained in 47 U.S.C. § 396 (1982). The CPB's authorization contains many similarities with that of the Endowment. One principal difference, however, is the funding mechanism chosen by the Congress. The CPB is funded through annual appropriations made to a special fund within the Treasury. Although the CPB's use of funds so provided is subject to a number of conditions, funds are made available directly, and not through a grant agreement with any Federal agency.

The Endowment has cited the legislative history of the National Endowment for Democracy Act in support of the view that USIA was not intended to oversee the Endowment's use of grant monies and that congressional and GAO oversight provisions alone were considered sufficient to ensure accountability. On the House side, according to the Endowment, neither Congressman Fascell (floor manager of the bill) nor any other member "indicated that USIA oversight of the Endowment was among the protections included in the Act or that it should have been." We do not, however, find the record to be so clear. For example, Congressman Fascell, in responding to another member's postulation of a situation in which Endowment funding might be misused, indicates that the agency would indeed have a role in overseeing the expenditure of funds:

> But for his scenario to actually occur, you would have to assume that the Congress has given up all oversight. You would have to assume that the executive branch, whatever administration is in power, has no concept and cares less about what is going on, because this money is not automatic. It has to be budgeted, it *has to go through the agency*, it has to be authorized, it has to be appropriated. And there is continual oversight. It assumes that nobody will know what is happening. 129 Cong. Rec. H3816 (daily ed. June 9, 1983). [Italic supplied.]

Similarly, Senator Percy, floor manager in the Senate, stated, in his explanation of the Endowment's authorization:

> As for the boondoggle allegation, the Endowment will come under continuous and extensive scrutiny by the appropriate committees of both Houses of Congress. The additional provisions for GAO oversight, *as well as the terms of the USIA grant agreement under which it will function,* assure a convergence of oversight procedures virtually unique among grantees of Federal funds. 129 Cong. Rec. S12714 (daily ed. Sept. 22, 1983). [Italic supplied.]

This statement, although quoted by the Endowment in support of its view that an audit role for USIA was not contemplated by the drafters of the legislation, indicates instead that the USIA grant agreement was considered one of many oversight mechanisms; it could not be considered such, however, unless the USIA had the power to oversee and enforce its terms.

The Endowment's principal argument in support of its position is that USIA's role in administering its grant to the Endowment is limited by the inclusion of language in the authorization that the USIA grant agreement "may not require the Endowment to comply with requirements other than those specified" in the enactment. The question, therefore, is whether this language removes the Endowment from being subject to the ordinary oversight and financial controls implicit in the creation of a Federal grantor-grantee relationship, but not specifically delineated in the authorization. It is our conclusion that it does not.

The provision in question, to our knowledge, is unique to the Endowment's authorization. We know of no other grant authorization that is similarly limited. The legislative history of the enactment does not provide any useful explanation for its inclusion. The original version of the bill eventually enacted as the National Endowment for Democracy Act simply had authorized USIA to make

grants to the Endowment to carry out the purposes of the Act. H.R. 2915, § 610, 98th Cong., 1st Sess. (1983), set forth in 129 Cong. Rec. 3812 (daily ed. June 9, 1983). The language was contained in a comprehensive amendment to the bill during Senate consideration, offered by Senator Percy. The amendment restructured the authorization in essentially the form later enacted. *See* 129 Cong. Rec. S14139-44 (daily ed. Oct. 19, 1983). The only explanation of the amendment at the time was Senator Percy's statement that he was "offering a technical, perfecting amendment drafted by its sponsors in order to guarantee the constitutional perfection of the bill." [3]

The USIA has interpreted the language in question as meaning only that the Endowment was intended to be free of USIA's programmatic restrictions and criteria, and not that it would be without fiscal or administrative accountability to USIA for grant monies. According to USIA:

> The usual limitation on this Agency's program activities, such as the ban on the domestic dissemination of program materials and our normal internal grant review process, would not, therefore apply to the Endowment. Nothing in the authorizing legislation or history indicates that Congress intended the Endowment to be so unique as to exempt it from the type of fiscal accountability long required by the General Accounting Office of Federal grantees and from such significant legislation as the civil rights laws and the Fly America Act.

We agree with this view.

A strict interpretation of the language of section 503 (a) is urged upon us by the Endowment. Such an interpretation would, in effect, render the grant agreement unenforceable by the grantor agency. Under this view, USIA would have no authority to review expenditures of funds under the grant, nor to enforce the terms of the grant through exercise of financial control, as the enactment does not specifically authorize the agency to perform these functions. In our view such an extreme limitation would be inconsistent with the Congress' selection of a grant as the device to be used to carry out the purpose of the program. The creation of a grantor-grantee relationship between the agency and the Endowment would be meaningless if the grantor's role was limited to the ministerial function of disbursing funds at the grantee's request. We therefore find USIA's interpretation of the language cited to be a reasonable one—i.e. that it was intended to prohibit the agency from specifying programmatic requirements other than those included in the act.

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[3] The original bill would have named two seated members of the Congress to serve as "incorporators" of the Endowment, and further specified that Congressman Fascell was to serve as chairman of the incorporators, and as interim chairman of the Endowment. H.R. 2915, § 604 (a), 98th Cong. 1st Sess. (1983), set forth in 129 Cong. Rec. H3811 (daily ed. June 9, 1983). It thus appears that the restructuring of the bill was primarily intended to forestall any allegation that this arrangement would have violated article I, section 6 of the Constitution, which prohibits any member of Congress from being appointed to civil office under authority of the United States created during the period of his tenure (and which prohibits any person holding office under the United States from being a member of Congress during his continuance in office).

It is our view as well that USIA, in administering the grant in question, is responsible for seeing that all other relevant statutory restrictions are complied with by the Endowment. The Endowment's own submission recognizes that other statutory restrictions (such as Title VI of the 1964 Civil Rights Act) apply to the Endowment by their own terms, and may be included in the grant agreement, if not otherwise in conflict with the Endowment's authorizing legislation. We agree, and conclude that USIA, as administrator of grant assistance to the Endowment, has a duty to ensure the Endowment's compliance with such requirements through the exercise of appropriate financial controls. However, USIA may not, in its exercise of financial control over the Endowment, impose restrictions not specifically intended to fulfill the purposes specified in the authorizing legislation, or that are not otherwise separately applicable by statute.

We would note that, in exercising its oversight role, USIA may require the Endowment to comply with procedural mechanisms designed as tools to see that grant funds are used only to carry out authorized purposes, including Office of Management and Budget Circular A-122, July 8, 1980. *See* B-203681, September 27, 1982. In applying those procedures, however, the limitations described above should be kept in mind, *i.e.,* that procedural requirements not specifically related to the Endowment's fulfillment of grant purposes—or not otherwise separately applicable by statute—should not be considered to apply.

Finally, USIA has requested that we review its standard list of general grant conditions to see which, under the analysis presented above, would be applicable to the Endowment. We have briefly summarized our views below:

I. *Entertainment* (grantee agrees not to use grant monies for the purpose of entertainment). In our view, this provision would be applicable, but is derived from (and should be interpreted in the context of) the requirement that grant monies be used only for purposes specified in the authorization. Compare, for example, inclusion of entertainment costs as unallowable in OMB Circular A-122, July 8, 1980. To the extent that entertainment expenses may be justified as necessary to carry out the purposes of the grant, they may be allowable. *See* B-196690, March 14, 1980 (grant to American Samoan Judiciary may be used to entertain foreign dignitaries if in furtherance of official purposes).

II. *Documentation* (requires grantee to maintain its files and financial records to facilitate documentation of allowable costs). This provision is intended to permit verification that expenses incurred are for authorized grant purposes, and would therefore be applicable.

III. *Amendments* (permits amendments as necessary). This provision would be applicable to the extent that amendments are for the purpose of furthering (or overseeing) authorized grant purposes.

IV. *Reassignment of Funds* (prohibits reassignment without prior approval of the agency's contracting officer "except when authorized above"). This provision is unnecessary, as both the authorization and grant agreement specifically authorize the Endowment to provide grant monies to other private-sector organizations.

V. *Examination of Records* (permits USIA and GAO access to records of the grantee or its subcontractors). This provision also permits verification that expenses incurred are for authorized grant purposes, and thus may be applicable.

VI. *Officials not to Benefit* (prohibits Members of Congress, Delegates, or resident commissioners from benefiting from the grant). The inclusion of this restriction would ordinarily be advisable to protect against any appearance of impropriety (and may in fact be applicable to some or all of the categories of individuals named, under some independent authority). Nonetheless, grants (or subgrants) to the individuals listed would not, *per se,* be contrary to the purposes specified in the authorizing legislation. Thus, as the restriction reflects a policy not specifically related to delineated grant purposes or specified in the authorization, it may not be required by USIA unless applicable to the Endowment under separate statutory authority.

VII. *Covenant Against Contingent Fees* (grantee warrants that grant was not solicited under an agreement for later compensation). This provision is unnecessary, as the Endowment is a statutory grantee.

VIII. *Disputes* (establishes procedures for resolving factual questions arising during the course of the grant). This provision facilitates grant administration, and may be included as applicable to the Endowment.

IX. *Equal Opportunity* (requires the grantee to agree not to discriminate, and to take certain steps to that end). This provision is applicable to the extent it is consistent with the requirements imposed on the Endowment by the Civil Rights Act of 1964, or other statutory authority.

X. *Compliance with Federal and State Laws* (grantee agrees to comply with applicable employment laws and regulations). This provision also reflects policies to which the Endowment is separately subject, and thus may be required by USIA.

XI. *Termination* (both grantor and grantee may terminate after 30 days' written notice). This provision, although applicable, should be read in the context of the authorizing legislation. The Endowment clearly has the right to refuse to accept grant monies and thus may at any time choose to exercise its right to terminate the grant agreement. The USIA, because this is a statutory grant, may only terminate under limited circumstances.

XII. *Termination for Convenience of the Government* (Agreement may be terminated whenever contracting officer determines it is in best interest of the Government). This provision is not applicable,

because of the Endowment's position as a statutory grantee. The grantor agency may not terminate for convenience, only for cause (i.e. if the grantee violates the grant agreement, or otherwise fails to comply with its statutory responsibilities).

XIII. *Interest and Refunds* (interest on advances, unexpended funds, and refunds to be returned to the U.S. Government). These requirements are applicable to the Endowment. They are based on the principle that a federal grantee may use funds only for the purposes authorized; grantees may not utilize unused grant monies to build cash reserves. *See* B-203681, September 27, 1982.

XIV. *Non-Discrimination. See* item IX.

XV. (Deleted by USIA.)

XVI. *Employment of the Handicapped.* This provision may be applicable to the extent it is consistent with the requirements imposed on the Endowment by 29 U.S.C. § 794, or other statutory authority.

XVII. *Preference for U.S. Flag Carriers.* This provision may be applicable to the extent it is consistent with the requirements of 49 U.S.C. 1517, or other statutory authority.

XVIII. *Convict Labor.* This provision, not specified in the authorizing legislation, may not be included by USIA unless applicable to the Endowment under separate statutory authority.

XIX. *Listing of Employment Openings.* Section 2012 of Title 38, from which this requirement is derived, applies to procurement contracts, and does not appear applicable to the Endowment.

XX. *Payment of Interest on Contractors' Claims* (provides for interest on disallowed cost allowances overturned on appeal under the disputes clause). This provision may be included by USIA to the extent that agency considers it necessary to facilitate grant administration. Such a clause, however, may also be more appropriate for procurement-type contracts. *E.g.* 41 U.S.C. §§ 601-13 (1982).

[B-217330]

Bidders—Debarment—Labor Stipulation Violations—Davis-Bacon Act—Wage Underpayments—Debarment Required

The Department of Labor recommended debarment of a contractor for violations of the Davis-Bacon Act because the contractor had underpaid employees and maintained payroll records that were not complete as required. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was grossly careless, coupled with an indication of bad faith. Therefore, the contractor will be debarred under the Act.

Matter of: Family Construction Company—Davis-Bacon Act Debarment, June 7, 1985:

The Assistant Administrator, Employment Standards Administration, United States Department of Labor (DOL), by a letter dated May 3, 1984, recommended that the names Family Construc-

tion Company (Family Construction), Edwin Green, and Sylvia Green, be placed on the ineligible bidders list for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982), which constituted a disregard of obligations to employees under the Act. We concur in DOL's recommendation.

Family Construction performed work under contract YA-511-CT3-240029 with the United States Bureau of Land Management constructing a fence line. This contract was subject to the Davis-Bacon Act requirements that certain minimum wages be paid. Further pursuant to 29 CFR § 5.5(a) (1984), the contractor was to submit payroll records certified as to correctness and completeness, specifying for each worker—among other things—classifications of work performed, daily and weekly hours worked, rates of pay, and wages paid.

The DOL found as a result of an investigation that employees were not paid the minimum wages required pursuant to the Davis-Bacon Act. Further, DOL found that Family Construction's payrolls were certified by Edwin Green and Sylvia Green to be accurate and complete; yet those payrolls failed to show the required classification of work performed, daily and weekly hours worked, rate of pay, and wages paid. The DOL informed us that by certified letter dated April 4, 1984, Family Construction was given constructive notice at its last known address in detail of the violations with which it was charged, and that debarment was possible. Further, Family Construction was given an opportunity for a hearing on the matter before an administrative law judge in accordance with 29 CFR § 5.12(b) (1984). The DOL reported to us that these letters were returned by the United States Postal Service marked "Box closed due to non-payment," and that further attempts to locate the contractor were unsuccessful. After reexamining the record, DOL found that Family Construction violated the Davis-Bacon Act without any factors militating against debarment. Therefore, DOL recommended that Family Construction Company, Edwin Green, and Sylvia Green, be placed on the ineligible bidders list for violations of the Davis-Bacon Act which constituted a disregard of obligations to employees under the Act.

The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. § 276a-2. In Circular Letter B-3368, March 19, 1957, we distinguished between "technical violations" which result from inadvertence or legitimate disagreement concerning classification and "substantial violations" which are intentional as demonstrated by bad faith or gross carelessness in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act.

Based on our independent review of the record in this matter, we conclude that Family Construction Company, Edwin Green, and Sylvia Green, disregarded their obligations to their employees

under the Davis-Bacon Act. There was a substantial violation of the Davis-Bacon Act in that the underpayment of employees was grossly careless as demonstrated by Family Construction's submission of payrolls certified by Edwin Green and Sylvia Green to be accurate and complete; yet those payrolls failed to show the required classification of work performed, daily and weekly hours worked, rates of pay, and wages paid. Further, they did not cooperate in the investigation, which is an indication of bad faith.

Therefore, the names Family Construction Company, Edwin Green, and Sylvia Green, will be included on a list to be distributed to all departments of the Government, and, pursuant to statutory direction (40 U.S.C. § 276a-2), no contract shall be awarded to them or to any firm, corporation, partnership, or association in which they, or any of them, have an interest until 3 years have elapsed from the date of publication of such list.

[B-217344]

Bidders—Debarment—Labor Stipulation Violations—Davis-Bacon Act—Wage Underpayments—Debarment Required

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and failed to pay its employees overtime compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

Matter of: Steel Erectors, Inc.—Davis-Bacon Act Debarment, June 7, 1985:

The Assistant Administrator, Employment Standards Administration, United States Department of Labor (DOL), by a letter to the Comptroller General, dated July 12, 1984, has recommended that the names of Gary Gregory, individually and as owner of Steel Erectors, Inc., and of Steel Erectors, Inc., be placed on the debarred bidders list for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982) and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332 (1982). For the following reasons, we concur with DOL's recommendation, order its implementation, and further order that the funds on deposit with our Office in this matter be distributed to the workers involved.

Steel Erectors performed work under contract number DE-AC04-82AL18822, with the Department of Energy for construction of a building at the Rocky Flats Plant, Golden, Colorado. The contract was subject to the Davis-Bacon Act requirements that certain minimum wages be paid. Further, pursuant to 29 C.F.R. § 5.5(2) (1984), the contractor was to submit payroll records certified as to correctness and completeness.

The DOL found as a result of an investigation that employees were not paid the minimum wages required pursuant to the Davis-Bacon Act. Further, DOL found that certified payrolls were falsified and incomplete, and that employees were not paid overtime compensation under the Contract Work Hours and Safety Standards Act. The DOL notified Steel Erectors of the violations of which it was charged by certified letter, together with an admonition that debarment was possible. Further, Steel Erectors was given an opportunity for a hearing before an administrative law judge in accordance with 29 C.F.R. § 5.12(b) (1984). The DOL reported to us that while the record indicates that the letter was received, no hearing was requested. After reexamining the record, DOL found that Steel Erectors violated the Davis-Bacon Act without any factor militating against debarment. Therefore, DOL recommended that the names Steel Erectors, Inc., and Gary Gregory, individually and as owner of Steel Erectors, Inc. be placed on the ineligible bidders list for violations of the Davis-Bacon Act which constituted a disregard of obligations to employees under the Act. We concur in this recommendation.

The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. § 276a-2. Further, as stated above, the DOL recommended debarment. In B-3368, March 19, 1957, we distinguished between "technical violations" which result from inadvertence or legitimate disagreement concerning classification, and "substantial violations" which are intentional as demonstrated by bad faith or gross carelessness in observing obligations to employees with respect to the minimum wage provisions of the Davis-Bacon Act. Falsification of payroll records is a basis for debarment under the Davis-Bacon Act. See e.g., *Metropolitan Home Improvement Roofing Co., Inc.,* B-215945, January 25, 1985.

Based on our independent review of the record in this matter, we conclude that Steel Erectors, Inc., and Gary Gregory, individually and as owner of Steel Erectors, Inc., disregarded their obligations to their employees under the Davis-Bacon Act in that the underpayment of employees was intentional as demonstrated by Steel Erectors' bad faith in the falsification of certified payroll records. In addition, the record indicates that Steel Erectors failed to pay its employees overtime compensation.

Therefore, the names Steel Erectors, Inc., and Gary Gregory, individually and as owner of Steel Erectors, Inc., will be included on a list to be distributed to all departments of the Government, and, pursuant to statutory direction (40 U.S.C. § 276a-2), no contract shall be awarded to them or to any firm, corporation, partnership, or association in which they, or any of them, have an interest until 3 years have elapsed from the date of publication of such list.

[B-215738 et al.]

Bonds—Performance—Administrative Determination To Require

One-hundred-percent performance bond can be required for janitorial services contract which involves cleaning of considerable amount of government property, including rooms containing electronic equipment and spacecraft, and where unacceptable or late performance would be intolerable. Such a properly justified bonding requirement does not unreasonably restrict competition or improperly prejudice small business' bonding capacity where 12 bids were received on the IFB.

Bids—Invitation for Bids—Specifications—Defective—Allegation Not Sustained

Protester has not met burden of proving that specification for janitorial services is deficient because estimated quantities or "mandays" needed to clean certain buildings are consistent with sizes of buildings.

Contracts—Protests—Basis for Protest Requirement

General unsupported protest after bid opening that invitation for bids/(IFB) is not "definite," "simple," "comprehensible," or "understandable" and, therefore, violative of Federal Acquisition Regulations does not state grounds of protest cognizable under Bid Protest Procedures and is untimely in any case.

Contracts—Protests—Interested Party Requirement—Direct Interest Criterion

Protester, which alleges that agency improperly failed to circulate its pre-bid-opening protest to other prospective bidders for comments, is not "interested party" under Bid Protest Procedures to raise this issue, since protest is essentially on behalf of these other bidders. In any case, the protester has not indicated how it was prejudiced by this alleged failure.

Bidders—Qualifications—Preaward Surveys—Utilization—Failure To Conduct—Justification Reasonable

Agency need not perform preaward survey on non-responsive bidders.

Bids—Responsiveness—Failure To Furnish Something Required—Prices

Where an invitation for bids for janitorial services requires bidders to submit with their bids a base rate necessary for the operation of the Economic Price Adjustment clause, which provides for upward and downward price adjustments based on fluctuations from a based rate quoted in the successful bid, bids not quoting this rate must be rejected as nonresponsive. Failure to provide such information at bid opening is material because the legal rights of the contractor and government are affected.

Bids—Prices—Escalation—Provision—Propriety

An Economic Price Adjustment clause in an invitation for bids for janitorial services which provides for price adjustments based on fluctuations from a base rate quoted in the successful bid may not adequately protect the government's legal rights. Although this base rate is supposed to be based on labor rates on which the bid price is based, there is an economic incentive for a bidder to submit a base rate less than that on which it based its bid price to enhance the possibility of an upward price adjustment and minimize the possibility of a downward price adjustment. In this case, the bid base rate of the low responsive bidder is significantly lower than next low bidder although the difference between the bids is not significant; consequently, verification of this base rate should be made before award.

Bids—Mistakes—Correction—Clerical Error

Bid, which quoted monthly unit prices instead of the requested man-hour unit prices on an invitation for bids for janitorial services, may be corrected as a clerical error obvious from the face of the bid, where the unit prices quoted are one-twelfth of the extended yearly prices and the man-hour unit prices are easily ascertainable by dividing the total yearly prices by the estimated man-hour quantities stated in the invitation for bids.

Matter of: Galaxy Custodial Services, Inc.; Government Contractors Inc.; Trinity Services, Inc., June 10, 1985:

Galaxy Custodial Services, Inc., Government Contractors Inc. (GCI), and Trinity Services, Inc., protest the proposed award under invitation for bids (IFB) F08650-84-B-0011 to American Maintenance Company. This IFB, issued by the Air Force, solicited both unit and extended fixed-price bids for six line items for the performance of janitorial services at the Cape Canaveral Air Force Station. The solicited services covered the period October 1, 1984, to September 30, 1985, with two priced, evaluated 1-year options. Only one award is to be made under the IFB.

The IFB, as amended, contains an Economic Price Adjustment (EPA) clause which required the bidders to provide certain information with their bids. No award has been made.

We dismiss Galaxy's protest in part and deny the remainder. We deny GCI's and Trinity's protests.

BACKGROUND

On January 25, 1984, the IFB was issued, followed by a number of amendments. On July 9, 1984, Galaxy protested to this Office. This protest concerns the IFB requirement for a performance bond and certain alleged inconsistencies in the IFB concerning "manday" requirements and the sizes of the buildings to be serviced.

While this protest was pending, 12 bids were received and opened on July 24, 1984. The four lowest bids, including option prices, were:

Galaxy	$5,314,920.00
GCI	6,085,510.56
American	6,529,896.00
Trinity	6,532,908.00

At bid opening, the Air Force specifically noted that Galaxy and GCI had not supplied the information requested by the EPA clause, and that, therefore, these bids were nonresponsive and rejected. In addition, certain discrepancies were noted in the unit prices of some line items in American's bid. The Air Force subsequently decided that American had made a mistake in these unit prices

which could be corrected as an obvious clerical error apparent from the face of the bid. Therefore, American is considered by the Air Force to be the successful bidder.

On July 31, 1984, Trinity protested an award to any firm other than itself. Trinity's primary argument was that American's mistake should not be corrected, but that American should be permitted to withdraw its bid. On August 1, 1984, GCI protested the rejection of its bid as nonresponsive. GCI argued that its failure to furnish the requested EPA clause information could be waived as a minor informality. On August 3, 1984, Galaxy submitted a number of additional protest grounds as discussed below.

