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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

ACTING ASSOCIATE GENERAL COUNSEL

Henry R. Wray

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[B-213530]

Appropriations—Fiscal Year—Availability Beyond—Travel and Transportation Expenses

Reimbursable expenses of an employee transferred in the interest of the Government must be charged against the appropriation current when valid travel orders are issued. B-122358, August 4, 1976 and 35 Comp. Gen. 183 (1955) and other cases inconsistent with this decision are overruled.

Matter of: Recording of Obligations for Employee Transfer Costs, November 2, 1984:

An authorized official of the Department of Transportation requests that we reconsider our precedents holding that reimbursable expenses of employees transferred in the interest of the Government must be obligated against the appropriation current when the employee incurs the expense. The official asks that the rule be changed so that the obligation may be recorded against the appropriation current when the employee is ordered to make the move. As will be explained below, we conclude that these expenses should be recorded against the appropriation current when valid travel orders are issued.

BACKGROUND

Federal agencies, such as the Federal Aviation Administration (FAA) of the Department of Transportation, often must transfer employees for the benefit of the Government. Generally, the transferred employees are entitled to receive reimbursement of their travel and transportation expenses as well as relocation expenses. *See* 5 U.S.C. §§ 5724 and 5724a. Often, employees do not incur all reimbursable transfer expenses in the fiscal year in which they are transferred. For example, employees have up to 3 years to sell their residence at the duty station from which transferred and still be entitled to be reimbursed residence transaction expenses of up to $15,000. *See* Federal Travel Regulations, para. 2-6.1e (Supp. 4, August 23, 1982), incorp. by ref., 41 C.F.R. § 101-7.003.

The uncertainty of when a transferred employee will incur a reimbursable expense creates problems for the employing agency. The agency must set aside sufficient funds in a fiscal year to reimburse employees for the maximum relocation expenses they may incur in that year. This is done by tentatively recording an obligation against the current fiscal year funds. That is, for each transferred employee, an agency reserves sufficient funds to reimburse the employee for the maximum estimated expenses of relocating. By the end of the fiscal year, the agency adjusts the amounts tentatively recorded as obligations so as to reflect the actual expenses incurred by the transferred employee during that fiscal year. The problem is that the amount of tentatively obligated funds in excess of the expenses actually incurred must be deobligated and is lost to the agency, since the fiscal year is over and these funds may not be carried over into the next fiscal year. For agencies that transfer many employees, the amount of funds that may be lost in this way can be substantial.

Furthermore, with the start of the new fiscal year, the agency must again tentatively obligate sufficient funds to reimburse the transferred employees for the potential maximum relocation expenses they may incur in the new fiscal year. Thus, for example, upon receipt of its funds for fiscal year 1982, the Southwest Region of the FAA tentatively obligated $546,500 for reimbursement of relocation expenses authorized but not incurred prior to fiscal year 1982.

The present system, as explained above, is set out in para. 25.1 of Office of Management and Budget (OMB) Circular No. A-34, as revised. When the FAA requested that OMB revise the Circular, the OMB representative explained that the Circular was based on GAO decisions and that any revision would require GAO to reconsider its previous rulings. The FAA therefore has made this request that we overrule our precedent and rule "that costs for PCS [permanent change of station] moves be obligated against the specific appropriation current *at the time* the employee is ordered to move and paid from that appropriation regardless of when the individual events of the move occur."

DISCUSSION

The OMB Circular No. A-34 accurately reflects the rulings we have made in this area. We have held that only when a transferred employee actually incurs expenses is there a binding obligation. B-122358, August 4, 1976; 28 Comp. Gen. 337, 338 (1948). This holding was based on the rule that the issuance of travel orders pursuant to an employee's transfer does not constitute a contractual obligation but is merely authorization for the employee to incur the expense. We therefore reasoned that until the employee incurred the expense the Government was not obligated to reimburse. 35 Comp. Gen. 183, 185 (1955). Consequently, we determined that to permit the charging of travel and transportation expenses to the appropriation current at the time the relocation was ordered would violate the language of 31 U.S.C. § 1502a, "the so-called bona fide need rule," which states that an appropriation limited in time for obligation is available only to pay "expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability." *See* 27 Comp. Gen. 25, 27 (1947). *See also* 31 Comp. Gen. 471, 472 (1952).

We have carefully reviewed our earlier cases and have concluded that they were wrong. It is now our view that an agency should charge the full amount of the reimbursable expenses against the appropriation current when the employee is issued travel orders.

As explained in more detail below, this position results from our recognition that the Government has incurred an obligation to pay relocation expenses at the time it transfers an employee.

The reasoning in our earlier decisions, that there was no obligation until the employee actually incurred reimbursable expenses, overlooked the fact that the relocation statutes and the implementing regulations create an obligation on the part of the Government to reimburse, within limits, whatever expenses the transferred employee incurs. For example, we have ruled that certain relocation benefits, such as reimbursement of allowable real estate expenses, are mandatory in nature and that an agency's attempt to deny approval of these expenses is ineffective. *See* 55 Comp. Gen. 613 (1976); B-161583, June 15, 1967. Thus, the Government's obligation is established when the employee is transferred. In this regard, upon the transfer of an employee in the interest of the Government, we have allowed reimbursement of residence transaction expenses even in the absence of the agency's prior authorization for the employee to incur these expenses. 55 Comp. Gen. 613; B-166681, July 9, 1969.

We recognize that until an employee actually incurs the relocation expenses the Government is not required to reimburse them. This, however, does not change our conclusion that the obligation to reimburse these expenses arises at the time the employee is ordered to relocate. In our opinion, regardless of when the expenses are actually incurred, the transfer of the employee is a bona fide need of the year in which he is ordered to transfer and the expenses must be charged against funds current in that year.

What constitutes a bona fide need of a particular fiscal year depends largely on the facts and circumstances of a particular case and there is no general rule applicable to all situations. 44 Comp. Gen. 395, 401 (1965). In this case it is clear that the need for the relocation of the employee and the resulting benefits and entitlements arises when the employee is ordered to be transferred, even though for a number of reasons beyond the agency's and employee's control certain relocation expenses may not be incurred until a fiscal year subsequent to the transfer. Accordingly, we conclude that there is a bona fide need for the relocation expenses in the fiscal year in which the employee is transferred.

We must address two other issues. The first is the statutory requirement that an amount may only be recorded as an obligation if there is documentary evidence of the expenses of travel under law. 31 U.S.C. § 1501(a)(7). In view of the mandatory nature of relocation expenses, we deem this statutory test to be met upon the issuance of valid travel orders to the transferred employee.

The second matter concerns the amount to be obligated. This presents no problem since this amount would not differ from the amount that agencies have been recording tentatively as obligations under the existing system, the estimated total costs of the relocation. *See* 35 Comp. Gen. at 185; OMB Circular No. A-34, para. 25.1. This method of obligation means that the amount recorded as obligated may not be the exact amount that is eventually spent; however, this is not unusual. Of course, agencies must obligate sufficient funds and, therefore, agencies should realistically estimate the probable reimbursement that may accrue to the transferred employee.[1]

In overruling our previous decisions in this area, of which the leading ones are 35 Comp. Gen. 183 and B-122358, August 4, 1976, we have considered the possibility that the current procedure may result in agencies inadvertently violating the so-called Antideficiency Act. 31 U.S.C. § 1341(a)(1)(B). Under the law an officer or employee of the United States may not commit the United States to make any payment in advance of an appropriation. The potential for violation exists because upon the transfer of the employee the agency commits itself to pay certain expenses, such as residence transaction expenses. These expenses, however, may not be paid for 2 or 3 years out of an appropriation not in existence when the agency committed itself to pay. This is, in effect, committing the Government to pay for an obligation or liability out of a future appropriation. *Cf.* 42 Comp. Gen. 272, 277 (1962). Indeed, it is theoretically conceivable that there will be no funds available when the expense is incurred, and yet we have deemed the reimbursement of the expense mandatory. Thus, by overruling our precedents and holding that the obligation is to be recorded against the appropriation current when the travel orders are issued, we eliminate the possibility of an Antideficiency Act violation.

Accordingly, we rule that for all travel and transportation expenses of a transferred employee, an agency should record the obligation against the appropriation current when the employee is issued travel orders. To the extent that prior cases are inconsistent with this ruling, those cases are overruled.

[B-216396.2]

Bids—Prices—Level Pricing Clause—Bid Responsiveness

In a situation where a bidder violates an invitation for bids' level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder. B-206127.2, Oct. 8, 1982; 60 Comp. Gen. 202; B-195520.2, Jan. 7, 1980; 54 Comp. Gen. 967; and 54 Comp. Gen. 476, are distinguished.

Matter of: Keco Industries, Inc., November 2, 1984:

Keco Industries, Inc., the second low bidder, has protested the award of a contract for air conditioners to ATACS Corporation

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[1] To ascertain these amounts, agencies should rely on past experience and refer to FTR, ch. 2 (Supp. 1, September 28, 1981, as amended).

under invitation for bids (IFB) No. DAA–J10–84–B–A182, issued by the Department of the Army Troop Support Command. Keco contends that ATACS' apparent low bid was nonresponsive due to a failure to bid certain preproduction units at the same price bid for the base quantity units, contrary to the terms of the solicitation, and therefore that the bid should have been rejected.

The protest was initially filed with this Office on September 13, 1984. By letter of October 4, Keco withdrew the protest. Shortly thereafter, Keco filed a motion for a preliminary injunction before the Federal District Court for the Eastern District of Virginia (Civil Action No. 84–1023–A) which, by order of October 12, granted ATACS' motion to intervene in the matter, denied Keco's motion for a preliminary injunction, and requested an advisory opinion from this Office.

We find Keco's position to be without legal merit.

Background

The IFB was issued on July 13, 1984, as a 2-year solicitation for the procurement of a total of 4,086 air conditioners. The solicitation was structured so that the first-year base requirement was for 583 production units (item 0001 AA) and 2 pre-production units (item 0001AB), with an option for the government to purchase an additional 585 units (item 0002). Under the first-year requirement, bidders were also to price various related technical manuals and test and validation reports (items A001 through A011). The second-year base requirement was for 1,458 production units (item 0003 AA) with an option to purchase an additional 1,458 units (item 0004). Bids were to be submitted on a unit price basis.

Under the terms of the solicitation, bidders were required to submit the same unit prices for the base quantities for the 2 years, that is, to level price those units, but could submit varying unit prices for the option quantities for the 2 years. By a written clarification message of July 26, which was never formally incorporated into the solicitation by amendment, the contracting officer cautioned bidders that a failure to level price the preproduction units would render a bid nonresponsive. The solicitation also provided that bids were to be evaluated for purposes of award by adding the total price for all option quantities to the total price for the base quantities.

Bids were opened on August 22. ATACS' bid was low, with Keco's second low, as follows:

	Item No.	Quantity	Unit Price	Total
		First Program Year		
ATACS	0001 AA	583	$4,450	$2,594,350
	0001 AB	2	18,000	36,000
	A001-A011			153,500
	0002	585	4,150	2,427,750
Total				5,211,600
Keco	0001 AA	583	4,491	2,618,253
	0001 AB	2	4,491	8,982
	A001-A011			18,007
	0002	585	4,491	2,627,235
Total				5,272,477
		Second Program Year		
ATACS	0003 AA	1,458	4,450	6,488,100
	0004	1,458	4,150	6,050,700
Total				12,538,800
Keco	0003 AA	1,458	4,491	6,547,878
	0004	1,458	4,491	6,547,878
Total				13,095,756
		Total Multiyear Requirements		
ATACS				17,750,400
Keco				18,368,233

From the above, it can be seen that ATACS failed to level price item 0001 AB, the preproduction units. The Army, however, concluded that this failure did not make the firm's bid nonresponsive, and awarded ATACS the contract on September 11; the Army then exercised the first-year option on Sepember 22.

Protest and Analysis

Keco urges that it was prejudiced by the Army's acceptance of ATACS's allegedly nonresponsive bid. In this regard, the firm asserts that it was the low, responsive bidder for the first-year requirement, although admittedly not low for the entire contract period. Keco believes that had it been permitted to bid in the same manner as ATACS, that is, by submitting an unlevel bid, it might have been able to displace ATACS as the low bidder. We do not agree.

In cases dealing with a bidder's failure to level price [1] its bid, the determinative issue is whether or not this deviation worked to the prejudice of other bidders for the award. *ABL General Systems Corporation*, 54 Comp. Gen. 476 (1974), 74-2 CPD ¶ 318. We held in *ABL* that a submitted bid was nonresponsive where it contained a unit price for a base quantity and a higher unit price for an unevaluated option quantity in violation of an IFB provision that the option unit price was not to exceed the unit price for the base quantity. We found this deviation to be prejudicial because, although ABL was the low bidder on the base quantity, if the second low bidder had also been able to unlevel its bid by increasing the unit price for the option quantity, then the second low bidder conceivably could have reduced its unit price bid for the base quantity with the dollar reduction being added to the unevaluated option price. Since the IFB provided that evaluation was only to be made on the base quantity price, the second low bidder, whose bid price already was close to ABL's, could then have become the low bidder. *Id.* at 479.

In *Keco Industries, Inc.*, 54 Comp. Gen. 967 (1975), 75-1 CPD ¶ 301, Keco's multiyear bid deviated from the requirement that like items be priced the same for each program year, because Keco had submitted a higher unit price for the first-year requirement than it did for the second- and third-year requirements that it had included certain nonrecurring costs in the first-year unit price. The second low bidder protested that Keco's bid was nonresponsive because Keco had failed to level price the first-year quantity. However, we noted that Keco's bid was significantly low on all alternatives: the first program year (including the nonrecurring costs), the second program year, the third program year, and the aggregate amount. We saw no prejudice occasioned by Keco's failure to level price the first-year quantity because the second low bidder could not have become low if it had been permitted to bid in a like manner. *Id.* at 970.

However, in *Keco Industries, Inc.*, B-195520.2, Jan. 7, 1980, 80-1 CPD ¶ 17, we held that the agency's rejection of the firm's bid as nonresponsive was proper where Keco had telegraphically reduced its unit prices for particular first-year multiyear requirements prior to bid opening, but had left the second-year unit prices for the same items unchanged, thereby violating the IFB provision that unit prices for the same items had to be identical for the 2 program years. We found the possibility of prejudice to other bidders in this case because of the closeness of the bidding—Keco's evaluated bid, considering only the items that had been reduced in the first-year, was 5 percent lower than the awardee's bid on the

[1] The purpose of a level pricing provision is to prevent bidders from lowering their prices in evaluated portions of the bid and inflating their prices in unevaluated portions to the government's detriment.

first year, 2 percent higher on the second year, and less than 2 percent lower in the aggregate. For the other items, Keco was 6 percent lower on the first year, 1 percent lower on the second year, and 4 percent lower overall. We concluded that Keco's unleveled bid was nonresponsive and therefore properly rejected.

We held in *Sentinel Electronics, Inc., et al.*, 60 Comp. Gen. 202 (1981), 81-1 CPD ¶ 52, that a bid was properly rejected where, although the bidder literally complied with the IFB's level option pricing provision, a lump sum price reduction offered for the base quantity had the potential for prejudice because it effectively reduced the protester's per unit cost for the base quantity substantially below that for the unevaluated option quantity, thereby circumventing the level pricing requirement. We noted the possibility that other bidders effectively could have reduced their base quantity unit prices below that of the protester if they had been able to offer the same lump sum price reduction as the protester did. Therefore, we concluded that the protester's bid was properly rejected as nonresponsive, even though it was apparent that the protester had not meant to violate the level option pricing provision.

In *Numax Electronics Inc.*, B-206127.2, Oct. 8, 1982, 82-2 CPD ¶ 317, a situation similar to that in *ABL, supra*, we held that Numax's bid was properly rejected as nonresponsive where the firm had violated the level option pricing provision by offering the same unit price for the option quantity as it did for the base quantity only if the agency exercised the entire option; Numax had increased the per unit option price for progressively smaller increments of the option quantity. We emphasized that the determinative issue was not that Numax had violated the level option pricing provision, but whether this deviation had prejudiced the other bidders. We concluded that there was indeed the possibility of prejudice because, although Numax's bid was low in the aggregate, it was conceivable that the second low bidder could have underbid Numax on the base quantity with the dollar reduction being added to its option price if it had been allowed to violate the level option pricing provision as well. Since the IFB provided that evaluation was to be made on the price of the base quantity only, the second low bidder thus could have become the apparent low bidder.

In the present matter, we find essential differences in the structuring of the IFB from the structuring of the solicitations in these prior cases. Significantly, there was no level option pricing provision included in this IFB. Clause H3(b.) provided that:

> * * * Varying prices may be offered for option quantities depending on the quantities actually ordered and the date or dates when ordered.

Clause H5(6) provided that:

> The unit price of each item in the multiyear requirements shall be the same for all program years included therein.

Therefore, bidders had to offer the same unit prices for items 0001 AA and 0003 AA, the base quantities for the 2 years, but could offer varying unit prices for items 0002 and 0004, the option quantities. ATACS' bid for the above items was properly made, the firm bidding a unit price of $4,450 for the 2-year base quantities and $4,150 for the 2-year option quantities. The only issue, then, is whether ATACS' failure to level price the preproduction units in the first year is analagous to those cases where a true level option pricing provision was violated to the prejudice of other bidders.

As indicated previously, the contracting officer informed bidders by means of a July 26 clarification message that clause H5(6) required that the unit price for the preproduction units had to be the same as that for each item in the multiyear requirements, and that a failure to level price the preproduction units would render the bid nonresponsive.

ATACS alleges that it never received this message, and correctly observes that the message was never incorporated into the solicitation by means of a formal amendment. Nevertheless, we will analyze the bids to see whether or not this unleveling of ATACS' price for the preproduction units may have worked to the prejudice of other bidders. Our rationale is that, irrespective of the July 26 message, clause H5(6) seemingly indicates that the two preproduction units, as they are part of the base quantity, are to be priced the same, the interpretation reached by the contracting officer.

A key point here is that, unlike the situation in previous cases such as *ABL, Sentinel Electronics,* and *Numax, supra,* option prices submitted under this solicitation were evaluated for purposes of award. Clause M5(a.) specifically provided that:

> Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of options will not obligate the Government to exercise the option or options.

Therefore, under the evaluation scheme, award would only be made to that bidder whose total price for the multiyear requirements, including the option quantities, was low.

We fail to understand Keco's allegation that the firm was low for the first year. It is true that Keco's bid was low in the first year as to the combined prices for the base quantity, the preproduction units, and the technical materials,[2] but that fact is irrelevant because the firm's price for the option quantity was also evaluated.[3] Consequently, Keco's actual total bid for the first-year requirement, which must include the option quantity prices, was $5,272,477 as opposed to ATACS' bid of $5,211,600, a difference of $60,877. For the second year, again including both the base and option quantity prices, Keco's total bid was $13,095,756 against $12,538,800 for ATACS, a difference of $556,956. In the aggregate,

[2] For these 3 items Keco's bid was $2,645,242 versus ATACS' bid of $2,783,850 for the same items.

[3] We note that evaluated options are included in a solicitation with the expectation that they will be exercised. Here, the first-year option was in fact exercised shortly after award.

Keco's total bid for the 2 program years was $18,368,233 versus $17,750,400 for ATACS, a difference of $617,833 in ATACS' favor.

Keco argues by way of affidavit from its president that the firm would have increased its unit prices for the first-year requirement had it been able to submit an unlevel bid. Keco contends that this unleveling would have resulted in an increase of payments by the government during the initial stage of the procurement, thereby increasing the firm's "cash flow" so as to enable it to reduce its unit prices for the second year. Accordingly, Keco believes that this manner of bidding would have enabled it to bid a lower aggregate price than ATACS. We see no merit in the argument.

