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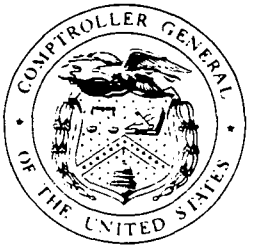

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[B-219749.2]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of Fact or Law—Established

The General Accounting Office (GAO) sustains a protest on reconsideration where the agency failed to provide GAO with a copy of a memorandum, prepared while the protest was pending, that reversed its determination that the protester's proposal to provide an aircraft part could not be evaluated without a final assembly drawing used by the previous supplier. Since the memorandum establishes that the agency's initial rejection of the protester's proposal was unreasonable, GAO recommends resolicitation if delivery schedules permit.

Matter of: Pacific Sky Supply, Inc.—Reconsideration, April 2, 1986:

Pacific Sky Supply, Inc. requests reconsideration of our decision denying its protest in *Pacific Sky Supply, Inc.*, B-219749, Oct. 11, 1985, 85-2 CPD ¶ 406. Pacific Sky argues that the Department of the Air Force failed to provide our Office with a September 3, 1985 memorandum that the protester believes would have changed our decision.

We reconsider our prior decision and sustain the protest.

Our decision involved a purchase order issued to Hamilton Standard Division of United Technologies by the Air Force for 68 base assemblies, which provide support for C-130 aircraft electronic propeller control equipment. Pacific Sky submitted a proposal to provide the base assemblies after the agency announced the planned procurement in the Commerce Business Daily on March 8, 1985. The firm stated that it would purchase all components of the assemblies from suppliers to the previous producer, Hamilton Standard, and would assemble the components in accordance with a drawing in Hamilton Standard's illustrated parts catalog for the item.

The Air Force rejected Pacific Sky's offer because it believed that neither the protester nor the Air Force had sufficient technical data to ensure proper manufacture and, on June 29, 1985, placed an order under a basic ordering agreement with Hamilton Standard. Pacific Sky protested to our Office, contending that since it was going to assemble components manufactured by Hamilton Standard's suppliers in accord with Hamilton Standard's own drawing, a requirement for further technical data was not reasonable. In this connection, the protester submitted a telex message it had sent to Hamilton Standard asking whether the base assembly constructed of components listed in Hamilton Standard's parts catalog "can be used without modification or selection of any kind as stated in Hamilton Standard publication P-5056-6 pages 6-1 thru 6-17." Hamilton Standard's reply, dated August 15, 1985, was as follows:

CONFIRM P/N 526005 BASE ASSEMBLY ASSEMBLED IN ACCORDANCE WITH THE PARTS LIST ON PAGES 6-15 IN MANUAL P5056-6 IS ACCEPTABLE FOR USE.

In its report on the protest, the Air Force stated that "critical tolerances" and the "essential function" of the base assembly mandated purchase only from Hamilton Standard in the absence of that firm's manufacturing data and assembly drawing. The agency's only specific concern, however, related to the location of certain receptacles on the base assembly. The Air Force believed that without the Hamilton Standard final assembly drawing, Pacific Sky could not ensure that receptacles in the base assembly were placed so that pins on equipment supported by the base (a syncrophaser), which are plugged into the receptacles, would not break and disable the equipment.[1] Pacific Sky had stated in its proposal that it would use an FAA-certified syncrophaser to make sure that the receptacles were properly located. The Air Force contended that, because of the variety of equipment used by the Air Force, this procedure would be insufficient to establish that all syncrophasers would properly align with the base assembly receptacles.

In its response to the Air Force's report, Pacific Sky did not address or even acknowledge the Air Force's argument concerning potential alignment problems. Instead, it asserted that the issue was really one of responsibility, and should be referred to the Small Business Administration under the certificate of competency program. We concluded that the issue was one of technical acceptability and not responsibility. Since Pacific Sky had failed to rebut the agency's technical position and thereby meet its obligation to prove that rejection of its proposal had been unreasonable, we denied the protest.

Additional Information

In reaching our decision, we considered the Hamilton Standard telex quoted above. We concluded that, in itself, the message did not refute the Air Force's concern that it could not determine whether the receptacles were properly located on the base assembly without the final assembly drawing.

Pacific Sky has now obtained a memorandum dated August 25, 1985, from the contracting office to the Air Force technical evaluators, requesting reconsideration of Pacific Sky as a qualified source for base assemblies based upon the exchange of telex messages with Hamilton Standard. The contracting office requested that the reevaluation be expedited because of the pending protest. In a memorandum dated September 3, *i.e.*, 5 weeks before we issued our decision on October 11, the Air Force office that had previously found Pacific Sky not to be a qualified source, and whose views were responsible for rejection of the protester's proposal and the Air Force's position in the protest report, reversed its opinion. The memorandum stated that Hamilton Standard's August 15 telex had

[1] The synchrophaser automatically controls propeller speed by varying the pitch and angle between the four propellers. Propeller speed may also be controlled manually.

located receptacles was not a safety hazard. As discussed above, Pacific Sky did not offer any response to the Air Force's position.

We believe that the Air Force's reversal of its position that an additional assembly drawing is required to locate the receptacles establishes that its initial position was unreasonable. The only new information apparently considered by the Air Force in its reevaluation was a one sentence telex to the protester from Hamilton Standard stating that a base assembly assembled in accordance with the firm's catalog drawing "is acceptable for use." Hamilton Standard did not indicate what it meant by "acceptable" or for what uses the assembly would be acceptable. The statement is clearly incomplete in its failure to address the location of the electrical receptacles. Pacific Sky acknowledges that the Hamilton Standard drawing is insufficient for this purpose and proposed to use an FAA-certified syncrophaser to place the receptacles. Yet, Hamilton Standard stated that the assembly would be "acceptable" without any reference to how the receptacles could be properly located using only the parts catalog drawing.

The brief telex message from Hamilton Standard to Pacific Sky could not reasonably support the complete alleviation of Air Force concerns about faulty alignment of syncrophaser pins and base assembly receptacles unless those concerns were not meaningful in the first instance. Consequently, on the record before us, we conclude that the Air Force's rejection of Pacific Sky's offer and its underlying technical judgment were unreasonable. Indeed, had the September 3 memorandum been included in the procurement record, we would have sustained the initial protest. Therefore, we reconsider our original decision and sustain the protest now.

Recommendation

The Air Force states that the lead time for manufacture of base assemblies is 21 months. The agency reports that it has a sufficient quantity on hand for only 14 months, so that a termination of Hamilton Standard's contract and reaward to Pacific Sky will "cause the grounding of C-130 aircraft and adversely affect the C-130 Programmed Depot Maintenance Schedule."

According to Pacific Sky, the Air Force has overestimated the lead time for this equipment. The protester has provided quotations from the component suppliers showing a maximum lead time of 4½ months for components and states that it can deliver the items within 6 months following award.

Pacific Sky's offer was substantially below the price quoted by Hamilton Standard, and the protester is apparently willing to enter a contract at its original price for delivery well within the 14 months required by the Air Force. The proposal was submitted in response to request for proposals (RFP) No. F09603-85-R-1050, which the Air Force provided to Hamilton Standard and to other firms responding to a Commerce Business Daily announcement. We

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been evaluated and, in view of it, Pacific Sky was considered a potential source for the base assembly providing the parts were purchased from Hamilton Standard's suppliers and assembled in accord with Hamilton Standard's parts catalog. The technical office added that it would assign the base assembly "a competitive code."

Although the protest was still pending, the Air Force did not provide our Office with a copy of this memorandum. The Air Force notified us that Hamilton Standard had agreed to provide its base assembly drawing so that, whatever our decision on the protest, future procurements would be competitive. We were not told that the agency had already decided that the item could be competitively procured without the drawing.

The Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(b)(2) (West Supp. 1985), requires agencies to submit a "complete report (including all relevant documents)" within 25 working days from receipt of notice of a protest to our Office. The act, 31 U.S.C.A. § 3553(f), and our implementing Bid Protest Regulations, 4 CFR § 21.3(c) (1985), further require the report and all relevant documents to be provided to the protester, except for documents that would give the protester a competitive advantage or that the firm is not legally authorized to receive. While neither the act nor our regulations explicitly address documents created while a protest is pending, we believe that in this case the Air Force should have provided us with the September 3 memorandum. The document constitutes a reversal of the agency's technical evaluation upon which it based its position in the protest report. Moreover, as we discuss below, the technical reevaluation was clearly relevant to the reasonableness of the agency's initial determination to reject Pacific Sky's proposal.

The Air Force asserts that its technical reevaluation was based upon "data and information" unknown to the government at the time of the protested procurement actions, *i.e.*, rejection of Pacific Sky's proposal and placement of the delivery order with Hamilton Standard. The agency argues that its original decision must be viewed in light of circumstances at the time, and that subsequent determinations based upon additional information should not be applied retroactively.

The base assembly consists of less than 25 parts bolted together. It has no moving parts and functions only as a platform upon which to mount a syncrophaser. The detailed drawing in Hamilton Standard's parts catalog shows how all the components of the base assembly are to be connected, and no additional assembly drawing appears clearly to be required. However, no dimensions are provided on the drawing, so in considering Pacific Sky's initial protest we accorded some weight to the Air Force's strongly stated concerns that it could not be assured that the electrical receptacles on the assembly would be properly located, even though the agency stated that any risk of syncrophaser pins breaking because of improperly

located receptacles was not a safety hazard. As discussed above, Pacific Sky did not offer any response to the Air Force's position.

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believe that an award to Pacific Sky in response to its proposal would not comply with the requirement for full and open competition in government procurement, 10 U.S.C.A. § 2304(a) (West Supp. 1985), since other firms have not had an opportunity to submit offers on the basis of the Hamilton Standard drawing used by Pacific Sky. Consequently, we are recommending that the Air Force issue a new competitive solicitation and terminate Hamilton Standard's contract, if time permits. We note that since Hamilton Standard purchases components and merely assembles the equipment, termination costs should be relatively low.

If the agency has insufficient time to complete a competitive procurement, as is apparently the case from the Air Force's representations regarding necessary delivery schedules, the Air Force should negotiate a contract in response to Pacific Sky's original offer, assuming that it otherwise finds the firm responsible. Finally, if in negotiating with Pacific Sky, the Air Force is unable to obtain a satisfactory delivery schedule at the offered price, continuing Hamilton Standard's contract would be appropriate. In that case, Pacific Sky would be entitled to its proposal costs and expenses of pursuing the protest.

We reconsider our prior decision and sustain the protest.

[B-221120]

Leaves of Absence—Annual—Accrual—Crediting Basis—Military Service—Temporary Disability Retired List Status Effect

A former member of the United States Navy who was separated from the service with disability severance pay (10 U.S.C. 1212), has been a civilian employee of the government since 1960. At the time of civilian appointment, he was credited with 6 years, 6 months and 10 days of military years of service for annual leave accrual purposes (5 U.S.C. 6303), which included 3 years, 7 months and 10 days of time spent on the Temporary Disability Retired List (TDRL). The TDRL time is not properly creditable for this purpose. Under 5 U.S.C. 6303(a), and 5 U.S.C. 8332(c)(1)(A), while military service is creditable. the term "military service" is defined in 5 U.S.C. 8331(13) to mean "honorable active service." Since placement of a military member's name on the TDRL list removes his name from the active duty list, he is in a retirement status during that time. Therefore, the employee's civilian service computation date must be reestablished and his annual leave balance adjusted.

Matter of: Edgar K. Epp—Accrual of Annual Leave—Temporary Disability Retired List, Apr. 2, 1986

This decision is in response to a request from the Chief, Personnel Management Office, Bureau of Reclamation, Department of the Interior. The question involves the proper crediting of military service time for civil service annual leave accrual and retirement purposes in the case of Mr. Edgar K. Epp.

BACKGROUND

Mr. Epp entered onto active duty in the United States Navy on May 31, 1951. As a result of a service-connected injury, he was transferred to the Temporary Disability Retired List (TDRL), effective May 1, 1954. At that time, he had performed 2 years, 11 months and 0 days of active duty. On December 10, 1957, his name was removed from the TDRL and he was separated from the Navy with disability severance pay authorized under 10 U.S.C. § 1212. His total military time upon separation, both active and time spent on the TDRL, was 6 years, 6 months and 10 days.

In 1960, Mr. Epp was appointed to a civilian position in the Federal Government. Shortly after his appointment, he was credited with the full 6 years, 6 months and 10 days military time and began to accrue annual leave at the rate of 6 hours a pay period. And, after having performed approximately 8 years and 6 months of civilian service, he began to accrue annual leave at the rate of 8 hours a pay period.

The agency contends that the time Mr. Epp spent on the TDRL (3 years, 7 months and 10 days), is not creditable in establishing an employee's service computation date for annual leave accrual, or for civil service retirement purposes. Mr. Epp, on the other hand, claims that the additional service credits he received were credited based on a decision of this Office which was noticed several years after he entered civilian service. He brought the decision to the attention of his personnel officer who agreed that it applied to his situation. He is unable to locate that decision.

The point made by the submitting official is that if this additional service time is properly creditable, Mr. Epp will soon be eligible for optional civil service retirement. If the additional service time is not properly creditable, then his service computation data would have to be reestablished. This, in turn, would require an adjustment of and a reduction in his annual leave balance as well as delaying his eligibility for optional retirement. The submission goes on to state that while agency research has failed to uncover a decision by this Office which would support Mr. Epp's position, a recent decision, B-212738, February 14, 1984 (published as *Daniel F. Cejka*, 63 Comp. Gen. 210 (1984)), while not specifically on point, tends to support the agency's view that time spent on the TDRL is not creditable service for leave and retirement.

DECISION

The law governing accrual of annual leave, which was in effect when Mr. Epp was appointed to a civilian position, was contained in 5 U.S.C. § 2062 (1958), and is presently codified as 5 U.S.C. § 6303 (1982). Since the governing laws have remained virtually unchanged in substance since then, all reference will be to the current Code.

Section 6303(a) of Title 5, United States Code, provides in part:

(a) * * * In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title * * *.

Section 8332(c)(1)(A) of Title 5, United States Code, provides in part:

* * * the service of an individual who first becomes an employee before October 1, 1982, shall include credit for each period of military service performed before the date of the separation on which the entitlement to an annuity under this subchapter is based * * *

The term "military service" is defined in 5 U.S.C. § 8331(13) to mean "honorable active service in the armed forces."

Thus, for the provisions of 5 U.S.C. § 6303, military service time which is creditable to establish the rate at which an individual is authorized to accrue annual leave as a civilian employee is limited to "honorable active service." In this connection, 10 U.S.C. 101 (22) and (24), when read together, define military active service to mean,

* * * full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

These are the governing basic provisions of law. Based on the sketchy information provided by Mr. Epp, we have researched our decisions in which the above-quoted provisions or their antecedent provisions were cited in an effort to locate the decision to which he referred. We have not found any decision which characterized time spent in an inactive or military retirement status, such as time spent on the TDRL, as constituting military active service as that term is defined in 5 U.S.C. § 8331(13), or in 10 U.S.C. § 101 (22) and (24). In fact, the decisions which we did find indicated the contrary position.