GALAXY'S PROTEST

Galaxy timely protests the IFB requirement for a 100-percent performance bond. Galaxy notes that the IFB is set aside for small business and alleges that if this large performance bond is required, it would be virtually impossible for a small business to secure bonding on other procurements.

Although a bond requirement may in some circumstances result in a restriction of competition, it nevertheless can be a necessary and proper means of securing to the government fulfillment of the contractor's obligations under the contract in appropriate circumstances. *Renaissance Exchange, Inc.*, B-216049, Nov. 14, 1984, 84-2 C.P.D. ¶534. Bonds are required for construction contracts by statute. Under Defense Acquisition Regulation (DAR) § 10-104.2 *reprinted in* 32 C.F.R. pts. 1-39 (1984), performance bonds may be required on nonconstruction contracts "when the terms of the contract provide for the contractor to have the use of government material, property or funds and further provides for the handling thereof by the contractor in a specified manner" or for financial reasons where it "is necessary to protect the interests of the government."

This contract involves the use and cleaning of a considerable amount of government property, including rooms which contain highly sophisticated electronic equipment and spacecraft, where a considerable degree of care and specialization is required because of the need for a "particle free environment." The Air Force indicates that unacceptable or late performance on this contract cannot be tolerated because that could delay missile launches or contaminate missile "payloads."

We have held that where a decision to require bonding on nonconstruction contracts is reasonable and made in good faith, we will not disturb such a determination, and that the protester bears the burden of demonstrating that the determination is unreasonable or in bad faith. *K. H. Services,* B-212172, Sept. 15, 1983, 83-2 C.P.D. ¶329; *Wright's Auto Repair & Parts, Inc.*, B-210680.2, June 28, 1983, 83-2 C.P.D. ¶34. A determination that continuous oper-

ations are absolutely required, as was effectively made here, itself is a reasonable basis for requiring a performance bond. *Renaissance Exchange, Inc.*, B-216049, *supra*. Moreover, 12 bids, including Galaxy's, were received from small businesses under the IFB. This is strongly indicative that this was not an unreasonable restriction of competition. See *Executive-Suite Services, Inc.*, B-212416, May 29, 1984, 84-1 C.P.D. ¶577; *Cantu Services, Inc.*, B-208148.2, Dec. 6, 1982, 82-2 C.P.D. ¶507. Consequently, from our review, we believe that the Air Force bond requirements were justified and not unreasonably restrictive of competition. Galaxy's protest on this point is denied.

Galaxy also protests that a bidder does not know, when it bids on the IFB, the amount of the performance bond required because the contract price is adjusted biweekly as payments are made. We find no ambiguity as to the amount of the 100-percent performance bond that will be required in this case, the total bid price for the basic 1-year contract period. The contract price does not change based on the biweekly payments as alleged by Galaxy. Because some of the line items are based on estimated quantities, the contract price may eventually change if the estimated quantities turn out to be different from the quantities eventually performed. However, this change in contract value would not affect the amount of the initial 100-percent performance bond.

Galaxy also protests that the IFB was deficient because certain specified "mandays" needed to clean certain buildings are inconsistent with the sizes of these buildings. Galaxy cites a number of examples to support this allegation. However, the Air Force indicates there are no inconsistencies because some of the buildings are open spaces (hangars) and some are offices. It is apparent that more square feet can be cleaned in open spaces than in offices in the same period of time. From our review, we do not believe Galaxy has met its burden of showing that the estimated "mandays" or building square footage is erroneous or inconsistent. See *Gulf Coast Defense Contractors, Inc.*, B-212641, Feb. 28, 1984, 84-1 C.P.D. ¶243. Consequently, Galaxy's protest on this point is denied.

GALAXY'S SUPPLEMENTAL PROTEST

In its August 3, 1984, protest, Galaxy contends that the IFB was not "definite," "simple," "comprehensible," or "understandable" and that, therefore, it violates the Federal Acquisition Regulation (FAR). Galaxy only expanded on this protest basis by referencing the various monresponsive bids and the proposed award to American. These general unsupported assertions do not state grounds of protest cognizable under our Bid Protest Procedures. *Alice Roofing*, B-216277, Sept. 18, 1984, 84-2, C.P.D. ¶321; *John Crane Houdaille, Inc.*, B-212829.2, Dec. 16, 1983, 83-2 C.P.D. ¶698. In any case, these grounds of protest are not timely under our Bid Protest Proce-

dures, since they were not asserted prior to the bid opening date, 4 C.F.R. 21.2(b)(1) (1984). Galaxy's protest on this basis is dismissed.

Galaxy also protests that agency improperly failed to circulate its initial protest to all prospective bidders prior to bid opening so they could submit relevant comments to this Office. Section 21.1(a) of our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1984), requires that in order for a protest to be considered by our Office, a protester must be an "interested party." This protest basis is essentially on behalf of other potential bidders, which could be adversely affected by the Galaxy protest. These other firms would be the proper interested parties to complain about their failure to be notified of Galaxy's protest. *Superior Boiler Works, Inc.; Conservco, Inc.,* B-215836, *et al.,* Dec. 6, 1984, 84-2 C.P.D. ¶633. Under these circumstances, Galaxy's protest on this point is dismissed. In any case, Galaxy has not indicated how it was prejudiced by a failure of the agency to notify other potential bidders of its protest. See *Searle CT Systems,* B-191307, June 13, 1978, 78-1 C.P.D. ¶433.

Galaxy also protests that the Air Force is reneging on its earlier commitment that it would perform a preaward evaluation of the three low bidders to determine their ability to perform the contract work. As indicated below, Galaxy's bid was properly found to be nonresponsive. No useful purpose is served in reviewing a nonresponsive bidder's responsibility. Consequently, the Air Force's failure to perform such a survey on Galaxy was entirely appropriate. See *ITE Imperial Corporation, Subsidiary of Gould, Inc.,* B-190759, Aug. 14, 1978, 78-2 C.P.D. ¶116 at 16; *Seal-O-Matic Dispenser Corporation,* B-187199, June 7, 1977, 77-1 C.P.D. ¶399 at 6.

Galaxy has never specifically protested the Air Force's rejection of its bid as nonresponsive for failing to supply the information requested by the EPA clause. However, it has timely protested the Air Force's failure to provide it with written reasons as to why its bid was rejected. The Air Force indicates that Galaxy's representative was at bid opening when the contracting officer announced that Galaxy's bid was nonresponsive. Also, the Air Force correctly indicates that no regulation requires such a written notification. Consequently, Galaxy's protest on this point is denied.

GCI'S PROTEST

Galaxy's and GCI's bids were rejected as nonresponsive for failing to provide certain information requested by the EPA clause. GCI timely protest this determination. Since the reasons for bid rejection are the same for both Galaxy's and GCI's bids, the following analysis is applicable to both bids.

The EPA clause essentially provides a system for postaward price adjustments based on particular price fluctuations. The basic purpose of an EPA provision is to protect the government in case of a decrease in the cost of labor or material and the contractor in

the event of an increase. *Sentinel Electronics, Inc.*, B-212770, Dec. 20, 1983, 84-1 C.P.D. ¶5; *American Transparents Plastic Corporation*, B-210898, Nov. 8, 1983, 83-2 C.P.D. ¶539.

The EPA clause in this case was particularly complex and was included in an amendment to the IFB pursuant to a special deviation to the DAR. Under this clause, bidders were requested to provide certain data with their bids and were cautioned as follows:

> Again, Bidders are reminded to complete the blanks which appear in * * * the revised clause. *Failure by the Bidder to furnish the information which is required to be shown in these blanks shall cause the Bid to be considered nonresponsive and it shall be rejected.* If any Bidder has any questions regarding this clause, he or she should contact the Buyer * * *.

The information solicited was a "Base Composite Weighted Average Labor Rate" for the first option year (hereinafter "Base Rate") *and* "Base Quantity of SCA [Service Contract Act]—Employee Direct Labor Hours" (hereinafter "Base Hours") for both the first and second option years. No EPA clause information was solicited for the basic contract period because there was no provision for an EPA price adjustment for that period. The IFB defines the "Base Rate" as the result of dividing the total bid SCA-employee direct labor dollars, including fringe benefits, for the basic contract period by the total SCA-employee direct labor hours bid for that period. The Base Hours to be furnished with the bid are the labor hours bid for SCA employees for each option period. Presumably, bidders are supposed to calculate the Base Rate and Base Hours from their individual bid worksheets on which they based their bid and option prices.

The EPA clause provides for both upward and downward price adjustments for the option periods if two separate "triggerband arrangements" are satisfied. That is, a price adjustment would only be called for if (1) the actual composite weighted average labor rate (the labor dollars actually incurred divided by the direct labor hours for the option period) (hereinafter "Actual Rate") differed by one percent or more from the Base Rate bid and (2) if the average Consumer Price Index for Urban Wage Earners and Clerical Workers for the initial contract period differed by one percent or more from the average index rate for the option period. If both these thresholds are satisfied, the EPA clause then provides for an upward or downward price adjustment. The amount of this adjustment is based on calculation involving the Base Rate and the Actual Rate and the Base Hours or actual hours worked, or the aforementioned consumer price indices and Base or actual hours worked, whichever is less.

Where an IFB containing an EPA clause clearly and unequivocably advises that certain information necessary to the implementation and operation of the EPA clause is required with a bid in order for the bid to be considered responsive, a bidder which fails to provide such information by bid opening must be rejected as nonresponsive. *Patriot Oil, Inc.*, B-191607, Sept. 7, 1978, 78-2 C.P.D.

¶177. *Contrast Ashland Chemical Company,* B-206882, Jan. 18, 1983, 83-1 C.P.D. ¶57, and *Roarda, Inc.,* B-204524.5, May 7, 1982, 82-1 C.P.D. ¶438, where low bids were properly considered responsive, despite failing to provide certain EPA clause information, because the IFB's did not clearly require the absent information. In this case, the IFB clearly requires specific information with the bid to implement the EPA clause and warns that the bid will be rejected as nonresponsive if it does not do so.

GCI argues that the failure to provide the EPA clause information does not relate to bid responsiveness because the requested information in no way affects what the bidder is bound to perform or any other aspect of the bidder's compliance with the IFB provisions. GCI argues that a matter which does not relate to bid responsiveness cannot be used to reject bids as nonresponsive. However, we have consistently recognize that a bid is also nonresponsive if a bid effectively limits the bidder's liability to the government under the IFB. See *Hewlett-Packard Company,* B-216530, Feb. 13, 1985, 85-1 C.P.D. ¶193. The EPA clause is a material contract provision which significantly affects the legal rights of the government and the legal obligations of the contractor. *Aqua-Trol Corp.* B-191648, July 14, 1978, 78-2 C.P.D. ¶41; *Patriot Oil, Inc.,* B-191607, *supra.*

GCI argues that the only result of not furnishing the Base Rate and Base Hours for the EPA clause would be that a contractor may not then be entitled to a price adjustment under the EPA clause. However, the most notable material legal obligation of the contractor to the government under the EPA provision is the possibility of a downward contract price adjustment. Even assuming that the possibility of a downward adjustment is remote in this case, we have held that if the government is precluded from making such an adjustment, this would materially change the legal rights of the parties. See *Aqua-Trol Corporation,* B-191648, *supra* (failure to acknowledge IFB amendment adding an EPA clause cannot be waived as minor informality).

Further, in this case, the EPA price adjustment figures were not to be considered in determining the low bid. In view of this fact, GCI cites *Roarda Inc.,* B-204524.5, *supra,* to support its position that its bid is responsive. GCI argues that *Roarda* holds that the EPA price adjustment must be part of the agency's determination of the low bid price in order to affect bid responsiveness. In *Roarda,* the low bid was found to be responsive despite failing to provide certain information relating to operation of the EPA clause. We did mention in that decision that the EPA price adjustment data was not to be part of the determination of the low bid. However, as we indicated in *Ashland Chemical Co.,* B-206882, *supra,* at 3-4, the *Roarda* case did not turn on this point; rather, we stated that *Roarda* turned on the fact that the EPA clause did

not require the missing information to be supplied with the bid so the bid could not be rejected as nonresponsive.

GCI argues that supplying the Base Hours and Base Rate with the bid serves no useful purpose, since actual option hours can be used under the EPA clause in lieu of the Base Hours to allow the clause to operate and since the Base Rate is easily determinable by a simple mathematical exercise. We will not discuss the matter of the failure to provide the Base Hours since the omission of the Base Rate with the bid would clearly render a bid nonresponsive as discussed below.

In this case, the Base Rate to be supplied by the bidder with its bid is essential both for determining whether the "triggerband" percentage differential, which would call for a price adjustment, has been satisfied and the amount of the price adjustment. The failure to supply a Base Rate means that the specified EPA clause price adjustment mechanism cannot operate. Cost of living index changes could preclude or limit price adjustments under the EPA clause. However, in order for the EPA clause to operate as advertised, the Base Rate is necessary.

Further, the allegedly simple mathematical exercise to determine the Base Rate can only be done by referring to the bidder's workpapers used to prepare its bid, information not submitted with the bid. Since the matter is material and bidders were clearly advised of the need to supply the Base Rate with the bid, the failure to provide such information with the bid affects the legal rights of the parties, such that the acceptance of a bid without this information would, by its nature, be prejudicial to the other bidders. *Hewlett-Packard Company,* B-216530, *supra; Aqua-Trol Corp.,* B-191648, *supra.* Under such circumstances, it would be impermissible to allow a bidder to make its bid responsive by submitting this information after bid opening. See *Hewlett-Packard Co.,* B-216530, *supra.*

In view of the foregoing, Galaxy's and GCI's bids were properly rejected as nonresponsive and GCI's protest is denied.

VERIFICATION OF AMERICAN'S EPA CLAUSE DATA

Notwithstanding the foregoing, we are concerned that the EPA clause in this IFB could permit an award which would not adequately protect the government's legal rights under this clause. See *Hampton Metropolitan Oil Co.; Utility Petroleum, Inc.,* B-186030, *et al.,* Dec. 9, 1976, 76-2 C.P.D. ¶471. Specifically, there would seem to be some economic incentive for a bidder to submit a Base Rate less than that on which it actually based its bid with the hope of enhancing the possibility of an upward price adjustment under the EPA clause and minimizing the possibility of a downward price adjustment.

In this case, American has proposed a significantly lower Base Rate and less Base Hours than Trinity, although the difference between their bid prices is not significant. Further, although American submitted its bid worksheets to support its mistake in bid claim, the basis for the Base Rate quoted in American's bid is not apparent from those worksheets. An inaccurate Base Rate could prejudice the government's rights under the EPA clause. See *Holland Oil Co.*, Armed Services Board of Contract Appeals (ASBCA), No. 26603, June 21, 1982, *reprinted in* 82-1 BCA ¶15908 (CCH 1982); *Fermont Division, Dynamics Corporation of America*, ASBCA No. 21949, March 19, 1979, *reprinted in* 82-1 BCA ¶13774 (CCH 1982), where the government was held bound to erroneous EPA index rates by virtue of acceptance of the bids.

Therefore, we believe that the Air Force, in determining American's responsibility, should take whatever steps are appropriate to satisfy itself that American's Base Rate and Base Hours are not too low, such that the government's rights under the EPA clause would be prejudiced, before it makes an award to American. See *Hampton Metropolitan Co., Inc.; Utility Petroleum, Inc.*, B-188030, *et al., supra.* If American's Base Rates or Base Hours are so unarguably false as to amount to fraud, it would be appropriate to reject its bid.

TRINITY'S PROTEST

Trinity protests any award to a bidder other than itself. Trinity's protest concerns the discrepancies between American's unit prices and the total extended prices for a number of the IFB line items.

American's bid for the basic contract period was as follows (American filled in blanks):

Line item	Supplies/services	Quantity	Unit	Unit price	Amount
01AA	Janitorial services	12	MO	$112,00	$1,344,000
01AB	Special requirements	12	MO	4,000	48,000
01AC	Dedicated buildings	Estimated 24,960	MH	24,136	289,632
01AD	Clean rooms and/or white rooms	Estimated 36,400	MH	37,407	488,884
01AE	Anticipated requirements	Estimated 2,080	MH	2,595	31,140
01AF	Emergency service/one-time cleanups.	Estimated 1,000	MH	1,248	14,976
	Total			181,386	2,176,632

"MO" is defined as "month" and "MH" is defined as "man-hour" on the IFB bid schedule. American's bids for the option years were identical to those for the initial contract period.

FAR, 48 C.F.R. § 14.406-2 (1984), provides that "any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award." American claims that it made a correctable clerical error by quoting monthly unit prices rather than man-hour unit prices for line items 01AC, 01AD, 01AE, and 01AF, but that the total extended amounts for those line items were correct. Trinity alleges that it would be improper to permit correction of American's bid because this would prejudice the competitive bid system and Trinity, but that American should be permitted to withdraw its bid.

In this case, the unit prices for the line items in question are exactly one-twelfth of the total yearly amount and are considerably more than what a man-hour unit price would be. Consequently, it is apparent that these unit prices are monthly prices. Moreover, the man-hour, unit prices for these line items are easily ascertainable simply by dividing the total line item price by the stated estimated man-hour quantity. In this case, the rounded-off unit prices would be $11.60 per man-hour for line item 01AC, $12.33 per man-hour for line item 01AD, $14.97 per man-hour 01AF. Under these circumstances, we believe that correction of American's unit prices is proper. See *Atlantic Maintenance Company*, 54 Comp. Gen. 686, (1975), 75-1 C.P.D. ¶108 (bid which erroneously quoted monthly unit price for a line item instead of the requested square footage unit price may be corrected by dividing the total line item price by the stated estimated square footage); *Dependable Janitorial Service and Supply Co.*, B-188812, July 13, 1977, 77-2 C.P.D. ¶20 (bid which erroneously quoted square footage price for line item instead of the requested monthly unit price may be corrected by dividing the total yearly price for the line item by 12); *Federal Aviation Administration—Bid Correction*, B-187220, Oct. 8, 1976, 76-2 C.P.D. ¶ 326 (bid which erroneously inserted obviously excessive linear foot unit price on one line item may be corrected by dividing the total line item price by the stated estimated linear footage).

Trinity references the language in standard form 33A which had been incorporated by reference into the IFB, which states "in case of discrepancy between a unit price and extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent or in the same manner as any other mistake." However, we have held that extended bid prices should govern, where, as here, the unit prices are clearly erroneous, even where this language is included in the IFB. *Miller Disposal Services, Inc.*, B-205715, June 7, 1982, 82-1 C.P.D. ¶543 at 5-6.

Trinity cites 35 Comp. Gen. 33 (1955) and *RAJ Construction, Inc.*, B-191708, Mar. 1, 1979, 79-1 C.P.D. ¶140, to support its position that it would be improper to permit bid correction in this case. However, in both those cases the low bidder submitted obviously "ridiculously" low unit prices for one IFB line item and the bidders then attempted to refuse an upward correction of these unit prices

because the correction would no longer make them the low bidder. That is not the case here.

Therefore, Trinity's protest is denied. However, the appropriate unit prices for these line items are required to be added to the contract at the time of award. *See* FAR, 48 C.F.R. § 4.406-2(b).

[B-218404.2, B-218474]

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Certificate of Competency—Inapplicability of COC Procedures

Agency decision to terminate negotiations with small business offeror under solicitation for architect-engineer services need not be referred to Small Business Administration under certificate of competency procedures since agency decision is based on evaluation of offeror's qualifications relative to other offerors as prescribed by Brooks Act, 40 U.S.C. 541-544, not a negative responsibility determination.

Matter of: Richard Sanchez Associates, June 10, 1985:

Richard Sanchez Associates protests the decision by the Corps of Engineers to terminate negotiations with the firm under two solicitations, request for proposals (RFP) No. DACA63-84-R-0107, for engineering design work for dormitory renovation at Bergstrom Air Force Base, Texas, and RFP No. DACA63-84-R-0022, under which the agency would award three indefinite delivery contracts for multidiscipline design work at various military installations in Texas and Louisiana. Both solicitations were issued under the Brooks Act, 40 U.S.C. §§ 541-544 (1982), which prescribes procedures for acquiring architect-engineer (A-E) services. The protester, a small business, contends that the termination of negotiations with it constituted a negative responsibility determination which should have been referred to the Small Business Administration (SBA) for a certificate of competency (COC) determination under 15 U.S.C. § 637(b)(7)(A) (1982). We deny the protests.

Under the procedures for acquiring A-E services set out in 40 U.S.C. §§ 541-544, the contracting agency first must publicly announce its requirements. An evaluation board set up by the agency then evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the specific project. Discussions then must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternative methods or approach" for providing the services requested. The board then prepares a report for the selection official, ranking in order of preference no fewer than the three firms considered most qualified. The selection official makes the final choice of the three most qualified firms and negotiations are conducted with the highest ranking firm. If the contracting officer is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

RFP No. DACA63-84-R-0107 was announced in the Commerce Business Daily (CBD) on October 9, 1984. On December 27, the protester was informed that its was selected as the most qualified firm for the project. The agency's evaluation was based on information in the standard forms (SF) 254 and 255[1] submitted by the protester regarding the experience and size of the firm and its capacity to accomplish the work in the specified time. A predesign conference was held on January 24, 1985, and the protester submitted its proposal on February 15.

On February 18, the agency project manager received information from another branch in the agency indicating that the protester did not have seven employees as shown on the SF 255 submitted in response to the RFP. In a telephone conversation with the project manager on February 21, the protester confirmed that his firm had three technical employees, himself, a draftsman and a junior architect. During a visit to the protester's office on February 22, the agency's field project manager noted that there were only two technical employees present, the protester and a draftsman, and that the protester had stated that he planned to hire two more architects to work on the agency's project at Bergstrom Air Force Base.

Based on this information, the agency decided that the SF 255 did not accurately reflect the current composition of the protester's firm. In view of the actual personnel capacity of the firm, the agency determined that the protester was not the most qualified offeror and terminated negotiations with the firm.

The second solicitation, RFP No. -0022, was announced in the CBD on November 16, 1984. The agency determined that the protester was one of the three highest ranking offerors and, by letter dated December 31, notified the protester that he would receive one of the three indefinite delivery contracts to be awarded under the RFP.

The SF 255 submitted by the protester on November 23 indicated a total of 13 employees in the firm. During a visit to the firm on January 11, 1985, however, the project manager found a total of only three technical personnel—the protester, a draftman, and a junior architect. Based on the actual personnel capacity of the firm, the agency decided that the protester was not among the three most qualified firms for the project and terminated negotiations with the firm.

The Brooks Act specifically provides for termination of negotiations with the most qualified firm if the contracting agency and the firm are unable to reach an agreement on price. *See* 40 U.S.C.

[1] SF 254 is the statement of qualifications submitted annually by firms wishing to be considered for A-E contracts. Among other things, it requires each firm to indicate its total number of employees by discipline. SF 255, a supplement to SF 254, lists a firm's additional qualifications with respect to the specific project. It requires the firm to list by discipline the number of personnel presently employed.

§ 544(b). Here, in comparison, the agency discussed during negotiations that its original assessment of the protester's qualifications was based on inaccurate information. It then decided that negotiations with the protester were no longer appropriate. The protester maintains that the agency's decision to terminate negotiations under both RFPs constituted a determination that the protester was not a responsible offeror; since the firm is a small business, the protester argues, the agency was required to forward its determination to the SBA for a final decision on the protester's responsibility under the COC procedures. We disagree.