We believe that Keco's statements as to how it would have structured its bid had it been allowed to unlevel its unit prices are purely speculative, and self-serving. More importantly, the determinative issue in this type of case is, as we have indicated, whether the other bidders could have lowered their bids below that of the offending bidder if they had been permitted to unlevel their prices in the same manner. See *Keco Industries, Inc.*, 54 Comp. Gen., *supra*, at 970. The only unleveling done by ATACS was to price its preproduction units at $18,000 each. Thus, under the standard to determine prejudice, Keco would only be found to be harmed by ATACS' unleveling if Keco possibly could have become low by bidding "in the same manner," that is, by also unleveling its price for the preproduction units.

We fail to see the possibility of prejudice to Keco occasioned by ATACS' limited deviation from the level pricing requirement. The effect of ATACS' unleveling of its price for the preproduction units only increased its bid for that item by $27,100, which is a *de minimis* amount given the $617,833 difference between the firms' total bids for the multiyear requirements. In our view, it is inconceivable that Keco could have overcome this difference if it had been allowed to unlevel its price for the preproduction units as well, and we note that the firm does not even attempt to suggest that it could have done so.

Accordingly, since we fail to find any possible prejudice to Keco, we believe the Army acted properly in accepting ATACS' low bid and in awarding the firm the contract.

[B-214405, *et al.*]

Contracts—Damages—Liquidated—Actual Damages *v.* Penalty—Price Deductions—Reasonableness

Protester, alleging a liquidated damages provision imposes a penalty, must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. A solicitation provision shown to authorize deductions for an entire lot of custodial services, based on the contractor's unsatisfactory performance of only a portion of the tasks, imposes a penalty if it authorizes deductions without regard to what proportion of the services renders the entire lot unsuitable for the government's purpose.

Matter of: Environmental Aseptic Services Administration, November 7, 1984:

Environmental Aseptic Services Administration (EASA) protests that five invitations for bids (IFBs), issued by the General Services Administration (GSA) for custodial services, contain provisions imposing allegedly unfair monetary deductions for defective performance.[1]

We deny the protests.

Each of the solicitations contains a table, captioned "Criteria for Deductions," that lists broad categories of services covered by the specifications, and states an amount to be deducted for each category of services when the contractor unsatisfactorily performs a specified unit, or lot, of those services. For example, one specification lists a $1.23 deduction for the unsatisfactory cleaning of a toilet fixture, and a $3.60 deduction for the unsatisfactory cleaning of 1000 square feet of workroom space. In addition, the solicitations contain the following clause:

Application of Criteria for Deductions

A. *Toilet Cleaning.* In instances where toilet rooms are not satisfactorily cleaned or policed and serviced as determined by the contracting officer's designated representative, deductions shall be made for the entire room at the rate indicated in the Criteria for Deductions . . . multiplied by the number of fixtures in the toilet room (fixtures are water closets, urinals, and washbasins).

B. *Room Cleaning.* In instances where room cleaning has not been satisfactorily performed, or where any portion or portions of work have been omitted or inadequately performed, a deduction for the entire room area shall be made at the rate indicated in the Criteria for Deductions. . . . (NOTE: In large open areas, the building support columns or other obvious dividers should be considered in determining the composition of an individual office when deductions are being made.)

The protester's contention that the solicitations impose penalties relates to the fact that the provisions apparently authorize deductions for an entire room based on the contractor's unsatisfactory performance of a portion of the room. (The protester does not challenge the actual rates of deductions listed.)

The challenged provisions, along with the Criteria for Deductions, establish a system of liquidated damages—that is, fixed amounts the government can recover from the contractor upon proof of violation of the contract, and without proof of the damages actually sustained. *Environmental Aseptic Services Administration*

[1] The solicitation numbers and our respective docket numbers are listed below:

GSA Solicitation No.	GAO Docket No.
GS-07B-21621	B-214405
GS-07B-21636	B-214573
QPR-9PPB-84-01278	B-214575
GS-07B-21624	B-214606
GS-04B-84622	B-214790

and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194. The Federal Acquisition Regulation (FAR), like the Federal Procurement Regulations (FPR) that it superseded, requires that a rate of liquidated damages be reasonable in light of the solicitation's requirements since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR, § 12.202(b), 48 Fed. Reg. 42,102, 46,160 (1983) (to be codified at 48 C.F.R. § 12.202(b) and basically restating FPR, 41 C.F.R. § 1-1.315-2(c) (1983)).

We will review a protest that a solicitation's liquidated damages provisions impose a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. *Environmental Aseptic Services Administration and Larson Building Care Inc., supra.* The spectre of incurring substantial penalties might discourage potential bidders from competing, or cause others not to offer as low a price as they might otherwise be willing to offer. In this respect, the protester did not submit a bid under any of the solicitations (although it is not clear that the alleged penalties, by themselves, prevented the protester from doing so).

Before we will rule that a liquidated damages provision imposes a penalty, however, the protester must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. See *International Business Investments, Inc.*, B-213723, June 26, 1984, 84-1 CPD ¶ 668. The contracting agency is most familiar with the circumstances of its procurements, and our standard of review has been fashioned to take this into account; the protester, therefore, bears the burden of showing that the liquidated damages rate is arbitrary or otherwise unreasonable. *Eldorado College*, B-213109, Feb. 27, 1984, 84-1 CPD ¶ 238.

Here, the protester complains about two features of the liquidated damages provisions, which the protester contends establish that the deduction rates are unreasonable. Those are, first, that there is no variation between the amounts deductible for a marginal failure and a complete failure within a particular lot—in either case, a deduction may be taken for the entire room—and second, as a consequence, the deduction procedure deprives the contractor of credit for partial or substantial performance.

We do not believe that liquidated damages are invalid, *per se*, simply because the rates of deductions fail to vary in proportion to the extent of inadequate performance. Rather, we believe that a liquidated damages scheme properly may result in a deduction for an entire lot of services based on the contractor's failure to satisfactorily perform only a portion of the component tasks, if the nature of the deficiencies renders the lot unsuitable for the government's purposes. See *Environmental Aseptic Services Administration and Larson Building Care Inc., supra;* see also *Orlando Wil-*

liams d/b/a Orlando Williams Janitorial Service, Armed Services Board of Contract Appeals (ASBCA) Nos. 26,099, 26,872, Nov. 28, 1983, *reprinted in* 84-1 B.C.A. ¶ 16,983 (CCH 1984).

The solicitation provision authorizing a deduction for an entire toilet room where the rooms "are not satisfactorily cleaned or policed and serviced" is not inconsistent with this standard. The provision leaves a determination of what proportion of the tasks renders the entire room unsatisfactory to the inspector's discretion, which presumably will be exercised in good faith and in compliance with procurement laws and regulations. If GSA administers the provision by taking deductions without regard to whether the deficiencies are of such a proportion as to render the toilet room unsuitable for the government's purpose, that would involve a matter of contract administration, see *United Food Services, Inc.*, B-215538, Oct. 23, 1984, 84-2 CPD 450, which the contractor could challenge pursuant to the contract's disputes clause, but not before this Office.

The room-cleaning provision goes further than the toilet-cleaning one, however, stating that in instances "where room cleaning has not been satisfactorily performed, or where any portion or portions of work have been omitted or inadequately performed, a deduction for the entire room shall be made. . . ." This could be interpreted as authorizing a deduction for a large room containing, for example, 20 work stations because of the contractor's failure to clean one station adequately. Absent circumstances where the unsatisfactory cleaning of one station would render the entire room unsuitable for the government's purpose, the provision would impose damages without regard to the proportion of satisfactory performance and deny the contractor credit for substantial performance. We believe that such an application of the provision would result in a penalty. In this respect, the ASBCA has held that such an "all or none" inspection procedure, employed to inspect rooms serviced under a custodial contract, imposes an unfair and unreasonable penalty. See *Orlando Williams d/b/a Orlando Williams Janitorial Service, supra; Clarkies, Inc.*, ASBCA No. 22,784, Aug. 13, 1981, *reprinted in* 81-2 B.C.A. ¶ 15,313 (CCH 1981). While the threat of a penalty might serve as a spur to satisfactory performance, it is well-settled that such a penalty is improper and unenforceable. *Priebe & Sons v. United States*, 332 U.S. 407 (1947).

GSA insists that the intent of the room-cleaning provision is to permit deductions for entire rooms (or areas) where inspection of the rooms reveals performance defects that render the entire rooms defective. We do not think that this intention is manifestly or reasonably apparent from the language of the solicitation and, by separate letter, we are recommending to the Administrator of General Services that future solicitations be amended to reflect the agency's intention clearly in order to prevent the adverse effect a penalty provision can have on competition.

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We do not believe, however, that the defect in the room-cleaning provision is of sufficient magnitude to require correction of the current solicitations, under each of which bids already have opened or a contract awarded. Under such circumstances in the past, we have advised the contracting agency that it should avoid taking unreasonable deductions in administering the contract; the presence of penalty provisions by themselves, however, did not pose an obstacle to a valid award. See *Environmental Aseptic Services Administration and Larson Building Care Inc., supra*; *Linda Vista Industries, Inc.*, B-214447, *et al.*, Oct. 2, 1984, 84-2 CPD ¶ 380. We believe the same result should obtain here, especially since the record shows that GSA obtained adequate competition under each solicitation. See *Linda Vista Industries, Inc., supra.*

We therefore deny the protest, but are recommending revision of future solicitations.

[B-215244]

Officers and Employees—Transfers—Real Estate Expenses—Advertising Costs—House Sale

A transferred employee attempted to personally sell his residence at his old duty station and incurred advertising expenses. Because he was unsuccessful, he placed the sale in the hands of a real estate agent who did sell the property. A commission paid to the agent on that sale was reimbursed to the employee, but prior advertising costs were disallowed. On reclaim, the disallowance is sustained. When a separate advertising cost is incurred which does not result in the sale of a residence, para. 2-6.2 of the Federal Travel Regulations (FTR) precludes reimbursement.

Officers and Employees—Transfers—Real Estate Expenses—Determination of Pro Rata Reimbursement—Relationship of Acreage to Residence Site

A transferred employee owned a residence on a 10-acre tract at his old duty station. In order to facilitate sale, the property was divided into two parcels and sold to two separate buyers. Real estate expenses of the parcel containing the residence were reimbursed to employee, but expenses associated with the parcel not containing the residence were disallowed. On reclaim, the disallowance is sustained. When separate purchasers of divided property are involved, a parcel of land other than that upon which the residence is situated is not considered as being reasonably related to the residence as required by FTR para. 2-6.1f.

Transportation—Household Effects—Weight Limitation—Excess Cost Liability—Actual Expense Shipment—Computation Formula

A transferred employee shipped household goods under the actual expense method. The goods weighed in excess of the maximum allowable. Under FTR para. 2-8.3b(5), the employee is liable for excess weight and delivery costs as a percentage of the total expenses associated with that shipment, based on the ratio of the excess weight to the total weight of the goods shipped. These regulations have the force and effect of law and may not be waived or modified, regardless of circumstances.

Matter of: John A. Byrd—Real Estate and Transportation of Household Goods Expenses, November 13, 1984:

This decision is in response to a request from an authorized certifying officer, Internal Revenue Service, Southwest Region, Department of the Treasury. The matter concerns the entitlement of one of its employees, Mr. John A. Byrd, to be reimbursed certain relocation expenses and excess weight and delivery charges for his household goods shipment incident to a permanent change-of-station transfer in August 1982. For reasons set forth below, we hold that Mr. Byrd may not be reimbursed for the advertising or closing costs on the parcel of land not containing his residence, and he is liable for the charges for excess weight of household goods with the modification of the computation set out below.

BACKGROUND

Mr. Byrd, an employee of the Internal Revenue Service, Southwest Region, was transferred from Dallas, Texas, to Durango, Colorado, effective August 23, 1982. At that time, he owned and occupied as his residence a house on 10 acres of land in Canton, Texas. Immediately following receipt of notice of his impending transfer, he attempted to sell his home and all surrounding property without the assistance of a real estate agent. As a result, he incurred advertising expenses in the amount of $211.62. Because he was unsuccessful, he listed the property with a real estate agent. In order to facilitate the sale, the real estate agent divided the property into two parts. The first part was a 2.136-acre parcel containing Mr. Byrd's residence. The second parcel was all of the remaining acreage. Both parts were sold on or about August 22, 1983, to two separate buyers.

Mr. Byrd was reimbursed for the real estate expenses incurred incident to the sale of the 2.136-acre parcel, but the expenses of selling the second parcel were disallowed, based on our decision B-171493, February 2, 1971. In addition to that disallowance, the agency also disallowed reimbursement for the advertising expenses incurred by Mr. Bryd prior to placing the property in the hands of the real estate agent. This disallowance was based on provisions of the Internal Revenue Manual (IRM), 1763, section 593(1)(b); paragraph 2–6.2b of the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR); and 46 Comp. Gen. 812 (1967). Mr. Byrd has disputed the disallowance of those two items.

The third expense item in dispute is the charge assessed against Mr. Byrd for the excess weight of his household goods shipment and extra delivery expense incurred. Based on provisions in the IRM and our decision B-199780, February 17, 1981, the agency determined that the excess weight and delivery charges owed by him were $548.49. Mr. Byrd determined by his own computation that he owed only $315.22, from which he deducted $25 for damages claimed to have been done to his personal property by the movers and reimbursed the agency $290.22. The agency not only disagrees with his computation, but claims that any such loss or damage claim which he had must be made against the moving company.

DECISION

Advertising expenses

Paragraph 2-6.2 of the FTR, which governs reimbursable and nonreimbursable real estate expenses, provides:

a. *Broker's fees and real estate commissions.* A broker's fee or real estate commission paid by the employee for services in selling his residence is reimbursable, but not in excess of rates generally charged * * * in the locality of the old official station. * * *

b. *Other advertising, selling, and appraisal expenses.* Costs of newspaper, bulletin board, multiple-listing services and other advertising for sale of the residence at the old official station are reimbursable if the employee has not paid for such services in the form of a broker's fee or real estate agent's commission. * * *

In our decision 46 Comp. Gen. 812 (1967), we considered a situation similar to that involved in the present case, where the employee incurred advertising expenses in an unsuccessful attempt to personally sell his residence before securing the services of a broker. We ruled there that where an employee is reimbursed a broker's fee or real estate commission in connection with the sale of his residence, which fee includes advertising costs, any other advertising expenses incurred by the employee may not be reimbursed. See also B-178531, July 16, 1973.

While Mr. Byrd has asserted that his purpose for attempting to sell his residence himself was to save himself and the Government the commission expense, the focus of the quoted FTR provisions is the reimbursement of expenses incurred in the successful selling of a residence. Since the real estate commission charged for the consummation of the residence sale apparently included advertising expenses, there is no basis upon which additional advertising expenses may be allowed in the present case.

Residence sale expense

Paragraph 2-6.1f of the FTR provides in part:

f. *Payment of expenses by employee-pro rata entitlement.* * * * The employee shall also be limited to pro rata reimbursement when he/she sells or purchases land in excess of that which reasonably relates to the residence site.

Mr. Byrd contends that when he purchased the house at his old station as his residence, it was on the 10 acres that he sold. Further, that even though the property was sold in two parts to separate purchasers, it was done in that manner only to facilitate the sale, and both tracts were sold at the same closing.

In our decision 54 Comp. Gen. 597 (1975), we set forth guidelines for use by agencies to determine the amount of property which "reasonably relates to the residence site" for which reimbursement of real estate expenses may be made. These guidelines, while not exhaustively stated therein, include examination of zoning laws appraisal by experts and consideration of the location and topography of the land, as ways of establishing reasonableness of the property size being sold.

In B–171493, February 2, 1971, we concluded that where an employee divided his property into separate parcels for sale, the parcels other than the lot on which the house was situated did not relate to the residence site. In a line of decisions following 54 Comp. Gen. 597 (1975), we recognized that where separate parcels were conveyed to an individual purchaser, the existence of separate transactions gave rise to the rebuttable presumption that the parcel not containing the residence was excess, thus warranting consideration of the factors discussed in 54 Comp. Gen. 597 (1975). For example, in *William C. Sloane,* B–190607, February 9, 1978, we considered a claim of an employee who sold a 2-acre parcel on which the residence was situated and 3 days later sold the adjacent 5-acre parcel to the same buyer. Based on the considerations outlined in 54 Comp. Gen. 597, the agency determined that a first parcel was deemed an adequate building site in the area and that the remaining property sold could be developed separately for residential purposes. We sustained the agency determination and concluded that only the commission on the parcel of property containing the residence was reimbursable. In *W. Carl Linderman,* 60 Comp. Gen. 384 (1981), the presumption arising from the sale of property in two parcels was rebutted based upon the factors set out in 54 Comp. Gen. 597 (1975).

In cases where the separate parcels are sold to separate purchasers, the analysis set out in 54 Comp. Gen. 597 (1975) will generally lead to a finding that the lot without the residence is excess. See *Franklin J. Rindt,* B–199900, February 10, 1981, and *Harold J. Geary,* B–188717, January 5, 1978. While the "presumption of excess" analysis was not explicitly applied in these cases, the results would have been the same if it had been used.

In the present case, both the 2.136-acre parcel containing the house as well as the remaining acreage satisfied the minimum lot size as a residential site. Since each parcel was sold to a separate purchaser, the situation in the present case is indistinguishable from that in the *Rindt* and *Geary* cases. Therefore, we concur with the agency determination that the parcel without the house was excess and that the expenses related to its sale were not reimbursable.

Excess weight and delivery charges

The version of paragraph 2–8.2a of the FTR, in effect during the period in question, provided that the maximum weight allowance for household goods authorized for employees with immediate families was 11,000 pounds.[1] When the actual expense method of shipment is used, paragraph 2-8.3b(5) prescribes the procedure to be followed in determining the charges payable by the employee for the excess weight. That paragraph states:

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

In our decision *Brown and Schmidt,* B-199780, February 17, 1981, reconsidered and affirmed in *William A. Schmidt, Jr.,* B-199780, April 8, 1982, 61 Comp. Gen. 341, we stated that when the actual expense method of shipment is used, the excess weight charge computation provided in the above paragraph is predicated on the actual net excess weight as a percentage of the *total charges* for the shipment. Charges that would be assessed even if the shipment did not exceed the limitation are to be included in the total charges. Citing to *Ronald E. Adams,* B-199545, August 22, 1980, we further stated therein that the FTR's have the force and effect of law and may not be waived or modified regardless of the existence of any extenuating circumstances.

As the foregoing relates to Mr. Byrd's case, we find the agency's computation method as well as Mr. Byrd's computation method to be in error. The actual weight of Mr. Byrd's household goods which were shipped totaled 12,980 pounds, or 1,980 pounds over the maximum allowable. The total cost of that shipment, including storage and delivery charges, was \$3,331.21. This results in an excess weight charge of \$508.15, computed as follows:

$$\frac{\text{excess weight}}{\text{total weight}} = \text{ratio}$$

total charges × ratio = employee's share

$$\frac{1{,}980}{12{,}980} = 0.1525423$$

\$3,331.21 × 0.1525423 = \$508.15

[1] That maximum weight limitation was increased to 18,000 pounds, effective November 14, 1983. See General Services Administration Bulletin FPMR A-40, Supplement 10, March 13, 1984.

With regard to the agency statement that Mr. Byrd improperly claimed a $25 credit from the payment he made for damage to his personal property, we concur. The provisions of FTR paragraph 2-8.2e and IRM 1763, section 564, provide that the limitations on the Government's liability for loss or damage are contained in the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. § 3721 (1982)). In situations where the Government is not responsible for the loss and damage, the employee is to seek redress from the one who allegedly caused the loss. In this case, if fault exists, it would be the carrier.

In summary, Mr. Byrd is not entitled to be reimbursed for the expense of advertising the sale of his residence and is not entitled to be reimbursed for the real estate expenses which relate to the sale of the parcel of land which did not contain his residence. He is, however, only to be charged $508.15 for the cost of excess weight and extra delivery and may not be credited the $25 for his loss or damage to his shipment. Since he has already paid $290.22, recovery of an additional $217.93 is to be sought from him.