In 31 Comp. Gen. 213 (1951), we considered, in part, the nature of a military member's status while his name is on the TDRL. We ruled therein that, notwithstanding the fact that the presence of his name on that list did not make his retirement permanent, since, the placement of his name on that list removes his name from the active duty list, "temporary retirement" is "retirement." That ruling has been consistently followed. See 36 Comp. Gen. 628 (1957); 38 Comp. Gen. 268 (1958); and 47 Comp. Gen. 141 (1967). See also, Captain *John B. Turpit, USMCR, Retired,* B-206133, February 1, 1983, in which the language contained in 10 U.S.C. § 687(b)(4), limiting entitlement to readjustment pay was similarly construed.

Mr. Epp and the agency official who authorized the crediting of additional military time may have misread a decision in which the term "years of service" appeared, since that term is used in 10 U.S.C. § 1212, as well as 5 U.S.C. § 6303. If so, such a reading was in error. Under 5 U.S.C. § 6303, "years of service" is comprised of active military service and service as a civilian employee of the government. Since there is no provision of law stating that military

retired time on the TDRL qualifies as active service for section 6303 purposes, it may not be so used. Therefore, since Mr. Epp had only served on active military duty a total of 2 years, 11 months and 0 days prior to his appointment as a civilian employee, that is the maximum military service time creditable to him for annual leave accrual purposes. Accordingly, his service computation date is to be reestablished and his annual leave balance adjusted as necessary.

With regard to civil service retirement, matters involving determinations of years of service creditable for that purpose come within the exclusive jurisdiction of the Office of Personnel Management (OPM). However, it is to be observed that since the definition of "military service" under 5 U.S.C. § 8331(13) is also used to establish civil service retirement years of service, we are not aware of any basis to conclude that OPM would permit the inclusion of TDRL time for that purpose. See, in this connection, 5 C.F.R. Part 831, Subpart C (1985).

[B-217821]

Departments and Establishments—Damage Claims—Reimbursement Prohibition

The Federal Aviation Administration may not be reimbursed by the Navy for replacement cost of an Instrument Landing System owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft, since property of Government agencies is not the property of the separate entities but rather of the Government as a single entity and there can be no reimbursement by the Government to itself for damage to or loss of its own property. This decision distinguishes 41 Comp. Gen. 235.

Property—Public—Damage, Loss, etc.—Repair, Replacement, etc. Costs

Although the Federal Aviation Administration (FAA) charged the cost of replacement of Instrument Landing System (ILS) to its "Facilities and Equipment (Airport and Airway Trust Fund)" appropriation account which consists of appropriations made to the FAA from the Airport and Airway Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, this does not bring activity within exception to interdepartmental waiver rule recognized by this Office for damage caused to property held in trust by the Government on behalf of particular identifiable beneficiaries in order to protect beneficiaries equitable interest in property. FAA is using Federal funds to repair damage to Government-owned property and is not acting as trustee on behalf of particular group of identifiable beneficiaries in repairing ILS. This decision distinguishes 41 Comp. Gen. 235.

Matter of: Reimbursement by Navy to Federal Aviation Administration for Damage to Instrument Landing System, April 8, 1986:

This decision is in response to a request from J.E. Murdock, III, Chief Counsel, Federal Aviation Administration (FAA), Department of Transportation, dated March 5, 1985, asking whether it may be reimbursed by the Navy for the replacement cost of an In-

strument Landing System (ILS) owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft. The FAA replaced the ILS at a cost of $33,000.00 and then sought reimbursement from the Navy. However, this request was denied in a letter dated December 2, 1983, from the Assistant Counsel for the Office of the Navy Comptroller, Office of General Counsel, Department of the Navy, on the grounds that the decisions of this Office preclude inter-agency payment of claims for damages caused by employees of one agency to property owned by the Government and under custody and control of another agency. While the Navy recognized that certain limited exceptions to the rule exist, it is its view that this case does not fall within any of these exceptions. This position was affirmed in a letter submitted at our request by the Counsel for the Office of the Navy Comptroller.

On the other hand, the FAA contends that since the funds it used to replace the ILS came from the Airport and Airway Trust Fund, this case falls within the exception recognized by this Office in 41 Comp. Gen. 235 (1961).

For the reasons stated below we find that the reimbursement by Navy to the FAA for destruction of the ILS owned by the Government under the custody and control of the FAA is not authorized.

BACKGROUND

We have held that:

> Generally, Federal inter-agency claims for damages to property are not reimbursed * * * on the theory that all property of agencies and instrumentalities of the Federal Government is not the property of separate entities but rather of the Governments as a single entity. Thus there can be no reimbursement by the Government to itself for damage to or loss of its own property. 60 Comp. Gen. 710, 714 (1981).

Like most rules (this one is commonly referred to as the interdepartmental waiver rule), this one is not without its exceptions, express or implied. Thus, where the Congress has by statute required an inter-agency activity to operate on a self-sustaining basis by the recovery of all capital equipment and operating costs from other agency users on a reimbursable basis, a statutory exception to the rule is created. *See* 59 Comp. Gen. 515 (1980).

The FAA points out however that even in the absence of express statutory authority, we held in 41 Comp. Gen. 235 (1961) that a claim against the Air Force submitted by the Bureau of Indian Affairs on behalf of the users of the San Carlos Irrigation Project, Coolidge, Arizona (characterized as a Government instrumentality), for damages to the project's power lines was not precluded under the interdepartmental waiver rule.[1] We held that:

[1] While we held that the interdepartmental waiver rule did not apply to the claim in this case, we indicated that other factors may have served to preclude the claim. 41 Comp. Gen. 238 (1961). Even if a claim may be presented, some basis of attrib-

* * * while title to and control of the San Carlos project remains vested in the United States and the project is a Government instrumentality *it is clear that the only funds available for repair of the damage caused to the project are funds of the project beneficiaries held in trust for them by the Government.* And, as stated by the Assistant Secretary, it is they rather than the Government who are bearing the instant loss. 41 Comp. Gen. 237-238 (1961) [Italic supplied.]

Relying upon the reference to the trustee status of the Government which resulted in the claim not being on behalf of another Government agency, but instead, on behalf of the third party beneficiaries, the FAA feels it enjoys a similar status because repairs to the ILS are funded from the Airport and Airway Trust Fund. We disagree.

DISCUSSION

The Airport and Airway Trust Fund (Trust Fund) is currently authorized and established under 26 U.S.C. § 9502 (1982). Under subsection 9502(b) amounts equivalent to taxes received in the Treasury under various aviation excise tax provisions are appropriated to the Trust Fund. In addition, there is authorized to be appropriated to the Trust Fund such amounts as are required to make any authorized expenditures. 26 U.S.C. § 9502(c). Interest on Trust Fund investments, as well as the proceeds from the sale of any Trust Fund investment asset, are to be credited to the Trust Fund. 26 U.S.C. § 9602(b)(3).

The Congress has authorized use of the Trust Fund for the purpose of meeting obligations of the United States. 26 U.S.C. § 9502(d). For example, the Congress has authorized the Trust Fund to obligate up to certain specified amounts for each fiscal year from 1982 through 1987 for making project grants to sponsors for airport planning or development.

The law also authorizes the making of appropriations to the Secretary of Transportation from the Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, 49 U.S.C. App. §§ 1348(b), 2205(a) (1982); the direct cost of operating and maintaining air navigation facilities, 49 U.S.C. App. §§ 2205(c) (1982; and for research, engineering, development, and demonstration projects relating to improved facilities and to meet the needs of safe and efficient navigation, 49 U.S.C. App. §§ 1353, 2205(b) (1982). The ILS falls within the definition of an air navigation facility.[2]

Appropriations for capital improvements for air navigation facilities are included in the annual "Facilities and Equipment [F&E]

uting liability to the agency alleged to have caused the damage in question must be found to exist.