There is no indication in the statute which prescribes the procedures for acquiring A-E services or its legislative history that the ranking of small business firms competing for an A-E procurement was intended to be referred to the SBA. *See* 40 U.S.C. §§ 541-544; S. Rep. No. 1219, 92nd Cong., 2d Sess. (1972). To the contrary, under the statutory scheme it is the contracting agency which is authorized to compare the relative merits of the participating A-E firms in the context of the particular services, required by the agency. Further, unlike a responsibility determination, which concerns whether a bidder has the minimum capability to perform as required, the agency's evaluation in an A-E procurement focuses on each offeror's capability and qualifications relative to the other offerors. In an analogous context, we have held that it is appropriate in negotiated procurements to use responsibility-related factors in making relative assessments of the merits of competing proposals; if a small business is found deficient in such situations, COC procedures do not apply. *Electrospace Systems, Inc.,* 58 Comp. Gen. 415, 425 (1979), 79-1 CPD ¶264; *Anderson Engineering and Testing Co.,* B-208632, Jan. 31, 1983, 83-1 CPD ¶99.

We conclude that the agency was not required to submit its decision to terminate negotiations with the protester to the SBA for a responsibility determination.

The protests are denied.

[B-214561.2(1)]

Debt Collections—Referral to Justice—Debtor's Request for Court of Law Determination

Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 and in accordance with the requirements of 5 U.S.C. 5512, General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer.

To the Honorable Edwin Meese, III, Attorney General of the United States, June 11, 1985:

Mr. Frederick R. DeCesaris has requested, by letter dated September 4, 1984 (copy enclosed), that the General Accounting Office report to you that the amount of $4,301 plus interest (as required

by 31 U.S.C. § 3717 (1982)) is claimed due and asserted against him by the United States. This request was made by Mr. DeCesaris pursuant to 5 U.S.C. § 5512(b) (1982) so that suit may be instituted against him to adjudicate the matter in the appropriate United States district court.

Mr. DeCesaris is the clerk of the United States district court for the District of Rhode Island. The amount claimed represents the total amount of and balance due on funds entrusted to and unaccounted for by persons working under the direct supervision of Mr. DeCesaris. The facts and circumstances of this loss are discussed in some detail in our decision 63 Comp. Gen. 489 (1984) (copy enclosed). Under the law, accountable officers are automatically and strictly liable for funds entrusted to them. See *Serrano* v. *United States,* 612 F.2d 525, 528 (Ct. Cl. 1979). Our decision concerned a request for relief under 31 U.S.C. § 3527 (1982) submitted by the Administrative Office of the United States Courts on behalf of Mr. DeCesaris and two of his subordinates. We declined to grant relief to Mr. DeCesaris.

It has been the position of prior Attorneys General that the provisions of 5 U.S.C. § 5512 are mandatory. The collection of this debt is required to be undertaken immediately, by means of salary offset. Moreover, should the accountable officer request it, GAO is required to report his debt to the Attorney General, who is required to institute litigation against the officer within 60 days. *E.g.,* 4 Op. Att'y Gen. 33 (1842) (the act "requires" the accounting officers of the United States to initiate administrative offset, and "there shall be no discretion to sue or not to sue" on an account reported to the Attorney General pursuant to the request of the accountable officer). *Cf.* 10 Comp. Dec. 288 (1903); 39 Comp. Gen. 203 (1959).

By letter of today's date, we are advising Mr. DeCesaris and his agency of this referral and the requirement that offset against Mr. DeCesaris' pay be effected during the pendency of this litigation. A copy of that letter is enclosed. Also enclosed, are copies of all the relevant materials in our files pertaining to this matter. Should you have any questions on this matter, please feel free to have your staff contact Mr. Neill Martin-Rolsky of my staff, at 202-275-5544.

[B-214561.2(2)]

Debt Collections—Referral to Justice—Debtor's Request for Court of Law Determination

Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 (1982), and in accordance with the requirements of 5 U.S.C. 5512 (1982), General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer.

Accountable Officers—Liability—Generally

Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative offset is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 CFR ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trail concerns the original amount asserted against the officer, not the balance remaining to be paid.

To Frederick R. DeCesaris, United States District Court for the District of Rhode Island, June 11, 1985:

This responds to your letter of September 4, 1984, concerning the Federal Government's claim against you and over the unexplained loss of $4,301 entrusted to persons under your supervision. This matter was discussed in our decision, 63 Comp. Gen. 489 (1984). As you know, our decision declined to relieve you from liability for that loss. In your letter, you requested that the General Accounting Office report this claim to the Attorney General of the United States, pursuant to 5 U.S.C. § 5512(b) (1982), so that this matter may be adjudicated in the Federal courts. By letter of today's date (copy enclosed), we have complied with your request. Presumably, you will be hearing from an appropriate official of the Department of Justice shortly.

In your letter, you stated that it was your understanding, based on information from officials of the Administrative Office of the United States Courts, that no deductions from your paycheck may be made to collect this claim until the matter has been fully litigated. This information is not correct. Under the law, accountable officers are automatically and strictly liable for funds entrusted to them. See, *e.g., Serrano v. United States,* 612 F.2d 525, 528 (Ct. Cl. 1979); 54 Comp. Gen. 112, 114 (1974). The provisions of section 5512 reflect this principle. That act provides:

> (a) The pay of an individual in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable.
> (b) When pay is withheld under subsection (a) of this section, the General Accounting Office, on request of the individual, his agent, or his attorney, shall report immediately to the Attorney General the balance due; and the Attorney General, within 60 days, shall order suit to be commenced against the individual. 5 U.S.C. § 5512 (1982).

Previous decisions of the Comptroller of the Treasury, the Attorney General of the United States, and the Comptroller General, all indicate that the provisions of this act are mandatory, may not be waived, and require the Government to immediately commence collection of an accountable officer's debts, without regard to the pendency of litigation on the underlying indebtedness. 4 Op. Att'y Gen. 33

(1842); 10 Comp. Dec. 288 (1903); 39 Comp. Gen. 203 (1959). See also *Al Parker v. United States,* 187 Ct. Cl. 553, 559 (1969); *Serrano v. United States,* 612 F.2d at 529.

Orginally, both the Comptroller of the Treasury and the Attorney General held that section 5512 requires the complete stoppage of an accountable officer's pay until the debt has been paid in full. *See, e.g.,* 21 Op. Att'y Gen. 420 (1831); 8 Comp. Dec. 101 (1901). This was held to be the case, regardless of the hardship that would be imposed on the officer. 2 Op. Att'y Gen. at 425; 8 Comp. Dec. at 101. For a variety of reasons, GAO does not adopt that position. Instead, we have held that installment deductions may be allowed in place of a complete stoppage of pay. 2 Comp. Gen. 689, 691-92 (1923); B-180957-O.M., Sept. 25, 1979. *Cf.* 19 Comp. Gen. 312 (1939).

However, there is no requirement that suit be filed or completed prior to the initiation or completion of collection by means of offset. 4 Op. Att'y Gen. 33; 17 Op. Att'y Gen. 30 (1881). Compare *Serrano v. United States,* 612 F.2d at 529. In fact, it has been held in the past that section before 5512 contemplates the initiation of collection by offset before litigation is instituted against the officer (4 Op. Att'y Gen. at 35-36; 17 Op. Att'y gen. at 31; A-2423, *et al.,* May 31, 1928; 38 Comp. Gen. 731 (1959), and that in order to invoke the provisions of section 5512(b), an accountable officer must submit evidence to show his pay has actually been stopped (A-20796, Dec. 9. 1927). Finally, it has been held that, even after litigation has been initiated, collection of a debt by offset should continue. A-22201, Feb. 15, 1929; B-8188, Sept. 27, 1941. This construction of section 5512 does not present the courts with litigation of "moot" issues since the issues at trial under section 5512(b) concerns not the collection of any amounts remaining to be paid, but rather, the amount and validity of the Government's total original claim on that debt. A-11893-O.M., July 20, 1936. Should the officer win in court, the amount withheld is refunded to him. A-22201, June 1, 1928; A-11893-O.M., July 20, 1936.

Based on the foregoing precedents and principles, we are advising the Administrative Officer of the United States Courts that it should immediately begin collection of your debt by means of salary offset, as required by 5 U.S.C. § 5512(a). In view of the statutory provision in section 5512(b) for adjudication of this matter in the courts (as well as the fact that you participated, through written submissions, in our original decision on this matter, and you have not disputed the existence or amount of the loss with which you are charged, or requested reconsideration of the legal conclusions of this Office's decision), there is no need to afford you with an additional hearing on this matter. *See* Federal Claims Collection Standards (FCCS), 4 C.F.R. §§101.4 102.3(b)(2)(ii) (1985). Otherwise, collection should proceed generally in accordance with the provisions of the FCCS, including those provisions which include the assessment of interest and other charges. *See* FCCS, 4 C.F.R. § 102.13,

implementing 31 U.S.C. § 3717 (1982). Of course, these conclusions do not preclude you from pursuing any other legal rights or remedies available to you. See, for example, *Louisel v. Mortimer,* 277 F. 882 (5th Cir. 1922).

Should you have any questions in this matter, please do not hesitate to contact Mr. Neill Martin-Rolsky of my staff, at 202-275-5544.

[B-217339]

Quarters Allowance—Basic Allowance For Quarters (BAQ)—With Dependent Rate—Child Support Payments By Divorced Member—Both Parents Service Members—Dual Payment Prohibition for Common Dependents

Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance.

Matter of: Technical Sergeants Brenda J. Sykes, USAF, and Lee A. Sykes, USAF, June 11, 1985:

This case concerns the question of whether a divorced member of a uniformed service is entitled to the basic allowance for quarters at the "with dependent" rate on the basis of having legal custody of the only child of a marriage to another military member who also claims the allowance based on an offer to voluntarily supplement a monthly court-ordered child-support payment of $100 per month that would not qualify him otherwise for the increased allowance.[1] We conclude that where the non-custodial member is ordered by the court to make a monthly support payment that is less than the amount required by regulation for entitlement to the "with dependent" rate, a claim by the custodial member for the same allowance may be paid where she/he is contributing a substantial amount of the child's support and is not occupying Government quarters.

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[1]The request was submitted by Captain R.D. Watson, USAF, Accounting and Finance Officer, Headquarters 438th Military Airlift Wing, McGuire Air Force Base, New Jersey. It was approved by the Department of Defense Military Pay and Allowance Committee as Air Force submission number DO-AF-1448.

Facts

Technical Sergeant Brenda J. Sykes claims a basic allowance for quarters at the "with dependent" rate on behalf of her child which she has in her legal custody. The propriety of paying the claim arose when her former husband and father of the child, Technical Sergeant Lee A. Sykes, also claimed the allowance on the basis that the child should be considered his dependent because he makes payments to Brenda for the support of the child.

A June 28, 1982 divorce decree incorporating a separation agreement awarded the mother custody of the child and ordered the father to pay $100 per month child support. He paid $100 per month from April 1982 through October 1983, then increased the amount to $110 in November and December 1983, and again increased it to $125 in January 1984, an amount that he has paid ever since. With a letter to him of February 21, 1984, Brenda Sykes returned $45, the excess over the $100 court-ordered monthly amount she received in November and December 1983, and January 1984, and announced her intentions to refuse any amount in excess of $100 unless the increased amount was ordered by the court. However, Lee Sykes returned her $45 check and she then began receiving a $125 monthly allotment from his pay in April 1984.

Lee Sykes occupied non-Government quarters during the relevant period. Until January 1984, he received quarters allowance at the "without dependent" rate. Effective January 23, 1984, he requested, and since then has received the allowance at the "with dependent" rate. Brenda Sykes departed Government quarters and filed her claim for quarters allowance at the "with dependent" rate on January 16, 1984.

The difference between the "with" and "without" dependent rates for Lee Sykes for the period of the claim was $113.40. As indicated, he offered $125 monthly support payments beginning in January 1984. The question presented by these circumstances is whether the custodial member (Brenda) is entitled to the increased allowance on the theory that the court-ordered support payment is less than the amount required by regulation, or whether the non-custodial member (Lee) is entitled to it on the basis on his voluntary, though disputed, offer of an amount to supplement the deficient court/ordered payment which , in combination, would exceed the amount of child support required by the regulation as a basis for the entitlement to him.

Discussion

The extra amount of quarters allowance at the "with dependent" rate, provided under 37 U.S.C. § 403 (1982), is intended to reimburse members for part of the expense of providing quarters for their dependents. 60 Comp. Gen. 399 (1981). Two members may not

receive the increased allowance on the basis of the same dependent. 51 Comp. Gen. 413 (1972), and *Sergeants Mason and Smith,* 64 Comp. Gen. 121, 123 (1984). Paragraph 30236 of the Department of Defense Military Pay and Allowances Entitlements Manual generally governs the situation where one member-parent is paying support for a child who is in the other member-parent's custody. See *Sergeant Leocadia Doerfer, USAF* B-189973, February 8, 1979. As a general rule, where a non-custodial member pays child support in the amount required by the regulations, he/she qualifies for the entitlement. *Technical Sergeant Mary L. Fabian,* B-215235, March 19, 1985. More specifically, however, the regulation as a whole reflects the principle that where the amount of court ordered support is less than the difference between the "with" and "without" dependents quarters allowance rates, the member having legal custody may claim the child if that member is providing substantial support and is not occupying Government quarters. Where the custody and support obligations of divorced members are created by court order or by separation agreement, their entitlements, if any, remain unchanged until the obligations change either by a new court order or by mutual agreement. *Airman McCoy and Sergeant Cooper,* 62 Comp. Gen. 315, 318 (1983).

Here, a court established the members' custody and child-support obligations. The court awarded child custody to Brenda Sykes and ordered Lee Sykes to pay $100 per month for the child's support. It is undisputed that the $100 court-ordered amount does not satisfy the minimum support payment required by paragraph 30236(a)(1) of the Pay and Allowances Manual. That paragraph requires that where a member is ordered to pay support, he/she is entitled to the "with dependent" rate, provided the "monthly support ordered is not less than the difference between that member's 'with' and 'without' dependent BAQ rates." In this case the difference was $113.40.

Although the regulation also provides that "when BAQ rates are later increased, support payments must be adjusted accordingly," we do not believe that that language was intended to convey to the non-custodial member the power to alter, unilaterally, the obligations of the members established by the court order. It would seem that any modification of the obligations would have to come from the court or by mutual agreement between the parties before any change could be made in the entitlement. Lee Sykes' voluntary offer of the supplemental amount had no effect on the legal obligations of the parties; Lee Sykes' court-ordered obligation for monthly child support remains at $100. As long as Brenda Sykes refuses to accept the additional amount and the court-ordered obligation remains unchanged, Lee Sykes' support obligation is insufficient to allow him to claim the child as his dependent. Therefore, he would not be eligible for the increased allowance. Brenda J. Sykes, however, would be entitled to the additional allowance, so long as she is

providing substantial support to the child, as appears to be the case. See *Sergeant Leocadia Doerfer, USAF,* B-189973, *supra.*

Concerning the "with dependent" rate quarters allowance payments which have been made to Lee Sykes since January 1984, it appears that Brenda attempted to return the extra $25 child support she received for January but it was returned to her by Lee. It is not clear how much she received for February and March, but she indicates that in April she began receiving a $125 monthly allotment. In any event, since Brenda Sykes made a good-faith effort to return the extra amounts and made it clear that she did not consider the amount of Lee Sykes' support obligation increased, Lee Sykes' support obligation for those months should be considered to be only $100 per month. Therefore, Brenda is entitled to the "with dependent" allowance for that period, not Lee. The finance officer should make payment to Brenda accordingly, and take appropriate collection action from Lee.

[B-217354]

Payments—Quantum Meruit/Valebant Basis—Absence, etc. of Contract—Transportation Changes

The Navy contracted with a specialized motor carrier to transport a ship's propeller from Virginia to California from where it was to be transported by the Air Force to the Philippines. Upon arrival in California, rather than unload the propeller from the tractor-trailer, the Navy borrowed the carrier's tractor and trailer, equipped with a fixture specially designed for ships' propellers, and one driver for 20 days, all of which were then flown by Air Force cargo plane from California to the Philippines, and returned to California transporting a damaged propeller for repair. The carrier is entitled to payment on a *quantum meruit* basis, in the absence of an agreement as to the charges for the services performed between California and the Philippines. Where the carrier fails to show that the Government ordered or received certain services, received a benefit for certain services allegedly provided, or where charges for certain services are duplicative of other charges paid, the General Services Administration's disallowance of the carrier's claim for charges for such services is sustained.

Matter of: Dan Barclay, Inc., June 11, 1985:

Dan Barclay, Inc., asks the Comptroller General to review settlement action taken by the General Services Administration (GSA) on its claim for services performed in relation to the transportation of ships' propellers for the Department of the Navy between Virginia and the Philippines during the period from September 23 to October 24, 1983. Of the $236,872.83 billed by the carrier, GSA allowed $35,130.76. Based on the record before us, we sustain GSA's action on the holding that Barclay has not shown that it is entitled to the additional $201,742.07.

Facts

On September 23, 1983, a team of two drivers employed by Dan Barclay, Inc., a specialized motor carrier with headquarters in New

Jersey, arrived at the Naval Supply Center, Williamsburg, Virginia, in a tractor pulling a semi-trailer equipped with a fixture specially designed to accommodate ships' propellers. Propellers, apparently because of their irregular dimensions and shape, must be transported at an unusual angle, a situation that complicates transportation. The fixture includes a "jig" to hold the propeller with hydraulic valves and cylinders (powered by an engine-driven pump), which is capable of lifting, raising and lowering propellers to a secure position.

Under a Government Bill of Lading, No. S-5540187, the carrier agreed to provide transportation and all necessary accessorial services, such as obtaining necessary over-dimensional highway permits, for movement of a four-bladed ship's propeller from Williamsburg, Virginia, to Travis Air Force Base, California. The propeller, which was marked for the Naval Ship Repair Facility, Subic Bay, Philippines, weighed 39,000 pounds; was 15 feet high; 12 feet, 8 inches wide; and occupied roughly 1,000 cubic feet of space.

The carrier tendered delivery at Travis on September 27, 1983, thus completing performance under the contract, for which payment has been made. The rates and charges for the services performed under the contract for the transportation from Williamsburg to Travis are not the subject of review here. Review relates to services performed outside the contract from September 27 to October 18 between Travis and the Philippines under circumstances that were highly unusual for a motor carrier. No written contract between the carrier and the Government provided charges for these services, nor did the carrier have tariffs or rate tenders specifically applicable to such a shipment outside the United States.

When the carrier's vehicle arrived at Travis, the Military Sealift Command decided that, instead of unloading the propeller from the carrier's equipment and providing independent means of moving and bracing it on an Air Force C5A aircraft to be flown to the Philippines, it would be preferable to leave the propeller intact on the carrier's equipment and use the entire unit as a convenient and safe means of handling incident to the air transportation. Barclay agreed with the proposal and assigned the second driver of the team to accompany the unit.

The carrier's tractor and trailer with the propeller were then loaded on the Air Force aircraft which departed Travis on September 30, 1983, and after stops in Hawaii and Guam, it arrived in the Philippines on October 2. When the propeller was unloaded from the carrier's equipment 2 days later, the Navy instructed the driver to load a damaged propeller for return to Travis, and after several cancellations the plane, carrying the equipment, driver, and damaged propeller, departed the Philippines on October 14. After the usual stops en route, the plane landed at Travis on October 16. Two days later, the driver departed Travis and delivered the propeller to the Naval Supply Center, Oakland, California. On

the following day he departed with the unladen vehicle, for New Jersey.

The transportation of the damaged propeller from Travis to Oakland was performed under Government Bill of Lading No. S-3737261. The charges for that portion of the shipment have been paid and are not in question here.

The charges under review here are those for services rendered after the initial arrival of the shipment from Williamsburg at Travis, through the return from the Philippines to Travis. Because of the time constraints involved, formal contracting procedures were not followed for this portion of the shipment. The carrier's bills for its services during this period were broken down into separate charges, including:

1. Jig (fixture) detention
2. Vehicle detention
3. Special services support staff
4. Driver services
5. Storage
6. Other, including engineering services, telegram, telephone, office assistance, etc.

The GSA disallowed all or a major part of the charges.

Carrier's Contentions

Barclay contends that it is not due the full amount billed, $236,872.83, it is entitled to $171,993, the amount the Navy allegedly paid for services provided by the Air Force; or as a minimum, $94,253.11, which is the total for 19 days at a daily rate ($4,960.69) derived from dividing the carrier's charges billed for the services performed from Virginia to California under the Government Bill of Lading contract by the number of days that portion of the shipment took. The thrust of the carrier's claim is the premise that the services were requested to meet an "emergency" since the Navy considered it "critical" that the new propeller be transported as quickly as possible to replace a damaged propeller on a ship of the Seventh Fleet.

General Principles of Law

Where there is no specific agreement between the parties as to rates, payment is made for services actually requested and performed on a *quantum meruit* basis. 36 Comp. Gen. 529, 531 (1957). On that basis, the claimant is entitled to payment for the reasonable value of the work or labor. To recover, the claimant must show that the Government received a benefit. B-173765, November 18, 1971. Where benefit is shown, payment may be based on the lowest rates available to the Government for the same or similar services. *Starflight*, Inc., B-212279, November 13, 1984. The burden of proof

is on the claimant. 52 Comp. Gen. 945, 948 (1973); 41 C.F.R. § 101-41.603-3 (1984). Where there are disputed questions of fact, we rely on the statements furnished by the administrative officers of the Government. 45 Comp. Gen. 99 (1965).

Discussion

We do not consider the amount paid by the Navy to the Air Force, $171,993, to be a reasonable basis for payment to Barclay because the services performed by each were substantially different. The Air Force provided crews, ground support and multi-million dollar cargo aircraft for the round-trip transportation between California and the Philippines. Barclay provided the use of a tractor and trailer with fixture and one driver, for incidental ground use.

Also, we fail to see how the average daily charges for the carrier's transportation services performed under the Government Bill of Lading contract can be a reasonable standard either. Under that contract, Barclay performed full carrier services, including all the transportation, and assumed common carrier liability for the cargo, plus the care for its own equipment, whereas between Travis and Subic Bay, Barclay simply provided its equipment for the use of the Government; the Government provided the transportation services, assumed responsibility for the cargo, and as bailee, the responsibility for the care of Barclay's equipment while in transit.

Barclay's Tender No. 23, as amended, and the Heavy and Specialized Tariff Bureau Tariff 401-A publish line-haul rates and charges for accessorial services performed within the continental United States. Although the line-haul rates have no use as a standard of reasonableness since the Air Force, rather than Barclay, performed the transportation services, we see no reason why the accessorial charges cannot be used as a basis of reasonableness to the extent the services performed by Barclay overseas were the same or similar. Therefore, as explained below, we find GSA's settlement on this basis appropriate.

Detention

Barclay contends that the jig is an expensive piece of equipment for which it is entitled to detention charges in addition to detention charges for the vehicle. Barclay states that it is currently making two jigs for the Navy at a cost of over $74,000 each, and that in previous contracts shippers paid over $100 per hour for jig detention. Thus, it claims that $100 per hour should be used as a reasonable standard for payment here. On that basis Barclay claims $48,000 for 20 days' jig detention.