[B-216152.2]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of Fact or Law—Not Established

Protester requesting reconsideration of a General Accounting Office decision must present a detailed statement of the factual and legal grounds warranting reversal or modification, specifying any errors of law or information not previously considered. When the only basis for reconsideration cited by the protester is an unsupported allegation of bad faith on the part of agency officials, the request for reconsideration will be denied.

Matter of: Janke and Company, Incorporated—Request for Reconsideration, November 13, 1984:

Janke and Company, Incorporated, requests reconsideration of our decision in *Janke and Company, Inc.*, B-216152, Aug. 30, 1984, 84-2 CPD ¶ 242, dismissing Janke's protest against the decision of the Department of the Navy to award a contract to the Small Business Administration (SBA) and the proposed award of a subsequent subcontract to JWM Corporation pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). We affirm our prior decision.

Section 8(a) authorizes the SBA to enter into contracts with any government agency having procuring authority and to arrange for performance by letting subcontracts to socially and economically disadvantaged small business concerns.

In its initial protest, Janke alleged a possible failure to prepare an adequate assessment, as required under SBA's Standard Operating Procedures (SOP), of the impact on firms not in the 8(a) program of reserving the contract for the program. We held that because SBA's SOP merely provide internal policies and guidelines that complement the SBA regulations implementing the 8(a) program at 13 C.F.R. part 124 (1984), we would not review SBA's compliance with those internal procedures absent a showing of possible fraud or bad faith. Since Janke failed to allege fraud or bad faith, we dismissed the protest.

In its request for reconsideration, Janke now alleges that SBA and the Navy have acted in bad faith in setting aside the procurement for the 8(a) program. In particular, Janke refers to a letter from SBA it received on or about August 21, 1984, and in which SBA informed Janke that since the procurement was considered a first-time buy there could be no adverse impact on Janke and thus there was no need for an impact study. Janke contrasts this position with a June 19 letter from SBA assuring Janke that SBA would conduct an impact study prior to accepting a contract and with a July 19 letter from the Navy advising a member of Congress of the SBA statement. Janke argues that this vacillation in regard to the impact study, when considered with the allegedly unannounced agency decision to set aside this procurement for the 8(a) program even though it had been previously synopsized in the Commerce Business Daily, demonstrates bad faith.

While Janke may believe that SBA and the Navy were acting solely to deprive Janke of an opportunity to compete, it has submitted no evidence that this was in fact the case. Rather, it essentially asks that we infer bad faith from the actions of the SBA and the Navy. However, inference and supposition is not sufficient. See *Ebonex, Inc.*, B-213023, May 2, 1984, 84-1 CPD ¶ 495 at 4. Consequently, Janke's request for reconsideration falls short of making the requisite showing of possible bad faith.

The request for reconsideration is denied.

[B-214458.3; B-214458.4]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Additional Evidence Submitted—Available But Not Previously Provided to GAO

Analyses presented by an agency in its request for reconsideration of a decision sustaining a protest against the determination of the agency to continue to perform services in-house rather than by contracting out for the services will not be considered since the agency declined to present any comments or analyses at the time of the protest and the information which forms the basis for the analyses was available at that time.

General Accounting Office—Jurisdiction—Contracts—In-House Performance, *v.* Contracting Out—Cost Comparison—Adequacy

Neither Office of Management and Budget (OMB) Circular No. A-76 nor agency regulations preclude a protest to General Accounting Office from an agency's administrative review of a contractor's appeal of an in-house cost estimate.

General Accounting Office—Recommendations—Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Recalculation of Government's Cost

The provision in OMB Circular No. A-76 concerning independent preparation and confidentiality of government in-house cost estimate does not preclude GAO from recommending, pursuant to a protest, that the agency recalculate the cost of in-house performance.

Matter of: Griffin-Space Services Company—Reconsideration, November 14, 1984:

Griffin-Space Services Company (Griffin) and the Department of the Navy (Navy) request reconsideration of our decision in *Griffin-Space Services Company,* B-214458.2, Sept. 11, 1984, 84-2 C.P.D. ¶ 281, where we sustained Griffin's protest and recommended corrective action.

Navy's Request

We sustained Griffin's earlier protest against the Navy's determination that the Navy could perform utilities plant operation and maintenance for a 3-year period at the United States Naval Submarine Base, New London, Connecticut, at a lower cost than Griffin, based on a comparison of Griffin's low bid under a two-step formally advertised solicitation, with adjusted cost estimates prepared by the Navy. The Navy did not rebut Griffin's allegation that the Navy relied on inaccurate and understated historical costs in developing its cost estimates and violated the ground rules for the cost comparison.

In a letter dated April 24, 1984, responding to our request for an agency report on Griffin's protest to GAO, counsel for the Navy commented that its position is that it is precluded from commenting on the issues raised in the protest. That letter stated:

> The protest involves the administrative review made by the Commander, Submarine Force, U.S. Atlantic Fleet, of the cost comparison ancillary to the solicitation. Under DOD 4100.33, paragraph 9.c., the administrative review is not subject to our negotiation, arbitration, or agreements with affected parties. Therefore we are precluded from commenting on the issues raised in the protester's protest, or on the propriety of the final decision rendered under the administrative review.

The Navy's request for reconsideration states that while the Navy was constrained from commenting directly regarding the Navy's final administrative determination of February 3, 1984, denying Griffin's appeal against the results of the cost comparison, there is no such constraint regarding GAO's September 11, 1984, decision.

The Navy, citing Office of Management and Budget (OMB) Circular No. A-76 (Circular) and regulations, basically argues that the GAO does not have jurisdiction to examine the results of a cost comparison after an administrative review has occurred and, therefore, the Navy does not have to defend through a report to the GAO the results of an administrative review. We do not agree.

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We have held that we will not review cost comparisons *until* the administrative review process has been completed. See *Halifax Engineering, Inc.*, B-214379, Mar. 14, 1984, 84-1 C.P.D. ¶ 308. However, although we have recognized that the underlying determination involved in cost comparisons, whether work should be performed in-house by government personnel or performed by a contractor, is one which is a matter of executive branch policy and not within our protest function, we have stated that where, as here, a contracting agency utilizes the procurement system to aid in its determination of whether to contract out, by spelling out in a solicitation the circumstances under which a contractor will or will not be awarded a contract, a protest from a bidder alleging that its bid has been arbitrarily rejected will be considered by our Office. See *Jets, Inc.*, 59 Comp. Gen. 264 (1980), 80-1 C.P.D. ¶ 152. While the finality provisions of the Circular and the regulations preclude further administrative review, we do not believe they can be interpreted to preclude an appeal to our Office in appropriate circumstances.

Our initial decision was based on the record available to us at that time. The Navy declined to comment on the protester's statements concerning the cost comparison and the administrative review which indicated that the cost comparison had been conducted in a faulty manner. The Navy's attempt to now support the propriety of the cost comparison will not be considered since the Navy could have presented its analyses at the time of the protest, but chose not to. See *Development Associates, Inc.—Reconsideration*, B-205380.2; B-205380.3, Mar. 28, 1983, 83-1 C.P.D. ¶ 313. Our procedures do not permit piecemeal presentation of information to our Office and we have held that parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. *Development Associates, Inc.—Reconsideration*, B-205380.2; B-205380.3 *supra*.

The Navy's request for reconsideration is denied.

Griffin's Request

Griffin requests that we reconsider our recommendation that the Navy recalculate the cost of in-house performance and thereafter make a second comparison with Griffin's bid. Griffin argues that permitting the Navy to recalculate its costs after learning Griffin's bid price would be tantamount to giving the Navy a second chance to retain the contract in-house. Griffin contends that this procedure is in conflict with the provisions of the Circular which require that the government must prepare its bid, as would any other contractor, independently and without the knowledge of the prices of other bids. In support of its position, Griffin cites the Circular, part IV, chapter I, paragraph "g," which states:

g. The confidentiality of all cost data, including the contract price, must be maintained to ensure that Government and contract cost figures are completely independent. For example, the contracting officer will not know the in-house cost estimate until the cost comparison is accomplished at bid opening date.

Griffin therefore requests that we recommend that the Navy award the contract in question to Griffin without permitting the Navy a chance to first recalculate its costs.

We believe that the above-quoted language applies only to the initial bid opening procedure and not to the results of cost comparisons which are appealed. In fact, chapter II, section (D)(6), of the March 1979 Cost Comparison Handbook (supplement No. 1 to the Circular), which is applicable to this procurement, allows for changes to be made in the government's estimate after the cost comparison has been conducted where significant discrepancies are noted during the review process. We have recognized on prior occasions the propriety of permitting the government to recalculate its estimate after bids are exposed where significant errors are found in its estimate. See *Holmes & Narver Services, Inc., and Morrison Knudsen Company, Inc.*, B-212191, Nov. 17, 1983, 83-2 C.P.D. ¶ 585; *RCA Service Company,* B-208204.2, Apr. 22, 1983, 83-1 C.P.D. ¶ 435; *Satellite Services, Inc.*, B-207180, Nov. 24, 1982, 82-2 C.P.D. ¶ 474.

Because Griffin has not shown any error of fact or law in the recommendation which we made, it is affirmed.

[B-214584]

Pay—Aviation Duty—Overpayment—Collection Action Warranted

An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments.

Matter of: Fraudulently Received Flight Pay, November 14, 1984:

This decision responds to a request for an advance decision concerning the validity of payments of flight pay and Aviation Career Incentive Pay made to an Army lieutenant colonel, and whether collection action should be taken to recover these payments.[1] We find that, in view of the Army's investigation which indicates that the officer fraudulently qualified for both flight training and flight duty, he was not entitled to receive flight pay and Aviation Career Incentive Pay under applicable statutes and regulations. In addition, there is no basis for the extension of the *de facto* rule to allow

[1] The request for advance decision was submitted by S. Gast, Finance and Accounting Officer, U.S. Army Aberdeen Proving Ground, Maryland. It was assigned submission number DO-A-1432 by the Department of Defense Military Pay and Allowance Committee.

the officer to retain the flight pay and Aviation Career Incentive Pay where he fraudulently qualified for such pay. Therefore, collection action should be taken to recover the amount fraudulently received.

FACTS

The Army reports that the officer involved received flight pay and Aviation Career Incentive Pay in the total amount of $37,304 during the period of May 22, 1969, through November 13, 1982. The Army has found that the officer fraudulently qualifed for this pay in that he had someone other than himself take the initial eye examination to make himself eligible for flight school, and that he falsified Standard Forms 89 and 93 (Report of Medical History), in that he indicated that he did not wear contact lenses or glasses, and concealed his myopia. There is no question, however, that the officer otherwise performed required services as an Army aviator.

As a result of the allegations of fraud, supported by evidence obtained in an investigation of the matter by the Army Criminal Investigation Command, the Army began collection action against the officer for the full amount of flight pay and Aviation Career Incentive Pay he had received. The officer has protested the collection action. He argues, in essence, that poor eyesight is a defect that could have been waived by the Army, that he performed the required service, that the Government has not suffered in any way by his actions, and that, therefore, it would be unjust to rely on "technicalities" to collect from him.

DISCUSSION

A service member's entitlement to pay is dependent upon statutory right; accordingly, the rights of the affected member must be determined by reference to the governing statutes and regulations. *Bell v. United States,* 366 U.S. 393, 401 (1961); *United States v. Larinoff,* 431 U.S. 864, 869 (1977).

The flight pay and Aviation Career Incentive Pay received by the officer are authorized by 37 U.S.C. § 301 (1970) and 37 U.S.C. § 301a (1982), respectively, [2] subject to prescribed regulations. Both statutes provide for incentive pay in addition to basic pay for frequent and regular performance of flight duty required by orders provided certain other conditions are met. These conditions are prescribed in Executive Orders Nos. 11157, as amended, and 11800, the Department of Defense Military Pay and Allowances Entitlements

[2] Pub. Law 93-294, May 31, 1974, 88 Stat. 177, added section 301a to title 37, U.S. Code, providing Aviation Career Incentive Pay for officers who hold, or are in training for, an aeronautical rating or designation. Prior to the enactment of Pub. Law 93-294, such officers were entitled to incentive pay under 37 U.S.C. 301 for duty as a crew member participating in aerial flight (flight pay).

Manual and various service regulations. Only members who meet these requirements are entitled to the special pay for flying duty.

Among other conditions such as minimum flying time requirements, an individual must meet certain medical fitness standards to qualify for flight training and flying duty. See Army Regulation 40-501, Chapter 4. If a member fraudulently qualifies for flight training and flying duty by misrepresenting his medical fitness, he does not meet the conditions as required by the authorizing statutes and regulations implementing those statutes. Therefore, he would not be entitled to flight pay or Aviation Career Incentive Pay under those statutes and regulations.

We have recognized, in certain instances, that members of the uniformed services may receive pay and allowances and other benefits incident to a *de facto* status. In one case an individual, when he enlisted in the service, fraudulently concealed the fact that he had used drugs which, if known, would have disqualified him for enlistment. He was discharged from the service based on his fraudulent enlistment but we held that he could retain the pay he had received prior to the discovery of the fraud. This was allowed by analogy to the *de facto* officer rule. *Richard A. Johnson,* B-179517, May 15, 1974. See also *Leonard D. Ellison,* B-185116, August 26, 1976; 44 Comp. Gen. 258 (1964); 41 Comp. Gen. 293 (1961).

We have noted, however, that an erroneous appointment to an office which may still qualify a person as an officer *de facto* differs from an assignment to flying duty. In the latter case there is no appointment to any office, but merely an assignment of additional or special duty to a member of the service. 23 Comp. Gen. 578, 581-582 (1944). Thus, we have held that there is no basis for the extension of the *de facto* rule to authorize retention of additional or special pay paid, when the individual had not complied with specific provisions of law or regulations necessary to qualify for such payments. 40 Comp. Gen. 642 (1961), and 23 Comp. Gen. 578, *supra. See also* 49 Comp. Gen. 51 (1969), and B-148716, June 22, 1962.

While the officer in this case performed flying duties during the period in question, to be entitled to the special pay for such duty, he is required not merely to have been an Army officer, but also to have met the specific requirements of the laws and regulations. He did not meet those requirements because his orders to flight status were invalid, having been obtained through fraud.

While we held in one case that an officer is entitled to flight pay, although failing to satisfy the regulatory requirement of taking an annual physical examination, 48 Comp. Gen. 81 (1968), that case is distinguishable from the facts here. In that case, entitlement to flight pay was based on the existence of competent orders and the failure to take prescribed steps to effect a suspension or termination of those orders. There was no allegation that the orders placing the individual involved in that case in a flight status were issued as a result of fraud. In the present case, from the beginning the officer's flying orders were based on fraudulent information. Therefore, they never could have been considered valid. *See* 41 Comp. Gen. 206 (1961).

Based on the information submitted, we agree with the Army's determination that the officer is not entitled to payments of flight pay and Aviation Career Incentive Pay he received from May 22, 1969, through November 13, 1982. Accordingly, appropriate collection action should be taken.

[B-215586]

Subsistence—Per Diem—Headquarters—Weather Conditions Causation

An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per diem or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances.

Matter of: Philip Rabin, November 14, 1984:

An employee claims expenses incurred for dinner and lodging at a location near his residence when a snowstorm interrupted his travel to his home following a temporary duty assignment.[1] The employee may not be reimbursed for the meal or lodgings because he was in the city of his residence when these expenses were incurred.

Mr. Philip Rabin, an employee of the Department of Defense employed at Ford George G. Meade, Maryland, was assigned to temporary duty in Camden, New Jersey. He returned by train to Baltimore, Maryland, at approximately 6:40 p.m. on March 8, 1984, and proceeded by automobile toward his home in a snowstorm. Finding the main road very difficult to travel due to the intensity of the storm and secondary roads covered by snow and ice, he determined that it would be impossible to continue to his home. At 7:30 p.m. he stopped at a motel, ordered dinner and registered. After learning at 11 p.m. that roads were passable, he checked out of the motel and proceeded to his home.

Mr. Rabin filed a claim in the amount of $7.50 for the dinner meal and for $86.58 for lodging expense which claim was denied on grounds that the meal was consumed by him near his residence at or near his official duty station and that he did not spend the night in the motel. Mr. Rabin contends that his actions were justified and that he had made a good faith effort to reach his home before making the expenditures.

Per diem instead of subsistence may not be allowed an employee either at his permanent duty station or place of abode from which

[1] Mr. Kenneth F. Chute, Finance and Accounting Officer, National Security Agency, Fort George G. Meade, Maryland, submitted this request for a decision.

he commutes daily to the official station. Federal Travel Regulations, para. 1-7.6a (Supp. 1, September 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983). Reimbursement of actual and necessary subsistence expenses follow the same rules as entitlement to per diem. FTR, para. 1-8.1.

We have consistently held that absent statutory authority, an employee may not be paid per diem or actual subsistence at his headquarters or at his place of abode from which he commutes daily to his official duty station, despite unusual working conditions which may be involved. 42 Comp. Gen. 149 (1962). *Thomas R. Smith,* B-186090, November 8, 1976; *Department of Commerce,* B-188985, August 23, 1977; and Joslin McIntosh, B-200779, August 12, 1981.

In the present case, Mr. Rabin made the expenditures in Baltimore, Maryland, where he resides and where the terminal servicing Fort Meade is located. We have previously denied payment to an employee who rented a hotel room at the official duty station due to blizzard conditions which prevented him from going home and payment to an employee for a hotel room at the official duty station where travel was limited by heavy snow and icy roads. *Department of Commerce,* B-188985, *supra; Joslin McIntosh,* B-200779, *supra.*

Accordingly, Mr. Rabin may not be reimbursed for the cost of his dinner meal and lodging.

[B-216516]

Contracts—Negotiation—Offers or Proposals—Evaluation—Level of Effort

Contrary to the protester's contention that the agency improperly "normalized" proposed levels of effort in cost realism evaluation, the agency reviewed offerors' individual approaches and made its own assessment of the level of effort, using the government estimate as a guide.

Contracts—Negotiation—Offers or Proposals—Evaluation—Agency Adjustment of Proposal—Propriety

Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low staffing levels—a deficiency which was repeatedly pointed out in discussions—was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels.

Contracts—Negotiation—Offers or Proposals—Evaluation—Cost Realism—Function

Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in request for proposals which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation.

Contracts—Negotiation—Offers or Proposals—Evaluation—Agency Adjustment or Proposal—Propriety

Upward cost adjustment of 69-percent of proposal in cost realism analysis, primarily due to evaluated increase in staffing levels, did not amount to rewriting proposal since agency only determined for evaluation purpose what probable and realistic cost of contracting with that offeror would be.

Contracts—Cost Accounting—Cost Accounting Standards—Board Standards—Standard 402

Agency erroneously added personnel as direct charge in probable realistic cost analysis of offeror's cost proposal. Offeror was covered by cost accounting standards (CAS) and proposed personnel as part of indirect charge. Under CAS part 402, offeror must account for costs incurred for same purposes in like circumstances as direct costs only or as indirect costs only. Since offeror indicates that it always charged offered personnel as indirect charge and since government cannot legally dictate how offeror should establish accounting system, further discussions should be held to verify offeror's accounting practice and to clarify government requirements.

Contracts—Negotiation—Cost-Reimbursement Basis—Evaluation Factors—Lowest Estimated Costs and Fees Not Controlling

Award on cost-reimbursement contract made at proposed cost amount, without further discussions, where cost analysis of successful proposal shows realistic cost of proposal is $920,000 (5.5 percent) less than proposed amount, is unusual and poor business practice, although adjustments in cost analysis and evaluation that awardee's proposal was lowest are not found unreasonable. Since protest is sustained on other grounds, discussions concerning evaluated overstated or excessive costs should be conducted.

Contracts—Negotiation—Cost-Plus-Award-Fee Contracts—Evaluation

Protest that proposed award fee should have been considered in probable cost evaluation of proposals on cost-plus-award-fee contract, where such evaluation is award determinative, is not meritorious, where protester submitted proposal after being fully informed that this was the way that proposals would be evaluated. Agency had reasonable basis for not evaluating proposed award fee and this evaluation did not violate any legal requirement.