[2] 49 U.S. Sec. 1301(8) defines air navigation facility to mean:

> * * * any facility used in, available for use in, or designed for use in, aid or air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and takeoff of aircraft.

(Airport and Airway Trust Fund)" appropriation account for the FAA. Appropriations for operation and maintenance expenses (including repairs) are included in the annual "Operations" appropriations to the FAA. This includes operations, maintenance and repairs to air navigation facilities. Each year some portion of this appropriation is derived from the general fund in the Treasury and the remainder from the Trust Fund. The FAA charged the $33,000.00 cost of replacing the ILS to its F&E account, as opposed to its Operations account, apparently on the ground that the ILS could not be repaired but had to be replaced.

In our opinion, the situation described in 41 Comp. Gen. 235 (1961) is clearly distinguishable from the situation presented here. The San Carlos Irrigation project was undertaken in consequence of the special trust relationship the Government exercises with regard to Indians. No such special relationship exists with regard to air carriers or air passengers. The San Carlos Irrigation project was characterized as a Government instrumentality operating in furtherance of this special trust relationship. Here, a Government agency—the FAA—is serving the Government's interest on behalf of the public generally.

Although the San Carlos Irrigation project (which includes both irrigation and electrification activities) was initially constructed using appropriated funds, the construction cost was required to be repaid by the project's users. Additionally, users were required to pay the cost of operating and maintaining the project. Presumably this liability included the cost of repairing the damaged power lines. The beneficiaries of the San Carlos Irrigation project entered into a debtor-creditor relationship with the Government to pay the project's costs either by virtue of statutory lien's being placed upon Indian lands to assure payment of their proportionate share of costs or by contracts executed with public or private landowners agreeing to pay the assessed charges. Here, funds are raised by excise taxes which remain constant unless adjusted by legislation. Furthermore, the legal liability is limited to the tax assessed and ends when payment for the particular item or service subject to the tax is made. No additional liability accrues by virtue of use of purchase of the item or service.

The assessments paid by the beneficiaries of the San Carlos Irrigation project were deposited directly to a trust fund account which a permanent appropriation made available for the purpose of operating and maintaining the San Carlos Irrigation Project, 25 U.S.C. §385a (formerly 31 U.S.C. §725S–1) and were not viewed as Federal funds. Here, the excise taxes are deposited to the general fund of the Treasury and amounts equal to receipts are transferred to the credit of the Trust Fund. However, no expenditures for construction, operation and maintenance of air navigation facilities may take place unless the Congress appropriate funds for that purpose. Once appropriated they remain Federal funds. Furthermore,

should they choose to do so, there is nothing to preclude the Congress from appropriating the funds for some other purpose unrelated to construction, operation or maintenance of air navigation facilities. While the Trust Fund serves to identify a source of funding for these purposes, the Congress has not limited itself to amounts in the Trust Fund for purposes of funding these activities and appropriations from the general fund are available and used to supplement the Trust Fund.

Nothing in the FAA's submission warrants our concluding (or even contends) that the ILS was not property owned by the United States in its sovereign capacity on behalf of the public generally, but instead as trustee exercising fiduciary duties in relationship to the property on behalf of specific identifiable beneficiaries. Merely appropriating amounts equivalent to aviation excise taxes collected to the Trust Fund is insufficient to create an equitable interest in the Trust Fund or the property purchased with funds appropriated from the Trust Fund on behalf of the various excise taxpayers. In such a situation we cannot distinguish the interests represented by the Government on behalf of some particular beneficiary with regard to the ILS purchased with funds appropriated from the Trust Fund that would warrant not applying the interdepartmental waiver rule, and the interest normally represented by the Government on behalf of taxpayers generally with regard to property purchase with funds appropriated from the general fund of the Treasury which in the past has not served to preclude application of the interdepartmental waiver rule.

Therefore we find no basis for holding that the interdepartmental waiver rule is inapplicable in this situation.

[B-211490]

Transportation—Automobiles—Overseas Employees—Authority

Civilian employees of the Government who are separated from service at an overseas post may be allowed to have privately-owned vehicles which were transported to those posts at Government expense transported to an alternate destination not in the United States or the country in which the employee's actual residence is located. Such transportation is subject to the limitation that the cost may not exceed the constructive cost of having the vehicle shipped to the employee's place of actual residence when transferred to his last duty station overseas and may not be authorized if separation occurred before April 10, 1984, the date of the decision *Thelma I. Grimes*, 63 Comp. Gen. 281.

Matter of: Transportation of Privately Owned Vehicles, Apr. 9, 1986:

This action is in response to a request for a decision regarding a proposed change in the Joint Travel Regulations which would allow shipment of privately-owned vehicles at Government expense in connection with the separation of civilian employees stationed overseas to a location other than to the country and location of the

employee's actual residence a the time of the assignment to duty outside the United States.[1] Based on a recent change in our decisions, we hold that civilian employees are now entitled to transportation of privately-owned vehicles under these circumstances. Such entitlement is not dependent upon a change in the regulations.

BACKGROUND

Authority for transportation and travel expenses of a civilian employee to an overseas duty station and return to his or her country of actual residence at the time of assignment to that duty station is provided in 5 U.S.C. § 5722 for new appointees and by 5 U.S.C. § 5724(d) for transferred employees by reference to section 5722. Section 5722 was originally interpreted by us to limit the employee to return to the United States, or the country of actual residence at the time of overseas assignment, within a reasonable time after completion of duty at the overseas duty station. It was held that there was no authority for payment of travel of these employees to points other than the country of actual residence, which in most cases was the United States. 31 Comp. Gen. 389 (1952).

However, we have recently reconsidered our position regarding transportation and travel expenses allowed to civilian employees upon separation at overseas posts. We have held that payment or reimbursement for travel and transportation expenses incurred by civilian employees upon separation overseas to an alternate point may be allowed even though not in the country of actual residence at the time of the appointment to the overseas post. However, the cost to the Government may not exceed the constructive cost of travel and transportation to the employee's place of actual residence at the time of the overseas assignment. *Thelma I. Grimes*, 62 Comp. Gen. 281 (1984).

DECISION

Shipment of privately-owned vehicles is authorized at Government expense between the United States and an employee's post of duty abroad or between duty posts outside the United States when the agency head determines that it is in the interest of the United States for the employee to have a privately-owned vehicle at his post abroad. 5 U.S.C. § 5727. This authority extends to employees who are transferred under 5 U.S.C. § 5722.

Since transportation of privately-owned vehicles is authorized by reference to the authority contained in 5 U.S.C. § 5722, it follows that shipment of a privately-owned vehicle should be treated as are other transportation and travel expenses authorized by that provi-

[1] The request was made by the Honorable Delbert L. Spurlock, Jr., Assistant Secretary of the Army (Manpower and Reserve Affairs), in his capacity as Chairman, Department of Defense Per Diem, Travel and Transportation Allowance Committee.

sion of law. Therefore, 5 U.S.C. § 5727 should be construed to authorize a civilian employee to have his privately-owned vehicle shipped at Government expense to an alternate destination not in the country of his or her actual residence at the time of the appointment, with the limitation that the cost of shipment of the vehicle to the alternate destination may not exceed the constructive cost of shipment to the actual residence. Since this is a change in our view and is predicated upon the result of our decision in *Thelma I. Grimes*, 62 Comp. Gen. 281, *supra*, it may not be applied to individuals separated prior to April 10, 1984, the date of that decision.

We have reviewed the current provisions of the Joint Travel Regulations, especially Chapter 11 concerning the shipment of privately-owned vehicles, and do not find that the provisions thereof prohibit shipment to an alternate port by a separating employee. In fact, paragraph C11004-2b of Chapter 11 (Change 226, August 1, 1984) appears broad enough to permit shipment to a destination specified by the employee. Thus, although the regulation could be changed to make the allowance of an alternate destination entirely clear, as in paragraphs C4201 and C7003-3b(1), we do not find that allowance of such alternate destinations is dependent upon a change in the regulation.