As GSA previously advised Barclay, the evidence of record does not support the contention that separate jig detention is due. We note that neither tariff 401-A nor tender 23 provides a separate charge for jig detention. The GSA allowed the carrier over $24,000

for vehicle detention based on rates in the carrier's tariff which apply to the detention of the carrier's vehicle when transporting heavy and specialized commodities or articles requiring special equipment or handling. Tariff 401-A, item 1507. However, GSA disallowed additional jig detention charges on the theory that the vehicle detention provisions covered all equipment, including any trailer fixtures, in the absence of a specific provision for the fixture. We agree with this determination.

Special Services Support Staff

The carrier billed $134,775 for special services support staff. This was based on $450 per hour, 24 hours per day, 7 days a week, for standby of three company executives who made themselves available for contact by telephone at company headquarters in New Jersey or at home. Barclay contends that these services were required because Government agents requested expeditious service for a critical transportation movement. The Military Sealift Command states that no such request for standby of company executives was made and that no such standby was necessary. The Sealift Command has stated that, with the exception of a few telephone calls on one weekend totaling about 1 hour, all contacts with Barclay were made during normal working hours. The GSA was correct in accepting the statements of the Military Sealift Command personnel in this regard. There is no evidence that the Government received any benefit from such special service the carrier claims to have provided and there is no evidence that the Government requested such service. Thus, we agree with the disallowance of this item.

Storage

The carrier contends that in addition to detention charges it is entitled to storage charges at a rate of $77.50 per day, as published in item 1751 of tariff 401-A, for the same period of time on the theory that detention and storage charges are separate.

Although the tariff contains separate provisions for detention and storage, it does not follow that they apply simultaneously. Item 1751 provides that "carrier's trailers" may be used for storage upon request, while item 1507 provides an hourly rate for the detention of a "tractor-trailer combination" and does not apply to "trailers without motive power." Thus, it appears that these are mutually exclusive charges. In addition, there is no evidence that the trailer here was requested for storage purposes. Instead, the tractor-trailer combination was detained for the use of the Government, and the charge for the use of the trailer was included in the detention charge. Thus, we agree with GSA that storage charges in addition to payment of vehicle detention charges of $24,000 for use of the carrier's equipment is not appropriate.

Driver

While noting that under item 1535 of tariff 401-A there is no extra charge for a driver between the hours of 7 a.m. and 5 p.m., GSA allowed hourly charges for the driver 24 hours per day since the driver was outside the United States for most of the period. Barclay, however, contends that the rates applied by GSA from item 1535 of the tariff were erroneous. Under item 1535 the rates are higher for a second driver than for the first driver. Barclay states that of the two-man team that operated the vehicle to California, the second driver accompanied the propeller to the Philippines. This fact is irrelevant because the item applies only where a request is made for more than one driver. For the transportation from Travis to the Philippines and return only one driver was requested and only one was dispatched.

Other Charges

We have reviewed the other charges and find that the carrier failed to show that the Government received any benefit from the services that allegedly were performed, that such services were requested by the Government, or that they were actually provided.

We conclude that, based on the facts as stated by the Government, and in the absence of proof that the carrier is entitled to more than the amount allowed by GSA, we cannot authorize payment of any additional amount.

Accordingly, GSA's action is sustained.

[B-215511]

Travel Expenses—First Duty Station—Manpower—Shortage—Relocation Expenses

Travel and transportation expenses for new appointees to manpower shortage positions in the Federal service are authorized by law and the Federal Travel Regulations. Claimant was selected for appointment to such a position in Asheville, N.C., and signed a 12-month service agreement. Agency issued a travel order and advanced funds to claimant for travel expenses, but withdrew offer of employment prior to reporting date due to budget constraints. Claimant is not liable for portion of travel advance paid by agency relating to relocation travel since failure to fulfill service agreement was for reasons beyond her control. There is no authority to allow remainder of expenses. However, since Ms. Randall acted in good faith reliance on her selection for appointment and representations of agency officials, we conclude the equities of the case warrant our reporting this matter to Congress under the Meritorious Claims Act.

Matter of: Betsy L. Randall—Relocation Expenses—Employment Offer Withdrawn, June 12, 1985:

This decision is in response to a request from the United States Department of Agriculture concerning the continuation of collection efforts against Ms. Betsy L. Randall, to recover a travel advance made to her as an appointee to a manpower shortage position. For the reasons which follow, only a portion of the expenses

may be retained. However, we are reporting this matter to Congress pursuant to the Meritorious Claims Act.

BACKGROUND

On December 22, 1981, Ms. Randall was offered and accepted a position as a GS-11 Supervisory Plant Pathologist with the Forest Service, United States Department of Agriculture, in Asheville, North Carolina, with a reporting date of January 25, 1982. The offer advised Ms. Randall that she was entitled to reimbursement for travel and relocation expenses from Raleigh, North Carolina, to Asheville, North Carolina, in that the position was determined to be a shortage category appointment. See para. 2-1.2a(3) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR) *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983). Ms. Randall was given a Travel Authorization, AD-202, dated January 6, 1982, along with a travel advance in the amount of $2,339.25. The Travel Authorization authorized per diem, mileage, and transportation and storage of household goods for her and her husband.

Subsequent to the issuance of the Travel Authorization to Ms. Randall, the Forest Service determined, due to budget constraints, that it would be unable to fill the position offered to Ms. Randall, and on January 21, 1982, she was notified that the job offer was rescinded. Prior to January 21, 1982, but subsequent to the issuance of the Travel Authorization, Ms. Randall incurred expenses for the rental of an apartment in Asheville, heating oil, water and sewage deposit, electricity, and mileage. By letter of May 28, 1982, Ms. Randall repaid $1,767.43 of the travel advance, but retained $571.82 to cover the expenses she had incurred incident to her travel to Asheville and the rental of an apartment there along with the connection of utilities. The Forest Service requested that Ms. Randall refund the portion of the travel advance that she retained since she never became a Forest Service employee and was not entitled to any relocation reimbursement. Ms. Randall has requested that she be permitted to retain these funds as she incurred the underlying expenses in good faith reliance on the offer of employment, the written travel authorization, and the advance of travel funds.

OPINION

The authorization for the payment by the Government of the travel and transportation expenses of new appointees to a position in the United States for which it is determined there is a manpower shortage is statutory. Section 5723(a) of title 5, United States Code, authorizes the reimbursement of travel and transportation expenses for new appointees appointed to manpower shortage positions. The statute in section 5723(b) expressly conditions such reimbursement on the individual's agreement to remain in the Govern-

ment Service for 12 months after the appointment unless separated for reasons beyond his or her control which are acceptable to the agency. Section 5723(c) further provides that the agency may pay these expenses whether or not the individual selected has been appointed at the time of travel. The regulations implementing the statutory provisions appear in the FTR. Paragraph 2-1.5a(1)(b) of the FTR expressly provides that, "[i]n case of violation of such an agreement, including failure to effect the transfer, any funds expended by the United States for such travel, transportation, and allowances shall be recoverable from the individual concerned as a debt due the United States."

It is not necessary that an individual be appointed before an agency may pay the travel and transportation expenses. Although section 5723(a) refers only to a "new appointee," the language of section 5723(a) is specifically made subject to the implementing regulations and to subsections (b) and (c) of section 5723. Section 5723(b) states that an agency may pay expenses under subsection (a) "only after the individual selected agrees in writing to remain in the Government service for 12 months after his appointment * * * unless separated for reasons beyond his control which are acceptable to the agency concerned." If the agreement is made, subsection (b) further provides that, if the individual violates the agreement, the expenses paid by the agency are recoverable as a debt due the United States. In our opinion, section 5723(a) when read together with section 5723(b) clearly covers individuals selected for appointment as well as "new appointees." See *Dr. William Post, Jr.*, B-196795, June 5, 1980.

In the present case, Ms. Randall was an indivdual selected for appointment to a manpower shortage position, and she did sign the 12-month service agreement. Hence the Forest Service was authorized to pay her expenses under section 5723(a). The record shows that Ms. Randall did not complete the service obligation for reasons clearly beyond her control, i.e., her offer of employment was rescinded. Therefore, Ms. Randall is entitled to be reimbursed for her travel expenses, including mileage allowance and applicable per diem, for her trip from Raleigh to Asheville. However, Ms. Randall has charged a roundtrip mileage allowance against her travel advance ($96.00). Since we are not aware of any authority, including 5 U.S.C. § 5723, which authorizes return mileage for a new employee hired and employed within the continental United States after the expiration of the term of service, Ms. Randall would not have been eligible for return travel to Raleigh even if she had been allowed to complete her service agreement. Therefore, only $48 of the claimed $96 mileage allowance may be approved.

The agency questions the effect of its rescission of Ms. Randall's job offer prior to her actual reporting date on her entitlement to travel allowances. As indicated above, Ms. Randall's actual report-

ing date is not one of the operative facts from which her travel entitlement accrues. Since at the time of her travel from Raleigh to Asheville, Ms. Randall was an individual selected for appointment and since she traveled under properly executed travel orders prior to the rescission of her job offer, she is entitled to a $48 mileage allowance without regard to her actual reporting date.

However, 5 U.S.C. § 5723, as amended, does not authorize a new appointee reimbursement for residence purchase or rental expenses. Of the $571.82 which Ms. Randall charged against her travel advance, only the mileage charge is not related to her rental of an apartment in Asheville. Her other expenses for rent and utilities could not have been reimbursed even if Ms. Randall had commenced work for the Forest Service as originally proposed.

Ms. Randall received a travel advance in the amount of $2,339.25, as noted above, of which she has already refunded $1,767.43. This Office has always considered travel expense advancements to be in the nature of a loan. 54 Comp. Gen. 190 (1974). Thus, the money was loaned to Ms. Randall for the purpose of traveling to Asheville in connection with her proposed appointment. Hence, we find no basis for Ms. Randall to keep the amount of the advance, except for the mileage allowance. See 5 U.S.C. § 5705 (1982).

However, in view of the fact that Ms. Randall acted in good faith reliance on her selection for appointment and the representations of agency officials, we feel the equities in the instant case are such as to warrant our reporting this matter to the Congress pursuant to the Meritorious Claims Act, 31 U.S.C. § 3702(d) (1982).

Accordingly, we are forwarding a report to the Congress requesting that Ms. Randall be relieved from liability to the United States for the balance of $523.82 remaining due on her travel advance. Further collection action should be suspended pending congressional consideration of our request.

[B-216914.2]

Advertising—*Commerce Business Daily*—Publication Requirement—Prior To Ordering Under Basic Ordering Agreement—Spare Parts Procurement

General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked.

Matter of: Pacific Sky Supply, Inc., June 17, 1985:

Pacific Sky Supply, Inc. protests the allegedly improper actions of the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, in issuing 32 delivery orders for aircraft engine parts to General Motors Corporation, Allison Gas Turbine Operations (De-

troit Allison). The orders, placed in August and September 1984 against Detroit Allison's basic ordering agreement (BOA), No. F34601-83-G-0276, were for T56 engine components applicable to the C130 aircraft.

We deny the protest.

Pacific Sky contends that the synopsis and approval requirements of Public Law No. 98-72 were not met, stating that its personnel did not see any notices in the Commerce Business Daily (CBD) before the noncompetitive orders were placed.

Public Law No. 98-72 amended section 8(e) of the Small Business Act to enhance small business competition by improving access to procurement information. *See* 15 U.S.C. § 637 (Supp. I 1983). The section requires that a proper notice be published in the CBD for all procurements of $10,000 or more (with certain exceptions). In the case of a BOA, notice of an intent to place an order must be published at least 30 days before competition is foreclosed. 15 U.S.C. § 637(e)(2). Agencies are prohibited from commencing negotiations on a sole source contract until at least 30 days after the publication of a proper notice of intent to contract. 15 U.S.C. § 637(e)(4) further states that before negotiating a sole source contract of more than $1,000,000 (in fiscal year 1984), the head of the procuring activity or his deputy must approve such a contract; in addition, the contracting officer must evaluate all responses to the CBD notice.

Pacific Sky questions whether these approval requirements were met and argues that the contracting officer could not have evaluated responses unless the intent to place the orders had been properly synopsized. The protester also contends that the Air Force's waiver of the synopsis requirements for eight of the orders on the basis of urgency was improper because of the long period of time, *i.e.*, up to 2 years after award, permitted for delivery.

The Air Force responds that it complied with the statute and applicable sections of the Federal Acquisition Regulation, 48 CFR §§ 5.201-5.203 (1984). Synopses for 24 of the proposed orders were transmitted to the CBD between August 8, 1983 and August 10, 1984; this exceeds the statutory time requirements. The agency states that the remaining eight orders were not synopsized because of urgency, an exception permitted by 15 U.S.C. § 637(e)(1)(B). In addition, according to the Air Force, sole source approvals were obtained for all awards of more than $1,000,000; two of the orders did not require such approval, since the purchase request estimates were less than this amount.

The Air Force has provided us with a random sample of the CBD notices published between June and August 1984. This sample shows the following synopses published:

Order No.	Date synopsis transmitted	Date published	CBD page No.	CBD issue No.
SA69	June 1, 1984	June 11	38	PSA-8605
SA75	June 20, 1984	June 29	23	PSA-8619
SA54	June 21, 1984	July 2	18	PSA-8620
SA68	June 21, 1984	July 2	18	PSA-8620
SA79	July 26, 1984	Aug. 3	14	PSA-8643
SA67	Aug. 6, 1984	Aug. 21	13	PSA-8655

Based upon this information, it appears that the Air Force did in fact comply with the synopsis requirements of Public Law No. 98-72. In the absence of any evidence to the contrary, we find no basis to question the Air Force's compliance with regard to 24 of the protested orders. We can only conclude that Pacific Sky failed to see the CBD notices, some of which appeared as much as a year before the awards, and mistakenly concluded that they had not appeared.

As for Pacific Sky's contention that the Air Force improperly invoked the urgency exception for the remaining eight, the record shows that the Air Force did so only after considering such factors as administrative lead time, production lead time, inventory levels, pipeline time, flying hour programs, and maintenance schedules. The contracting officer states that support of T56 engine components is of extreme concern to the major commands and that to ensure continuity of support, they had requested contractual coverage at the earliest possible date. Pacific Sky has made only general allegations concerning the 2 years allowed for delivery and has not refuted the Air Force's arguments as to the actual lead times. Under these circumstances, we find no basis to question the Air Force's determinations of urgency for the eight orders.

Pacific Sky finally contends that it should have been awarded two orders that allegedly would have resulted in a substantial savings to the Air Force. We note, however, that all T56 engine components are assigned acquisition method codes indicating that only approved sources can be considered for award. Since Pacific Sky is not an approved source (and according to the Air Force has not submitted sufficient data to permit approval), the firm could not have been awarded a contract for any of the components covered by the protested delivery orders. We note that Pacific Sky is fully aware of the approved source requirement and that the firm has on several occasions been found nonresponsive for failure to provide sufficient data to enable the Air Force to qualify it. See *Pacific Sky Supply, Inc.*, B-215189, *et al.*, Jan. 18, 1985, 64 Comp. Gen. 194, 85-1 CPD ¶53.

The protest is denied.

[B-218241]

Contracts—Protests—Court Action—Protest Dismissed

General Accounting Office (GAO) will not consider a protest where the issues presented are before a court of competent jurisdiction and the court has not expressed any interest in a GAO decision, or where the issues have already been decided by the court.

Contracts—Protests—Court Action—Protest Dismissed

GAO will not award attorneys fees or other costs of pursuing a protest where GAO has made no determination on the merits of the protest because the matter was decided by a court by competent jurisdiction.

Matter of: Pitney Bowes, Inc., June 18, 1985:

Pitney Bowes, Inc. protests an award of contract by the U.S. Army Defense Supply Service-Washington ("Army") to Whitaker Brothers ("Whitaker") under solicitation No. MDA903-85-B-0014. The solicitation is for ten high-volume mailing systems, including mailing machines, electronic scales, a postal-meter tape-dispensing mechanism, and an accumulator to tabulate mailings and postage costs. Pitney Bowes contends that the awardee's bid was nonresponsive because it offered equipment which was reconditioned rather than new, and the Invitation for Bids made no provision for acceptance of such equipment.

We dismiss the protest.

Pitney Bowes filed its protest with our Office on February 26, 1985. Under Section 2741 of the Competition in Contracting Act of 1984 ("CICA"), P.L. 98-369, and section 21.4 of our Bid Protest Regulations implementing CICA, 4 C.F.R. 21.0 *et seq.* (1985) ("Regulations"), the Army was required immediately upon receipt of the protest to direct the awardee, Whitaker, to cease performance under the contract and to suspend any related activities that might result in additional obligations being incurred by the United States under that contract as long as the protest was pending. The Army refused to suspend contract performance, however, and Pitney Bowes filed suit in the United States District Court for the District of Columbia on March 13, seeking to enjoin the agency from proceeding with the contract. Pitney Bowes also sought from the court declaratory relief on the merits of its protest, bid preparation costs plus costs and attorneys fees. *Pitney Bowes v. United States,* Civ. Action No. 85-0832. The District Court issued a Temporary Restraining Order, enjoining the Army from proceeding with performance of the Whitaker contract. On April 1, 1985, the District Court granted Pitney Bowes' Motion for Summary Judgment, holding that the Army's award to Whitaker Brothers violated Federal Acquisition Regulation, section 10.010 and finding the contract therefore void. Although the court enjoined performance of the Whitaker contract, it did not order that the contract be awarded to Pitney Bowes, the next low bidder, nor did it award costs or fees.

The Army has indicated to the protester that it has not yet made a decision on whether such award will be made.

Pitney Bowes has requested a determination of its protest, notwithstanding the District Court's decision. The protester does not seek to disturb the decision of the District Court on the merits of its case, but wishes to apply to our Office for costs of filing and pursuing its protest, to which it believes it is entitled under CICA and § 21.6(d) of our regulations.

Our Bid Protest Regulations require the dismissal of any protest where the matter involved is the subject of litigation before a court of competent jurisdiction, (unless the court requests a decision by the General Accounting Office) or where the matter involved has been decided by the court, 4 C.F.R. § 21.9, and it has long been the policy of our Office not to decide protests that come within these guidelines in the present regulation. *Santa Fe Corp.*, B-218234.2, Mar. 27, 1985, 64 Comp. Gen. 429, 85-1 CPD ¶361; see *Raycomm Industries, Inc.*, B-182170, Feb. 3, 1975, 75-1 CPD ¶72.

The issues presented in Pitney Bowes' court proceeding are identical to the issues presented in this protest, with the exception of the protester's claim for costs and attorney's fees. Therefore, the court's determination of the lawsuit controls the resolution of the bid protest issues. Under the doctrine of *res judicata*, the court's determination of these issues is final and binding on the protester and the Army. Therefore, it would be pointless for us now to consider the merits of Pitney Bowes' complaint.

Pitney Bowes argues that it is nevertheless entitled to a determination of its claim for costs, since this issue was not addressed by the court. Pitney Bowes asserts that it did not voluntarily elect to pursue a remedy in court, but was forced to resort to litigation when the Army refused to suspend performance of the contract while the protest filed with our Office was pending. After the court granted a temporary restraining order, both parties filed motions for summary judgement; Pitney Bowes expressed in its motion its willingness for the court to seek an advisory opinion from this Office. The protester argues, therefore, that it was at all times willing to have the matter resolved by this Office. Furthermore, Pitney Bowes objects that the Army's refusal to comply with the stay provisions of CICA necessitated the court action and should not now have the less direct result of denying Pitney Bowes any forum in which to pursue the remedies made available by statute.

We recognize the difficulty of the situation created by the agency's refusal to adhere to the provisions of CICA. However, the fact remains that Pitney Bowes actively sought relief from the court. Thus, the protester accepted the possibility that the court would decide the case without requesting our opinion and indeed invited the court to do so. Where a protester seeks and obtains substantive relief from a court with no decision by this Office, it is not entitled to the award of attorneys fees by the Comptroller General.

The responsibility of this Office under CICA is to decide if a protested procurement action violates a statute or regulation. Such a decision on the merits of a protest is an essential condition to a declaration that the protester is entitled to the award of reasonable costs of filing and pursuing the protest, including attorneys fees. 4 C.F.R. 21.6(d). Thus, the authority to declare entitlement to these costs is ancillary to our decision regarding compliance with the procurement statutes and regulations. The legality of the Army's action in this case has been finally determined by a United States District Court, and our regulations therefore require dismissal of the protest.

The protest is dismissed.

[B-216688]

Appropriations—Contracts—Amounts Recovered Under Defaulted Contracts—Disposition—Funding Replacement Contracts

A performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract to complete the work of the original contract. The performance bond constitutes liquidated damages which may be credited to the proper appropriation account in accordance with analysis and holding in 62 Comp. Gen. 678 (1983). 46 Comp. Gen. 554 (1966) is modified to conform to this decision. Requirements for documentation of the accounting transactions are set forth in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

Matter of: National Park Service—Disposition of Performance Bond Forfeited to Government by Defaulting Contractor, June 20, 1985:

This decision is in response to a request dated October 1, 1984 (Reference: S7217 (MWR-AB)) from Mr. Donald L. Sondag, an Authorized Certifying Officer of the National Park Service. Mr. Sondag requests a decision as to whether a performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract. If we answer yes to his first question, he asks further, what documentation would be necessary to authorize the obligation of the performance bond funds. As set forth below, we conclude that the performance bond in question may be used to fund a replacement contract. Further, requirements for documentation of the transaction are set forth in the GAO Policy and Procedures Manual for Guidance of Federal Agencies.

Facts: On August 17, 1983, the National Park Service awarded a contract for the sale of Government property to Mr. Fred Boreman for the removal of greenhouses in an area of planned development at the Cuyahoga Valley National Recreation Area. The contract called for Mr. Boreman to pay the Government $6,500 for the salvage value of the greenhouses and to post a performance bond of $2,500. The $6,500 received from Mr. Boreman by the Park Service

was deposited in the General Treasury Land and Water Conservation Fund for sale of surplus property. Mr. Boreman duly removed the greenhouses, but thereupon abandoned the site and failed to remove debris and restore the site to a natural state in accordance with the terms of the contract. Mr. Boreman's default resulted in the forfeit of his $2,500 performance bond to the Government.

The National Park Service intends to solicit bids to complete the demolition and restore the site, which it estimates will cost $10,000 to $15,000. The Service asks whether the forfeited $2,500 performance bond may be used to fund partially the replacement contract.

Analysis: The performance bond in this case constitutes liquidated damages. Section 4 of the "Special Terms and Conditions of Sale" attached to the invitation for bids reads, in part:

> A performance bond will be required in the amount of two thousand five hundred dollars ($2,500) per lot or lot item as indicated, to assure completion and cleanup of the site. A performance bond may be furnished in the form of cashiers check, money order, certified personal check or cash. Checks are to be made payable to the National Park Service. *The Performance Bond will be forfeited to the Government in the event the buildings or structures have not been removed and/or the site cleaned up to the satisfaction of the Contracting Officer and/or his designated representative, within the time limit specified, all rights, titles, interests, and bond amount will be forfeited to the Government and the payments thereon made will be retained by the Government as liquidated damages.* (Emphasis in original.)

The traditional rule for funds received by a Government agency as liquidated damages for a contractor's default is that they may be retained in the appropriation originally charged with the contract. 44 Comp. Gen. 623, 626 (1965). The two rationales for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts are that they effect an authorized reduction in the price of the individual contract concerned, and that this would make them available for return to the contractor should he subsequently be relieved of his liability. 23 Comp. Gen. 365 (1943); 9 Comp. Gen. 398 (1930).