Contracts—Negotiation—Cost-Plus-Award-Fee Contracts—Award Fees—Negotiation Propriety

Award of cost-plus-award-fee contract at proposed cost plus 10 percent award fee violates regulatory limit on award fee where government evaluation of costs was that they should be $920,000 (5.5 percent) less than proposed costs because award fee is then 10.6 percent of government evaluated reasonable cost of awardee's proposal.

Matter of: CACI, Inc.-Federal, November 19, 1984:

BACKGROUND

On September 24, 1984, CACI, Inc.-Federal (CACI), protested the award under a request for proposal (RFP) by the Naval Supply Center (Navy), Oakland, California, of contract No. N00228-84-C-5005 to Bechtel Operating Services Company (Bechtel). This cost-plus-award-fee contract was for services and materials for the receipt and warehousing, kit assembly, preservation, packaging, packing, crating, integration and shipping of self-contained, relocatable modular hospital units.

On September 24, 1984, CACI also brought an action in the United States District Court for the District of Columbia (Civil Action No. 84-2971, *CACI, Inc.-Federal v. United States, et al.*) requesting a temporary restraining order and preliminary injunction against further performance of the Bechtel contract pending disposition of this protest and the ultimate review of the legality of the award by the court. By memorandum order dated September 26, 1984, the court issued a temporary restraining order requiring that the Navy issue a stop work order to Bechtel to cease immediately any performance under its contract pending a decision on the motion for preliminary injunction and that the General Accounting Office give expedited treatment to the CACI protest. On October 16, 1984, in a memorandum order, the court granted the motion for preliminary injunction.

This opinion responds to the court's request. See *Applicators, Inc.*, B-215035, June 21, 1984, 84-1 C.P.D. ¶ 656. The record which our Office considered in this matter was primarily the pleadings and affidavits filed in the lawsuit, the Navy's cost analyses documents and Bechtel's and CACI's proposals. The last arguments and documents were received in our Office on October 19, 1984.

CACI's protest basically concerns the cost evaluation of CACI's and Bechtel's proposals. CACI asserts that this evaluation was improperly performed, and that either CACI should have received the award or further negotiations should have been conducted.

We sustain the protest on two separate grounds. First, we believe the Navy improperly performed the cost realism analysis because in the analysis it added certain personnel as direct costs, despite the fact that CACI proposed these personnel as indirect costs. We find that this evaluation violated the Cost Accounting Standards (CAS), as further discussed below. Second, as discussed below, the award fee proposed and contracted for with Bechtel violated the applicable 10-percent regulatory fee limitation.

THE PROCUREMENT

The RFP was issued in December 1983 and solicited technical and cost proposals for the performance of the integration, assembly and warehousing services for 3 years and a phase-in period. The RFP also encompassed a number of options for shelter outfitting and preassembled module construction. The Navy states that this full complement of services had not previously been procured from commercial sources.

Proposals were received on March 19, 1984, from CACI, Bechtel, Holmes & Narver Services, Inc. (Holmes & Narver), and Pan-Am World Services, Inc. (Pan-Am). Technical proposals and revisions

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thereto were evaluated by a technical evaluation board. Cost proposals were separately reviewed. Written and oral discussions were conducted with all offerors. On August 14, 1984, the offerors were advised that their proposals were "acceptable" and "substantially equal" technically and that the predominant factor in determining the awardee would be the lowest cost, as evaluated on the basis of the government's determination of a realistic cost. Pan-Am dropped out of the competition because it was unable to submit further proposal revisions by the required deadline.

The three remaining offerors were expressly advised that award fee would not be considered part of the evaluated cost, although proposed base fee would continue to be considered part of this cost. The Navy states that it eliminated award fee from the cost evaluation to encourage offerors to offer a larger award fee instead of base fee. The option costs were also not part of the evaluated cost.

The best and final offers were received on August 31, 1984. The final proposed costs (excluding options) and base fee (not award fee) of CACI, Bechtel, and Holmes & Narver were as follows:

Bechtel	$16,739,609
Holmes & Narver	12,666,127
CACI	9,528,740

Holmes & Narver proposed a base fee equal to 1.5 percent of its proposed costs and an award fee equal to 7 percent of its proposed costs. Bechtel and CACI both proposed a zero-percent base fee but an award fee equal to 10 percent of their proposed costs, that is, $1,673,961 and $952,874, respectively.

The Navy evaluated the proposed costs, excluding award fee and options, of the offerors as follows:

Bechtel	$15,818,637
Holmes & Narver	16,220,008
CACI	16,123,757

The evaluated realistic cost of Bechtel is 5.5 percent below its proposed costs, while the evaluated realistic costs of Holmes & Narver and CACI are 28 percent and 69.2 percent, respectively, higher than their proposed costs. Based upon this evaluation, the Navy awarded the contract to Bechtel.

COST EVALUATION OF CACI PROPOSAL

1. Generally

We have consistently held that considering evaluated costs instead of proposed costs provides a sounder basis for determining the most advantageous proposal, since the government is required—within certain limits—to pay the contractor's actual allowable and allocable costs. 52 Comp. Gen. 870, 874 (1973); *Dynatrend, Inc.*, B-192038, Jan. 3, 1979, 79-1 C.P.D. ¶ 4 at 22. A government determination of evaluated realistic cost is no more than an informed judgment of what costs should be reasonably incurred by acceptance of a particular proposal. *Grey Advertising Inc.*, 55 Comp. Gen. 1111, 1126 (1976), 76-1 C.P.D. ¶ 325 at 17-18, and cases cited therein. Determining whether submitted proposals are realistic as to cost must properly be left to the informed judgments and administrative discretion of the contracting agency, which is in the best position to judge the realism of costs and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis. 50 Comp. Gen. 592, 600 (1971); *Raytheon Company*, 54 Comp. Gen. 169, 184 (1974), 74-2 C.P.D. ¶ 137 at 19-20. These agency determinations should not be second-guessed unless thay are not supported by a reasonable basis. *Kentron-Hawaii, Limited v. Warner*, 480 F.2d 1166, 1172 (D.C. Cir. 1973); *Management Services, Inc.*, 55 Comp. Gen. 715, 724 (1976), 76-1 C.P.D. ¶ 74 at 10.

We will first discuss CACI's assertions concerning the evaluation of its proposal which caused its costs to be evaluated 69.2 percent higher than its proposed costs. CACI's proposal was rated technically acceptable as well as technically equal to Bechtel's proposal. CACI asserts, therefore, that no fair or rational cost realism analysis could have produced such an extraordinary upward adjustment of CACI's proposed costs. This adjustment was primarily caused by major evaluated increases in CACI's proposed staffing levels. CACI believes its staffing should have been considered sufficient in view of its acceptable technical rating and the Navy's actions were tantamount to an impermissible rewriting of CACI's proposal. Additionally, CACI has raised three specific concerns about its cost evaluation. First, CACI asserts that the Navy improperly evaluated the proposals against a Navy predetermined and undisclosed staffing estimate, that is, the proposed staffing was "normalized" to this estimate without considering the unique or differing performance approaches proposed by the various offerors. CACI asserts that "normalization" of staffing was irrational since the RFP solicited innovative approaches. CACI also asserts that the cost evaluation improperly eliminated its proposed use of Amtech Field Service Corporation (Amtech), a CACI affiliate with lower overhead rates, in the cost evaluation. CACI asserts that the Navy's use of higher CACI overhead rates in the evaluation caused its proposed costs to be improperly evaluated higher. CACI further argues that various personnel who were proposed as part of CACI's indirect costs were treated in the Navy cost evaluation as direct charges, which violated the CACI's CAS Disclosure Statement.

We have reviewed, *in camera*, the Navy cost evaluation of both CACI's and Bechtel's proposals. Although the government cost estimate was used by the Navy in evaluating CACI's proposal, it appears that the Navy primarily considered CACI's technical approach in evaluating CACI's cost proposal, both with regard to the level of effort proposed for each category of work and compensation levels to be paid, using the government estimate as a guide. In this regard, CACI's proposed personnel in each job category were not automatically adjusted to the government estimate of the needed personnel to perform the job. Some job categories were accepted as proper and others were adjusted to levels of effort different from the specific government estimate for that category. We note that Bechtel's proposed levels of effort were accepted by the Navy in most cases, even where the government estimate was more or less than the Bechtel proposal. The final evaluated Bechtel levels of effort in some cases exceeded and in some cases were less than CACI's evaluated levels of effort. Consequently, we do not believe the Navy "normalized" CACI's and Bechtel's proposed personnel costs without consideration of the individual technical approaches.

We find, however, that the Navy's explanations of this matter are somewhat misleading. From reading the Navy's arguments, one could reasonably conclude that CACI's and Bechtel's proposals were only innovative as to their individual "bar coding" approaches. ("Bar coding" is a process for maintenance and control of inventory and records through a machine readable representation of data.) Further, one could conclude that adjustments were made to the proposals to bring them in line with the government estimate, as adjusted to take into account the lesser level of effort in certain categories of work thought achievable by "bar coding." The Navy seems to indicate that it used this "conservative" approach in evaluating CACI's proposal despite its disbelief that CACI's "bar coding" approach would really achieve savings in the level of effort. Therefore, we can see how Bechtel and CACI were misled into believing that "normalization" occurred in the cost evaluation.

It is apparent that the Navy and CACI disagree as to what level of effort CACI would take to satisfactorily perform this work in accordance with CACI's technical approach and the RFP requirements. It is also clear that the Navy believed that CACI was trying to "buy-in" and obtain this award with an unrealisticaly low level of effort and compensation system. CACI asserts that it is not "buying in" and that its innovative and proprietary "bar coding" approach would permit it to perform at its proposed level of effort. The Navy has provided detailed reasons critiquing CACI's particular "bar coding" approach, while CACI has defended its approach and stated that the Navy misunderstood its proposal. Based on the record, and in view of the broad discretion vested in the contracting agency in these technical/cost matters, we cannot say that the agency's position is unreasonable. See *Electronic Data Systems Federal Corporation,* B-207311, Mar. 16, 1983, 83-1 C.P.D. ¶ 264.

Furthermore, the record indicates that during discussions, the Navy repeatedly told CACI that it was significantly understaffed and specifically indicated the areas where this understaffing was perceived to exist. In this case, CACI submitted a number of proposal revisions. CACI made some adjustments to its proposed levels of effort as a result of these discussions and provided various explanations of why it could perform the work with its proposed level of effort. These adjustments, however, did not satisfy the Navy and the explanations did not persuade the Navy. Contrast *Bank Street College of Education,* B-213209, June 8, 1984, 63 Comp. Gen. 393, 84-1 C.P.D, ¶ 607 at 14, where the agency did not disclose concern to the protester over a low proposed level of effort in discussions, but the agency's cost evaluation adding significantly more staffing was upheld as reasonable.

It is admittedly unusual that the cost of a technically "acceptable" and "equal" proposal would be adjusted upwards 69 percent, primarily because of evaluated staffing. Under many procurements, this would be considered in the technical evaluation as reflecting adversely on the offerors' understanding of the government's requirements. However, a cost analysis can be a function entirely separate and not related to the outcome of a technical evaluation. *Vinnell Corporation,* B-203806, Aug. 3, 1982, 82-2 C.P.D. ¶ 101 at 8. A review of the technical evaluation criteria in this RFP shows how such a large adjustment to a technically acceptable offer could occur.

Under the RFP technical evaluation scheme, certain minimum requirements had to be met in order for proposals to be considered acceptable—none of which directly addressed proposed staffing levels. Additionally, the offerors' technical approach was graded against certain criteria in descending order of importance as follows:

a. Technical Approach
b. Resources Availability
c. Management Capability
d. Experience
e. Cost

Only under the "Resources Availability" criterion was proposed staffing to be specifically judged and staffing levels were only one subelement of that criterion. Consequently, under the Navy's technical evaluation, a proposal with "unrealistically" low staffing levels could be rated acceptable and equal to other proposals with much higher staffing levels by virtue of receiving higher scores in the top ranked "Technical Approach" evaluation criterion.

We have noted that technically equal proposals may be evaluated as having very different realistic costs. *The Bendix Corporation*, B-208184, Sept. 16, 1983, 83-2 C.P.D. ¶ 332 at 5-6. Despite the size of the upward adjustment to CACI's proposal, this does not amount to rewriting CACI's proposal; the Navy only determined, for evaluation purposes, what the probable and realistic cost of contracting with CACI would be. *Computer Sciences Corp.*, B-210800, Apr. 17, 1984, 84-1 C.P.D. ¶ 422 at 9. The characterization in the technical evaluation of CACI's staffing as "average" does not bind the agency to accent that staffing in the cost evaluation. See *Vinnell Corporation*, B-203806, *supra*, at 8; *Computer Sciences Corp.*, B-210800, *supra*, at 9.

Based upon our review of the cost evaluation and record (except for our comments below on the Navy's treatment of CACI's proposed indirect cost personnel), we cannot say that the adjustments to CACI's proposed costs were irrational or not soundly based, despite our inability to completely rationalize the cost evaluation document with the subsequent Navy explanations. See *PRC Computer Center*, 55 Comp. Gen. 60 at 78 (1975), 75-2 C.P.D. ¶ 35 at 22; *Grey Advertising, Inc.*, 55 Comp. Gen., *supra*, at 1134-1135. In this regard, it appears that the Navy has documented in the cost analysis document the reasons for each adjustment in CACI's proposed levels of effort and compensation levels. It also appears that these adjustments were based upon the Navy's assessment of CACI's proposal using the government estimate as a guide in the evaluation. Finally, it seems clear that CACI was adequately apprised that its proposed level of effort was perceived to be deficient.

2. Amtech Overhead Rates

CACI states that the Navy did not consider its use of Amtech in calculating the indirect rates in the cost evaluation. However, our *in camera* review substantiates the Navy's position that Amtech's proposed rates were adopted for purposes of the cost evaluation, without verification with cognizable audit agencies. Such verification may now be achievable in view of the recommendation below.

3. Consistency with Cost Accounting Standards

As part of the cost analysis, the Navy added a certain level of effort to CACI's proposed accounting function as a direct charge. CACI proposed no level of effort for its accounting function because it proposed charging this cost as an indirect cost.

CACI asserts that the Navy's treatment of its accounting function as a direct charge would cause CACI to violate its CAS Disclosure Statement filed pursuant to 50 U.S.C. app. § 2168(h) (1982). The Navy responds that since dedicated accounting personnel are necessary to perform this contract, CACI's charging this cost to its indirect account instead of as a direct cost probably violates CACI's CAS Disclosure Statement. From our review, it appears that CACI consistently indicated to the Navy that this function would not be a direct charge to the contract under its accounting system, but rather would be included as a part of CACI's indirect pool costs charged under the contract. The Navy states that CACI's approach reflects a misunderstanding of the RFP's extensive cost reporting requirements and that only a dedicated accounting function can fulfill contract requirements. CACI states that the RFP did not require a dedicated accounting function and to require this now would necessitate an RFP amendment. This matter was discussed on a number of occasions during negotiations in an obviously inconclusive manner. Also, the parties apparently disagree as to what level of effort will be required to perform this function, whether it be a direct or indirect charge under the contract, and as to whether CACI's existing accounting personnel in its indirect cost pool could properly perform these contract functions. Finally, the Navy claims that it asked CACI to certify that this charge would never be charged directly. CACI denies this and questions whether such a request would have been appropriate in any case.

We have reviewed the CACI CAS Disclosure Statement and have determined that the accounting function is not clearly indicated to be either a direct or indirect charge under that statement. It is notable that neither the Navy nor CACI has pointed to a particular paragraph in the Disclosure Statement which allegedly supports their respective positions.

The Navy says that because dedicated accounting personnel are necessary, its cost must be charged as a direct cost to the contract because they can be identifiable with a particular final cost objective, citing Defense Acquisition Regulation (DAR) § 15-202(a) (Defense Acquisition Circular (DAC) No. 76-33, Feb. 15, 1982). The Navy contrasts "direct" charges with "indirect" costs which are incurred for common or joint objectives, citing DAR § 15.203(a) (DAC No. 76-33, Feb. 15, 1982).

However, the Navy fails to recognize that part 402 of the CAS supplements this general rule for CAS-covered contractors, such as CACI. *See* DAR part 3-12 (DAC No. 76-46, Aug. 24, 1983); DAR Appendix "O"; 4 C.F.R. part 402 (1984). Section 402.40 of CAS, 4 C.F.R. § 402.40 (1984), states:

§ 402.40 *Fundamental requirement.*

All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective. Further, *no final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final objective.* [Italic supplied.]

CACI asserts that it always charges the accounting functions as an indirect charge on all its contracts. There is no indication that the Navy attempted to verify whether or not this was the case during the audit or negotiations. Further, there is no indication that the Navy attempted to ascertain whether CACI's existing accounting personnel (apparently charged to its indirect cost pool) had any excess capacity to accommodate the Navy's requirements. In any case, even assuming the RFP required dedicated accounting personnel, CACI was required to cost this function consistent with CAS part 402. If CACI has provided the accounting function as an indirect charge on other contracts (government or nongovernment), CAS part 402 (4 C.F.R. part 402 (1984)) would seem to require CACI to charge this function to this contract as an indirect charge. If this contract required something different from CACI's ordinary accounting functions, it is possible that CACI could elect to charge this as a direct charge. But, even in this event, it would be CACI's initial election of how it wanted to manage its accounting system, so long as CACI complied with CAS. The government cannot legally dictate how an offeror should establish his accounting system. *Dynatrend, Inc.*, B-192038, *supra*, at 19.

In view of the foregoing, we find that the Navy improperly added the accounting function as a direct charge without proper verification of the appropriate treatment of this cost under CACI's accounting system and the CAS. Therefore, we sustain this aspect of the protest and recommend that revised proposals be submitted. From our review of CACI's final cost proposal, CACI seemed to propose Amtech—its affiliate—to perform this function and the costs for this function would be part of Amtech's indirect cost pool. Since Amtech's CAS Disclosure Statement was not provided this Office, we can only speculate that Amtech's accounting system is similar to CACI's accounting system. In any event, it is not clear what effect this would have on the cost evaluation. Although CACI speculates that deletion of the direct charge adjustment made for the accounting function would make it the low evaluated offeror, it may be that the Navy had legitimate concerns about CACI's proper satisfaction of the Navy's accounting requirements.

We have found no specific requirements in the RFP for a dedicated accounting staff. The record is conflicting as to whether the Navy wanted this "dedicated" function at the Navy's Oakland, California, facility or in the CACI home office. Although the contracting officer says in her affidavit that she did not say or convey to CACI that these employees had to be located in California, the cost analysis document justified adding accounting positions to the level of effort because "the long distance accounting approach" cannot meet the stringent RFP cost control and reporting requirements. Since this protest has been sustained, if the Navy has a legitimate requirement for the accounting function or any other function not specifically designated in the RFP to have dedicated personnel, offerors should be advised and given an opportunity to submit proposals on that requirement in accordance with proper accounting practice and the Navy should evaluate the proposed approaches in accordance with CAS.

In this regard, the Navy also added personnel to CACI's management control function. We are unable to determine from the record whether these added personnel would be proposed as part of CACI's or Amtech's indirect cost pool.

Discussions should be conducted with CACI on this point to assure compliance with CAS and that RFP requirements are met. The CACI CAS Disclosure Statement does specifically indicate that "contract administration" is treated as an indirect charge in CACI's accounting system.

In any case, the Navy is entitled to perform a cost analysis and conduct such discussions as required to verify that whatever approach is proposed will satisfy the RFP's accounting, reporting, and/or contract administration functions. Even if any of these cost areas are eventually considered to be properly part of the indirect cost pool, the Navy would be entitled to review the offerors' indirect cost rates to ascertain what effect, if any, proper satisfaction of these requirements would have on the indirect cost pool and rates.