Likewise, the controlling provisions of the Federal Travel Regulations, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985), Chapter 2, Part 10, relating to the transportation of privately-owned vehicles do not prohibit transportation in the circumstances in question. Paragraph 2-1.5g(4) of those regulations contains the general statement that "under decisions of the Comptroller General, ordinarily an employee is entitled to travel and transportation expenses upon separation only to the country of actual residence at the time of assignment to such duty." However, this statement predates our decision in *Thelma I. Grimes, supra*, and is no longer accurate in view of that decision.

Accordingly, the cost of shipping privately-owned vehicles to a port serving the alternate destination of a separating employee, not to exceed the cost of travel to the port serving the actual residence, may be paid by the Government. However, payment may be made only in connection with separations after the date of our decision in *Thelma I. Grimes*, 62 Comp. Gen. 281, *supra*, i.e., April 10, 1984.

[B-221572]

Bids—Invitation for Bids—Cancellation—After Bid Opening—Defective Solicitation

Due to special experience requirement in invitation for bids (IFB), which agency determined was not necessary to meet its needs, only one of five actual bidders was eligible for award and other potential bidders were excluded from competing. Canceling the IFB after bid opening in order to resolicit without the experience require-

ment therefore was proper since both actual and potential bidders would be prejudiced by award under bu original IFB.

Matter of: Agro Construction and Supply Co., Inc., Apr. 9, 1986:

Agro Construction and Supply Co., Inc., protests the decision by the Fish and Wildlife Service, Department of the Interior to cancel invitation for bids (IFB) No. FWS 2-86-05 for construction of a corral system and to issue a new IFB with revised specifications and requirements. Agro maintains that the specifications in the original IFB adequately described the work required and that the revisions proposed by the agency either are unnecessary or will not meet the agency's needs. We deny the protest.

The IFB called for construction of corrals for buffalo and longhorns at the Wichita Mountains Wildlife Refuge, Oklahoma. The IFB was issued on November 1, 1985, with bid opening set for December 2. Amendment No. 1 to the IFB, also issued on November 1, in part added the following provision:

> All offerors shall be required to provide proof of similar corral construction experience by virtue of successful construction of at least three projects in excess of $50,000 each consisting of similar welded steel construction including handling and sorting facilities.

Five bids were received, ranging from $492,400 (submitted by Johnson Engineering Co., Inc.) to $845,000. Agro submitted the second lowest bid ($562,310). According to the agency, the total amount of funds then available for the contract was $515,000. At bid opening, the low bidder, Johnson Engineering, was found ineligible for award for failure to meet the special experience requirement added to the IFB by Amendment No. 1. The agency subsequently found that only one of the five bidders, Agro, satisfied the experience requirement.

By letter dated December 12, the contracting officer notified all bidders that he had decided to cancel the IFB and issue a new solicitation. The decision to cancel was based on the contracting officer's determination that certain revisions to the specifications would lower the cost of the project, and that the special experience requirement unnecessarily discouraged potential bidders from competing.

In its report on the protest, the agency originally argued that the cancellation was proper because all bids except Johnson's exceeded the amount of funds available for the contract; the revised specifications would result in lower costs to the government; and the revised IFB would omit the experience requirement which had hindered full and open competition. In a subsequent submission, the agency advised that the funding limitation no longer was a problem because additional funds had since been made available for the project. The agency also conceded that the proposed revisions to the specifications would increase, not decrease, the cost of the project as a whole. Nevertheless, the agency maintains that cancel-

lation of the IFB was proper because (1) the experience requirement, which will be eliminated from the revised IFB, unnecessarily limited the field of competition; and (2) the revised specifications will better meet the agency's needs.

Agro argues that the specifications in the original IFB adequately describe the agency's needs. In addition, Agro maintains that the experience requirement ensured that the successful bidder would be capable of performing under the contract. Agro also states that the experience requirement was a significant factor in its decision to submit a bid, since Agro assumed that it would be competing only against firms which, like Agro, had the specialized experience called for by the IFB.

We find that it was proper for the agency to cancel the IFB in order to eliminate the special experience requirement and issue a new IFB. Because of the potential adverse impact on the competitive bidding system of canceling an IFB after bid opening, the contracting agency must have a compelling reason to do so. *Dyneteria, Inc.*, B-211525.2, Oct. 31, 1984, 84-2 CPD ¶ 484; Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1984). When an agency's decision to cancel is challenged, a key factor in deciding whether a compelling reason for the cancellation exists is whether award of a contract under the original IFB would result in prejudice to other actual or potential bidders. *See Doug Lent, Inc.*, B-209287.2, June 21, 1983, 83-2 CPD ¶ 9 (cancellation was proper where potential bidders were precluded from bidding due to defective specification); *Haughton Elevator Division, Reliance Electric Co.*, 55 Comp. Gen. 1051, 1058 (1976), 76-1 CPD ¶ 294 (prejudice to actual and potential bidders due to inclusion of unnecessary experience requirement in IFB was compelling reason to cancel).

Here, the agency concluded that the special experience requirement is not necessary to ensure that the firms participating in the competition are qualified to perform under the contract; the protester has not shown that this conclusion is unreasonable. The agency also reasonably determined that the special experience requirement had a significant adverse effect on competition since four of the five bidders, including the low bidder, did not satisfy the requirement. Awarding a contract under the original IFB thus would prejudice the low bidder who did not meet the requirement as well as other firms which may have bid if the experience requirement had not been included in the IFB. In addition, we note that the agency's cancellation of the IFB in order to issue a revised IFB without the restrictive experience requirement is consistent with the requirement in the Competition in Contracting Act, 41 U.S.C.A. § 253(a)(1)(A) (West Supp. 1985), that contracting agencies obtain "full and open competition" in conducting procurements. Accordingly, we find that the agency had a compelling reason to cancel based on its determination that actual and potential bidders were unreasonably excluded and full and open competition there-

fore was not obtained. *See Lesko Associates, Inc.*, B-209703, Apr. 22, 1983, 83-1 CPD ¶ 443; *Gould, Inc.*, B-190787, Aug. 31, 1978, 78-2 CPD ¶ 158.

In addition to removing the experience requirement, the agency cited the need to revise the IFB to include the agency's increased requirements as a reason for canceling the IFB. We need not consider the protester's objections in this regard because, even if Agro's assertions concerning the specification revisions are correct, the cancellation nevertheless is proper, based on the agency's decision to eliminate the special experience requirement.

Agro requested that it be awarded its bid preparation costs and the costs of pursuing the protest. Recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C.A. § 3554(c)(1) (West Supp. 1985); Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1985). Since we have denied the protest, we also deny Agro's claim for recovery of costs.

[B-220736]

Officers and Employees—Transfers—Real Estate Expenses—Reimbursement

The statutes and regulations authorizing transferred federal employees to be reimbursed for the expenses of the "sale" of their residence at their old duty station place no definitive limitations on the meaning of the term "sale." Hence, a transferred employee who conveyed the title of his old residence to a state agency in exchange for $10 and a release from his mortgage contract may be reimbursed for his allowable expenses in the sales transaction, even though it was not an ordinary open-market real estate sale.

Officers and Employees—Transfers—Attorney Fees—House Purchase and/or Sale

The Federal Travel Regulations provide that transferred federal employees may be allowed reimbursement of legal expenses associated with the sale of their old residence, including the expenses of advisory and representational services not involving litigation before the courts. A transferred employee may therefore be reimbursed for legal fees reasonably and necessarily paid to obtain representational services to negotiate his release from a mortgage contract in exchange for his conveyance of his ownership of his old residence in a situation that did not involve foreclosure proceedings or other type of litigations.