However, the rule that liquidated damages may be returned to an appropriation account has been held to be inapplicable where the above rationales do not apply; for example, when a contractor has received no payment from the Government and it is unlikely that the contractor would or could contest the default. 46 Comp. Gen. 554, 556 (1966). Those circumstances are present here. In the instant case, no funds were paid by the Government to the contractor. Further, Mr. Boreman has abandoned the site and, despite repeated notices, has given no indication that he will contest the forfeiture of the performance bond. Accordingly, we conclude that the two rationales of the traditional rule regarding the disposition of liquidated damages—that they may be retained in an appropriation account rather than deposited in miscellaneous receipts—are not applicable here.

Nonetheless, we need not depend on the traditional rule regarding the disposition of liquidated damages (and its associated cases) in resolving this case. In 62 Comp. Gen. 678 (1983), this Office over-

turned a long line of cases in establishing a new rule regarding the retention of "excess costs of reprocurement" received by the Government from Government contractors. In previous cases, we had held that such funds must be deposited into the general fund of the Treasury rather than the appropriation from which the contract payments were made. *See, e.g.,* 27 Comp. Gen. 117 (1947). However, in 62 Comp. Gen. 678, we changed our position and concluded that that rule disrupted the procurement process and was not required by statute. We held:

> We do not think it is logical to insist that a breaching contractor is legally responsible for excess reprocurement costs and then, when the contractor fulfills that obligation, refuse to permit his payments to be used for that purpose. We regard the contractor's payments as being analogous to a contribution to a Government trust account, earmarked for a specific purpose. Just as the proceeds of a trust are considered to be appropriated for the purpose for which the funds were deposited, so too should excess reprocurement collections be considered to be available only for the purpose of funding a replacement contract.
>
> This use of the recovered excess reprocurement costs does not, in our view, constitute an illegal augmentation of the agency's appropriation. The agency is being made whole at no additional expense to the taxpayer. It will merely be receiving the goods or services for which it bargained under the original contract. 62 Comp. Gen. at 682.

We conclude that the analysis in 62 Comp. Gen. 678 regarding recovered excess reprocurement costs is equally applicable to the liquidated damages recovered in the instant case. In our view, the legal distinction between damages received from a defaulting contractor for the excess costs of reprocurement and liquidated damages specified in the contract is not pertinent. When used for the purpose of funding a replacement contract, both serve the purpose of making the Government whole and ensuring that the Government receives the goods or services for which it bargained under the original contract.

Accordingly, we conclude that the proceeds of the $2,500 performance bond forfeited by the contractor in the case at hand may be used by the National Park Service to fund a replacement contract to complete the work which was to have been performed under the original contract. To the extent our decision in 46 Comp. Gen. 554 (1966) is inconsistent with that result, that decision is modified accordingly.

Finally, the National Park Service asks what documentation would be necessary to authorize the retention and subsequent obligation of the performance bond. The GAO Policy and Procedures Manual for the guidance of Federal Agencies provides:

> Collections that are credited to appropriation and fund accounts must be proper and be authorized by law or appropriate regulations. Agencies must be able to produce references to such authorizations if they are called for in connection with the audit of accounts by the General Accounting Office. Agency collection records pertaining to refunds and reimbursements will include descriptions of transactions sufficient for identifying the source of, or reason for, the collection. GAO, Policy and Procedures Manual for the Guidance of Federal Agencies, tit. 7, § 12.4. (TS No. 7-40, July 14, 1983).

The National Park Service should document the retention of the performance bond in accordance with that provision. The funds could then be obligated for the replacement contract like any other available funds.

[B-218387]

Bids—Modification—Before Bid Opening—Ambiguity Allegation

A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be the subject of award.

Matter of: Harris Construction Company Inc., June 21, 1985:

Harris Construction Company, Inc. protests the award of a contract to Abhe and Svoboda Inc. (A&S) under solicitation No. N62470-84-B-4205 to demolish a seaplane hanger, Bldg. A-1 at the United States Naval Air Station Annex, Bermuda.

The protest is sustained.

In response to the Navy solicitation bids were received from Harris and A&S in the amounts of $231,000 and $223,610, respectively. A&S attempted to modify its bid by sending a telegram to the Navy. The telegram, which was received prior to bid opening, acknowledged two amendments to the solicitation and stated "We hereby increase our bid price in the amount of EP+ JJ X GALE X KKBIU".

Shortly after bid opening Western Union sent the Navy a corrected version of the garbled message. The corrected version increased the bid by $194,000 for a final bid price of $417,610.

A&S initially filed a protest with our Office challenging the failure of the Navy to award it the contract at its original bid price of $223,610. Prior to our issuing a decision on the protest, the Navy agreed with A&S and awarded the contract to it. Harris now protests the award of the contract to A&S.

Harris argues that either the garbled message made A&S's bid nonresponsive or A&S should have its intent to modify its bid reflected by adding the $194,000 increase to its initial bid of $223,610, thus making Harris the low bidder. Harris argues that the Navy has improperly allowed A&S to accept the award or reject it at A&S's option. Accordingly, Harris asks that the contract be terminated and it be allowed reasonable costs of filing and pursuing its protest including attorney fees.

The Navy argues that the unintelligible telegraphic modification must be ignored in considering A&S's bid since the intelligible version of the telegram arrived after bid opening. The Navy cites *Southern Rock, Inc.,* B-182069, Jan. 30, 1975, 75-1 C.P.D. ¶68, where an agency ignored a late telegraphic modification which

would have made the bidder no longer low and we permitted award to that bidder after it verified its original bid price.

Bid responsiveness requires an unequivocal offer to provide, without exception, exactly what is required at a firm-fixed price. *Medi-Car of Alachua County,* B-205634, May 7, 1982, 82-1 C.P.D. ¶439. Where a bidder indicates prior to bid opening that its price is not firm, as was the case here, its bid cannot be said to offer a fixed price. *Cf. Burroughs Corporation,* 56 Comp. Gen. 142, 150 (1976), 76-2 C.P.D. ¶472 (offeror, which states shortly prior to closing date for receipt of proposals that its price would be adjusted upwards approximately $120,000 as a result of a proposal mistake has not proposed a fixed price that can be accepted by the government). A&S's bid was indefinite since the message stated that the bid price was raised by an indeterminate amount. Accordingly, the A&S bid did not offer a firm-fixed price at bid opening. The *Southern Rock* case cited by the Navy is distinguishable from the present situation because in that case the telegram arrived after bid opening, so it could not be considered. Moreover, the garbled telegram here which rendered the bid indefinite could not be ignored since it also acknowledged two material amendments; without this acknowledgment, A&S's bid would have been nonresponsive.

We sustain the protest and we recommend that the Navy terminate its contract with A&S and make an award to Harris. In view of our recommendation that award be made to Harris, Harris' claim for costs of filing and pursuing its protest including attorney fees is not allowable under our Bid Protest Regulations. 4 CFR § 21.6(e).

[B-216748]

Pay—After Expiration of Enlistment—Courts-Martial Proceedings—Awaiting Proceedings

An enlisted marine who was placed on administrative hold and prevented from completing his processing out after he had been given his certificate of discharge claims pay for the period after that date during which he remained at the marine base on administrative hold pending court-martial charges. The court held that since he had been given his discharge before court-martial charges were brought he was not subject to his jurisdiction. The handling over of the discharge certificate was equally effective for administrative purposes and the individual's status as a member and right to further pay ended at that time.

Matter of: Effect of Discharge Delivery, June 24, 1985:

We have been asked whether a former enlisted member of the Marine Corps is entitled to pay after he was issued a discharge certificate but while he was held pending court-martial.[1] The court-

[1] This matter was submitted by K. J. Wright, Disbursing Officer, Marine Corps Finance Center, Kansas City, Missouri, and was assigned control number DO-MC-1446 by the Department of Defense, Military Pay and Allowance Committee.

martial charges against the individual were dismissed on the basis that he had been discharged before those charges were brought. Since the facts show that he was discharged before the charges were brought, he was not a member of the Marine Corps after that date while being held for court-martial and, therefore, he is not entitled to pay for any period after that discharge.

During the latter part of 1983, the claimant had been given nonjudicial punishments for minor offenses which culminated in an Administrative Discharge Board determination that he should be separated from the service prior to the completion of his enlistment for minor disciplinary infractions. This Board directed that he be discharged on or before December 9, 1983. On December 8 discharge papers had been completed and a discharge certificate was given to the member before he was given his final pay. Apparently, the original signed discharge form should not have been given the member prior to his reporting for final pay. However, before the member was to report for his final pay, a hold was placed on futher action in his case because action was being taken to bring criminal charges against him based on suspected theft of a firearm. The member remained at the marine base and on December 22, he was reduced in grade from private first class to private.

In due course charges were brought, but a court-martial, on January 26, 1984, determined that the member was not subject to its jurisdiction because he had been effectively discharged before the criminal charges had been brought against him. The military judge held specifically that he had been given his final discharge certificate by an individual authorized to do so and, although this person may have given the discharge to him prematurely, it effectively terminated his status as a marine.

Thus, although the former member was detained from December 8, 1983, through January 26, 1984, he was, in the eyes of the court, not a member of the service during that period.

The right of a member of the armed services to pay is a statutory one and not one which depends upon the rules governing ordinary contractual relationship. *Bell v. United States,* 366, U.S. 393, 401 (1961). It is fundamental that an individual must be a member of an uniformed service in order to be entitled to pay. 37 U.S.C. § 204; B–151189, April 19, 1963. If this former member lost his status as a member of the Marine Corps on December 8, 1983, his entitlement to pay as a marine also ended on that day.

We have held that the determination of a court-martial as to the status of an individual for jurisdictional purposes under the Uniform Code of Military Justice is not necessarily binding for administrative purposes. 57 Comp. Gen. 132 (1977). But if the court has considered all pertinent facts, the determination of the individual's status for administrative purposes will probably be the same as determined by the court. 57 Comp. Gen. 136. Although the facts

in the cited case involved the question of whether individuals had been properly inducted into the service as opposed to whether they were effectively discharged, the rule that an individual is entitled to pay only if he or she is in fact a member at the time is the fundamental rule upon which the decision in that case was based. It was held that if the individual had not been properly inducted, he or she had no right to pay as a member. The *de facto* rule was applied to permit an individual to retain pay which had been received while serving under an invalid induction, but that rule does not permit the payment of further pay once the status of the individual as a non-member is clear.

In this case the member received his discharge certificate and, although he remained under military control because he was prevented from completing his processing out, he relied upon the discharge to escape prosecution for theft based on the argument that the discharge had been effective when given to him on December 8, 1983. We find that the delivery of the discharge certificate was valid also for administrative purposes and that it terminated his status as a marine. Thus, his entitlement to pay also terminated on December 8, 1983.

Accordingly, the former marine may not be paid for any period after December 8, 1983.

[B-214873]

Compensation—Removals, Suspensions, etc.—Backpay—Abandonment of Position

Employee who was carried as absent without leave (AWOL) for period prior to her discharge, and who was ordered reinstated by the MSPB, is not entitled to backpay for the period she was AWOL in the absence of evidence that she was ready, willing and able to work during that period.

Travel Expenses—Overseas Employees—Transfers—Failure to Report at New Duty Station

Employee stationed in Rome, Italy, was transferred to the United States and later discharged for failure to report for duty in the United States. Notwithstanding the Merit Systems Protection Board order requiring her reinstatement, she may not be reimbursed for travel from Rome to the United States on the basis of her transfer since she never reported for duty in the United States.

Travel Expenses—Overseas Employees—Return for Other Than Leave—Transfer—Payment Basis

The record does not provide an adequate basis for determining the location of the employee's permanent duty station at the time of her discharge. Accordingly, payment for return travel from Rome to the United States cannot be authorized pursuant to para. 2-1.5a(a)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981).

Travel Expenses—Witness v. Complainant—Administrative Proceedings

Employees who are ordered reinstated may be reimbursed for travel to attend their hearing. However, an employee's travel while in annual leave status 5 months prior to the hearing, over 2 months prior to the effective date of discharge, and over 3 weeks prior to issuance of a notice of a proposed adverse action cannot be equated with travel to attend a hearing. Such travel is governed by the rule which applies to travel away from an employee's permanent duty station while on approved leave. Under this rule, the Government is responsible only for the cost of travel from the leave location to the location of the hearing. The claim for travel to the leave location is denied.

Matter of: Colegera L. Mariscalo—Backpay and Travel Expenses Incident to MSPB Proceeding, June 25, 1985:

Kevin D. Rooney, Assistant Attorney General for Administration, has requested a decision on whether Colegera L. Mariscalo, an employee of the Drug Enforcement Administration (DEA), is entitled to backpay for the period June 15, 1981, through August 7, 1981, and to reimbursement for the cost of her airfare from Rome, Italy, to New York, New York. Based upon the present record, we find that Ms. Mariscalo is not entitled to backpay for the period claimed, and that she is not entitled to reimbursement for the constructive cost of travel from Rome, Italy, to New York, New York.

Ms. Mariscalo was provided with a copy of the agency's submission in this case and given an opportunity to comment. Her attorney, Irving Kator, filed written comments on her behalf.

On August 7, 1981, Ms. Mariscalo was removed from her position as a secretary with the DEA for failure to accept a reassignment to another location. She appealed her removal to the Merit Systems Protection Board (MSPB). On December 9, 1981, the hearing examiner issued a decision finding that the reassignment was a subterfuge for removal and, therefore, not taken for legitimate management reasons. The agency filed a petition for review of the decision of the hearing examiner, and that petition was denied by the MSPB on January 7, 1983. The agency was ordered to cancel the removal.

Ms. Mariscalo was reinstated on March 14, 1983, and has been paid backpay for the period August 7, 1981, the date of her discharge, to the date of her reinstatement. She has requested reimbursement for the two additional items based upon the following facts.

FACTS

Ms. Mariscalo had been employed at the Rome office of the DEA since 1965, and had lived in Italy since 1959. In 1978 and again in 1980 she had been advised that she was being reassigned to another location. She filed grievances under the agency grievance system contesting the proposed transfers, but she was successful only as to the 1978 proposed reassignment. Finally, after dismissal

of the second grievance, in early February 1981 while Ms. Mariscalo was on annual leave at her family home in New York, she was directed to report for duty at the DEA Resident Office in Key West, Florida, on March 9, 1981.

Ms. Mariscalo had previously advised DEA that she would not accept reassignment to another location and she did not report for duty at Key West on March 9. Instead, she voluntarily returned to Rome. Through her attorney, Ms. Mariscalo submitted a request for 30 days sick leave, with a note from her doctor in Rome. That request for sick leave was approved. Accordingly, from March 9 to April 7, 1981, Ms. Mariscalo was carried in approved sick leave status, and her reporting date at the Key West Office was changed to April 8, 1981.

She did not report for duty on April 8, 1981, and again submitted a request for sick leave, with a note from her doctor in Rome. That request was approved and Ms. Mariscalo's reporting date was changed to May 7, 1981.

When Ms. Mariscalo did not report to Key West on May 7, the agency contacted her in Rome. Ms. Mariscalo again advised the agency that she did not intend to report to Key West, that she wanted to exhaust her leave and had forwarded a request for annual leave to agency headquarters in Washington, D.C., and that she would await termination. She also advised that she would be returning to New York in June.

The agency approved 192 hours of annual leave and established a new reporting date at the Key West Office of June 15, 1981. On June 2, while on annual leave, Ms. Mariscalo left Rome and returned to her family home in New York.

Ms. Mariscalo did not report for duty in Key West on June 15. A notice of proposed adverse action was issued on June 24, and she was terminated effective August 7, 1981, for failure to accept reassignment. She was carried in absent without leave (AWOL) status from June 15 to August 7, 1981.

On August 13, 1981, Ms. Mariscalo's attorney requested that the MSPB hold the hearing in Washington, D.C. There is no evidence in the record to indicate that the agency made an objection to holding the hearing in Washington, D.C., or that the agency requested that the hearing be held at any other location. The record does not show where the agency advised Ms. Mariscalo to file her appeal, as required by 5 C.F.R. §1201.21(a) (1984). See also, 5 C.F.R. §§1201.22(a) and 1201.4(e).

The hearing was held on November 2, 1981, in Washington, D.C., and Ms. Mariscalo traveled from New York to Washington, D.C. to attend. The agency has reimbursed her for her travel from New York to Washington, D.C., and return, on the grounds that an employee is entitled to reimbursement for the cost of travel to testify at an MSPB hearing. *Lawrence D. Morderosian,* B-156482, June 14, 1977; 33 Comp. Gen. 582 (1954).

Ms. Mariscalo now seeks backpay for the period June 15 through August 7, 1981, prior to her termination, when she was carried in AWOL status. She also seeks reimbursement for her travel from Rome to New York on June 2, 1981.

OPINION

Absent Without Leave

The agency denied Ms. Mariscalo's claim for backpay for the period of AWOL because she "voluntarily chose not to report to her new duty station."

Ms. Mariscalo's attorney argues that since the MSPB found her removal to be improper, and since the removal was based upon her refusal to report to Key West, the transfer itself was illegal. Therefore, Ms. Mariscalo was under no legal obligation to report to Key West, and is entitled to her salary for the period she was carried as AWOL. It is argued that the agency had no legal basis for withholding her salary since the loss of salary was due to the illegal act of the agency, and was through no fault of Ms. Mariscalo.

We note that there is nothing in the MSPB decision which addresses Ms. Mariscalo's entitlement to backpay for the period of AWOL. However, even assuming the MSPB's decision could be construed as argued by Ms. Mariscalo's attorney, there is no entitlement to backpay for the period claimed in the circumstances of this case.

There is no entitlement to backpay for periods during which an employee is not ready, willing and able to work. B-160200, April 6, 1967; *Ralph C. Harbin,* B-201633, April 15, 1983. In this case. Ms. Mariscalo did not report for duty at any location when her leave ended, and did not in any other way demonstrate that she was ready, willing and able to work during the period in question. She was carried in sick leave status at her request from March 9 through May 6, 1981, and then she was carried in annual leave status until June 15, 1984. There is nothing in the record which would establish that her circumstances changed on June 15, and she then became immediately available for work. Accordingly, her claim for backpay is denied.

Reimbursement for Travel

The agency denied Ms. Mariscalo's request for reimbursement for her travel on June 2, 1981, from Rome to the United States on two grounds. First, DEA found that since she did not report for duty at Key West, she is not entitled to the constructive cost of travel from Rome to Key West. The agency relied on *Joseph Salm,* 58 Comp. Gen. 385 (1979).

Secondly, DEA found that the MSPB could have held the hearing in Rome and, therefore, the agency was not obligated to reimburse

her for the constructive cost of travel from Rome to Washington, D.C., to testify at the hearing on her case.

Ms. Mariscalo's attorney argues that our decision in *Joseph Salm* is distinguishable and cannot properly be relied upon to deny payment in this case. He also disputes the agency's refusal to pay on the basis that the hearing could have been held in Rome. He points out that although DEA states the hearing could have been held in Rome, the hearing was in fact held in Washington, D.C. Moreover, the Washington, D.C. location was favorable to the agency since it is the location of its headquarters. He argues that it would have cost more to fly MSPB and agency attorneys to Rome than it would have cost to fly Ms. Mariscalo to Washington, D.C.

As a third basis for payment Ms. Mariscalo's attorney relies upon paragraph 2-1.5a(1)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), which provides that employees separated overseas for purposes of the Government are entitled to reimbursement for return travel to the United States. He argues that, although the agency issued the termination papers from the United States, Ms. Mariscalo was constructively discharged from Rome. Since she was discharged in Rome for purposes of the Government, she is entitled to return travel to the United States as provided at paragraph 2-1.5a(1)(b).

The record in this case is not sufficient to authorize payment of Ms. Mariscalo's travel to the United States under paragraph 2-1.5a(1)(b). Had she chosen to remain in Rome and await the notice of her discharge, and her discharge, there could be some basis for concluding that her termination occurred there, irrespective of the location from which the agency issued the formal notice of discharge.

Instead, for a period of 4 to 5 months, Ms. Mariscalo was carried in a combination of sick and annual leave at her request, and voluntarily traveled from Rome to New York twice. She was AWOL for almost 2 more months. Thus, she had not actually been at work anywhere in the agency for about 7 months prior to her discharge. The record does not indicate the status of her former position in Rome or of her proposed position in Key West during this 7-month period.

Further, neither the decision of the hearing examiner nor the decision of MSPB addresses the issue of whether Ms. Mariscalo was separated from a post of duty outside the conterminous United States. Under these circumstances, and absent a determination from the MSPB that Ms. Mariscalo was discharged from her position in Rome, the record does not provide an adequate basis for determining her entitlements under paragraph 2-1.5a(1)(b). *But see,* 5 C.F.R. § 1201.181, *Robinson v. Department of the Army,* MSPB Docket No. SF07528310135 (June 12, 1984); *Spezzaferro v. Federal Aviation Administration,* MSPB Docket No. BN075281F0717 Comp.

(October 25, 1984). Accordingly, we cannot authorize payment on that basis.

Likewise, Ms. Mariscalo's transfer to the Key West office does not provide a basis for payment. We agree with her attorney that the facts in *Joseph Salm* differ from the facts in this case. Nonetheless, since Ms. Mariscalo did not report for duty in Key West, the transfer to Key West does not provide a basis for payment of her travel on June 2, 1981. There is no authority to pay an employee for travel to a new duty station when the employee refuses to report for duty at the new location.

The remaining argument offered in support of payment for Ms. Mariscalo's travel on June 2 is that she was required to travel to the United States to litigate her removal, and is, therefore, entitled to reimbursement for her trip from Rome to the United States. The agency disputes this, arguing that the MSPB hearing could have been held in Rome.

We point out that there is no entitlement to reimbursement or incidental expenses incurred in connection with litigation over an adverse action, including travel to arrange for representation by an attorney, and travel to confer with an attorney. We have held, however, that an employee who has been ordered reinstated may be reimbursed for travel expenses incurred in connection with travel to attend an MSPB hearing. *Lawrence D. Morderosian,* B-156482, *supra. Cf. Gracie Mittelsted,* B-212292, October 12, 1984. The potential application of this rule in the circumstances of this case is complicated by the fact that there were a number of possible locations at which the hearing could have been held. In any event, we find it unnecessary to explore the question of where the hearing could or should have been held since we conclude that the June 2 trip fundamentally does not qualify as travel to attend an MSPB hearing.

As noted above the record does not provide a sufficient basis for determining Ms. Mariscalo's permanent duty station at the time of her discharge. However, the record is clear that when she traveled from Rome to New York on June 2, 1981, Ms. Mariscalo was on annual leave status. Her travel, in fact, occurred 5 months before the hearing on November 2, 1981, over 2 months before the effective date of her discharge on August 7, and over 3 weeks before she even received the June 24 notice of a proposed adverse action.

Under these circumstances, her travel on June 2 cannot be viewed as travel to attend the hearing. While the purpose of her travel on June 2 may have been to facilitate litigation over an anticipated discharge, there is no legal authority for payment on that basis. Travel in anticipation of discharge cannot, in these circumstances, be equated with travel to attend a hearing. Accordingly, wherever her permanent duty station was at the time of her discharge in August, her travel on June 2, must be governed by the

rule that applies to travel away from the official duty station while on approved annual leave.