AWARD AT ESTIMATED COST HIGHER THAN EVALUATED COST

CACI protests the award of a contract to Bechtel at its proposed estimated cost of $16,739,609, because Bechtel's proposal was evaluated to cost only $15,818,637 and the award amount exceeded CACI's evaluated cost of $16,123,127. (Actually, the contract amount shown on the contract document includes the unevaluated options, which may or may not be exercised. Therefore, the total contract estimated cost is shown on the contract document as $18,844,193.) From reviewing the cost analysis document, it appears that large reductions in Bechtel's evaluated cost from its proposed cost can be accounted for in two areas. First, there was a significant reduction in the materials and supplies from those proposed by Bechtel. The analysis attributes this reduction to the determination that less materials and consumables for packing and crating would be needed than were proposed. The second, and the majority of the total $920,972 reduction from Bechtel's proposed cost, is attributed to a reduction in the level of effort of a Bechtel proposed subcontract with the BDM Corporation (BDM) for automatic data processing. The Navy was so impressed by Bechtel's particular "bar coding" approach that it believed the labor hour estimate proposed under the BDM subcontract was excessive when compared to the government estimate for this task.

The Navy and Bechtel assert that it is entirely proper to make an award in an amount higher than the evaluated costs because the contract is a cost-reimbursement type which only obligates the Navy to pay the costs actually incurred by the contractor in accordance with certain specific cost standards, provided they are reasonable, allocable and otherwise allowable. See DAR § 3-405.5 (1976 ed.). Additionally, it is asserted that the Navy can control contract costs through use of the technical direction clause, award fee mechanism, the Allowable Cost, Fee and Payment clause (DAR § 1-203.4 (DAC No. 76-17, Sept. 1, 1978)), the subcontract clause, and other contract provisions. Consequently, the award amount is only a ceiling beyond which it may be more difficult to get costs reimbused. According to the Navy, the evaluated cost, on the other hand, is the government's educated guess of what the contract will really cost for the purpose of an award judgment. The contracting officer also states that reopening negotiations after evaluation of best and final offers appeared unnecessary because, under the contract provisions, Bechtel required approval from the contracting officer of the BDM subcontract so the costs were considered easily controlled.

It is clear, as even CACI concedes, that adjustment to proposed costs to determine realistic costs can be both downward and upward. *Computer Sciences Corp.*, B-210800, *supra.* Moreover, this Office has recognized that contract awards can be in a different amount than the evaluated costs. *Bell Aerospace Company; Computer Sciences Corp.*, 54 Comp. Gen. 352 (1974), 74-2 C.P.D. ¶ 248, as explained in *GTE Sylvania, Inc.*, 57 Comp. Gen. 715 at 755 (1977), 77-2 C.P.D. ¶ 422 at 49; *Prospective Computer Analysts*, B-203095, Sept. 20, 1982, 82-2 C.P.D. ¶ 234 at 5. We do not agree with CACI that this large reduction to Bechtel's proposed costs necessarily makes Bechtel's proposal less than equal to CACI's under the technical evaluation criteria or is tantamount to rewriting Bechtel's proposal. See *Computer Sciences Corp., supra,* at 9. We have reviewed, *in camera,* the downward adjustments made by the Navy to Bechtel's cost proposal in its cost realism analysis and cannot say they are unreasonable. *Grey Advertising Inc.*, 55 Comp. Gen., *supra,* at 1134-1135. Consequently, based on the foregoing, we cannot find the Navy's assessment that Bechtel's evaluated costs were lower than CACI's evaluated costs was unreasonable.

However, award without further discussions under these circumstances is certainly an unusual and poor business practice. Consequently, inasmuch as we have sustained this protest on other grounds, we believe the Navy should conduct discussions with Bechtel in an effort to negotiate the evaluated overstated or excessive costs prior to award. See *Griggs & Associates, Inc.*, B-205266, May 12, 1982, 82-1 C.P.D. ¶ 458; *Bank Street College of Education,* 63 Comp. Gen. 393, *supra,* at 23; *Ikard Manufacturing Company,* 63 Comp. Gen. 239 at 241 (1984), 84-1 C.P.D. ¶ 266 at 4. As we stated in 50 Comp. Gen. 739, 745 (1971):

* * * the time for exploring the cost aspects of a proposal—that is, *all* proposals within a competitive range—is during the course of negotiations and not at some time after receipt of best and final offers * * *

TREATMENT OF AWARD FEE IN COST EVALUATION

CACI has complained that if the award fee had been considered in the cost evaluation then it would clearly have been the low evaluated offeror because of Bechtel's significantly higher proposed award fee of $1,673,961 as opposed to CACI's award fee of $952,874. However, CACI was fully aware that the award fee would not be evaluated when it submitted its best and final offer. Indeed, CACI took full advantage of this evaluation scheme by proposing a maximum 10 percent award fee. CACI cannot now complain about this evaluation scheme. See section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984). In any case, it is clear that the agency had a legitimate and reasonable basis for not evaluating award fee as part of the total cost in evaluating proposed costs, that reason being to encourage offerors to propose less base fee and more award fee. In any case, there is no legal requirement that award fee be evaluated as part of the cost evaluation where the evaluation is in accordance with the scheme disclosed to the offerors.

VIOLATION OF LIMIT ON AWARD FEE

CACI also asserts that the award fee in the Bechtel contract violated pertinent fee limitations. We agree. DAR § 3-405.5(d) (1976 ed.) states that "maximum fee (base fee plus award fee) [on a cost-plus-award-fee contract] shall not exceed the limitations stated in 3-405.6(c)(2)." DAR § 3-405.6(c)(2) (DAC No. 76-16, Aug. 1, 1978) states in pertinent part:

(2) 10 U.S.C. 2306(d) provides that in the case of a cost-plus-fixed-fee contract the fee shall not exceed ten percent (10%) of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary concerned at the time of entering into such contract. * * *

As indicated in DAR § 3-405.6(c)(2), *supra*, the estimated cost is to be determined by the *government at the time of entering into a contract.* This government determination could only be done by a price or cost analysis. *See* DAR § 3-806 (DAC No. 76-7, Apr. 29, 1977); DAR § 3-803 (DAC No. 76-40, Nov. 26, 1982); DAR § 3-807(a)(3) (DAC No. 76-16, Aug. 1, 1978); DAR § 3-807(d) (DAC No. 76-16, Aug. 1, 1978).

In this case, Bechtel's proposal for an award fee of $1,673,961 with no base fee was based upon its proposed cost of $16,739,609. The Navy's evaluated cost estimate of the contract, however, was only $15,818,637. Consequently, since the Navy accepted Bechtel's proposal without further discussions, Bechtel's fee is 10.59 percent of the Navy's evaluated estimated cost.

The Navy and Bechtel themselves disagree on the maximum award fee available under the contract. The Navy recognizes the contractually agreed upon amount of $1,673,961 as the limitation, but argues that the "estimated costs," on which the fees are based, referenced in the regulation are those estimated amounts that have been contractually agreed upon. The Navy analysis effectively ignores the requirement for an independent *government assessment* of Bechtel's costs. The regulation does not indicate that the contract's estimated costs is what is referenced in determining the limit on fee; rather, the regulation contemplates a separate *government determination* of the estimated costs.

Bechtel asserts that the maximum award fee would be 10 percent of the Navy's cost realism estimate, i.e., $1,581,864, because DAR § 3-405.5(d), *supra*, and § 3-405.6(c)(2), *supra*, make this amount a ceiling on the award fee "by definition" such that this limitation cannot be violated by the award document. However, it certainly is not proper to contract in violation of the regulations and rely upon the regulations to reform the contract. Cf. *B. B. Saxon Company, Inc.*, 57 Comp. Gen. 501, 506 (1978), 78-1 C.P.D. ¶ 410 at 9. The very disagreement of the parties on this point shows the need for further negotiations. Finally, it is argued that Bechtel may not in fact earn in excess of a 10-percent award fee because only "excellent" performance, which is speculative, would allow Bechtel to earn all the award fee permitted by the contract. However, DAR § 3-405.5(d), *supra*, and DAR § 3-405.6(c)(2), *supra*, govern contracts *as they are awarded*. Therefore, this argument has no merit and the protest is sustained on this point.

CONCLUSION

Based upon the foregoing, CACI's protest is sustained. In accordance with the guidance set forth in this decision, there should be further negotiations with the offerors in the competitive range and revised cost proposals should be solicited. Unless Bechtel is the successful offeror on this recompetition, its contract should then be terminated.

[B-216731]

Contracts—Small Business Concerns—Awards—Size Status—Contract Not Set-Aside for Small Business—Eligibility for Award

Bidder which certifies that it is not a small business was eligible for award of the contract under an invitation for bids not set aside for small business.

Matter of: Nello Construction Company, November 19, 1984:

Nello Construction Company (Nello) protests award of a contract to Jendoco Construction Company (Jendoco) under invitation for bids (IFB) No. K0348078, issued by the Bureau of Mines, Department of the Interior (Interior).

We deny the protest without obtaining a report from the contracting agency, in accordance with section 21.3(g) of our Bid Protest Procedures, 4 C.F.R. § 21 (1984).

Nello contends that Jendoco, the low bidder, is ineligible for award "as a small business concern under section "K," "Representations, Certifications and other Statements of Offerors or Quoters" of the IFB. In section "K" of its bid, Jendoco certified that it was not a small business.

In response to a protest previously filed by Nello with Interior involving this same allegation, the contracting officer held that since the solicitation was not set aside solely for small business concerns, the certification by Jendoco as a large business did not render Jendoco ineligible for award. The contracting officer also stated that the purpose of the "Small Business Size Standard" in a solicitation which is not set aside for small business concerns is to inform all bidders of the criteria for size determination for the proper execution of the small business size certification. The certification is important for proper application of the equal bid provision of the Federal Acquisition Regulation (FAR) § 14.407-6, 48 Fed. Reg. 42,102, 42,183 (1983) (to be codified at 48 C.F.R. § 14.407-6), and for implementation of the Small Business and Small Disadvantaged Business Subcontracting Plan required by FAR § 52.219-9, 48 Fed. Reg. 42,102, 42,523 (1983) (to be codified at 48 C.F.R. § 52.219-9).

The small business certification is required by FAR § 52.219-1, 48 Fed. Reg. 42,102, 42,523 (1983) (to be codified at 48 C.F.R. § 52.219-1), to be inserted in every solicitation when the contract is to be performed in the United States, its possessions or territories, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. Therefore, inclusion of the certification and small business standards in a solicitation does not, by itself, constitute a set-aside for small business. FAR § 19.508(c) and § 52.219-6, 48 Fed. Reg. 42,102, 42,250 and 42,524 (1983) (to be codified at 48 C.F.R. § 19.508(c) and § 52.219-6), require that a solicitation, set aside for small business, contain the phrase "NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE." Nello has not alleged or shown that the IFB contained the small business set-aside notice required by the FAR. Since the procurement has not been set aside for small business, the low bidder, which is not a small business, was eligible for the award.

[B-213539]

Compensation—Removals, Suspensions, etc.—Deductions From Backpay—Retirement and Tax Adjustments

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. 8346(b), Office of Personnel Management has sole authority to waive erroneous payments from the Civil Service Retirement Fund.

Compensation—Removals, Suspensions, etc.—Deductions From Backpay—Lump-Sum Leave Payment

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper.

Retirement—Civilian—Contributions—Backpay Award—Period of Separation

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of the separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. 5584 since there has been no erroneous payment of pay.

Matter of: Angel F. Rivera—Deductions from Backpay—Waiver of Erroneous Payments, November 20, 1984:

Mr. Angel F. Rivera, a former employee of the Community Services Administration and the Department of Health and Human Services, requests waiver of his indebtedness of $42,038.04. This indebtedness resulted from the reduction of Mr. Rivera's $21,400 backpay award by deductions of $34,092 for refunded retirement contributions, $20,235.60 for payments of severance pay, $7,612.44 for a lump-sum payment for annual leave, and $1,497.96 for retirement contributions covering the period of his improper separation from Government service. Our Claims Group forwarded Mr. Rivera's waiver request for our consideration, posing an additional question as to whether refunded retirement contributions were properly deducted from Mr. Rivera's backpay.

We hold that retirement contributions refunded to Mr. Rivera upon his improper separation must be deducted from backpay, since his retroactive reinstatement and receipt of backpay under 5 U.S.C. § 5596 (1982) removed the legal basis for the refund. The amount by which the refunded retirement contributions exceed backpay is subject to waiver by the Office of Personnel Management (OPM) under 5 U.S.C. § 8346(b) (1982), as implemented by 5 C.F.R. Part 831 (1984). Mr. Rivera's indebtedness for severance pay and the lump-sum payment for annual leave may be waived under 5 U.S.C. § 5584 (1982), since there is no indication that he was at fault in accepting the erroneous payments. Collection of retirement fund contributions covering the period of Mr. Rivera's separation is not subject to waiver under 5 U.S.C. §§ 5584 or 8346(b), since his indebtedness for the contributions did not result from an erroneous payment.

BACKGROUND

Effective September 30, 1981, Mr. Rivera was separated from his position with the Community Services Administration (CSA) through a reduction-in-force. After his separation he withdrew his retirement contributions in the amount of $34,092, received a lump-sum payment for annual leave in the amount of $7,612.44, and began receiving payments of severance pay which eventually amounted to $20,235.60.

Mr. Rivera was one of approximately 750 employees who were separated from CSA in response to the Omnibus Budget Reconciliation Act of 1981 ("Budget Act"), Public Law 97-35, August 13, 1981, 95 Stat. 357, which abolished CSA effective September 30, 1981. On October 1, 1981, the Department of Health and Human Services (HHS) assumed responsibility for administering the programs which previously had been administerd by CSA.

In anticipation of CSA's termination, the National Council of CSA Locals, American Federation of Government Employees, filed suit in the U.S. District Court for the District of Columbia in September 1981. The union argued that the Budget Act transferred the functions of CSA to HHS, and that, pursuant to the Veterans Preference Act of 1944, as amended, 5 U.S.C. § 3503 (1982), employees of CSA should be given preference in HHS' selection of personnel to administer the transferred programs. In *National Council of CSA Locals v. Schweiker,* 526 F. Supp. 861 (D.D.C. 1981), the district court ordered HHS to determine whether there actually had been a transfer of functions from CSA to HHS. The court stated that, if HHS determined that there had been a transfer of functions, it would be required to afford former CSA employees preference in accordance with the requirements of the Veterans Preference Act.

Pursuant to the district court's order in *National Council of CSA Locals v. Schweiker,* above, HHS conducted a review comparing the old functions of CSA and the new functions assumed by HHS. The agency found that the functions of CSA had been transferred to HHS, and that former employees of CSA were eligible for appointment to the transferred positions. Consequently, in November 1981, HHS notified former CSA employees that they would be considered for positions in HHS based on their retention standing and qualifications. Ultimately, HHS hired 150 of the 750 employees who had been separated from CSA, including Mr. Rivera.

Mr. Rivera was reinstated by HHS effective February 26, 1982. Like the other former CSA employees who had been appointed to positions in HHS, his appointment was made retroactive to October 1, 1981, with backpay. The HHS recredited Mr. Rivera's leave account with annual leave covered by the $7,612.44 lump-sum payment he had received, and, in accordance with Federal Personnel Manual (FPM) Letter 550-76, July 15, 1982, deducted the following items from his $21,400 backpay award: (1) retirement contributions which previously had been refunded to Mr. Rivera, in the amount of $34,092; (2) payments of severance pay amounting to $20,235.60; (3) the lump-sum leave payment in the amount of $7,612.44; and (4) unpaid retirement contributions for the period of Mr. Rivera's separation, amounting to $1,497.96. Based on its backpay computation, HHS determined that Mr. Rivera was indebted to the Government for $42,038.04.

Shortly after his appointment to a position in HHS, Mr. Rivera suffered a series of heart attacks and used most of the annual leave which had been recredited to him. Effective November 12, 1982, Mr. Rivera retired from Government service on account of disability. The agency collected Mr. Rivera's last two paychecks in the respective amounts of $1,162.73 and $1,369.76, and retained a lump-sum payment of $165.84 for his unused annual leave.

The HHS forwarded Mr. Rivera's request for waiver of his indebtedness for $42,038.04 to our Claims Group, with the recommendation that it not be waived. Specifically, the agency states that collection of the lump-sum leave payment paid to Mr. Rivera upon his separation would not be against "equity" and "good conscience" within the meaning of 5 U.S.C. § 5584, since he was recredited with annual leave covered by the lump-sum payment. Additionally, HHS maintains that our waiver standards set forth in 4 C.F.R. § 91.5(c) (1984) are not appropriate for application where deductions from backpay result in a net indebtedness, since those standards permit waiver if there is no indication that the employee knew or should have known that he was being overpaid.

Our Claims Group questions whether waiver is appropriate in this case, suggesting that Mr. Rivera may have known that he would be reinstated when he withdrew his retirement contributions and received a lump-sum payment for annual leave. In this regard, our Claims Group notes that the action in *National Council of CSA Locals v. Schweiker*, cited above, was pending at the time of Mr. Rivera's separation from CSA. Additionally, our Claims Group questions whether HHS properly deducted refunded retirement contributions from Mr. Rivera's backpay award.

The two issues presented for our consideration are: (1) whether HHS properly deducted refunded retirement contributions from

Mr. Rivera's backpay; and (2) whether Mr. Rivera's indebtedness for the amount by which deductions from backpay exceed his backpay award may be waived under 5 U.S.C. § 5584 (1982). These issues are addressed below.

DEDUCTION OF REFUNDED RETIREMENT CONTRIBUTIONS FROM BACKPAY

The Back Pay Act of 1966, as amended, 5 U.S.C. § 5596 (1982), entitles an employee to backpay when he undergoes an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay. If, as a result of the application of section 5596, an employee is entitled to backpay, he is, "*for all purposes* * * * deemed to have performed service for the agency * * *" during the period of wrongful separation. 5 U.S.C. § 5596(b)(1)(B). [Italic supplied.]

Implementing regulations contained in 5 C.F.R. § 550.805(a) (1984) provide that when an appropriate authority corrects an unjustified or unwarranted personnel action, the agency must compute the employee's pay and allowances as if the personel action had not occurred. Under 5 C.F.R. § 550.805(e)(2), the agency is required to deduct from backpay, "[a]ny erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action * * *."

The provisions of FPM Letter 550-76, July 15, 1982, explain that the "erroneous payments" which must be deducted from backpay under section 550.805(e)(2) include retirement annuity payments, refunds of retirement contributions, payments of severance pay, and lump-sum payments for annual leave. With respect to refunded retirement contributions, paragraph 5b of FPM Letter 550-76 provides that:

> b. *Refunds of retirement contributions.* The retirement law (5 U.S.C. 8342(a)) authorizes the refund of an employee's retirement contributions only upon absolute separation from the service or transfer to a position not subject to the law. Therefore, when a refund of retirement contributions is paid to an employee based on a separation which is subsequently found to be erroneous and is cancelled by restoring the employee to duty retroactively so that there was no break in the service, the restoration to duty removes the legal basis for the refund. A refund that was paid in error represents a debt due the retirement fund that must be deducted from any back pay entitlement.* * *

Although our Claims Group questions the requirement in FPM Letter 550-76 that refunded retirement contributions be deducted from backpay, we believe that this deduction is necessary to achieve the make-whole purposes of the Back Pay Act. As noted previously, 5 U.S.C. § 5596 provides that an employee who is retroactively restored to duty and awarded backpay must, "for all purposes," be regarded as having performed service during the period of the corrective action. Since the employee is regarded as never having been separated, he may not retain retirement contributions which, under 5 U.S.C. § 8342(a), are refundable only upon separation from the service or transfer to a position which is not covered by the Civil Service Retirement System.