Matter of: John C. Bisbee, April 10, 1986:

The issue presented in this matter is whether a transferred federal employee may be reimbursed for legal fees and expenses incurred in transferring ownership of his residence at his old duty station to an agency of a state government.[1] In view of the facts of record, and the applicable provisions of statute and regulation, we conclude that the employee is entitled to reimbursement.

[1] This action is in response to a request received from Mr. W.D. Moorman, Authorized Certifying Officer, National Finance Center, Department of Agriculture, for an advance decision concerning the propriety of certifying a voucher for payment in the amount of $450.02 in favor of Mr. John C. Bisbee.

BACKGROUND

Mr. John C. Bisbee is an employee of the U.S. Forest Service, Department of Agriculture. In 1980 he and his wife bought a house in Moffat County, Colorado, where he was then stationed. They financed the purchase of this house through a mortgage with a private lending institution, and Mr. Bisbee indicates that in this transaction they obtained a loan guarantee from a state agency, the Colorado Housing Finance Authority, under a state "low-income mortgage" program.

The Forest Service transferred Mr. Bisbee from Colorado to Indiana 3 years later in December 1983. Because of economic conditions prevailing at the time in Moffat County, Colorado, he and his wife were unable to sell their old residence on the open market at a price that equaled or exceeded the amount of their outstanding mortgage indebtedness. For that reason they entered into negotiations to dispose of the property in December 1984 with the mortgage lender and the Colorado Housing Finance Authority. These negotiations produced a settlement in May 1985 in which the Bisbee's mortgage contract was cancelled, and they transferred their title to the property by warranty deed to the Colorado Housing Finance Authority in exchange for a payment in the sum of $10 made by that agency to them.

Mr. Bisbee then submitted a claim to the Department of Agriculture in the amount of $450.02 as reimbursement of the legal fees and expenses he incurred in the negotiations leading to the transfer of ownership of his old residence in Colorado. In claiming reimbursement he stated that these fees and expenses were for the transfer of ownership of his old residence in a "deed in lieu of foreclosure," however, and because of his use of the word "foreclosure" the Department of Agriculture disallowed his claim for the reason that costs of foreclosure proceedings are not reimbursable as real estate expenses under the regulations covering the relocation entitlements of transferred federal employees.

Mr. Bisbee has now reclaimed reimbursement of the legal fees and expenses, indicating that no foreclosure action or other litigation was ever actually initiated in the matter. He indicates instead that he did not default on his mortgage obligations and entered into negotiations for the disposal of the property in December 1984 without any threat of foreclosure. He states that while he conceivably might have been forced into foreclosure proceedings if those negotiations had failed, the settlement reached had avoided that possibility.

In requesting an advance decision concerning Mr. Bisbee's renewed claim, the agency's accountable officer in effect questions whether the claim should be disallowed either because the transaction did not involve a normal sale of a residence, or because the legal fees related to negotiations involving possible litigation in

foreclosure proceedings rather than to services for an ordinary real estate sale.

Analysis and Conclusion

Section 5724a of title 5, United States Code, provides that to the extent considered necessary and appropriate under implementing regulations, funds available to an agency for administrative expenses are available for the reimbursement of certain relocation expenses of transferred employees. Among the relocation expenses specifically enumerated are the "(e)xpenses of the sale of the residence * * * of the employee at the old station." 5 U.S.C. § 5724a(a)(4)(A).

Implementing regulations are contained in Chapter 2, Part 6 of the Federal Travel Regulations.[2] Those regulations provide that the Government shall reimburse transferred employees for expenses required to be paid by them in connection with the sale of a residence of their old official station, and no definitive limitations are prescribed for the term "sale." FTR, para. 2-6.1. Among the items specifically authorized for reimbursement are legal and related expenses paid by the seller of a residence at the old official station, except that the "(c)osts of litigation are not reimbursable." FTR, para. 2-6.2c.

We have adopted the view that these provisions of statute and regulations permit reimbursement of allowable expenses incurred for the purpose of conveying title by other than the usual sale transaction.[3] Thus, we have authorized payment of allowable real estate expenses associated with transfers of title not only through open-market sales, but by gift and barter as well.[4] We have also previously indicated that we would authorize payment of allowable expenses associated with conveyances of title arranged for the purpose of satisfying an employee's mortgage loan obligations, in transactions not involving sales on an open real estate market.[5]

Concerning the reimbursement of legal expenses associated with transferring ownership of a residence, we have held that the expenses of advisory and representational services may be allowed as well as the expenses of title searches and other services specifically described under the regulations.[6] As indicated, however, the regulations expressly preclude reimbursement of the costs of litigation, and for that reason we have consistently disallowed claims for re-

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[2] FRT, para. 2-6.1 *et seq., incorp. by ref.*, 41 C.F.R. § 101-7.003.

[3] See, generally, *Bonnie S. Petrucci*, 64 Comp. Gen. 557, 559 (1985).

[4] B-173652, October 27, 1971; B-166419, April 22, 1969.

[5] See *Foreclosure Sale*, 61 Comp. Gen. 112, 113 (1981); and *Allan R. Irwin*, B-198940, July 29, 1980. In those cases we held, however, that costs of litigation and hypothetical expenses not actually incurred were not allowable as reimbursable expenses under the provisions of 5 U.S.C. § 5724a and FTR, para. 2-6.1 *et seq.*

[6] See *George W. Lay*, 56 Comp. Gen. 561 (1977); and *Daniel J. Everman*, B-210297, July 12, 1983. Compare also *Robert W. Webster*, 63 Comp. Gen. 68 (1983), concerning legal expenses not directly associated with a transfer of ownership of real property.

imbursement of attorney fees and other expenses incurred in the course of foreclosure proceedings initiated in state courts, including the expenses of a court-ordered sale of an employee's former residence. Nevertheless, we have expressed the view that the term "litigation" as used in the regulations has the limited meaning of a suit at law or an action before a court.[7]

In the present case we consequently find that Mr. and Mrs. Bisbee's transfer of title to their old residence by warranty deed to the Colorado Housing Finance Authority, in exchange for $10 and their release from their mortgage contract, constituted a "sale" within the meaning of that term as used in 5 U.S.C. § 5724a and FTR, para. 2-6.1, notwithstanding that the transaction did not involve an ordinary open-market realty sale. We further find that Mr. Bisbee's claim may not properly be disallowed on the basis that he is seeking reimbursement of the costs of litigation, since no suit at law or action before a court was ever initiated in this matter.

In addition, we find that the legal fees and expenses incurred by Mr. Bisbee were necessary and reasonable for representational and advisory services required in negotiating the transfer of title, and that he may therefore be reimbursed in the full amount claimed if the agency determines that the fees and expenses were within the customary range in the locality.[8]

The question presented is answered accordingly. The voucher and related documents are returned for further processing consistent with the conclusions reached here.

[B-218489.4]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Evaluation of Competitors—Discussions

The discussions with three architect-engineer (A-E) firms—as to anticipated concepts and the relative utility of alternative methods of approach—required under the Brooks Act, 40 U.S.C. 541-544 (1982), should contribute to making possible a meaningful ranking of the A-E firms. Accordingly, they should occur prior to the selection of the most highly qualified firm. Moreover, they may include questions reasonably related to an evaluation of a firm's qualifications.

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Evaluation of Competitors—Discussions

Evaluator's inquiry as to cost of protester's equipment, made during discussions which preceded the final ranking of architect-engineer firms, has not been shown to have been an inappropriate concern and in any event did not prejudice the protester where (1) agency reports that question was motivated only by personal interest and that the answer was not considered in evaluation, (2) nothing in record

[7] See *Foreclosure Sale*, 61 Comp. Gen. 112, *supra;* and *Foreclosure Sale*, B-214837, Ocbtober 11, 1984.