The general rule is that when an employee proceeds to a point away from his official duty station while on annual leave, he assumes the obligation of returning at his own expense. If during that leave, or at the expiration of that leave, the employee is required to perform temporary duty at another location prior to returning to his permanent duty station, the Government is chargeable only with the difference between the cost attributable to temporary duty at the other location and what it would have cost the employee to return to his permanent duty station directly from the place where he was on leave. *Paricia Stolfa and Devra Bloom,* B-189265, September 21, 1977; affirmed December 12, 1978.

Applying this rule to the facts in this case means that Ms. Mariscalo is entitled to reimbursement only for travel from New York to Washington, D.C., and return. Even assuming Rome was her permanent duty station at all times relevant to this issue, she left Rome voluntarily on June 2 while on annual leave. Her trip to Washington, D.C., in November to attend the hearing is comparable to temporary duty travel to a location other than the location of her leave.

The Government is therefore responsible only for the cost of her travel from her leave location to the location of the hearing, i.e., New York to Washington, D.C. and her return trip. Ms. Mariscalo has already been reimbursed for this amount. Her claim for reimbursement for travel from Rome to New York is denied.

[B-216861]

Bidders—Debarment—Labor Stipulations Violations—Davis-Bacon Act—Basis

The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act constituting a disregard of its obligations to employees under the Act, and both parties reached an agreement in an administrative law proceeding stipulating to the contractor's debarment. Accordingly, where the contractor specifically stipulates to debarment, after being granted due process by DOL in the form of an administrative law proceeding, we will accept DOL's findings as evidence of a violation of the Davis-Bacon Act. Therefore, the contractor is hereby debarred under the Act.

Matter of: Malloy Construction Company—Davis-Bacon Act Debarment—Stipulation Agreement, June 25, 1985:

The Deputy Administrator, Employment Standards Administration, United States Department of Labor (DOL), by a letter dated April 23, 1984, recommended that the names Malloy Construction Company (Malloy); Patrick Malloy, individually and as its President; and Donald Malloy, individually and as its Secretary-Treasurer; be placed on the ineligible bidders list for violations of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1982), which consti-

tuted a disregard of obligations to emloyees under the Act. We concur in DOL's recommendation.

Malloy entered into eight contracts (F28609-79-C-0043, F28609-79-C-0040, F28609-80-C-0023, F28609-80-C-0029, F28609-80-C-0036, DACA 51-80-C-0040, DABT 35-80-C-0191, and DABT 35-81-C-0005) variously with the Departments of the Army and Air Force for construction work. These contracts were subject to the Davis-Bacon Act requirements that certain minimum wages be paid. Further, pursuant to 29 C.F.R. § 5.5(a) (1984), the contractor was to submit payroll records certified as to correctness and completeness.

The DOL found, as a result of an investigation, that employees performing work for Malloy under these contracts were not paid the minimum wages required pursuant to the Davis-Bacon Act. Further, DOL found that the number of hours and the rates reported on the certified payrolls were inaccurate. Mallory was notified by certified letter of the nature and extent of the Davis-Bacon Act violations with which it was charged, and that debarment was possible. Malloy was also given an opportunity for a hearing on the matter before an administrative law judge in accordance with 29 C.F.R. §§ 5.6(c)(1) and 5.11(b) (1981). Such a hearing was requested. However, on June 22, 1983, an agreement was reached between DOL and Malloy, and approved by the administrative law judge (*Malloy Construction Company*, Case No. 82-DB-28, Office of Administrative Law Judges, United States Department of Labor (June 22, 1983) (Riffey, A.L.J.)), providing for payment to the workers of withheld funds and debarment of Malloy under the Davis-Bacon Act.

The Davis-Bacon Act provides that the Comptroller General is to debar persons or firms whom he has found to have disregarded their obligations to employees under the Act. 40 U.S.C. § 276a-2. In this regard we make independent legal determinations based upon our own evaluation of the evidence in each case. B-3368, March 19, 1957. However, in the agreement dated June 22, 1983, Malloy specifically stipulated that DOL's allegations of violations of the Act may be deemed admitted for purposes of payment of the workers and debarment. Accordingly, where the contractor specifically stipulates to debarment, after being granted due process by DOL in the form of an administrative law proceeding, we will accept DOL's findings as evidence of a violation of the Davis-Bacon Act.

Therefore, we find that Malloy Construction Company; Patrick Malloy, individually and as its President; and Donald Malloy, individually and as its Secretary-Treasurer; have disregarded their obligations to employees under the Davis-Bacon Act. The names Malloy Construction Company; Patrick Malloy, individualy and as its President; and Donald Malloy, individually and as its Secretary-Treasurer; will be included on a list to be distributed to all departments of the Government, and pursuant to statutory direction (40 U.S.C. § 276a-2), no contract shall be awarded to them or to any

firm, corporation, partnership, or association in which they, or any of them, have an interest until 3 years have elapsed from the date of publication of such list.

[B-218447.2]

Contractors—Responsibility—Determination—Factors for Consideration—Previous Rating, etc.

A prospective contractor's alleged unacceptable performance of a prior federal contract is one factor an agency should consider in determining the firm's responsibility, but does not automatically render the firm ineligible for award. General Accounting Office will not review an agency's affirmative determination of a firm's responsibility where there is no allegation or showing that the agency determination resulted from possible fraud or bad faith, or that a definitive responsibility criterion was not met.

Bids—Responsiveness—Pricing Response Nonresponsive to IFB Requirements—Failure to Bid Firm, Fixed Price

A bid is nonresponsive, and the bidder submitting it thus is not eligible for award, where the intended total bid price cannot be determined from the bid documents submitted at the time of bid opening.

Matter of: Turbine Engine Services—Request for Reconsideration, June 25, 1985:

Turbine Engine Services (Turbine) requests reconsideration of our decision *Energy Maintenance Corp.; Turbine Engine Service Corp.,* B-215281.3; B-215281.4, Mar. 25, 1985, 64 Comp. Gen. 425, 85-1 C.P.D. ¶341, holding that the U.S. Coast Guard improperly canceled solicitation No. DTCG40-84-B-0173 for turbine engine overhauls. In sustaining the protest, we recommended that the Coast Guard reinstate the solicitation and make award to the protester, Energy Maintenance Corporation (EMC), the low responsive bidder, if the firm was found otherwise eligible for award. Turbine claims our decision and recommendation are erroneous. We affirm the decision.

We sustained the EMC protest on the ground that the agency incorrectly had determined that the solicitation did not fully describe the required work, and thus was ambiguous.[1] We found that the solicitation as a whole clearly set forth the agency's needs, and thus should not have been canceled. Turbine argues that our decision is erroneous because: (1) it is inconsistent with out earlier decision, *Turbine Engine Services Corp.,* B-215281.2, Aug. 21, 1984, 84-2 C.P.D. ¶206, upholding the cancellation of solicitation No. DTCG40-84-B-0173; (2) EMC should have been ineligible for the award because it furnished an unacceptable engine under a prior Coast Guard contract; and (3) we should have recommended an award to

[1] Turbine's portion of the protest concerned the adequacy of the specifications in the resolicitation of this requirement issued after cancellation of the original solicitation. Turbine's protests thus became academic once we held that the original solicitation should be reinstated.

Turbine instead of EMC since Turbine was the low responsive bidder.

We did reject Turbine's arguments that the solicitation specifications were not defective in our *Turbine* decision and held that cancellation of the solicitation was unobjectionable. That decision, however, was based on the facts before us at that time. Turbine previously had objected (in *Turbine Engine Services Corp.*, B-215281, May 29, 1984, 84-1 C.P.D. ¶582, which we dismissed as untimely filed) that the specifications were defective. In view of this earlier argument and the agency's position, we found Turbine's new argument unpersuasive. Subsequently, we received a protest from EMC, and learned that EMC was neither party to nor advised of Turbine's protest of the cancellation. As a result, and because EMC raised arguments never asserted by Turbine, we considered EMC entitled to a decision on the merits of its protest. The agency's response to EMC's protest and the record developed for the protest showed for the first time that the cancellation in fact was not legally justifiable.

That EMC may have furnished an unacceptable engine under a prior Coast Guard contract does not render erroneous our recommendation that award be made to EMC "if otherwise found to be eligible for the award." Contrary to Turbine's apparent understanding, unsatisfactory past performance does not automatically render a firm ineligible for future contract awards. Rather, performance history is but one of several factors an agency should take into account in considering a prospective contractor's responsibility, that is, its ability to perform satisfactorily. *Jay Fran Corp.*, B-217145, Jan. 2, 1985, 85-1 C.P.D. ¶8.

After receiving our recommendation, the Coast Guard apparently determined that, notwithstanding alleged past performance problems, EMC was a responsible contractor; we have been advised that award has been made to EMC. As there is no allegation or showing that EMC was found responsible as a result of agency fraud or bad faith, or that a definitive responsibility criterion was not met, we will not consider this matter further. *See* Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1985); *Jay Fran Corp., supra.*

As to whether Turbine in fact was the low responsive bidder, Turbine was not eligible for the award here—and our recommendation that award be made to EMC thus is not improper—because its bid did not specify prices for each replacement part as called for under the solicitation. Instead of providing prices for each part on the 3-page parts list, Turbine stated as the price for all the parts "Vendor Net (T.P.M.S. + 8½%)." In other words, Turbine offered the parts at its cost from TPMS (Turbo Power & Marine Systems, the original equipment manufacturer specified in the solicitation) plus an 8½ percent mark-up.

In order to be deemed responsive, a bid must unequivocally offer to provide the requested items and meet specification requirements

at a firm, fixed price. A bid that limits the firm's contractual obligation or does not offer performance at a firm, fixed price must be rejected as nonresponsive. *Epcon Industrial Systems, Inc.*, B-216725, Dec. 27, 1984, 85-1 C.P.D. ¶2. A bidder's intended total price must be evident from all the bid documents submitted at the time of bid opening. *Id.*

Turbine's bid did not meet the above standard. While it would become clear during performance what price the government would be required to pay for a given part, this price could not be determined from the face of Turbine's bid; Turbine neither specified a particular TPMS price list as the basis for the reference in its bid, nor (we are advised by the agency) submitted a copy of a price list with its bid. Consequently, Turbine's intended bid price could not be determined at the time of bid opening. Under these circumstances, the Coast Guard properly rejected Turbine's bid as nonresponsive, and we properly recommended award to EMC (if otherwise qualified), as the low responsive bidder.[2]

Turbine states that it did not bid specific prices due to a TPMS policy of pricing its parts by part number and condition. It is not immediately clear to us why specific prices therefore could not be included in Turbine's bid. In any case, no matter what the business practices of qualified parts suppliers, since the solicitation required that prices be furnished for each part and provided for award based in part on these prices, bidders, including Turbine, were required to include them in their bids. If Turbine believed the solicitation was somehow deficient due to the parts pricing requirement, it was free to protest the matter to the Coast Guard or our Office prior to bid opening. Turbine did not do so.

Our prior decision is affirmed.

[B-218556]

Contracts—Protests—Information Evaluation—Sufficiency of Submitted Information

Failure specifically to request a ruling by the Comptroller General or to state the remedy desired, as required by General Accounting Office Bid Protest Regulations, is a minor procedural defect which does not require dismissal of the protest when the protest otherwise clearly indicates the desire for a ruling and the requested remedy.

Contracts—Protests—General Accounting Office Procedures—Filing Protest With Agency

Protest will not be dismissed for failure to furnish the contracting officer a copy of the protest 1 day after filing as required by GAO's Bid Protest Regulations, where the 1-day delay in doing so did not delay protest proceedings.

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[2] As discussed in our decision on EMC's protest, EMC's bid also contained uncertainties as to certain parts prices. Since EMC clarified its bid; the range of uncertainty was clear from the face of the bid; and the bid was low at either end of that range, EMC's bid was sufficiently definite and, thus, responsive.

Contracts—Protests—Contract Administration—Not for Resolution by GAO

Protest that contractor will not supply acceptable items notwithstanding the contractual obligation to do so involves a matter of contract administration, which is the procuring agency's responsibility, not GAO's.

Matter of: Container Products Corporation, June 26, 1985:

Container Products Corporation (CPC) protests the Pearl Harbor Naval Shipyard's issuance of purchase order No. N00311-85-M-7054 to Cromwell's Welding Company (Cromwell's) for waste containers used in transporting contaminated waste to disposal sites.

We dismiss the protest.

The Navy's request for quotations required that the containers be constructed to specified Department of Transportation (DOT) requirements published in title 49 of the Code of Federal Regulations and that certification of compliance and a supporting safety anaylsis be provided. Quotations were received from Cromwell and CPC, with Cromwell's offer being low. CPC contends, however, that Cromwell's containers will not meet the required DOT standards.

Initially, the Navy contends that the protest should be dismissed since the protester failed to request a ruling from the Comptroller General; failed to specify the form of relief requested; and failed to furnish a copy of the protest to the contracting officer within 1 day after filing the protest in our Office, as required by our Bid Protest Regulations, 4 C.F.R. part 21 (1985).

Section 21.1 of our Regulations provides, in subsection (c), that the protest "shall * * * (5) Specifically request a ruling by the Comptroller General * * * and (6) State the form of relief requested." While these requirements are stated in mandatory terms, subsection (f) states that a protest "may" be dismissed for failure to comply with any of the requirements of the section. Although CPC did not expressly request a ruling by the Comptroller General or specify desired remedies, there was no ambiguity about the protest issue or that CPC was requesting a decision by our Office and award of a contract. Therefore, the cited filing failures constitute minor defects which do not require dismissal of the protest.

As to the Navy's remaining objection, section 21.1(d) of our Regulations requires that the protester furnish to the contracting officer, or, if appropriate, another person or location designated by the agency, a copy of the protest no later than 1 day after the protest is filed in our Office. CPC filed the protest in our Office on April 15, 1985, but the contracting officer did not receive a copy until April 17. (The protester is located in Wilmington, North Carolina, and the procuring activity is located in Pearl Harbor, Hawaii.)

The basis for section 21.1(d) is found in 31 U.S.C. §3551, *et seq.*, as added by section 2741(a) of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, which requires both that our Office notify the contracting agency of the existence of a protest

within 1 day of the filing date and that the agency furnish a report on the protest within 25 working days after this notice. We strictly enforce section 21.1(d) to avoid a delay that would hamper the contracting agency's ability to meet the 25-day statutory deadline and otherwise delay protest proceedings. *Agha Construction—Reconsideration,* B-218741.3, June 10, 1985, 85-1 C.P.D. ¶ 662.

Nevertheless, as pointed out above, we retain the discretion, in section 21.1(f) of our Regulations, to grant exceptions to the requirement. Under the provisions of CICA, the agency report was due in our Office by May 20 and was received on May 17. The 1-day delay in the agency's receipt of a copy of the protest did not result in a delay of the protest proceedings. Therefore, CPC's failure to furnish a copy of the protest to the procuring activity 1 day after filing in our Office does not require dismissal of the protest.

We dismiss the protest on the merits, however. The Navy states that Cromwell has delivered the containers, including the required certification and safety analysis. Also, the Navy has determined that the containers and analysis conform to the requirements of the purchase order, and CPC has furnished no evidence to refute the Shipyard's finding. In any case, whether the items a contractor delivers actually comply with the performance obligation resulting from an award is a matter of contract administration, which is the responsibility of the procuring activity, not our Office. *Lion Brothers Company, Inc.,* B-212960, Dec. 20, 1983, 84-1 C.P.D. ¶7.

The protest is dismissed.

[B-206219]

Officers and Employees—Transfers—Service Agreements—Administrative Determination

Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms.

Officers and Employees—Transfers—Service Agreements—Failure To Fulfill—Involuntary Separation

Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious.

Matter of: Jeffrey P. Cardinal—Repayment of Relocation Expenses, June 28, 1985:

The issues in this decision involve the indebtedness of a former Federal employee for relocation expenses where the employee was

separated from Government service before completing his 12-month service agreement. We hold that the agency may require such a service agreement as a condition for paying relocation expenses. In addition, we sustain the agency's determination that the employee's separation was not for reasons beyond his control nor for reasons which were acceptable to the agency.

BACKGROUND

This decision is in response to the claim of Mr. Jeffrey P. Cardinal, a former employee of the Federal Aviation Administration (FAA), for repayment of retirement contributions which the FAA applied against his indebtedness to the agency for advance annual leave and relocation expenses. Mr. Cardinal is represented by his attorney, William J. Flynn.

Mr. Cardinal was employed by the FAA as an air traffic controller, and in December 1980, he transferred from Anchorage, Alaska, to Freemont, California. He signed a travel and transportation agreement with the FAA which stated that in consideration of payment of his relocation expenses, he agreed to remain in the Government service for 12 months from the date of relocation, unless separated for reasons beyond his control and acceptable to the agency. The date of relocation was January 3, 1981, the date Mr. Cardinal reported to his new duty station.

The record before us indicates that Mr. Cardinal was fired by the FAA in August 1981, for his participation in the strike by FAA air traffic controllers. His appeal of his removal was denied by the Merit Systems Protection Board, and he did not pursue an appeal before the U.S. Court of Appeals for the Federal Circuit.

Following his removal, the FAA determined that Mr. Cardinal was indebted for advance annual leave ($1,078.70) and repayment of his relocation expenses ($14,323.59). When Mr. Cardinal applied for refund of his retirement contributions ($7,823.29), the FAA applied this amount against his indebtedness, and the FAA has been pursuing collection of the balance of the indebtedness.

On behalf of Mr. Cardinal, Mr. Flynn does not dispute indebtedness for the advance annual leave. However, with respect to the relocation expenses, Mr. Flynn argues that his client was discharged and that since the agency failed to allow him to complete his "contractual obligations," it cannot now seek damages for breach of that agreement. Mr. Flynn also argues that 5 U.S.C. § 5724(i) concerning service agreements applies only to transfers within the "continential United States," and that since Mr. Cardinal was transferred from Alaska to California, the statute does not apply to his situation. Finally, Mr. Flynn contends that the agency may not extend a service agreement beyond the limits of the statute, citing *Finn v. United States,* 192 Ct. Cl. 814 (1970).

The report from the FAA states that Mr. Cardinal was separate for participation in an illegal strike contrary to 5 U.S.C. § 7311 and for absence without leave. The report states further that Mr. Cardinal's actions as a striker required that he be terminated from the Federal service and that his separation was not for reasons beyond his control. The FAA argues that Mr. Cardinal was transferred within the continental United States and that his relocation expenses were paid under the authority of 5 U.S.C § 5724(a) and (i). The FAA concludes that Mr. Cardinal is indebted for repayment of his relocation expenses, citing a memorandum opinion in *Smith v. United States,* No. 82-C-1328-M., slip. op. (N.D. Ala. March 31, 1983).

OPINION

The first issue for our decision concerns the authority for the FAA to require a service agreement in connection with this transfer. We note that for certain transfers under the relocation statutes, an employee must agree to remain in the Government service for 12 months after the transfer, unless separated for reasons beyond the employee's control which are acceptable to the agency concerned. Thus, an employee who is transferred to a post of duty outside the continental United States or an employee who is transferred within the continental United States is required by statute to sign a service agreement. See 5 U.S.C. §§ 5722(b) and 5724(i) (1982). See also para. 2-1.5 of the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1984).

The term "continental United States" is defined in 5 U.S.C. § 5721(3) as the several States and the District of Columbia, but not including Alaska or Hawaii. Thus, since Mr. Cardinal transferred from Alaska to California, his transfer was not within the "continental United States" as the term is used in the statute and regulations.[1] We also note that Mr. Cardinal's transfer was not subject to the provisions of 5 U.S.C. § 5722(b), since he was transferred *from* a duty station outside the continental United States rather than *to* a duty station outside the continental United States.

However, our decisions have held that even though the statute does not require a service agreement, agencies may refuse to pay relocation expenses unless the employee signs a service agreement. *Johnny R. Dickey,* 60 Comp. Gen. 308 (1981); 47 Comp. Gen. 122 (1967); *Thelma B. Van Horn,* B-205892, July 13, 1982; and B-163726, May 8, 1968. Where the employee signs such as agreement, as Mr. Cardinal did in this case, he is bound by its terms. 47 Comp. Gen. 122; and B-163726, cited above.

Mr. Cardinal signed a service agreement under the authority of Department of Transportation (DOT) Order 1500-6, which provides

[1] FTR para. 2-1.5 refers to the "conterminous United States" which is defined as the 48 contiguous States and the District of Columbia. FTR para. 2-1.4a.

in part that a service agreement is required for an employee who is transferred *to* the continental United States. Paragraph 322, Chapter 3, DOT Order 1500.6. Agency regulations such as these were recommended by our prior decisions. See 47 Comp. Gen. 122, 125, cited above.

Mr. Flynn argues that Mr. Cardinal's transfer was not subject to the provisions of 5 U.S.C. § 5724(i), and that the agency may not extend the statute to cover his transfer, citing the court's decision in *Finn,* cited above. As noted above, we agree that Mr. Cardinal's transfer was not subject to the provisions of 5 U.S.C. § 5724(i), since that statute applies only to transfers within the continental United States. We disagree, however, with the application of the *Finn* decision to Mr. Cardinal's situation.

In *Finn,* the Court of Claims considered the situation where, incident to a relocation, an agency required 12 months of service with that agency or the employee would violate the service agreement. The court held in *Finn* that where the applicable statue and reguations required only 12 months of Government service, the agency could not impose the more specific requirement of agency service. 192 Ct. Cl. 814, 820.

In Mr. Cardinal's case, the FAA has not imposed a more specific service agreement than that required by 5 U.S.C. §§ 5722(b) or 5724(i), and the agency's use of a service agreement in this situation has been recognized by our decisions. Therefore, we conclude that the *Finn* decision does not preclude the agency from requiring Mr. Cardinal to sign a service agreement.

The next issue for our decision is whether Mr. Cardinal was separated for reasons which were beyond his control and which were acceptable to the FAA. Our decisions in this regard state that this determination rests primarily with the agency concerned and that we will overturn the agency's determination only where it has been shown to be arbitrary or capricious. *William C. Moorehead,* 56 Comp. Gen. 606 (1977); *Arnold M. Biddix,* B-198938, March 4, 1981; and B-114898, July 31, 1975.

Mr. Flynn argues that Mr. Cardinal did not quit but was discharged by the FAA. He contends that Mr. Cardinal has been willing to work for the FAA since the time of the strike but the agency chose to terminate his employment, thus excusing a violation of the service agreement.

We note that Mr. Cardinal was separated from the Federal servcie for cause, and although he may have had little control in his separation, the actions resulting in his separation were within his control. B-114898, cited above. Thus, in the absence of any evidence that the FAA was arbitrary or capricious in refusing to accept Mr. Cardinal's reasons for his separation from Government service, we sustain the FAA's action in this case.

Accordingly, we conclude that Mr. Cardinal violated his service agreement and is indebted for the relocation expenses paid pursuant to that agreement.

[B-218640]

Contracts—Protests—Court Action—Dismissal

General Accounting Office (GAO) will not consider a protest where the issues presented are before a court of competent jurisdiction, despite the court's indication that it is willing to consider an advisory GAO decision. The court has also indicated that it intends to rule on the merits in advance of the date when it can be reasonably expected that GAO will be in a position to issue a decision, given the statutory time period for the agency to file its report on the protest and for the parties to comment on that report.