We note that the rule requiring the deduction of refunded retirement contributions is consistent with principles governing deductions for lump-sump leave payments and payments of severance pay. Specifically, we have held that an employee who is retroactively restored to duty and awarded backpay under 5 U.S.C. § 5596 may not retain a lump-sum payment for annual leave, since 5 U.S.C. § 5551(a) expressly conditions payment of the lump sum on an employee's separation from Government service. See *Vincent T. Oliver,* 59 Comp. Gen. 395 (1980); *Ernest E. Sargent,* 57 Comp. Gen. 464 (1978). Similarly, we have held that payments of severance pay must be offset against backpay because 5 U.S.C. § 5595(b)(2) authorizes severance pay only for an employee who has been separated. Since the employee is regarded, "for all purposes," as having performed service during the period of wrongful separation, he may not simultaneously claim the status of a "separated" employee. See *Ernest E. Sargent,* 57 Comp. Gen. at 466; *Sammy H. Marr,* B-178551, January 2, 1976.

Accordingly, in line with the provisions of FPM Letter 550-76, we conclude that a refund of retirement contributions must be offset against backpay awarded under 5 U.S.C. § 5596. On this basis, we hold that HHS properly deducted from Mr. Rivera's backpay the amount of retirement contributions he withdrew at the time of his improper separation.

WAIVER OF NET INDEBTEDNESS

The provisions of FPM Letter 550-76 state that the computation of net backpay is a three-step process. First, the agency must deduct any outside earnings received by the employee during the period of the unjustified or unwarranted personnel action. Second, the agency must deduct erroneous payments the employee received as a result of the improper personnel action. If the net amount of backpay is insufficient to cover all deductions for erroneous payments, these payments must be deducted in the following order: (1) retirement annuity payments; (2) refunds of retirement contributions; (3) payments of severance pay; and (4) lump-sum payments for annual leave. Finally, the agency must deduct from backpay "other authorized deductions," such as unpaid retirement contributions for the period of the separation, Federal and state taxes computed on net backpay, and health benefits premiums, if any.

Applying the provisions of FPM Letter 550-76, Mr. Rivera's backpay award of $21,400 must first be reduced by refunded retirement contributions in the amount of $34,092, resulting in a net indebtedness of $12,692 for those contributions. Added to that indebtedness, in order of precedence, are deductions of $20,235.60 for payments of severance pay, $7,612.44 for the lump-sum leave payment, and

$1,497.96 for retirement contributions covering the period of Mr. Rivera's separation. These items of indebtedness are discussed below.

Refunded Retirement Contributions

Mr. Rivera's net indebtedness for refunded retirement contributions is not subject to waiver by this Office, since 5 U.S.C. § 5584 limits our waiver jurisdiction to erroneous payments of "pay or allowances." A refund of an employee's own contributions to the Civil Service Retirement and Disability Fund does not constitute "pay" or an "allowance" within the meaning of 5 U.S.C. § 5584. See 4 C.F.R. § 91.2 (c) and (d).

Nevertheless, Mr. Rivera may request that OPM waive his net indebtedness for the refunded contributions. The provisions of 5 U.S.C. § 8346(b), as implemented by 5 C.F.R. Part 831, authorize OPM to waive erroneous payments from the Civil Service Retirement and Disability Fund.

Severance Pay and Lump-Sum Leave Payment

Mr. Rivera's indebtedness for payments of severance pay in the amount of $20,235.60 and the lump-sum leave payment in the amount of $7,612.44 is appropriate for waiver consideration under 5 U.S.C. § 5584, since those payments constitute "erroneous payments" within the meaning of the waiver statute. See *Vincent T. Oliver*, 59 Comp. Gen. at 397; see also FPM letter 550–76, July 15, 1982. Under the authority of 5 U.S.C. § 5584, this Office may waive debts arising out of erroneous payments to Government employees if collection "would be against equity and good conscience and not in the best interests of the United States." However, that authority may not be exercised if there is an indication of fault on the part of the employee in the matter. "Fault" is considered to exist if it is determined that the employee knew or should have known that an error existed but failed to take corrective action. See 4 C.F.R. § 91.5(c).

The HHS maintains that the conditions for waiver outlined in 4 C.F.R. § 91.5(c) are not appropriate for application where deductions from backpay result in a net indebtedness because, in the context of backpay awards, employees will "always meet the 'knew or should have known' test" and "this result could be very costly for the Government." However, the concerns expressed by HHS have no bearing on an individual waiver determination since 4 C.F.R. § 91.5(c) requires that such a determination be based on the particular facts and circumstances surrounding the erroneous payment. See generally *Ronnie C. Sutton and John W. McKenzie*, B-206385, December 6, 1982.

Applying the standards set forth in 5 U.S.C. § 5584 and 4 C.F.R. § 91.5(c) to this case, we find no indication that Mr. Rivera was at fault in accepting payments of severance pay or the lump-sum payment for annual leave. Although Mr. Rivera received the lump-sum leave payment after the National Council of CSA Locals filed suit alleging that CSA's functions had been transferred to HHS, he could not known that the union would prevail on the merits of the case. Furthermore, the district court's determination in *National Council of CSA Locals v. Schweiker,* cited previously, did not order the reinstatement of former CSA employees, but merely directed HHS to determine whether CSA's functions had been transferred to HHS. Even after HHS determined that a transfer of functions had occurred, it notified former CSA employees that selection for reemployment in the transferred positions would depend upon their retention standing and qualifications. Ultimately, HHS reinstated only 150 of the 750 employees who had been separated from CSA.

Under these circumstances, Mr. Rivera reasonably could not have known that his separation from CSA was improper until he was notified that he would be retroactively reinstated to one of the positions which had been transferred to HHS. Accordingly, we hold that repayment of the lump-sum leave payment and payments of severance pay which Mr. Rivera received prior to the date of that notification may be waived under the provisions of 5 U.S.C. § 5584.

The HHS maintains, however, that it would not be against "equity" and "good conscience" to collect the lump-sum leave payment from Mr. Rivera because, at the time of his reinstatement, he was recredited with annual leave covered by the lump-sum payment. We disagree. As indicated previously, the determination to waive an erroneous payment for annual leave turns on circumstances surrounding the erroneous payment at the time it was made, and not on facts existing at a later time when the payment has been found to be erroneous and the leave recredited. Furthermore, we note that the purpose of 5 U.S.C. § 5584 is to validate a payment or benefit to which an employee is not legally entitled. If an employee is not recredited with annual leave covered by the lump-sum payment, but repayment of the lump sum is "waived," the employee is in the same position as he was prior to the "waiver." Likewise, an employee receives no benefit if he is recredited with leave and required to repay the lump-sum payment. Only when waiver of the repayment is granted and leave recredited has the employee received the additional, equitable benefit intended by the waiver statute.

Accordingly, we find no basis for concluding that collection of the lump-sum leave payment from Mr. Rivera would be consistent with equity, good conscience, or the best interests of the United States. Therefore, collection of the erroneous lump-sum payment for annual leave and the payments of severance pay is waived.

Unpaid Retirement Contributions

Under the Back Pay Act, an employee who is restored to duty following an erroneous separation is deemed for all purposes to have performed Government service during the period of the separation, and such service is creditable for retirement purposes. See 5 U.S.C. § 5596(b)(1)(B); and FPM Supplement 831-1, paragraph S3-4j (September 21, 1981). Therefore, all Federal pay that would have been earned during the period of the separation is subject to deductions for retirement fund contributions. Even if no amount of backpay is due the employee because of excessive deductions, the employee must remit the appropriate amount of retirement contributions to the agency in order to receive full credit for the period of the separation. See 5 U.S.C. § 8334(c) (1982).

Accordingly, Mr. Rivera must pay retirement contributions in the amount of $1,497.96 in order to receive credit for service during the period of his separation. Collection of that amount may not be waived under 5 U.S.C. § 5584, since no erroneous payment of pay has been made. 55 Comp. Gen. 48 (1975).

CONCLUSION

For the foregoing reasons, we hold that the $34,092 in retirement contributions previously refunded to Mr. Rivera must be deducted from his $21,400 backpay award, and that his net indebtedness of $12,692 for those contributions may be considered for waiver by OPM. Mr. Rivera's indebtedness for payments of severance pay amounting to $20,235.60 and the $7,612.44 lump-sum leave payment is waived under the provisions of 5 U.S.C. § 5584. Mr. Rivera must pay $1,497.96 for retirement contributions covering the period of his separation, and that amount is not subject to waiver.

[B-214195]

Property—Private—Damage, Loss, etc.—Personal Property—Government Liability

Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e).

Matter of: U.S. Forest Service—Claim under 31 U.S.C. 3721, November 20, 1984:

Mr. W. D. Moorman, Authorized Certifying Officer, U.S. Department of Agriculture, asked whether claims of Forest Service employees for loss of personal property due to burglary in Government-owned quarters rented by the employees, which occurs through no fault of the employees, are cognizable under the provisions of the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. § 3721 (formerly 31 U.S.C. § 241, recodified by Pub. L. No. 97-258, September 13, 1982, 96 Stat. 973). As discussed below, we think they are.

In the representative case submitted with the decision request, personal property of a Forest Service employee residing in a Government-owned house within the forest in which the claimant was employed, was stolen during a burglary. There was no employee negligence. The Forest Service charged and deducted rent from the employee's salary for use of the Government-owned house. The employee's claim, based on the stolen items, was approved in the amount of $178.99 by the Forest Service pursuant to 31 U.S.C § 3721. Since the quarters were not "considered as part of the compensation in fixing the salary rate" of the claimant (the significance of this phrase will be discussed later), a question has arisen within the Forest Service as to whether the claimed loss can be considered to have occurred at quarters "assigned or provided in kind" by the Government, as provided in 31 U.S.C. § 3721(e).

Subsection (b) of 31 U.S.C. § 3721 authorizes the head of each agency to settle and pay claims up to $25,000 for damage to, or loss of, personal property incident to an employee's service. In addition, 31 U.S.C. § 3721(e) states:

> A claim may not be allowed under this section if the personal property damage or loss occurred at quarters occupied by the claimant in a State or the District of Columbia that were not assigned or provided in kind by the United States Government or the District of Columbia Government.

Further, 31 U.S.C. § 3721(k) provides that "settlement of a claim under this section is final and conclusive."

It is not within the jurisdiction of our Office to render decisions relative to the merits of a claim under 31 U.S.C. § 3721. In the absence of any overall policies prescribed by the President pursuant to 31 U.S.C. § 3721(j), such claims are for consideration under the regulations of the employing agency. B-190106, March 6, 1978. However, it is proper for our Office to consider the threshold question of whether a claim is properly cognizable under the statute. 58 Comp. Gen. 291 (1979).

Specifically the certifying officer requests a clarification of the meaning of quarters "assigned or provided in kind" by the Government. According to the submission, the question in this case arose because of some language in one of our early decisions, 17 Comp. Gen. 207 (1937). That decision dealt with section 3 of the Act of March 5, 1928, 45 Stat. 193, which required that the reasonable value of quarters furnished to civilian employees be "considered as part of the compensation in fixing the salary rate" of the employees. The requirement to consider the value of Government-furnished quarters in fixing the employee's salary rate was in lieu of charging rent to the employee, and applied only with respect to quarters furnished without charge to the employee. *See* 42 Comp. Gen. 386 (1963). The 1928 statute was superseded in 1964 by Public

Law 88–459, 78 Stat. 557, now codified at 5 U.S.C. § 5911 (1982), which contemplates the charging of rent for the furnishing of Government-owned quarters to civilian employees. *See* B–164200, May 24, 1968. The requirement to consider the reasonable value of quarters in fixing the employee's salary no longer appears in the statute—there is no longer a need for it since the employee is being charged rent—and the 1928 statute was in fact repealed by section 8 of Public Law 88–459, 78 Stat. 558. Thus, 17 Comp. Gen. 207 and similar decisions dealing with the 1928 statute are not relevant to the present inquiry.

In normal usage, the term "provided in kind" implies the furnishing of an item in lieu of a cash payment. Thus, it may be questioned whether quarters are "Provided in kind" where the employee is being charged rent. A review of the legislative history of 31 U.S.C. § 3721 fails to reveal a specific reference to this situation. However, it is not unnecessary to further explore this point because, in our opinion, the quarters in this case may be viewed as "assigned" for purposes of 31 U.S.C. § 3721(e).

The origin of 31 U.S.C. § 3721 is the Military Personnel Claims Act of 1945, 59 Stat. 225. This statute, in which the term "assigned or provided in kind" first appeared, was broadened to encompass the civilian agencies by the Military Personnel and Civilian Employees' Claims Act of 1964, which in turn has evolved into the present 31 U.S.C. § 3721.

The scope of the "assigned or provided in kind" language was considered in *Fidelity-Phenix Fire Ins. Co. v. United States,* 111 F. Supp. 899 (N.D. Cal. 1953), *aff'd sub nom. Preferred Ins. Co. v. United States,* 222 F.2d 942 (9th Cir. 1955), *cert denied,* 350 U.S. 837. An Air Force B–29 aircraft had crashed near a trailer park on an Air Force Base, causing considerable damage to personal property of Air Force personnel who lived in the trailer park. The Air Force paid property loss claims by its personnel under the Military Personnel Claims Act, to the extent that the losses were not insured.[1]

The trailer park was on Government property and was administered and governed by Air Force regulations. The trailers were owned by the individual members. The Air Force personnel stationed at that particular base were not required to live in the trailer park or on the base itself. Those who chose to live in the trailer park were charged a fee for use of the trailer space and received a quarters allowance in lieu of Government housing. Trailers were parked in specific locations assigned by base personnel, and were

[1] Normally, settlements under 31 U.S.C. § 3721 (and its predecessor legislation) are not subject to judicial review. The statute was relevant in the Fidelity-Phenix case because if the claims in question were properly paid under the Military Personnel Claims Act, then the claimants' insurers had no subrogation claim against the United States under the Federal Tort Claims Act, which was the holding of the case.

connected to utility lines and plumbing facilities provided and maintained by the Air Force.

On these facts, the court found that the trailer park constituted "assigned" quarters within the meaning of the Military Personnel Claims Act. 111 F. Supp. at 906.

In a 1960 memorandum to one of our audit divisions (B-142446-O.M., June 3, 1960), we considered a Navy regulation which included a definition of "assigned quarters" based on the *Fidelity-Phenix* decision. We concluded that the court's interpretation of "assigned quarters" was "not an untenable one" and that a claim paid under the Navy regulation therefore need not be questioned.

Turning now to this case, the house in question is owned by the Government and located at a remote ranger station within a national forest. The employee, we have been informally advised, is not required to live in the house as a condition of employment. However, because of the remote location of the ranger station, it would be highly impractical not to do so. Also, as noted earlier, the employee is charged rent for the quarters.

Applying the rationale of the *Fidelity-Phenix* case, we conclude that Government-owned rental housing located at a remote ranger station within a national forest may properly be viewed as "assigned" for purposes of 31 U.S.C. § 3721. Accordingly, the claim of a Forest Service employee for a personal property loss occurring at such quarters, rented by the employee and located within the forest at which the claimant is employed, is cognizable under the statute and may be considered at the discretion of the agency. Settlement thereof, if made in accordance with the provisions of 31 U.S.C. § 3721 and any agency regulations promulgated thereunder, would be final and conclusive. 47 Comp. Gen. 316 (1967).

[B-215237]

Agency For International Development—Advance of Funds—Interest—As Belonging to United States *v.* Others

Advances in excess of immediate cash needs to a subgrantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a).

Interest—Grant-In-Aid Funds—Disposition of Earned Interest

Interest earned by subgrantees on loans made as part of authorized program efforts is program income and can be used to further program objectives.

Matter of: Agency for International Development—Interest Earned by Subgrantees on Advanced Funding, November 20, 1984:

This decision is in response to a request from a certifying officer in the Office of Financial Management of the Agency for International Development (AID). The certifying officer requests that we decide (1) whether subgrantees can retain interest earned on advances from A.T. International, a primary recipient of an assistance award from AID, and (2) whether subgrantees who earn interest on loans made as part of the assistance program may retain this interest which according to the cooperative agreement is to be added to a revolving fund for further loans or program costs.

We conclude that under the terms of the cooperative agreement with A.T. International interest earned by a subgrantee on assistance funds prior to their expenditure for allowable costs are payable to AID. The interest must be deposited in the U.S. Treasury as a miscellaneous receipt. Interest earned by subgrantees on loans made under program authority is program income.

According to the certifying officer, AID has negotiated a new cooperative agreement (a form of financial assistance with A.T. International under 22 U.S.C. § 2395. The purpose of the cooperative agreement is to strengthen A.T. International's capacity to help develop appropriate technologies in developing countries. The program is to be carried out through subprojects or subgrants entered into with private organizations in cooperation with foreign countries. Among the methods A.T. International is authorized to use under the cooperative agreement is to provide capital contributions to subproject revolving accounts from which subgrantees will make interest bearing loans in furtherance of the program objectives. According to the agreement this interest will be available for subgrant costs and relending from the revolving fund.

The first question raised by the certifying officer is basically a request that we respond to a position taken by the AID Office of General Counsel concerning the legal consequences of a grantee obtaining an advance of grant funds and immediately disbursing them to a subgrantee. According to AID's Office of General Counsel, *any* interest earned on grant funds held by the subgrantee in advance of cash needs is not subject to the rule that interest earned on grant advances is held in trust for the United States. The argument is based on the conclusion that there has been a disbursement by the grantee. This view would apply generally to grantee-subgrantee advances, if we understand the Office of General Counsel's argument, and is not the result of any special program authority peculiar to AID. Subgrantees are not required to return interest to the United States where the grantee is a State or State instrumentality not required to account for interest on advances under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a).

It is a longstanding rule of this Office that interest earned by a grantee on funds advanced by the United States belongs to the United States rather than to the grantee and must be returned, except as otherwise provided by law. 59 Comp. Gen. 218 (1980), 42 Comp. Gen. 289 (1962), and cases cited therein. The reason for this rule is that statutes authorizing grant programs contemplate that recipients shall not profit other than in the manner and to the extent provided by law. Funds paid out to a grantee are not to be held, but are to be applied promptly to the grant purposes. 1 Comp. Gen. 652 (1922). Where a grantee holds advanced grant funds, he holds them in trust for the United States and must pay any interest earned on them over to the United States. 42 Comp. Gen. 289.

While we have never directly decided the question raised by the AID Office of General Counsel, as suggested in an AID interoffice memorandum, our decisions exempting subgrantees of States under the States' exemption from returning interest contained in the Intergovernmental Cooperation Act, *id.*, have assumed that subgrantees would otherwise be required to pay the interest earned on such advances to the United States. The AID General Counsel's argument rests on two difficulties with extending the trust theory to subgrantees. First, the disbursement to the subgrantee resembles a disbursement for grant purposes and, second, making the subgrantee responsible to the Government for interest is difficult since the Government's relationship is with the grantee not the subgrantee.

The advance as a disbursement. The advance of grant funds by a grantee to a subgrantee is not a disbursement for grant purposes as we have used that term in our decisions. While advancing grant funds to a subgrantee may be an authorized disbursement under a grant, there has been no disbursement for grant purposes in the sense that allowable grant costs have been incurred. Were the subgrantee simply to retain the funds in a bank account and never undertake the grant purposes, the grantee would have to return these funds to the Government because no allowable grant costs have been incurred. Under such circumstances it would be hard to characterize the financial transactions of either grantor or grantee as being for grant purposes.

In B-192459, July 1, 1980, we set forth four characteristics of a disbursement or expenditure for grant purposes. There we said an expenditure for grant purposes had occurred where (1) the grantee did not retain grant funds; (2) the grantee could not get the funds back on demand; (3) the organization that received the funds was independent of the grantee and not its agent, and (4) the grantee received something in exchange for the transfer of funds.