[8] See *George W. Lay*, 56 Comp. Gen. 561, *supra;* and *Daniel J. Everman*, B-210297, *supra.*

indicates otherwise, and (3) there is no showing that the cost of the equipment—as opposed to the cost of personnel—was such that it would be a substantial factor in determining the likely fee.

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

Protest filed more than 10 working days after basis was known is untimely. 4 C.F.R. 21.2(a)(2) (1985).

Contracts—Architects, Engineering, etc. Services—Procurement Practices—Evaluation of Competitors—Application of Stated Criteria

In procurements conducted under the Brooks Act, 40 U.S.C. 541-544 (1982), the contracting agency is required to consider the location of an architect-engineer firm and its knowledge of the locality of the project—unless application of the criterion would not leave an appropriate number of qualified firms. Higher evaluation score for location closer to project is reasonable.

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Evaluation of Competitors—Application of Stated Criteria

Protest that the architect-engineer (A-E) firm selected as the most highly qualified A-E firm did not comply with state licensing laws is denied where the statement of work only required the use of a registered surveyor, the awardee proposed to use a registered surveyor, and a state investigation indicated that the awardee hired licensed surveyors.

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Evaluation of Competitors—Evaluation Board

Contracting agency did not act unreasonably when it failed to inform the board evaluating the qualifications of architect-engineer firms of the allegation that one firm had failed to fully comply with a requirement in a prior contract for use of a registered surveyor where the question of licensing is unresolved and pending before the state licensing authority.

Matter of: Mounts Engineering, April 14, 1986:

Mounts Engineering (MOUNTS) protests the selection by the Bureau of Mines, Department of the Interior (Interior), of Potomac Engineering and Surveying (Potomac) as the architect-engineer (A-E) firm most qualified to collect mine subsidence data at Kitt No. 1 Mine in Barbour County, West Virginia. The selection of Potomac—and the consequent decision not to terminate the contract (No. SO156015) for the same services previously awarded to Potomac—was made after a reevaluation of qualifications undertaken pursuant to our decision in *Mounts Engineering; Department of the Interior—Request for Advance Decision*, B-218489, *et al.*, Aug. 16, 1985, 64 Comp. Gen. 772, 85-2 C.P.D. ¶ 181. We deny Mounts' protest.

Generally, under the selection procedures governing the procurement of A-E services as set forth in the Brooks Act, 40 U.S.C.

§§ 541-544 (1982), and in the implementing regulations in the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 36.600-36.609 (1984), the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project. The board then must conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR, 48 C.F.R. § 36.602-3(c). Thereafter, the board recommends to the selection official in order of preference no less than three firms deemed most highly qualified.

The selection official then must make the final selection in order of preference of the firms most qualified to perform the required work. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

By notice published in the Commerce Business Daily (CBD) of September 11, 1984, Interior announced a requirement for the collection of mine subsidence data—data on ground surface movements caused by underground mining—at Kitt No. 1 Mine in Barbour County, West Virginia. The agency requested interested firms to submit Standard Forms (SF's) 254, "Architect-Engineer and Related Services Questionnaire," by which A-E firms can document their general professional qualifications, and 255, "Architect-Engineer and Related Services Questionnaire for Specific Project," by which A-E firms can supplement the SF 254 with specific information on the firm's qualifications for a particular project. Potomac, Mounts and nine other firms responded to the announcement.

Interior then evaluated qualifications without holding the required discussions with three A-E firms. In the agency's initial evaluation Potomac received the highest point score, 890 points, while Mounts received the second highest score, 880 points. The next highest point score was only 770 points.

Given the closeness of the evaluation of the two firms, contracting officials determined that Potomac and Mounts were "equally preferred" and therefore requested them to submit cost proposals. Mounts thereupon submitted a cost proposal in which it offered to provide the required services at unit prices ranging from 26.7 percent to 100 percent above those offered by Potomac.

Shortly thereafter, the evaluation board was requested to reevaluate the qualifications of Potomac and Mounts in order to select the most preferred firm. Upon reevaluation, the board gave

Potomac's qualifications a score of 930 points and Mounts' qualifications a score of 915 points.

When Interior subsequently selected Potomac as the most preferred firm, Mounts protested first to the agency and then to our Office.

In addition to challenging the failure to conduct discussions and the request for cost proposals prior to selecting the most preferred firm, Mounts alleged that (1) there was no indication that Potomac could meet the requirement set forth in the CBD announcement for "registered surveyor(s)," since the SF's 254 and 255 initially submitted by Potomac, although indicating that the firm employed "Surveyors," did not indicate that its surveyors were "registered"; (2) the persons listed in Potomac's SF 255 as key personnel for this project either lacked surveying experience or were not employed by the firm; (3) Potomac lacked the necessary experience and capacity; and (4) the board failed to give Mounts credit for having a local office near the work site and for its allegedly superior knowledge of the locality of the project.

In response, Interior admitted that it had failed to conduct the required discussions. It also acknowledged that the SF's 254 and 255 submitted by Potomac for purposes of evaluation were "not up-to-date." Accordingly, the agency proposed to (1) obtain updated SF's 254 and 255 from the three firms previously rated most highly qualified; (2) appoint a new evaluation board, comprised of qualified personnel from outside the Bureau of Mines, to conduct discussions with and reevaluate the qualifications of the three firms; and (3) determine, based upon the results of the above, whether to continue the contract with Potomac or to terminate it and make award to another firm.

In our prior decision, we concluded that the failure to conduct the required discussions could have prevented a meaningful ranking and could have deprived Mounts of the opportunity for award. We also indicated that the evaluations were open to question on other grounds as well. We pointed out that while SF 255 must be current as of the time of the particular project, Interior had indicated that Potomac's SF's 254 and 255 were "not up-to-date." Moreover, we found Interior's request that firms submit cost proposals prior to its selecting the most highly qualified firm for negotiations to be improper since the Brooks Act only provided for the consideration of cost during negotiations—*i.e.*, after the final ranking of firms, 40 U.S.C. § 544—and the regulations prohibit the consideration of fees during discussions. FAR, 48 C.F.R. § 36.602-3(c). We therefore sustained Mounts' protest and concluded that there was no reason to question Interior's decision to conduct discussions with the three firms ranked highest in the initial evaluations and to reevaluate their qualifications.

Interior subsequently requested Potomac, Mounts and a third firm—L. Robert Kimball & Associates (Kimball)—to submit

updated SF's 254 and 255. A new evaluation board reviewed the updated forms and conducted discussions with the three firms.

Under the evaluation criteria provided to the board, the firms were to be evaluated on the basis of (1) professional qualifications necessary for satisfactory performance (25 percent), (2) "[l]ocation in general geographical area of the project and knowledge of the locality of the project" (25 percent), (3) specialized experience and technical competence in the type of work required (20 percent), (4) capacity to accomplish work in the required time (15 percent), and (5) past performance (15 percent).

Potomac was found to be the most qualified firm under these criteria, receiving a total of 968 evaluation points. Mounts was ranked second, receiving 951 points, while Kimball was ranked third at 808 points.

Mounts thereupon filed this protest.

DISCUSSIONS

Mounts questions both the timing and content of the discussions held with the three firms.

Mounts first contends that the evaluation board acted improperly when it held discussions "prior to the re-evaluation."

We disagree. FAR, 48 C.F.R. § 36.602-3(d), provides that the evaluation board shall:

> Prepare a selection report for the agency head or other designated selection authority recommending, in order of preference, at least three firms that are considered to be the most highly qualified to perform the required services. The report shall include a description of the discussions and evaluation conducted by the board to allow the selection authority to review the considerations upon which the recommendations are based.