Matter of: Prince George's Contractors, Inc., June 28, 1985:

Prince George's Contractors, Inc. protests award to Chemung Contracting Corporation under invitation for bids No. DTFA-15-85-B-10010, issued by the Federal Aviation Administration (FAA) for the rehabilitation of ramp taxiways at Washington, D.C. National Airport. Prince George's contends that award was improper because the FAA had the intention, before award, of significantly modifying the contract; according to the protester, this occurred on the day after award, thereby denying other bidders the opportunity to bid on the basis of the contract as awarded.

We will not consider the protest.

Prince George's filed its protest with our Office on May 24, 1985. Prince George's subsequently filed suit in the U.S. District Court for the District of Columbia, *Prince George's Contractors, Inc. v. Donald D. Engen, Administrator, et al.* (Civil Action No. 85-607), seeking injunctive relief. As a part of that proceeding, Prince George's obtained an order on June 13 requesting an advisory opinion from our Office prior to the date scheduled for the hearing on the preliminary injunction, June 26, or as soon thereafter as possible.

By letter dated June 17, we informed the court that we were not in a position to provide an advisory opinion until such time as the agency report and the comments of the protester and interested parties had been received, enabling us to review a complete file and issue a decision. We suggested that if the court still desired our assistance, it should establish deadlines for submissions by the various parties to our proceeding consistent with the court's time requirements.

We also asked the FAA voluntarily to expedite the processing of its report on the protest, and we asked the other parties to the protest to agree to abbreviated times for preparing comments.[1] Only

[1] Because Prince George's did not request expedited processing within 3 days of filing its protest, its request is not for consideration under the express option provisions of our Bid Protest Regulations, 4 C.F.R. 21.8 (1985).

the protester voluntarily agreed to expedited processing of the bid protest.

The court, by letter of June 18, advised that, regretfully, it must proceed without benefit of our advisory opinion unless it is fortuitously issued earlier than expected. The court further advised that it intended to rule on Prince George's motion for a preliminary injunction by mid-July, and perhaps earlier.

The hearing was held on June 26 as scheduled with a representative of our Office in attendance. Our Office's role in the court's proceeding was not discussed at the hearing, and the possibility of expediting the proceedings before our Office, by mandating abbreviated filing schedules, was not considered by the court. Rather, the hearing, which took more than 5 hours, dealt with the propriety of the contract award and the other matters at issue. At the close of the hearing, the court reiterated its intent to rule on Prince George's motion by mid-July and perhaps earlier.

As noted above, Prince George's protest was filed here on May 24. In accord with the Competition in Contracting Act of 1984, 31 U.S.C.A §3553 (West Supp. 1985), we have requested a report from FAA that is due on July 2, 25 working days from the agency's receipt of notice of the protest. After that, under our Bid Protest Regulations, the protester and interested parties have 7 additional working days to comment upon the FAA report, that is, until the close of business, July 12, *See* 4 C.F.R. §21.3.

Consequently, it appears that the court will, in all likelihood, rule on the merits of the dispute before the issuance of a decision by our Office under even the most optimistic assumptions.

Our Bid Protest Regulations require the dismissal of any protest where the matter involved is the subject of litigation before a court of competent jurisdiction (unless the court requests a decision by the General Accounting Office) or where the matter involved has been decided by the court, 4 C.F.R § 21.9, and it is the policy of our Office not to decide the protests that come within these guidelines. *Pitney Bowes, Inc.,* B-218241, June 18, 1985, 64 Comp. Gen. 623, 85-1 CPD ¶696. Despite the court's stated willingness to consider a decision of this Office should one fortuitously be issued earlier than expected, there exists no reasonable expectation that a decision can be issued in time to assist the court, given the court's stated intent to rule on Prince George's motion by mid-July or earlier. Rather, there is every reason to believe that our Office's decision would only be issued after the court has decided the matter on the merits when, under the doctrine of *res judicata,* the court's resolution of the issues will bind this Office. We therefore see no purpose of further considering the protest.

Protest dismissed.

[B-219061]

Appropriations—Continuing Resolutions—Expiration—Unobligated Balance Availability

Unobligated fiscal year 1984 carryover funds should not be deducted from the sum appropriated for refugee and entrant targeted assistance by the Fiscal Year 1985 Continuing Resolution. The general rule set forth in 58 Comp. Gen. 530 (1979) on which the Office of Refugee Resettlement (ORR) relied is distinguished. The result is also supported by strong expressions of congressional intent in the legislative history.

Appropriations—Impounding—Executive Branch's Failure To Expend Appropriated Funds

Although General Accounting Office differs from the ORR in arriving at the amount made available in Fiscal Year 1985 by the Continuing Resolution for refugee and entrant targeted assistance, we do not consider ORR to have violated the Impoundment Control Act, 2 U.S.C. 681 *et seq.* (1982). This case involves a good faith disagreement regarding the total amount of funds available for a particular program. There is no evidence that any agency official determined that the funds in question should not be spent for fiscal policy or other reasons.

Matter of: Funding for Refugee and Entrant Targeted Assistance Pursuant to the Fiscal Year 1985 Continuing Resolution, June 28, 1985:

This decision is in response to a direction to the Comptroller General included in the report of the House Committee on Appropriations on H.R. 2577, the Supplemental Appropriations Bill, 1985. The Committee directed this Office to determine the proper interpretation of the Fiscal Year 1985 Continuing Resolution, Pub. L. No. 98-473, 98 Stat. 1873, October 12, 1984, as it relates to funding for refugee and entrant targeted assistance administered by the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS). H. Rep. No. 142, 99th Cong., 1st Sess. 111 (1985). This decision also responds to a related letter, dated May 29, 1985, to this Office from four Members of the Congress—Representatives Don Edwards, Richard H. Lehman, Howard L. Berman, and Charles Pashayan, Jr. The May 29 letter requests that this Office review ORR's proposed funding level for refugee and entrant targeted assistance and determines whether that funding level constitutes an unlawful rescission under the Impoundment Control Act, 2 U.S.C. § 681 *et seq.* (1982).

Because of the short time period available to prepare a response in this case, we did not solicit the views of the Department of Health and Human Services. However, we were provided with a copy of a letter, dated February 27, 1985, from Phillip N. Hawkes, Director of the Office of Refugee Resettlement, to Representative Don Edwards which we believe adequately sets forth the views of HHS in this matter.

As set forth below, we conclude that ORR has incorrectly calculated the total funds available for targered assistance in Fiscal Year 1985 by $39,026,000, a sum which represents an unobligated

balance of appropriations for FY 1984. Based on clear legislative history, the Congress intended this sum to remain available for obligation in FY 1985, in addition to the amounts appropriated in the 1985 Continuing Resolution. However, we also conclude that this miscalculation does not constitute a violation of the Impoundment Control Act.

Background: ORR's Refugee and Entrant Targeted Assistance Program is authorized by Title IV of the Immigration and Nationality Act, 8 U.S.C. § 1521 *et seq.* (1982). In Fiscal Year 1984, refugee and entrant assistance activities, including targeted assistance, were funded by the "Joint Resolution Making Further Continuing Appropriations for Fiscal Year 1984," Pub. L. No. 98-151, 97 Stat. 964 (1983). That continuing resolution provided that such activities would be continued at the "current rate." A dispute developed regarding the meaning of the term "current rate." *See* 64 Comp. Gen. 21, (1984). Congress ultimately resolved the matter in the Second Supplemental Appropriations Act, 1984, Pub. L. No. 98-396, 98 Stat. 1369, 1392, August 22, 1984, which provided as follows:

> For purposes of section 101(c) of Public Law 98-151, the current rate for refugee and entrant assistance activities for fiscal year 1984 is $541,761,000, of which not less than $71,700,000 shall be available for social services (exclusive of targeted assistance), and not less than $77,500,000 shall be available for targeted assistance.
>
> Funds available for refugee and entrant targeted assistance activities under section 101(c) of Public Law 98-151 shall remain available through September 30, 1985. 98 Stat. 1392.

At the end of Fiscal Year 1984, ORR had obligated $38,474,000 of the $77,500,000 specifically available for Targeted Assistance, resulting in an unobligated carry-over balance for Fiscal Year 1985 of $39,026,000. *See* Appendix to the Budget of the United States Government, Fiscal Year 1986, Office of Management and Budget at I-K36.

For Fiscal Year 1985, Congress again resorted to a continuing resolution to provide specific funding for the Targeted Assistance Program. Pub. L. No. 98-473, 98 Stat. 1837, 1963, October 12, 1984. The 1985 Continuing Resolution appropriated in section 101(k):

> (k) Such amounts as may be necessary for continuing the following activities, not otherwise provided for in this joint resolution, which were conducted in the fiscal year 1984, under the terms and conditions provided in applicable appropriation Acts for the fiscal year 1984, at the current rate:
>
> * * * Refugee and entrant assistance activities under the provisions of title IV of the Immigration and Nationality Act, title IV and part B of title III of the Refugee Act of 1980, and section 501(a) and (b) of the Refugee Education Assistance Act of 1980, except that such activities shall be continued at a rate for operations not in excess of the lower of the current rate or the rate authorized by H.R. 3729 as passed the House of Representatives: *PROVIDED,* That such funds may be expended for individuals who would meet the definition of "Cuban and Haitian entrant" under section 501(e) of the Refugee Education Assistance Act of 1980, but for the application of paragraph (2)(B) thereof; 98 Stat. 1963.

The tems "current rate" and "rate authorized by" some other reference point—e.g., a House or Senate-passed bill, a Conference Report, the President's budget estimate, etc.—have become terms of appropriations art in Continuing Resolutions. Both terms must

be translated as a fixed amount of funds, for purposes of comparison, when the Continuing Resolution directs the agency to operate at the lower of two (or more) such reference points. *See* B-152554, October 9, 1970, printed in 116 Cong. Rec., October 12, 1970, and references therein. "Current rate" equals the total dollars made available for obligation in the prior fiscal year. 58 Comp. Gen. 530 (1979); B-194063, May 4, 1979; B-194362, May 1, 1979. The "rate authorized by H.R. 3729" is similarly a fixed dollar amount.

As passed by the House of Respresentatives on November 14, 1983, H.R. 3729 would, if enacted, have authorized the appropriation of $50,000,000 for the Targeted Assistance Program. *See* Cong. Rec. H9786 (Daily ed. November 14, 1983). Therefore, the comparison amounts are $77,500,000 (current rate) and $50,000,000 (H.R. 3729).

Both ORR and the signatories to the May 29 letter to this Office agree that of the two "rates" set forth in section 101(k) of the 1985 continuing resolution—the "current rate" and "the rate authorized by H.R. 3729"—the rate authorized by H.R. 3729, $50,000,000, is the lower. However, the interested parties disagree as to whether that $50,000,000 figure represents the maximum level of funding for the program or whether the program may utilize, in addition, the unobligated carryover balance of $39,026,000 from FY 1984. ORR contends that the total amount made available for the Targeted Assiatance Program in Fiscal Year 1985 pursuant to the 1985 continuing Resolution is $50,000,000. ORR reasons that the $39,026,000 in unobligated Fiscal Year 1984 Targeted Assistance Funds which were carried over to Fiscal Year 1985 must be deducted from the $50,000,000 "rate for operations specified by Congress" in order to comply with the directive that the rate for operations should not be "in excess" of the lower of the two references. Therefore, ORR concludes that the amount of "new funds" appropriated for Targeted Assistance by the 1985 Continuing Resolution is only $10,974,000. In support of this analysis, ORR cites our decision in 58 Comp. Gen. 530 (1979) which dealt with a similar situation under a Fiscal Year 1979 continuing resolution.

Representatives Edwards, Lehman, Berman, and Pashayan, however, contend that the total amount available for the Targeted Assistance Program in Fiscal Year 1985 pursuant to the 1985 Continuing Resolution is the $50,000,000 specified in H.R. 3729, *plus* the $39,026,000 in unobligated Fiscal Year 1984 carry-over funds, or a total of $89,026,000. They contend that the $50,000,000 specified in HR 3729 was intended to be new funds appropriated for Fiscal Year 1985 and that ORR is acting erroneously in deducting Fiscal Year 1984 carry-over from that sum. In support of their position, they cite the legislative history of the 1985 Continuing Resolution, including the following excerpt from the Conference Committee Report:

It is the intent of the conferees that $50,000,000 will be available for the targeted assistance program in fiscal year 1985, and that the Department will expend new monies to fulfill the 1985 appropriations levels provided by this bill. The conferees * * * direct the Department not to reduce any State or local entity's allotment on the basis of 1984 funds carried over or previously committed. (H. Rep. No. 1159, 98th Cong., 2d Sess. 402 (1984)).

The signatories to the May 29 letter to this Office contend, accordingly, that ORR's funding of Targeted Assistance in Fiscal Year 1985 at $50,000,000 constitutes an unlawful rescission of $39,026,000 under the Impoundment Control Act.

ANALYSIS

We conclude that our decision in 58 Comp. Gen. 530 (1979) is clearly distinguishable from the instant case.

The 1979 case concerned the availability of funds appropriated by the fiscal year 1979 Continuing Resolution for a Department of Labor program to be continued at a rate for operations "not in excess of the lower of the current rate or the rate authorized by S. 2570 as passed by the House of Representatives." The legislative language is, as ORR points out, very similar to the language in the 1985 Continuing Resolution used to fund the Targeted Assistance Program. However, in the 1979 case, the "current rate" and not the bill authorization "rate" turned out to be the lower dollar figure. We held that if there is a balance of unobligated funds which is carried over into the present fiscal year, that balance must be deducted from the "current rate" to determine the amount of new funds actually appropriated by the continuing resolution. This is because the "current rate" is made up of all the funds which were available to the agency for the prior fiscal year, whether obligated or expended or still available for obligation. Put another way, the term "current rate" already includes an unobligated balance, if any. To have added the unobligated balance to the "current rate" dollars in the 1979 case, would have been duplicative and have frustrated congressional intent that the 1979 program be carried out at a rate of operations not in excess of the "current rate."

In contrast, the $50 million for the Targeted Assistance appropriation does not include a prior year's balance. In fact, the legislative history clearly indicates that the Congress was well aware of the existence of the unobligated carryover funds and wanted them to remain available for the program in addition to its new monies. (*See* excerpt from Conference Committee Report, cited above.) The Congress took pains to instruct the Department to calculate each state's allotment for Targeted Assistance without reference to "1984 funds carried over or previously committed." H. Rep. No. 1159, *supra*. We therefore conclude that the rule with respect to deduction of unobligated balances in 58 Comp. Gen. 530 is not appli-

cable where the lower of two referenced rates is not the current rate.

Finally, although we do not agree with ORR's calculations of the amount of funds made available for the targeted assistance program for fiscal year 1985, we do not think that ORR violated the Impoundment Control Act, 2 U.S.C. § 681 *et seq.* (1982). This case involves a good faith disagreement regarding the total amount of funds available for a particular program. There is no evidence that any agency official determined that the funds in question should not be spent because they were not needed, or for fiscal policy or other reasons. *See* B-200769, November 7, 1980. Accordingly, we conclude that in the instant case, the failure of ORR to make the disputed $39,026,000 available for obligation does not constitute an illegal rescission within the contemplation of the Impoundment Control Act.

[B-219081]

Contracts—Negotiation—Competition—Equality of Competition

In the absence of any law or regulation indicating a contrary policy, unrestricted competition on all government contracts between commercial concerns and nonprofit educational institutions is required by the statutes governing federal procurement.

Contracts—Negotiation—Requests for Proposals—Specifications—Minimum Needs—Administrative Determination

An agency is responsible for determining its minimum needs and the best way of accommodating those needs, and we will not question that determination absent a clear showing that it is unreasonable. Once an agency establishes *prima facie* support for its position, the burden shifts to the protester to show such determination is clearly unreasonable. The protester has not carried its burden here.

Contractors—Conflicts of Interest—Potential or Theoretical

An allegation of a conflict of interest is denied where the record contains no evidence that physicians, employees of both the contracting agency and proposed awardee, would improperly refer the agency's patients to the awardee.

Matter of: Prescott's Orthotics & Prosthetics, June 28, 1985:

Prescott's Orthotics & Prosthetics (Prescott) protests the proposed award of a contract for prosthetic services by the Veterans Administration (VA) to the University of Texas Health Science Center Prosthetics Department.

We dismiss the protest.

The VA proposes to award the University of Texas, a tax-supported institution, a requirements contract for prosthetic services. At the time of this protest, the VA had requirements contracts with four private firms that provide the same services as the proposed awardee. Prescott argues that the University of Texas, as an institution receiving a substantial amount of money from state and federal tax revenues, has a distinct advantage over the other contractors.

In the absence of any law or regulation indicating a contrary policy, unrestricted competition on all government contracts between commercial concerns and nonprofit educational institutions is required by the statutes governing federal procurement. *E.I.L. Instruments, Inc.*, 54 Comp. Gen. 480 (1974), 74-2 C.P.D. ¶339. Further, although certain awardees may enjoy competitive advantages as a result of federal, state, or local programs, the government is not required to eliminate these advantages unless they are the result of unfair government action. See *Industrial Design Laboratories, Inc.*, B-215162, Oct. 16, 1984, 64 Comp. Gen. 8, 84-2 C.P.D. ¶413. We are unaware of any federal procurement statute or regulation that prohibits a tax-supported university from competing with private firms. Moreover, there is no indication that the award to the university was caused by unfair government action.

Prescott also argues that the four firms currently holding requirements contracts with the VA adequately meet the needs of the local community. This protest basis is dismissed. Merely because four firms currently provide the local community with prosthetic services is not a valid ground for protest. An agency has the responsibility to determine its minimum needs and the best way of accommodating those needs, and we will not question that determination absent a clear showing that it is unreasonable. *Logistical Support, Inc.*, B-215724, June 17, 1982, 82-1 C.P.D. ¶599. The initial burden is on the procuring agency to establish *prima facie* support for its minimum needs. Once established, the burden shifts to the protester to show that such determination is clearly unreasonable. *The Trane Company,* B-216499, Mar. 13, 1985, 85-1 C.P.D. ¶ 306. Here, the VA decided that its patients needed another provider of prosthetics. Prescott has not shown that the VA's determination to award another requirements contract was *prima facie* unreasonable, but only that it disagreed with the determination. In light of these circumstances, there is no reason to overrule the agency's decision.

Prescott's final contention is that a conflict of interest exists because VA physicians are also on the university's staff. Prescott argues that this situation will lead to agency physicians referring patients needing prosthetic services to the university. The VA responds that it strictly enforces its rules and regulations addressing conflicts of interest.

It is well settled that a protester has the burden of proving its case. *National Services Corp.*, B-205629, July 26, 1982, 82-1 C.P.D. ¶ 76. Moreover, a protester has not met its burden of proof where the allegation of conflict of interest is based solely on the protester's speculative statements. *Louis Berger & Assoc. Inc.,* B-208502, Mar. 1, 1983, 83-1 C.P.D. ¶195. Here, there is no evidence that physicians at the VA will only refer patients to the university. Prescott has simply shown that the possibility of a conflict of interest exists.

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ACCOUNTABLE OFFICERS

Courts. (*See* **COURTS, Administrative Matters, EMPLOYEES, Accountable Officers)**

Liability

Generally

Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative off-set is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns the original amount asserted against the officer, not the balance remaining to be paid. 606

ADVERTISING

Commerce Business Daily

Publication Requirement

Prior to Ordering Under Basic Ordering Agreement

Spare Parts Procurement

General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620

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Continuing Resolutions

Expiration

Unobligated Balance Availability

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Debarment—Continued
Labor Stipulations Violations—Continued
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Wage Underpayments—Continued
Debarment Required—Continued
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BIDS—Continued Page

Competitive System—Continued

Superior Advantages of Some Bidders—Continued

place of performance does not in itself render the solicitation unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders. 528

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Invitation for Bids

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Protest in which protester argues for more restrictive specifications—that a safety observer be present whenever maintenance or repair work is performed on refrigeration equipment—is denied where protester fails either to present evidence of fraud or willful misconduct by government officials or to point to a particular regulation which clearly requires the presence of a safety observer under the circumstance. 528

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Reasonableness

Protest that specifications are in excess of contracting agency's minimum needs and unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring contractor (1) to respond to request for emergency service on refrigeration equipment at commissary store within 3 hours, and with the tools the agency considered minimally necessary for prompt and efficient service, in order to avoid spoilage of perishable refrigerated food items, and (2) to schedule routine preventive maintenance

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An Economic Price Adjustment clause in an invitation for bids for janitorial services which provides for price adjustments based on fluctuations from a base rate quoted in the successful bid may not adequately protect the government's legal rights. Although this base rate is supposed to be based on labor rates on which the bid price is based, there is an economic incentive for a bidder to submit a base rate less than that on which it based its bid price to enhance the possibility of an upward price adjustment and minimize the possibility of a downward price adjustment. In this case, the bid rate of the low responsive bidder is significantly lower than next low bidder although the difference between the bids is not significant; consequently, verification of this base rate should be made before award..... 593
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Bid Guarantee Requirement
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Responsiveness—Continued

Bid Guarantee Requirement—Continued

Prior General Accounting Office cases to the contrary, including 51 Comp. Gen. 508 (1972), are hereby overruled..... 505

Prices Failure to Furnish Something Required Price

Where an invitation for bids for janitorial services requires bidders to submit with their bids a base rate necessary for the operation of the Economic Price Adjustment clause, which provides for upward and downward price adjustments based on fluctuations from a based rate quoted in the successful bid, bids not quoting this rate must be rejected as nonresponsive. Failure to provide such information at bid opening is material because the legal rights of the contractor and government are affected..... 593

"No-Charge", etc. Notations

Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and willing to commit themselves to furnishing the item in question—as by inserting a zero, "no charge," or "not separately priced,"—the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service..... 553

Pricing Response Nonresponsive to IFB Requirement

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"Mathematically Unbalanced Bids"

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BONDS

Bid

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Modification
Additional Work or Quantities
Within Scope of Contract Requirement
Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification

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Modification—Continued
Additional Work or Quantities—Continued
consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original contract for supplies and technical assistance exceeds the contract's scope and cannot be justified on a sole-source basis where both the modification and the original contract should have been competed..... 578
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Offers or Proposals
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Varying Degrees of Discussions
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Where a solicitation provides that award will be made to the technically acceptable offeror offering the lowest price and the protester's proposal is technically acceptable, the procuring agency properly may conduct detailed technical discussions with a technically deficient offeror while only affording the protester an opportunity to furnish a best and final offer; and agency need conduct detailed discussions only with offerors whose proposals contain technical uncertainties..... 524