In applying these tests to the advance here in question, we think there are a number of important distinctions to be made. While the grantee in this case might not have been able to literally get the funds back from the subgrantee on demand, the subgrantee had no claim to the funds at the time interest was earned. In other words, it had no legally enforceable right to obtain the advance or keep the money until it was applied to grant purposes. The original grant does not authorize the grantee to obtain funds in advance in order to make advances to subgrantees before they are needed by the subgrantee. Also, unlike in the instant case, the payment in B-192459, *id.*, created legally enforceable rights that directly related to carrying out the grant purpose. Since the advance itself does not accomplish grant purposes, the grantee obtained nothing from the sub-grantee in exchange for the advance. The grant was made under Treasury's letter of credit regulations, Treasury Circular 1075. These regulations made this point clear. Circular 1075 requires recipients of grant funds to time advances to subgrantees as closely as possible to their "actual disbursements * * * *for direct program costs and the proportionate share of any allowable indirect costs.*" [Italic supplied.] 31 C.F.R. § 205.4. *See* provision 7A of AID's standard grant provision. Accordingly, unless the program statute under which the grant was made specifically authorizes such transactions and this is incorporated in the grant agreement, we do not think the advance has become a disbursement for grant purposes.

Responsibility for Interest. The treatment of interest income of grantees has for many years been a standard grant condition. 62 Comp. Gen. 701, 706 (1983). We believe that the question raised here is expressly answered by provision 3(a) of the AID Standard Provisions attached to the award. This provision states:

> (a) If use of the AID funds provided hereunder results in accrual of interest to the Grantee or to any other person to whom Grantee makes such funds available in carrying out the purposes of the grant, the Grantee shall refund to AID an amount equivalent to the amount of interest accrued.

Accordingly, there is no need to imply a trust relationship between the grantee or the subgrantee for AID to recover the interest earned by the subgrantee on the advanced funds. The grant agreement expressly provides that the grantee is responsible for refunding an amount equal to the amount of interest to AID.

The certifying officer says that there is a problem in AID and A.T. International recovering the interest from subgrantees operating in currency controlled countries. The certifying officer proposes that recoveries of interest be handled by considering the interest earned in such circumstances as a drawdown of the award to A.T. International. AID will make adjustments with A.T. International's letter of credit that will permit AID to account to the Treasury for the interest earned that must be paid into Treasury as miscellaneous receipts. We have no objection to such an arrangement for recovering these amounts since this or similar means of recovery seen to be contemplated in AID's standard grant conditions.

In the case of interest earned on loans made by subgrantees in carrying out program purposes, it seems clear from the information supplied that this is program income. The retention and use of this interest is expressly provided for in the basic grant agreement. Section 6, paragraph c(5)(d). As program income, it can be used as an additional source of funds to carry out program purposes. *See* AID Handbook 13, paragraph 1J, Program Income; Office of Management and Budget Circular A-110, Attachment D.

[B-215268]

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

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished.

Matter of: Voice of America—Limitation on Pay Increase for Radio Broadcast Technician Foremen, November 26, 1984:

The issue in this decision is whether the pay increase for Radio Broadcast Technician Foremen may be excluded from the pay increase limitation imposed by law on most prevailing rate employees. We hold that the pay increase for these supervisors is subject to the statutorily imposed pay increase limitation even though their subordinates negotiated higher wage increases and were excluded from the pay increase limitation.

BACKGROUND

The decision is in response to a request from William E. Carroll, Director of Personnel, Voice of America, United States Information Agency.

The agency request states that Radio Broadcast Technicians are prevailing rate employees who negotiate their wages as provided under section 9(b) of Public Law 92-392 (August 19, 1972) and section 704 of Public Law 95-454 (October 13, 1978), 5 U.S.C. § 5343 note (1982). While Public Law 92-392 established a statutory basis for the prevailing rate system, section 9(b) of that law preserved the provisions of negotiated contracts in effect on the date of its enactment, as well as the renewal, extension or modification of such provisions. Section 704(b) of Public Law 95-454, the Civil Service Reform Act, (5 U.S. Code 5343(b)), clarifies the rights of employees covered by section 9(b) of Public Law 92-392 to negotiate their wages. 58 Comp. Gen. 198 (1979).

The first-line supervisors of these employees, Radio Broadcast Technician Foremen, are also prevailing rate employees, but as supervisors they are excluded from the bargaining unit which negotiates wages. Since 1981, the Foremen have had their wages set at 11.5 percent of the journeyman rate for Radio Broadcast Technicians. However, by applying the statutory pay limitation to the Foremen but not to the Technicians who negotiate their wages, the agency has not been able to maintain the 11.5 percent difference between the Foremen and their subordinates.

The agency asks whether the Foremen may be excluded from the statutory pay increase limitation since their wages are directly based on a negotiated rate which is exempt from the limitation.

The agency cites our decision in *Ableidinger and Walters*, 60 Comp. Gen. 58 (1980), where we held that the supervisors of Bureau of Reclamation employees who negotiate their wages could be paid double overtime since the supervisors' rates were based on the negotiated rates of their subordinates. The agency states that the pay-setting procedure for the Foremen is analogous to the one considered in our decision in *Ableidinger and Walters* since the Foremen wage rate is established directly from a negotiated pay rate; it attempts to preserve prevailing rates in the private sector economy; and it is based on a past practice which first existed 25 years ago.

Finally, the agency suggests that while the intent of the pay limitation was to treat white collar and blue collar employees equitably, it was not foreseen that application of the pay limitation would allow the pay rates of subordinates "to reach virtual parity" with supervisory rates, thereby causing adverse effects on morale and recruitment for these supervisory positions.

OPINION

The agency refers to the pay increase limitation of most prevailing rate employees imposed by section 101(f) of Public Law 98-151 (November 14, 1983), 97 Stat 973, which incorporated the provisions of H.R. 4139, as passed by the House of Representatives on October 27, 1983.[1] Section 616(a) of H.R. 4139 provides in part:

> Sec. 616. (a) Notwithstanding any other provision of law, no part of any of the funds appropriated for the fiscal years ending September 30, 1984, or September 30, 1985, by this Act or any other Act, may be used to pay any prevailing rate employee described in section 5342(a)(2)(A) of title 5, United States Code * * * in an amount * * *

Subsection 616(a) goes on to specify formulas for determining the amounts payable which, in effect, limit pay adjustments for prevailing rate employees to comparable adjustments for General Schedule employees.

Both the Radio Broadcast Technicians and Foremen are considered prevailing rate employees as described in 5 U.S.C. § 5342(a)(2)(A) as follows:

> An individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement * * *

Thus, both the Technicians and the Foremen are covered by the terms of subsection 616(a) of H.R. 4139.

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[1] We note that this pay increase limitation language is substantially the same in section 202 of Public Law 98-270, 98 Stat. 158, April 18, 1984 (fiscal year 1984), (5 U.S. Code 5305 note), and in section 101(j) of Public Law 98-473, October 12, 1984 (fiscal year 1985).

Section 616 than makes two exceptions to the pay increase limitation imposed by subsection 616(a). The first exception is contained in subsection 616(b) as follows:

(b) Notwithstanding the provisions of section 9(b) of Public Law 92-392 or section 704(b) of Public Law 95-454, the provisions of subsection (a) of this section shall apply (in such manner as the Office of Personnel Management shall prescribe) to any prevailing rate employee to whom such section 9(b) applies, *except that the provisions of subsection (a) may not apply to any increase in a wage schedule or rate which is required by the terms of a contract entered into before October 1, 1983.* [Italic supplied.]

This exception removes the Technicians from the limitation since, according to the agency, their salary increases are required by the terms of a contract entered into before October 1, 1983. On the other hand, the Foremen are not covered by the contract and, therefore, are not subject to the subsection 616(b) exception.

The second exception is contained in subsection 616(g) of H.R. 4139 as follows:

(g) Notwithstanding the limitations imposed on prevailing rate pay pursuant to subsection (a) of this section, such limitations shall not apply to wage adjustments for prevailing rate supervisors provided by the supervisory pay plan published in the Federal Register on March 30, 1983 (48 Fed. Reg. 13384).

The agency advises that the Foremen are not covered by the cited supervisory pay plan; thus the subsection 616(g) exception likewise does not apply to them.

In essence, therefore, the Foremen are subject to the pay increase limitation by the express terms of subsection 616(a) of H.R. 4139, and they are not covered by either of the exceptions to that limitation. We do not believe that our decision in *Ableidinger and Walters,* cited previously, provides a basis for removing the Foremen from the limitation.

Ableidinger and Walters concerned a statutory provision, 5 U.S.C. § 5544 (1982), which limits overtime compensation for prevailing wage employees to one and one-half the basic rate. In an earlier decision we had held that, notwithstanding 5 U.S.C. § 5544, prevailing rate employees could negotiate double overtime pay pursuant to section 9(b) of Public Law 92-392 and section 704(b) of Public Law 95-454. See 58 Comp. Gen. 198 (1979). We also had allowed double overtime pay for many years even though it was not based on negotiation under sections 9(b) and 704(b). See 59 Comp. Gen. 583 (1980). *Ableidinger and Walters* extended these decisions to approve double overtime for certain prevailing rate foremen who had received double overtime for 20 years and whose basic pay was tied to the rates negotiated by the employees they supervised. While these foremen were not subject to sections 9(b) and 704(b), we concluded:

Since the broad purpose of section 9(b) and section 704(b) was to preserve pre-existing prevailing rate practices, and since there is no sound basis for distinguishing the foremen's situation from that presented in 59 Comp. Gen. 583, *supra,* we hold that the payment of double time for overtime to the foremen * * * is proper. * * * 60 Comp. Gen. 58, at 60.

The considerations underlying our decision in *Ableidinger and Walters* do not apply in the face of the clear terms of the statutory pay increase limitation here involved. As noted previously, section 616 of H.R. 4139 expresses quite specifically both the basic coverage of the limitation and the exceptions to it. The limitation applies by its terms to the Radio Broadcast Technicians and the exceptions do not.

Moreover, subsection 616(b) of H.R. 4139 states that "[n]otwithstanding the provisions of section 9(b) of Public Law 92-392 or section 704(b) of Public Law 95-454," the limitation applies to any prevailing rate employees to whom section 9(b) applies except as inconsistent with contracts entered into before October 1, 1983. Thus, the basic approach of the limitation is to cover section 9(b) employees along with other prevailing rate employees. In view of this, the analogy to section 9(b) and section 704(b) relied on in *Ableidinger and Walters* is unavailing here.

Accordingly, we find no basis to exclude the Radio Broadcast Technician Foremen from the statutory pay increase limitation.

[B-213909]

Foreign Aid Programs—Grant Agreements With Foreign Governments—Interest Earned on Grant Funds—Retention—United States *v.* Foreign Government

The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds.

Matter of: Agency for International Development—Interest Earned on Grant Funds by Foreign Government, November 28, 1984:

FACTS

This decision is in response to a request from the Inspector General (IG) of the Agency for International Development (AID) for a legal opinion from our Office as to whether the United States can recover interest earned by a foreign government on AID grant funds. The IG's specific question concerns interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by AID to the Government of Egypt in the Basic Village Services Project (BVSP) in the 1981 fiscal year.[1] For the

[1] The submission we received from the IG also raised questions about the interest earned by the host government in two other grant programs—Development Decen-

reasons set forth hereafter, it is our view that the interest was earned after the grant funds were applied to a legitimate grant purpose and therefore cannot be recovered by the United States.

The BVSP was authorized on August 28, 1980, pursuant to section 532 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2346a. Under the terms of the grant, AID agreed to provide $20 million to the Arab Republic of Egypt to assist that country in implementing the BVSP. Article 2 of the Grant Agreement describes the purposes of the BVSP as follows:

> The Project * * * consists of technical and capital assistance for the design, management and construction of basic village services in Egypt in support of the policy of the Grantee to decentralize authority for development activities. It will focus on improving and expanding a continuing capacity in governorates and villages to plan, manage, finance, implement and maintain locally chosen and constructed rural infrastructure projects. The project will finance technical advisory services, training and research and evaluation. In addition it will finance the construction of locally selected infrastructure projects. * * *

Under the terms of the grant agreement, and its annexes, AID deposits funds in the account of the organization for the Reconstruction and Development of the Egyptian Village (ORDEV) after annual implementation plans are approved for each of the designated governorates (or provinces). ORDEV then allocates the funds to the governorates for approved subprojects. Each governorate in turn disburses the funds to the appropriate village council which makes payments to contractors as the projects are being completed.

An audit report on the BVSP, dated April 29, 1982, issued by AID's Regional IG in Cairo, indicated that as of December 31, 1981, AID has disbursed approximately $31 million in BVSP grant funds to ORDEV. More importantly, the audit found that as of that date the governorates and village councils participating in the Project had earned over $1 million in interest on the BVSP grant funds by depositing them in special interest-bearing accounts at the governorate and village levels. The audit report took the position that the BVSP Grant Agreement "requires" that interest earned on grant funds in the governorate and village accounts be returned to AID by the Egyptian Government. This consideration was based primarily on section D(2)(e) of the Grant Agreement's Standard Provisions Annex which reads as follows:

> Any interest or other earnings on Grant funds disbursed by A.I.D. to the grantee under this Agreement prior to the authorized use of such funds for the Project will be returned to A.I.D. in U.S. Dollars by the Grantee.

In response to the recommendation contained in the audit report that AID recover all of the interest that was earned by the governorates and village councils, AID's General Counsel took the position, in a memorandum dated June 6, 1983, that once the grant funds had been disbursed by ORDEV to the special accounts of go-

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tralization and the Agriculture Cooperative Marketing Project. However, the IG's office subsequently agreed informally to limit the scope of the inquiry to the BVSP only.

vernorates and village councils "they are deemed to have been disbursed for an 'authorized use' under the Grant." Accordingly, the General Counsel concluded that the interest earned on the grant funds at these lower governmental levels were not subject to refund under the grant agreement.

In light of the continuing dispute between AID's IG and General Counsel, the IG submitted the question to our Office for our legal opinion. The IG's submission states that under the so-called "augmentation rule," which provides that an agency may not increase or augment its appropriation from outside sources without specific statutory authority, interest earned by a grantee on funds advanced by the United States must be accounted for as funds belonging to the United States. Therefore, the IG concludes that such funds must be recovered and deposited in the Treasury as miscellaneous receipts. The IG rejects the General Counsel's view that disbursements to the special account of governorates and village councils constitute an "authorized use" of the grant fund. In this respect, the IG summarized the position of his office as follows:

> The "augmentation rule" discourages the accumulation of U.S. Treasury funds in grantee accounts by requiring a return of any interest earned to the U.S. Government. However, in certain instances AID has allowed an exemption from this rule by defining the beginning of a project's "authorized use" of funds as being from the establishment of grant fund accounts for the purpose of AID-financed projects. Project funds were then transferred from the grant accounts to interest bearing host government time deposit conduit accounts for long periods prior to use for project purposes. By defining these host government conduit accounts as a legal method of earning interest on AID grant funds, since they were set up after the point of "authorized use of funds" had been established, millions of dollars of interest earned by the conduit accounts are lost to the U.S. Treasury each year. In addition, this practice can be an incentive to delay use of U.S. funds for the purpose for which provided and appears to be an attempt to avoid the Congressional intent of the "augumentation rule."
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> The "augumentation rule" needs to be applied to these cases to prevent the diversion of foreign assistance funds to interest bearing host government bank accounts and to prevent this easily manipulated definition from being extended to a broad range of U.S. grant fund accounts.

ANALYSIS

Both the IG and the General Counsel agree that the determining factor in a case of this type is whether interest was earned before or after the grant funds were applied to an authorized grant purpose. Thus, in this case the critical issue is whether the central Eqyptian Government's disbursement of the grant funds to the governorates and village councils constituted an authorized use of grant funds under the specific terms of the BVSP grant and the underlying legislation.

Ordinarily we would be reluctant to accept the premise advanced by the General Counsel that the transfer of grant funds from a grantee to a subgrantee, or perhaps only to a subunit of the grantee[2] constitutes a legitimate disbursement for grant purposes. Our

[2] The precise relationship between the different elements of the Egyptian Government is unclear to us. The IG and General Counsel disputed this point as well. For

reluctance in this respect is based on the general rule that interest earned by a grantee on funds advanced by the United States belongs to the United States rather than the grantee and must be paid to the United States, except as otherwise provided by law. 62 Comp. Gen. 701 (1983); 59 Comp. Gen. 218 (1980); 42 Comp. Gen. 289 (1962), and cases cited therein. Grantees are considered to hold the advanced funds in trust for the United States pending their applications for grant purposes, *id.* The rationale for this rule is that statutes authorizing grant programs contemplate that grant funds are to be expended only for the purposes for which they were awarded and are not intended to be used for the profit of the grantee unless expressly agreed to or authorized. Agencies do not have the authority to agree to allow the grantee to earn and retain interest on grant funds prior to their expenditure unless such authority is expressly provided. *See* 62 Comp. Gen. 701, 702 (1983). The major source of authority allowing retention of interest is provided States and State instrumentalities under the Intergovernmental Cooperation Act of 1968, 31 U.S.C. § 6503(a). In this case AID does not claim that an exception to the general rule such as the Intergovernmental Cooperation Act provides the basis for the grantee to retain the interest. The AID position is that the general rule is satisfied because the interest was accrued in furtherance of the grant purpose. Section 531(a)(1) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2346(a)(1), under which the BVSP was authorized and funded, contains very broad program authority:

> The Congress recognizes that under special economic, political or security conditions the national interest of the United States may require economic support for countries or in amounts which could not be justified solely under chapter I of part I of subchapter I of this chapter. In such cases, the President is authorized to furnish assistance to countries and organizations *on such terms and conditions as he may determine, in order to promote economic or political stability.* * * * [Italic supplied.]

Clearly this language was intended to provide the President, and by extension AID, with a considerable degree of discretion in the design and implementation of grant projects so as to best accomplish the agency's programmatic objectives. We think that AID can make grants under this authority for the purpose of providing grantees or subgrantees with experience in managing, handling, and by implication, investing project funds, including the right to earn and retain interest thereon. In this respect it is significant that AID's program office which designed the grant project here in question, and AID's General Counsel, which provides legal guidance to that office, are convinced that the grant was designed and implemented to accomplish such objectives by making disburse-

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example, we do not know how independent the governorates and village councils are from the central government and whether the central government had the right to demand the grants funds be returned once they had been transferred to the governorates and village councils. Based on our analysis of the case however, it was not necessary for us to resolve this issue.

ment of grant funds to the lower governmental levels—governorates and village councils—a material purpose of this grant.

Our analysis of the grant agreement and supporting documentation leads us to the same conclusion reached by the General Counsel. That is, we believe that disbursement of the grant funds to the governorates and village councils for their management was a legitimate and proper purpose of this grant.

As mentioned above, the grant agreement states that the purpose of the grant is to support the grantee's policy of decentralizing authority for development activities in Egypt by focusing "on improving and expanding a continuing capacity in governorates and villages to plan, manage, finance, implement and maintain" locally selected projects. The project description in Annex I of the grant agreement emphasizes that the primary purpose the BVSP is "decentralization."

Descriptions and explanations of the purpose and objective of the BVSP contained in the BVSP Paper, dated July 22, 1980, a document which justifies and explains why the grant should be approved and how it would be implemented, are more specific. For example, Annex III of the BVSP Paper contains a cable dated June 9, 1980, from the Near East Bureau of the State Department approving further development of the BVSP proposal. The cable reads as follows:

> * * * Project purpose must stress acceleration of decentralization and increase of institutional capacity to plan, implement, monitor and fund local development activities rather than construction of rural infrastructure. If BVS project helps capitalize governorate fund, AID monitoring will be essentially concerned with evidence of expenditures at governorate level and selection and implementation procedures to be used at that level. * * *

Similarly, the goal of the project is described in the Project Paper (p. 4) as follows:

> The goal of this project is to expand decision making capacity on the broadest possible basis, within the framework of Egyptian policy of using the decentralization process as a means for achieving its development objectives, by providing local government decision-makers with experience in the allocation and utilization of resources and in developing the financial and other mechanisms to carry out development programs. Such decentralization is premised on the assumption that increased local government responsibility for local development activities will result in a more equitable and self sustaining development process relevant to both national and local interests.