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What Constitutes Discussion
A statement from the procuring agency to the low offeror following submission of best and final offers does not constitute improper discussions where award is to be made to the low technically acceptable offeror; the offeror already had been found technically acceptable; and the statement thus was not part of an effort to determine the acceptability of the offeror's proposal 524
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Agency's failure to include protester's proposal in the competitive range, based upon the evaluation of proposals and revised technical scores reflecting projected improvement in proposals if discussions were held, was not unreasonable or in violation of applicable statutes and regulations 540
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Based on its predecessor's production history, successor corporation to a government contractor properly was found to meet a solicitation requirement that the items to be offered must have been previously produced and sold commercially or to the government, where there have been no substantial changes in the product, manufacturing process, or staff 507
Requests for Proposals
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Administrative Determination
An agency is responsible for determining its minimum needs and the best way of accommodating those needs, and we will not question that determination absent a clear showing that it is unreasonable. Once an agency establishes *prima facie* support for its position, the burden shifts to the protester to show such determination is clearly unreasonable. The protester has not carrier its burden here 653
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Sole-Source Basis
Competition Availability
Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(A) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs 565
Justification
Inadequate
An agency may not decide to forego soliciting and offer from the incumbent for the next contract period, and instead award a sole-source contract to another firm, based on its view that deficient past performance indicates the incumbent is not responsible, since a non-responsibility determination should follow, not precede, a competition and, in the case of a small business like the incumbent, by law is subject to review by the Small Business Administration 565
Procedures
Commerce Business Daily Notice Procedures
A protest is sustained where the agency rejected a potential source of supply by making award on a sole-source basis prior to the expiration of the mandatory 30-day Commerce Business Daily (CBD) publication requirement outlined in the Small Business Act, as amended by Pub. L. 98–72, and where the protester's offered products comply with the requirements of the procurement as outlined in the CBD synopsis 480
Protests
Authority to Consider
District of Columbia Procurements. (*See* GENERAL ACCOUNTING OFFICE, Jurisdiction, Contracts, District of Columbia Procurements)
Basis for Protest
Requirement
General unsupported protest after bid opening that invitation for bids (IFB) is not "definite," "simple," "comprehensible," or "understandable" and, therefore, violative of Federal Acquisition Regulations does not state grounds of protest cognizable under Bid Protest Procedures and is untimely in any case 593
Contract Administration
Not for Resolution by GAO
Protest that contractor will not supply acceptable items notwithstanding the contractual obligation to do so involves a matter of contract administration, which is the procuring agency's responsibility, not GAO's 641
Court Action
Dismissal
General Accounting Office (GAO) will not consider a protest where the issues presented are before a court of competent jurisdiction, despite the court's indication that it is willing to consider an advisory GAO decision. The court has also indicated that it intends to rule on

CONTRACTS—Continued Page
Protests—Continued
Court Action—Continued
Dismissal
the merits in advance of the date when it can be reasonably expected that GAO will be in a position to issue a decision, given the statutory time period for the agency to file its report on the protest and for the parties to comment on that report 647
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Protest Dismissed
General Accounting Office (GAO) will not consider a protest where the issues presented are before a court of competent jurisdiction and the court has not expressed any interest in a GAO decision, or where the issues have already been decided by the court 623
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General Accounting Office Procedures
Filing Protest With Agency
Protest will not be dismissed for failure to furnish the contracting officer a copy of the protest 1 day after filing as required by GAO's Bid Protest Regulations, where the 1-day delay in doing so did not delay protest proceedings 641
Timeliness of Comments on Agency's Report
General Accounting Office (GAO) provide that protests are to be dismissed unless the protester submits either comments on the agency report or a statement requesting GAO to decide the matter on the existing record within 7 days after receiving the report. If a conference is held, the protester must submit either comments or a similar request for a decision on the existing record within 5 working days after the conference 515
Fact that the contracting agency sent its protest report directly to the protester instead of the firm's counsel does not affect the propriety of General Accounting Office's (GAO) dismissal of the protest for failure to comment on the report within 7 working days after the date anticipated for receipt. Counsel was advised when the protest was filed that receipt would be presumed to be on the anticipated date, yet failed to advise us of any problem in that respect within the 7-day comment period, as required by GAO's Bid Protest Regulations. 515
Timeliness of Protest
Additional Information Supporting Timely Submission
Where protester's statement that written protest to procuring agency, initially viewed by General Accounting Office (GAO) as untimely, was merely confirmation of timely oral protest is unquestioned by agency, it established that protest to GAO was timely 540
Adverse Agency Action Effect
Protest that agency's specifications for equipment are unduly restrictive is untimely under General Accounting Office's (GAO) Bid Protest Procedures where the protester filed a timely protest with the contracting agency before responses to the specifications were due, but waited almost 4 months to file with GAO after the agency

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Protests—Continued
General Accounting Office Procedures—Continued
Timeliness of Protest—Continued
Adverse Agency Action Effect—Continued
received responses from vendors without taking the action requested in the protest to the agency 484
General Accounting Office (GAO) Bid Protest Procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. Where protest was timely filed initially with the contracting agency and subsequent protest to GAO was filed within 10 working days of the contracting agency's initial adverse action on the protest, protest to GAO is timely 553
"Good Cause" Exception Applicability
Reliance on agency advice that a protest could be filed with General Accounting Office within 30 days of denial of a protest to the agency is not good cause for filing and untimely protest by the protester's attorney where material accompanying the agency's letter clearly stated that such protests must be filed within 10 days 450
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date for Proposals
Allegations that (1) the agency should have canceled the solicitation after relaxing technical requirements; (2) the amended solicitation contained and ambiguous specification; and (3) the 30 days allowed to prepare best and final offers was insufficient are untimely and not for consideration since the facts on which the allegations are based should have been apparent prior to the final closing date, but they were not raised until after that date 524
Information Evaluation
Sufficiency of Submitted Information
Failure specifically to request a ruling by the Comptroller General or to state the remedy desired, as required by General Accounting Office Bid Protest Regulations, is a minor procedural defect which does not require dismissal of the protest when the protest otherwise clearly indicates the desire for a ruling and the requested remedy 641
Interested Party Requirement
Direct Interest Criterion
A potential subcontractor complaining about definitive responsibility criteria that a bidder would have to meet as a prerequisite to award of the prime contract is not an interested party since to be an interested party under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract 500
Protester, which alleges that agency improperly failed to circulate its pre-bid-opening protest to other prospective bidders for comments, is not "interested party" under Bid Protest Procedures to raise this issue, since protest is essentially on behalf of these other bidders. In any case, the protester has not indicated how it was prejudiced by this alleged failure 577
Nonresponsive Bidder
The fact that the protester may have submitted a nonresponsive bid does not prevent the protester from being considered an interest-

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Interested Party Requirement—Continued
Nonresponsive Bidder—Continued
ed party where the protester seeks resolicitation of a procurement allegedly conducted on the basis of defective specifications and would have the opportunity to rebid if the requirement is resolicited..... 482
Potential Contractors, etc. Not Submitting Bids, etc.
To be considered and interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A manufacturer which supplies equipment to potential bidders or offerors in a federal procurement, but which is not a potential bidder or offeror in its own right, is not an interested party..... 577
Prospective Subcontractors
To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protect Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offer..... 523
Persons, etc., Qualified to Protests. (*See* CONTRACTS, Protests, Interested Party Requirement)
Protest and Debriefing Procedures Conferences. (*See* CONTRACTS, Protests, Conferences)
Timeliness. (*See* CONTRACTS, Protests, General Accounting Office Procedures, Timeliness of Protest)
Small Business Concerns
Awards
Small Business Administration's Authority
Certificate of Competency
Inapplicability of COC Procedures
Agency decision to terminate negotiations with small business offeror under solicitation for architect-engineer services need not be referred to Small Business Administration under certificate of competency procedures since agency decision is based on evaluation of offeror's qualifications relative to other offerors as prescribed by Brooks Act, 40 U.S.C. 541-544, not a negative responsibility determination..... 603
Sole-Source Procurements. (*See* CONTRACTS, Negotiation, Sole-Source Basis)
Time and Materials
Materials at Cost Requirement
Agency Discretion
Protest of solicitation provision limiting reimbursement for spare parts under a time-and-materials maintenance contract to the "actual cost invoiced to" the contractor is denied where protester fails to demonstrate that contracting officials abused their discretion when they determined that it would be more appropriate for a con-

CONTRACTS—Continued Page
Time and Materials—Continued
Materials at Cost Requirement—Continued
Agency Discretion—Continued
tractor to recover its material handling costs and any profit on the parts under its fixed labor rate rather than on a cost reimbursement basis. 528
Transportation Service
Procurement Procedures
The Navy is not required to follow procurement procedures to establish a scheduled airline traffic office (SATO) through which to acquire travel services, since establishment of a SATO does not involve a procurement of services within the meaning of the Competition in Contracting Act of 1984 551

COURTS
Administrative Matters
Employees
Accountable Officers
The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, establishes a bankruptcy court as a unit of the district court, in each judicial district. The bankruptcy judges may appoint clerks of bankruptcy courts. Amendment of 28 U.S.C. 1930 providing that bankruptcy filing fees are to be paid to "the clerk of the court" does not exclude payment to the bankruptcy clerks as the accountable officer for the funds. Incident to his office, the bankruptcy clerk also is the accountable officer for registry funds entrusted to the bankruptcy court. 535

DEBT COLLECTIONS
Procedure for Collection and Accounting
Waiver, Alteration, etc.
Debtor may contractually agree to procedures different from those specified in 31 U.S.C. 3176(a), or may completely waive entitlement to those procedures, as long as the variance or waiver is made voluntarily, knowingly, and intelligently. 493
Referral to Justice
Debtor's Requests for Court of Law Determination
Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 and in accordance with the requirements of 5 U.S.C. 5512, General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer. 605
Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 (1982), and in accordance with the requirements of 5 U.S.C. 5512 (1982), General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer 606
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ENLISTMENTS
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ENVIRONMENTAL PROTECTION AGENCY. (*See* ENVIRONMENTAL PROTECTION AND IMPROVEMENT, Environmental Protection Agency)

Environmental Protection Agency

Authority

Fuel Economy Performance Testing

Environmental Protection Agency (EPA) is responsible for designing and administering fuel economy performance test and computing Corporate Average Fuel Economy (CAFE) ratings for auto makers. Request questioned EPA's handling of CAFE tests and ratings in three specific areas. Findings are: 1) EPA has broad statutory authority to refine test procedures, even if harder tests have the effect of raising CAFE standards slightly; 2) EPA's use of informal Advisory Circulars instead of rulemaking procedures to effect test changes is improper unless test changes are "technical and clerical amendment[s]" exempted from rule making by statute, or unless one of the Administrative Procedure Act exceptions applies; and 3) Rulemaking proposing adjustments to CAFE ratings is a legally adequate response to a court order to address discrepancies resulting from test changes EPA made in 1979. To Rep. Dingell 570

EQUIPMENT

Automatic Date Processing Systems

Acquisition, etc.

Evaluation

Reasonableness

In reviewing an agency's evaluation of written responses to a Commerce Business Daily notice of intent to place an order against a particular vendor's nonmandatory automated data processing equipment schedule contract, GAO's role is to ascertain whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking a competitive solicitation, if possible, of the agency's requirements 484

FEDERAL GRANTS, ETC.

Generally. (*See* **GRANTS, Federal**)

FUNDS

Miscellaneous Receipts. (*See* **MISCELLANEOUS RECEIPTS**)

GENERAL ACCOUNTING OFFICE

Jurisdiction

Contracts

District of Columbia Procurement

Competition in Contracting Act of 1984, Pub. L. No. 98-369, 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protests concerning solicitation issued by the District and which is filed after the Jan. 15, 1985,

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
District of Columbia Procurement—Continued
effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed 488

GRANTS
Federal
Administration of Grants Programs
United States Information Agency (USIA), in providing statutory grant funds to National Endowment for Democracy, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. General Accounting Office finds that language and legislative history of authorizing legislation do not support Endowment's view that USIA was not intended to have any substantial role in seeing that grant monies are expended for authorized purposes..... 582

HUSBAND AND WIFE
Divorce
Military Personnel
Quarters Allowance. (*See* QUARTERS ALLOWANCE, Basic Allowance for Quarters (BAQ))

INSURANCE
Civilian Employees
Life Insurance. (*See* OFFICERS AND EMPLOYEES, Life Insurance)

MILITARY PERSONNEL
Allowance
Quarters. (*See* QUARTERS ALLOWANCE)

OFFICERS AND EMPLOYEES
Backpay
Removals, Suspensions, etc.
Generally. (*See* COMPENSATION, Removals, Suspensions, etc., Backpay)
Debt Collections. (*See* DEBT COLLECTIONS)
Household Effects
Transportation. (*See* TRANSPORTATION, Household Effects)
Liability
Government Losses
Accountable Officers. (*See* ACCOUNTABLE OFFICERS)
Life Insurance
Coverage During Periods of Suspension
Insurance coverage is determined on the basis of the election of the employee. Administrative errors in processing forms do not alter the rights and liabilities of the employee. Therefore, when the agency reimburses an employee for backpay for a period he was improperly separated and retired, the computation of his insurance deductions should be made on the basis of the insurance coverage actually elected 435

OFFICERS AND EMPLOYEES—Continued Page
Life Insurance—Continued
Premiums
Refund
Reinstated employees who elected to retire when improperly removed from the Forest Service may be reimbursed for life insurance premiums deducted from their annuities during the period of erroneous retirement. However, in computing the backpay due the employees there must be deducted premiums for the same insurance coverage applicable to them as employees for the erroneous retirement period. Thus, they will be in the same financial position they would have been in absent the improper personnel action 435
Service Agreements
Transfers. (*See* OFFICERS AND EMPLOYEES, Transfers, Service Agreements)
Subsistence
Per Diem. (*See* SUBSISTENCE, Per Diem)
Transfers
Real Estate Expenses
Broker's Fees
Employee exchanged residence at old duty station for another residence in the vicinity of the old duty station incident to a change of official station. Employee may be reimbursed under 5 U.S.C. 5724a(a)(4) for real estate broker's commission and other allowable expenses incurred as "seller" in the exchange of residences since the assumption of the balance of the employee's mortgage loan is tantamount to a cash payment. Amount of broker's commission which is reimbursable is governed by the Federal Travel Regulations, para. 2-6.2a, as amended, and is limited by the amount generally charged for such services by the broker or by the brokers in the locality where the residence is located 557
Refinancing
A transferred employee refinanced his residence at the old duty station in order to obtain assumable financing for the purchaser. The expenses involved in refinancing are reimbursable to the extent such costs are reasonable and customary in the area and otherwise allowable under the Federal Travel Regulations 568
Reimbursement
An employee was transferred back to a former duty station after a 12-year absence. He temporarily occupied a residence at that station which he had purchased 14 years before, but had rented out during most of that time. He than purchased another residence there and claims real estate expenses for this purchase. The agency disallowed his claim based on *Warren L. Shipp,* 59 Comp. Gen. 502 (1980), which held that, once an employee is officially notified of retransfer to a former duty station, reimbursement of real estate expenses is limited to those already incurred or which cannot be avoided. Shipp is hereby limited to situations where the employee is notified of retransfer to a former duty station before expiration of the time allowed for reimbursement of real estate expenses incident to the original transfer. Since this time period had expired years before the retransfer in the present case, Shipp does not apply and the claim is allowed. This decision modifies 59 Comp. Gen. 502 476

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation Expenses
House Sale. (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)
Real Estate Expenses. (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)
Service Agreements
Administrative Determination
Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms..... 643
Failure to Fulfill
Involuntary Separation
Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious..... 643
Transportation for House Hunting
Disallowance
Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for serveral house-hunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a)(2) (1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law. But see 47 Comp. Gen. 189..... 472
Travel Expenses. (*See* TRAVEL EXPENSES)

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

ORDERS—Continued Page
Permissive *v.* Mandatory—Continued
Travel Orders—Continued
route in compliance with the directive change-of-station provisions of the orders..... 489

PAY
After Expiration of Enlistment
Courts-Martial Proceedings
Awaiting Proceedings
An enlisted marine who was placed on administrative hold and prevented from completing his processing out after he had been given his certificate of discharge claims pay for the period after that date during which he remained at the marine base on administrative hold pending court-martial charges. The court held that since he had been given his discharge before court-martial charges were brought he was not subject to his jurisdiction. The handling over of the discharge certificate was equally effective for administrative purposes and the individual's status as a member and right to further pay ended at that time..... 629

PAYMENTS
Absence or Unenforceability of Contracts Quantum Meruit/Valebant Basis. (*See* PAYMENTS, Quantum Meruit/Valebant Basis, Absence, etc. of Contract)
Quantum Meruit/Valebant Basis
Absence, etc. of Contract
Transportation Charges
The Navy contracted with a specialized motor carrier to transport a ship's propeller from Virginia to California from where it was to be transported by the Air Force to the Philippines. Upon arrival in California, rather than unload the propeller from the tractor-trailer, the Navy borrowed the carrier's tractor and trailer, equipped with a fixture specially designed for ships' propellers, and one driver for 20 days, all of which were then flow by Air Force cargo plane from California to the Philippines, and returned to California transporting a damaged propeller for repair. The carrier is entitled to payment on a quantum meruit basis, in the absence of an agreement as to the charges for the services performed between California and the Philippines. Where the carrier fails to show that the Government ordered or received certain services, received a benefit for certain services allegedly provided, or where charges for certain services are duplicative of other charges paid, the General Services Administration's disallowance of the carrier's claim for charges for such services is sustained..... 612
Voluntary
No Basis for Valid Claim
Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expenses to bank offices certified as "nonself-sustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are

PAYMENTS—Continued Page
Voluntary—Continued
No Basis for Valid Claim—Continued
available only after certification. Bank, as voluntary creditor of the Government where direct expenditure by the Navy would not have been authorized. 467

PERSONAL SERVICES
Private Contract *v.* Government Personnel
Legality
Allegation that solicitation will create all illegal personal services contract is denied where protester fails to demonstrate that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship between the government and contracting personnel 528

PROTESTS
Contracts. (*See* CONTRACTS, Protests)

QUARTERS ALLOWANCE
Basic Allowance for Quarters (BAQ)
With Dependents Rate
Child Support Payments by Divorced Member
Both Parents Service Members
Dual Payment Prohibition for Common Dependents
Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance. 609
Entitlement
Sharing Arrangements
When two members entitled to and receiving housing allowances share a residence, their "rent plus" housing allowance must be paid at the sharer's rate regardless of the financial arrangements between the members. Although the regulations were not entirely clear in defining a sharer's entitlement, the fact that the Government is paying each member a housing allowance, although of different types, supports the conclusion that sharing arrangements should be taken into account even though costs may not, in fact, be shared so that sharers cannot manipulate the allowances to their advantage. 501

REFUGEES
Assistance Programs
Appropriations Availability. (*See* APPROPRIATIONS, Availability, Refugee Assistance)

SET-OFF Page

Debtor-Creditor Relationship

Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the workout agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement. 492

STATE LAWS

Federal Programs, etc. Effect

Where applicable federal law exists, General Accounting Office will not look to state law to determine the validity of a bid bond submitted for a federal procurement 474

SUBSISTENCE

Actual Expenses

Maximum Rate

The Department of Housing and Urban Development (HUD) requests a decision on whether foreign delegations on invitational travel and their official HUD escorts may be paid subsistence expenses exceeding the statutory limitation for Federal travel reimbursement. We find no basis to make an exception to the statutory limitation in this case. *United States Information Agency,* B-209375, December 7, 1982, is distinguished 447

Per Diem

Headquarters

Prohibition Against Payment

The Department of Housing and Urban Development (HUD) requests a decision on whether HUD employees escorting foreign delegations may be paid subsistence expenses at their official duty stations. The Federal Travel Regulations provide that an employee may not be paid per diem or actual subsistence expenses at his or her permanent duty station. There are certain exceptions, but we find no exception that would apply in this case. Therefore, employee escorts at their permanent duty stations may not be paid subsistence expenses.. 447

TRANSPORTATION

Household Effects

Drayage

Between Non-Government Quarters Overseas

An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972) 517

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TRAVEL AGENCIES. (*See* **TRANSPORTATION, Travel Agencies**)

TRAVEL EXPENSES

Constructive Travel Costs

Limited to Cost of Common Carrier

An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However, for computing constructive travel costs, only the usual taxicab or airport limousine fares, plus tip, should be used for comparison purposes..... 443

An employee and his agency disagree over the proper computation of the cost of a Government vehicle in determining the employee's constructive travel claim between his headquarters and temporary duty station. However, for the purposes of the constructive cost of common carrier transportation, the cost of a Government vehicle may not be used since it is defined in the Federal Travel Regulations as a special conveyance and not a common carrier..... 443

First Duty Station

Manpower

Shortage

Relocation Expenses

Travel and transportation expenses for new appointees to manpower shortage positions in the Federal service are authorized by law and the Federal Travel Regulations. Claimant was selected for appointment to such a position in Asheville, N.C., and signed a 12-month service agreement. Agency issued a travel order and advanced funds to claimant for travel expenses, but withdrew offer of employment prior to reporting date due to budget constraints. Claimant is not liable for portion of travel advance paid by agency relating to relocation travel since failure to fulfill service agreement was for reasons beyond her control. There is no authority to allow remainder of expenses. However, since Ms. Randall acted in good faith reliance on her selection for appointment and representations of agency officials, we conclude the equities of the case warrant our reporting this matter to Congress under the Meritorious Claims Act..... 617

Military Personnel

Temporary Duty

Authorization Requirement

Travel Allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service over which they have no control. Expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are thus nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken. Hence, two Navy officers who traveled to their home towns to perform temporary recruiting duty under orders clearly stating that the duty was permissive rather than directive in nature and that no travel allowance were authorized for such duty are not entitled to reimbursement of the travel expenses involved..... 489

Travel Orders. (*See* **ORDERS, Travel, Military**)

TRAVEL EXPENSES—Continued Page
Overseas Employees
Return For Other Than Leave
Transfer
Payment Basis
The record does not provide an adequate basis for determining the location of the employee's permanent duty station at the time of her discharge. Accordingly, payment for return travel from Rome to the United States cannot be authorized pursuant to para. 2-1.5a(a)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981)..... 631
Transfers
Failure to Report at New Duty Station
Employee stationed in Rome, Italy, was transferred to the United States and later discharged for failure to report for duty in the United States. Notwithstanding the Merit Systems Protection Board order requiring her reinstatement, she may not be reimbursed for travel from Rome to the United States on the basis of her transfer since she never reported for duty in the United States..... 631
Temporary Duty
Commuting Expenses
Constructive Per Diem *v.* Mileage Reimbursement
An employee, in computing his constructive travel claim, claims parking fees at the temporary duty location. Paragraph 1-4.3 of the Federal Travel Regulations provides a limit on reimbursement based on the constructive cost of traveling to and from the temporary duty area. Thus, local travel costs at the temporary duty area are separate from constructive travel costs to and from the temporary area. The employee should be reimbursed for only those local travel costs actually incurred without limitation by constructive cost..... 443
Vehicles
Use of Privately Owned
Mileage Reimbursement Claim. (*See* MILEAGE, Travel by Privately Owned Automobile)
Witness *v.* Complainant
Administrative Proceedings
Employees who are ordered reinstated may be reimbursed for travel to attend their hearing. However, an employee's travel while in annual leave status 5 months prior to the hearing, over 2 months prior to the effective date of discharge, and over 3 weeks prior to the issuance of a notice of a proposed adverse action cannot be equated with travel to attend a hearing. Such travel is governed by the rule which applies to travel away from an employee's permanent duty station while on approved leave. Under this rule, the Government is responsible only for the cost of travel from the leave location to the location of the hearing. The claim for travel to the leave location is denied..... 631

VOLUNTARY SERVICES
Personal Funds in Interest of Government. (*See* PAYMENTS, Voluntary)

WORDS AND PHRASES Page

Work-out agreement

Unless parties expressly agree to the contrary, a creditor acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt and if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement. 492