The grant agreement and supporting documentation is replete with other similar references that demonstrate that the primary purpose of the BVSP grant was to provide decision-makers at the governorate and village council levels with experience in all aspects of planning and executing development projects, including those relating to the handling, disbursement, and by implication, investment of funds needed to finance those projects. Thus, we believe that disbursement of BVSP funds by ORDEV to the governorate and subsequently to the village council levels did constitute an "authorized use" of grant funds.

Other information in the grant agreement and supporting documentation relating to the manner in which the BVSP funds were to be distributed and accounted for at each stage of the process lends further support to our conclusions. The following explanation of the intended funding mechanism from the BVSP Paper is especially significiant in this respect:

* * * When annual implementation plans are approved for each of the designated governorates, USAID will provide the equivalent of $15 million to be deposited to the account of ORDEV at the Central Bank of Egypt. ORDEV in turn will issue a check for $5 million to each of the three governorates upon certification by the governorate that the 10% maintenance fund has been established. Each governorate will then disburse the funds to the appropriate villlage councils for their approved projects.* * *

* * * * * * *

The cash management aspects of disbursing the entire annual allocation of $15 million up front prior to actual project implementation were carefully considered. An incremental funding mechanism with periodic reimbursement or replenishment was considered and rejected. *The project sites and the accounting stations are so widespread, the financial reporting network so diffuse, the need for funds at the provincial level in terms of timing and amount so uncertain, it is imperative to have the funds available at the nearest control point, which is the governorate. The initial expenditure of $15 million will be a disbursement, not an advance.* Periodic reporting from the GOE will indicate how the funds were used and will determine future allocations. [Italic supplied.]

As this explanation indicates, an important aspect of the funding mechanism was the disbursement of the funds to the lower governmental levels—especially the governorates—so the funds would be available where, when, and as needed. This explanation necessarily implies that the grant funds would sometimes be held at the lower governmental levels for some time until they were needed. In such circumstances, a governorate or village council that did not keep the funds in an interest-bearing account until they were needed would not appear to be acting responsibly toward achieving the primary stated purpose of the grant—developing a capacity "to plan, manage, fund, implement, and maintain" locally chosen projects.

As stated above, the primary purpose of the BVSP was to develop the capacity of governorates and village councils to participate fully in every aspect of planning, managing, and financing local development projects. Accordingly, we agree with the position of the General Counsel that the project's stated purpose would have been diminished if the governorates and village councils were not afforded full control over, and responsibility for, the BVSP grant funds once the funds were disbursed by ORDEV of the central government. This necessarily includes, in our view, the right to earn and retain interest on the funds while they were deposited in the special governorate and village council accounts required under the grant agreement.

As indicated above, we believe our conclusion is entirely consistent with the relevant decisions of our Office. Both the General Counsel and the IG argue that our holding in B-192459, July 1, 1980, involving a grant by the Community Services Administration

(CSA), support their conflicting positions. The *CSA* case involved interest earned at two different stages of grant implementation. The grant in that case was made by CSA to a hospital for the purpose of assisting in the construction of a new hospital facility. One "category" of interest was earned by the grantee hospital prior to any transfer of the grant funds. The other "category" of interest was earned by a trustee holding grant funds in a special hospital construction trust fund. Our decision held that while the interest earned by the hospital prior to the transfer of grant funds to the trustee had to be returned to the Government, citing the general rule in such cases, the interest earned by the trustee could not be recovered since the transfer of grant funds to the trustee was "an expenditure or disbursement for grant purposes." We reached the latter conclusion because the grantee had given up possession and control of the grant funds to an independent third party, from whom the grantee had no right to demand return of the funds and because the grantee had received something in exchange for the transfer of funds—the promise of new hospital construction.

In the present case, the IG maintains that his office could not find that any of the requirements established in the *CSA* case "were met in establishing the special accounts which served mainly as conduits for the funds to pass down the U.S. Treasury down to the project level." On the other hand, the General Counsel maintains that the test set forth in *CSA* was essentially satisfied in the BVSP.

The issue in this case is generally the same as the one in the CSA case—whether the transfer of funds to the governorates was a disbursement for grant purposes. However, the analysis required to resolve that issue is different because of the different purposes of the two grants. If the primary purpose of the BVSP grant had been to build or construct rural development projects—roads, water works, canals, sanitation systems, and so on—the relevant issue would be whether the transfer from the central government to the governorates satisfied the requirements set forth in our *CSA* decision. However, as explained above, the central purpose of the BVSP was to assist Egypt's effort to decentralize the responsibility for planning and managing such projects from the central government to the provincial and local governments. Therefore, under *CSA* and our general rule in such cases, the test to be applied is whether the transfer to the governorates and subsequently the village councils was a legitimate means of accomplishing the general grant purpose of decentralization. In our view, the grant agreement and supporting documentation indicates that such was the case.

In accordance with the foregoing , it is our conclusion that in the specific facts and circumstances of this case, AID has no legal basis to attempt to recover interest earned by the governorates and village councils on the BVSP grant funds that had been disbursed to them. Nevertheless, in order to remove any possible doubt or ambiguity in the future we recommend that new grant agreements for this or similar programs more clearly address the question raised in this case. Rather than answering this question by resorting to an analysis of the grant documents, it would be clearly preferable to have a paragraph in these documents that clearly connects the program purpose with the circumstances under which a grantee or subrecipient may retain interest income.

[B-214810]

Nonappropriated Fund Activities—Transactions With Government Agencies—Interagency Agreements—Propriety

Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16.

Matter of: Department of Agriculture Graduate School—Interagency orders for training, November 29, 1984:

This is in response to a request from the Secretary of Agriculture for a decision regarding the propriety of "interagency agreements" under which the Graduate School of the Department of Agriculture provides education or training services to Federal agencies on a reimbursable basis. As authority for these agreements, the Secretary cites provisions of the Economy Act, 31 U.S.C. § 1535, and the Government Employees Training Act, 5 U.S.C. § 4104 (1982). As set forth below, we conclude that neither of these statutes constitutes authority for the agreements in question.

The Graduate School of the U.S. Department of Agriculture conducts academic courses and training programs in a large number of disciplines, ranging from Arts and Humanities to Secretarial Studies. The Graduate School is a nonprofit organization under the general supervision of the Department of Agriculture. The Secretary of Agriculture appoints a General Administration Board of 15 members (more than half of whom are Department of Agriculture officials,) which functions similarly to a university board of trustees. The Graduate School receives no appropriated funds, but rather operates with funds derived from student fees and revenue from training services. Full time employees of the Graduate School are not Federal employees for purposes of the Federal employment laws. Most of the instruction is conducted by independent contractors.

It is the position of the Secretary that the Graduate School constitutes a nonappropriated fund instrumentality (NAFI) of the Department of Agriculture. NAFIs encompass a wide range of activities and resist a general definition. They share common characteristics in that they are associated with governmental entities, and, to some extent, are controlled by and operated for the benefit of those Government entities. However, the essence of a NAFI is that it is operated with the proceeds of its activities, rather than with appropriated funds. For purposes of this decision, we agree with the Secretary's opinion that the Graduate School constitutes a NAFI.

As indicated above, the Department of Agriculture cites the Economy Act, 31 U.S.C. § 1535, and the Government Employees Training Act, 5 U.S.C. § 4104 (1982), as authority for the "interagency agreements" here under review. These two statutes, although not interchangeable, are substantially similar in some respects. The first statute authorizes reimbursable orders for goods or services between agencies or major organizational units within agencies. The second statute authorizes reimbursable agreements between agencies for training services.

This Office consistently has taken the position that interagency or intra-agency agreements are not appropriate vehicles for transactions between NAFIs and Government agencies. We conclude that this position is valid whether the transaction in question is purportedly based on the Economy Act or the Training Act.

The leading case in this area is 58 Comp. Gen 94 (1978), wherein we considered the propriety of procurement of services and merchandise by the Army from Army-related NAFIs through the use of "intra-Army orders." In that decision, we observed:

> Although the NAFIs are recognized as being Government activities, they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriatioin requirements.
>
> * * * * * * *
>
> We believe that it is these differences, rather than the status of NAFIs as Government instrumentalities, which must be controlling here. In all three cases, what is involved is the transfer of moneys from the Army's appropriation accounts to the accounts of the NAFIs over which there is no direct control either by the Congress (through the appropriation process) or this Office (through the account settlement authority of 31 U.S.C. 71, 74 (1970)). Thus, for all practical purposes from an appropriation and procurement standpoint, the obtaining of goods and services from a NAFI is tantamount to obtaining them from non-Governmental, commercial sources. 58 Comp. Gen. at 97–98.

Accordingly, because "obtaining goods and services from a NAFI is tantamount to obtaining them from non-governmental commercial sources," a regular purchase order rather than an intra-agency or interagency order should be used when services are furnished by a NAFI to an appropriated fund activity. 58 Comp. Gen. at 98–99. *See also* B–199533, August 25, 1980 (Army acted improperly in purchasing services from NAFI without contract or regular purchase order processed through contracting official); B–192859, April 17, 1979 (disposition form, amounting to inter-office memorandum, is not proper vehicle for transaction between NAFI and Army).

We have recognized that sole source procurement through a NAFI may be permissible in certain circumstances such as when there are "organizational or functional reasons which dictate the impracticability of having services furnished by other than a NAFI" or when only a NAFI can provide goods and services in "extreme exigency situations." 58 Comp. Gen. at 98. However, where such procurements are justified "appropriate sole-source justifications" and the use of regular purchase orders are required. 58 Comp. Gen. at 98–99. *See* B–148581, *et al.*, September 2, 1980 (fact that NAFI had regular supply channel and established transportation and warehouse system for items to be procured was not itself sufficient to justify sole-source procurement). Additionally, of course, a NAFI may compete in, and be awarded a contract under a competitive procurement unless otherwise precluded by its charter from doing so.

The Department of Agriculture cites 37 Comp. Gen. 16 (1957) in support of its position that the Graduate School is a proper recipient of an "interagency" order. In that decision we considered a protest by a disappointed bidder on a contract for laundry service ultimately awarded to a NAFI. The contracting officer had solicited bids from commercial services, but then procured the services from a NAFI on the basis of a cost comparison. We decided to take no action on the protest. However, we did state our view that "it would be solely a matter of administrative discretion as to whether or not to procure the work or service from another Government agency or instrumentality when determined that its prices are lower than all bids received in response to a formal advertisement." 37 Comp. Gen. at 18–19.

The decision in 37 Comp. Gen. 16 concerned the propriety of the contracting officer's rejection of the submitted commercial bids. The decision did not reach the issue of whether the procurement from the NAFI was proper, and whether, if proper, such procurement could be done by interagency agreement. Accordingly, to the extent our language in 37 Comp. Gen. 16 suggests a different result than our holding in 58 Comp. Gen. 94 (1978) and similar cases, discussed above, it should not be followed.

Further, the Department of Agriculture contends that 58 Comp. Gen. 94 can be distinguished from the instant case. The Secretary specifically points to language in that decision where we observed:

> This does not mean that Defense Department NAFIs must now compete with regular commercial contracting services. NAFIs exist to help foster the morale and welfare of military personnel and their dependents. DOD Directive 1330.2; Army Regulation 230–1. Providing regular Defense Department operating activities with goods or services is not directly related to that purpose. This is particularly so with respect to the resale NAFIs such as the exchanges, which operate for the purpose of selling goods and services primarily to military personnel and dependents; they are not expected to sell to the "Government" itself. Thus, as a general proposition, we would view the sale of goods and services by NAFIs to regular Governmental operating activities to be outside the scope of the NAFIs' proper functions. Accordingly, as a general rule there should be no competition between NAFIs and commercial sources simply because NAFIs are not in the business of supplying the Government with its procurement needs. 58 Comp. Gen. at 98.

Agriculture infers from this paragraph that the "principle factor leading to the conclusions [of 58 Comp. Gen. 94] is the fact that the sale of goods and services to regular Governmental operating activities is outside the scope of the authorized activities of the Defense non-appropriated fund instrumentalities." On the other hand, the Secretary observes, the mission of the Graduate School specifically includes cooperation with other agencies. Accordingly, he concludes that the rationale of 58 Comp. Gen. 94 is not applicable in the instant case.

The analysis quoted above regarding the "scope of the NAFIs' proper functions" was not the basis of our conclusion that interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. That conclusion was based on several critical differences between NAFIs and Government agencies, including coverage under the procurement and appropriation laws. 58 Comp. Gen. at 98. The analysis regarding the "scope of the NAFIs proper function" was merely an observation that, although military NAFIs for some purposes were not required to compete with commercial enterprises, it seldom would be appropriate for a Government agency to purchase goods and services from Defense NAFIs, by *any* procurement method, "because NAFIs are not in the business of supplying the Government with its procurement needs." 57 Comp. Gen. at 98.

We agree with the Secretary that this analysis would not be fully applicable in the instant case, given the wide range of activities of the Graduate School. However, our agreement in this regard indicates that it is more likely that the Graduate School would be an appropriate recipient of a sole source or competitive procurement contract. It does not affect our conclusion that the Graduate School, as a NAFI, is not a proper recipient of an interagency order.

Finally, Agriculture has included in its submission an internal Civil Service Commission memorandum dated December 13, 1978. The memorandum concludes that there is "no legal impediment to designation of DOA [Agriculture] as the lead agency for Federal interagency training of auditors" under the Economy Act or the Training Act. Further, it concludes that there is "no legal problem with the assignment by DOA of the training responsibility to the Graduate School." However, this memorandum is not helpful to DOA's position in this case. As the memorandum correctly points out, the "issue of whether the [training] may be assigned to the Graduate School through DOA under section 601 of the Economy Act without going through contracting-out procedures is subject to the supervening authority of GAO to determine." In exercising this authority, we have determined that training may not be obtained from the Graduate School by interagency order either under the Economy Act or under the Training Act.

Accordingly, it is our conclusion that neither the Economy Act, 31 U.S.C. § 1534, nor the Government Employees Training Act, 5 U.S.C. § 4104 (1982), constitutes authority for the Graduate School to enter into "interagency agreements" with Federal agencies. However, in view of the long-standing uncertainty in this area of the law, this decision should be applied prospectively only, and the termination of agreements now in effect will not be required.

[B-214131]

Officers and Employees—Senior Executive Service—Compensation—Aggregate Limitation—Inclusions—Bonus Payments

Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished.

Matter of: Elizabeth Smedley et al.—Supplemental Payments to SES Rank Award Recipients, November 30, 1984:

This decision responds to the request of the Acting Assistant Controller, Financial Systems and Accounting, Department of Energy (DOE), for a decision as to whether members of the Senior Executive Service (SES) of that agency who received two separate payments for their awarded presidential ranks for fiscal year 1982 may retain the total amount of their award payments in view of our decision *Senior Executive Service,* 62 Comp. Gen. 675 (1983).[1] For the reasons which follow, we conclude that both the original payments and the supplemental payments may be retained by the SES members.

According to the Acting Assistant Controller, SES members Elizabeth Smedley, Percy Brewington, and Thomas Clark received initial rank award checks at the time of the Distinguished Executive Award ceremony held at the White House on November 22, 1982. However, these checks were dated September 29, 1982, and held in the control of DOE until the White House ceremony. These initial checks were for less than the $20,000 amount specified in 5 U.S.C. § 4507(e)(2) because that amount when combined with their respective base salaries would have resulted in aggregate amounts in excess of $69,630 (the annual rate payable for positions in the Executive Schedule, Level I, at the end of fiscal year 1982) in contravention of 5 U.S.C. § 5383(b), which provides as follows:

> In no event may the aggregate amount paid to a senior executive during any fiscal year under sections 4507 [rank awards], 5382 [basic pay], 5384 [performance awards], and 5948 [physicians comparability allowances] of this title exceed the

[1] B-212756, September 27, 1983.

annual rate payable for positions at level I of the Executive Schedule in effect at the end of such fiscal year.

Effective December 18, 1982, the statutory annual salary rate payable under Executive Schedule, Level I, was raised to $80,100. Public Law 97-377, § 129(b), December 21, 1982, 96 Stat. 1830, 1914. Based on this increase in the Executive Level I pay ceiling, DOE authorized supplemental rank award payments on April 5, 1983, in the following amounts: Elizabeth Smedley—$7,701.52; Percy Brewington—$4,013.84; Thomas Clark—$5,941.52.[2]

The crucial question for the purposes of applying the aggregate amount limitation in 5 U.S.C. § 5383(b) is when payment took place. We answered this question in *Senior Executive Service,* cited above, as follows:

> * * * We believe that the date of the check furnishes the most definite and certain answer to this question. That conclusion is consistent with the Prompt Payment Act, Public Law 97-177, § 6, May 21, 1982, 96 Stat. 85, which provides that a payment thereunder is deemed to be made on the date a check for the payment is dated. 31 U.S.C. § 3901(a)(5).
>
> Therefore, for purposes of establishing aggregate amounts paid during a fiscal year under 5 U.S.C. § 5383(b) a senior executive is considered paid on the date of the Treasury check. * * *

Since the DOE SES members who were awarded presidential ranks received checks dated September 29, 1982, DOE asks whether the decision quoted above requires the interpretation that these SES members received the initial payment in fiscal year 1982 and are therefore limited to the total salary ceiling of $69,630, thereby making DOE's supplemental payments to them improper.

In *Senior Executive Service*, we were primarily concerned with fixing the date of payment, for purposes of SES bonuses, where in the regular course of business a Treasury check is scheduled for disbursement, dated, and mailed to the intended recipient. As shown above, we decided upon the date of the check as furnishing the most definite and certain answer under those circumstances. We did not consider or decide the question of fixing the date of payment when a check is not handled in the regular course of business. We stated, 62 Comp. Gen. at 678, that specific situations not covered by that case should be submitted for decision.

In the present case, the Treasury checks to the three executives were not handled in the regular course of business. Instead, they were dated on September 29, 1982, and delivered to the DOE, whose officials retained custody of the checks for almost 2 months. The checks were not delivered to the employees until November 22, 1982. Where, as here, there is no dispute that the checks were held in the control of the employing agency, the date of the check is not controlling. In this situation the date of payment for purposes of 5 U.S.C. § 5383(b) is the date the checks were delivered to the rank

[2] We note that all amounts required for the presidential rank awards, including the supplemental payments, would be charged to fiscal year 1982 appropriations even though some or all of such amounts are paid in fiscal year 1983. See, e.g., 54 Comp. Gen. 472, 476 (1974).

award recipients. The decision *Senior Executive Service* is distinguished on the facts.

It is also significant to note that the amounts of the presidential rank awards involved in this case are specific statutory entitlements as set forth in 5 U.S.C. § 4507(e)(2), which provides as follows:

> Receipt by a career appointee of the rank of Distinguished Executive entitles the individual to a lump-sum payment of $20,000, which shall be in addition to the basic pay under section 5382 of this title or any award paid under section 5384 of this title.

This specific statutory entitlement of $20,000 for Distinguished Executives is limited only by the pay cap established by 5 U.S.C. § 5383(b) which is set forth above. Therefore, as was recognized in *Senior Executive Service,* for presidential rank award recipients under section 4507 whose initial payment was reduced because of the pay ceiling of 5 U.S.C. § 5383(b), an agency is required to make a supplemental payment so that the senior executive receives the full mount of the $20,000 statutory entitlement under section 4507(e)(2), limited only by the new Executive Level I pay ceiling of $80,100. We note that this conclusion is consistent with advice given to agency directors of personnel by memorandum dated March 15, 1983, from the Office of Personnel Management.

Accordingly, we conclude that the three DOE presidential rank award recipients were paid their initial award payments in fiscal year 1983, on the date the checks were given to them. Therefore, the supplemental award payments made to them later in fiscal year 1983 were properly made, subject only to the aggregate salary limitation for fiscal year 1983 of $80,100.

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