Since the selection of the most highly qualified firm should take into account the content of the discussions held with the three firms, the discussions must occur prior to the final evaluation of qualifications.[1]

As for the content of the discussions, Mounts points out that one of the evaluators inquired as to the cost of the equipment which Mounts proposed to utilize for this project. Mounts suggests that since the cost of its equipment "directly influences" the fee it must charge, this inquiry was improper. In addition, Mounts argues that the evaluation board acted improperly when it questioned the firm about the design of a theoretical subsidence program, since, according to Mounts, that was a subject "completely outside the scope of the required services."

In response, Interior explains that the evaluator inquired about the cost of Mounts' equipment "only to compare [the cost with] what his office had paid for similar equipment"; it denies that the

[1] We note that there was no requirement here for a preliminary evaluation to select the three firms with which discussions would be conducted, since these firms were already selected on the basis of the original evaluations.

evaluation board considered the cost in the evaluation. The agency maintains that the questions about the design of a theoretical subsidence program were undertaken pursuant to the requirement in FAR, 48 C.F.R. § 36.602-3(c), to discuss "concepts and the relative utility of alternative methods of furnishing the required services" and indicates that the answers "revealed much about a firm's qualifications to perform the project."

Mounts has not demonstrated that the evaluator's inquiry about the cost of certain equipment was an inappropriate concern. In any event, nothing in the record indicates that Mounts suffered any prejudice as a result of the questions and its answers. Mounts has made no showing that the cost of the equipment—as opposed to the cost of its personnel—was such that it would be a substantial factor in determining the fee Mounts was likely to propose. Moreover, nothing in the record indicates that the evaluation board in fact considered the cost of the equipment in evaluating Mounts' qualifications. See also *Douglas County Aviation, Inc., et al.*, B-213205.2, Sept. 27, 1985, 64 Comp. Gen. 888, 85-2 C.P.D. ¶ 345 (protest of evaluation method denied in the absence of prejudice from use of the method).

In addition, we conclude that Mounts has not shown that the questions about the design of a theoretical subsidence program were not reasonably related to a consideration of alternative approaches or to the evaluation of Mounts' professional qualifications.

LOCATION AND KNOWLEDGE OF THE LOCALITY

As indicated above, an evaluation criterion for "[l]ocation in the general geographical area of the project and knowledge of the locality of the project" was assigned 25 percent of the total possible evaluation points. Although both Potomac and Mounts had previously worked in northern West Virginia, Potomac maintained an office within 35 miles—or a 1-hour drive—of the project site while Mounts' nearest office was determined by the board to be within 60-65 miles—or a 2-hour drive—of the project. The evaluation board therefore assigned Potomac an average evaluation score of 241.66 points for location and knowledge of the locality, 29 more points than the 212.66 points assigned to Mounts under this criterion.[2]

Mounts, however, objects to the consideration of geographical location, maintaining that both firms are located in the same general geographical area. In a December 23 submission to our Office,

[2]Although Mounts alleged during its prior protest that it maintained an office in Philippi, West Virginia, "only a few miles from the site," the updated SF 254 submitted to the evaluation board indicates that it closest office is in Washington, Pennsylvania, approximately 60 miles from Barbour County, West Virginia, where the project site is located.

Mounts pointed out that the chairman of the evaluation board stated in his report of the evaluation results—a report which Mounts included in its submission—that since all three firms were located within 100 miles of the project site, location should not have been an evaluation factor. The chairman indicated that Mounts was the most qualified firm if location was not considered.

In a subsequent submission to our Office filed on January 31, Mounts pointed out that the chairman had also stated in the report to the contracting officer that if location was to be considered, then assigning 25 percent of the possible evaluation points to the criterion was excessive. Mounts therefore argued that if location was a proper criterion, it was "certainly weighted too heavily."

We initially point out that our Bid Protest Regulations, 4 C.F.R. pt. 21 (1985), require that protests—other than those based upon alleged improprieties in a solicitation—be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Since Mounts knew at least as early as its December 23 submission that Interior had assigned 25 percent of the possible evaluation points to the criterion for location, but did not protest the weight accorded this criterion until its submission filed on January 31, more than 10 working days later, its protest in this regard is untimely.

Moreover, we note that FAR, 48 C.F.R. § 36.602-1(a)(5), provides for the consideration of geographical location and knowledge of the locality, except where the application of this criterion would not leave an appropriate number of qualified firms. Mounts does not challenge the adequacy of the competition remaining after application of this criterion, and we have no independent basis to question the agency's decision to consider geographical location. Cf. *Bartow Group*, B-217155, Mar 18, 1985, 85-1 C.P.D. ¶ 320 (requirement for an office within 30 miles of project). Nevertheless, since Mounts bases its argument on the conclusion that Potomac and Mounts were essentially equal in regard to location, we consider it to be challenging the application of the criterion as well as its propriety.

Our review of an agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Moreover, the protester bears the burden of affirmatively proving its case. *Y.T. Huang & Assocs., Inc.*, B-217122, B-217126, Feb. 21, 1985, 85-1 C.P.D. ¶ 220.

Although the chairman of the evaluation board assigned the same point score to both Potomac and Mounts under the criterion for location, the remaining two members of the board assigned a higher point score to Potomac as a result of its office being located 30-35 miles closer to the project site. Since evaluating proposals involves subjective as well as objective judgments, it is not unusual for individual evaluators to reach disparate conclusions. *Digital Radio Corp.*, B-216441, May 10, 1985, 85-1 C.P.D. ¶ 526; *Western*

Engineering and Sales Co.; B-205464, Sept. 27, 1982, 82-2 C.P.D. ¶ 277. The average scores here for the location criterion, and therefore the total evaluation scores, reflected the conclusion of two of the three evaluators that Potomac's location 30-35 miles closer to the project site justified a higher score under the location criterion. Mounts has failed to demonstrate that the overall judgment of the evaluation board in this regard lacked a reasonable basis.

PROFESSIONAL QUALIFICATIONS

The CBD notice stated that the project "requires a registered surveyor(s) to conduct the survey," while the Statement of Work indicated that "registered surveyor(s) and crew(s) shall conduct the survey(s)." In the SF 255 it submitted in response to Interior's request for updated SF's 254 and 255, Potomac listed 6 "Surveyors" as currently employed by the firm and provided a brief resume for one land surveyor—registered in West Virginia, Maryland and Ohio—whose services it anticipated utilizing for the project.

Mounts, however, points out that by letter of June 5, 1985, the State Board of Examiners of Land Surveyors in West Virginia—the state where Kitt No. 1 Mine is located and where Potomac maintains an office—notified Potomac that the Board of Examiners had received a complaint filed by Mounts and that it appeared that Potomac was "not in full compliance" with West Virginia law "since . . . [the owner of Potomac] is not a licensed land surveyor." When Potomac allegedly failed to respond to this letter, the Board of Examiners, by letter of August 26, informed the firm that "in view of the information provided by Mounts Engineering regarding your surveying/activities, you are requested to cease and desist such practice in the State of West Virginia."

A contracting agency may require an offeror to comply with a specific known state or local licensing requirement as a prerequisite to award. See *Olson and Assocs. Engineering, Inc.,* B-215742, July 30, 1984, 84-2 C.P.D. ¶ 129. It need not, however, impose such a requirement, and if it does not then the contracting officer generally need not concern himself with state or local licensing requirements. See *North Park Village Homes, Inc.,* B-216862, Jan. 31, 1985, 85-1 C.P.D. ¶ 129; *Olson,* B-215742, *supra,* 84-2 C.P.D. ¶ 129 at 2.

The statement of work here did not require the proposed contractor itself to possess a license as a prerequisite to award. Rather, it merely required that the contractor use a registered surveyor and crew to conduct the survey; a requirement which Potomac proposed to meet through utilization of the services of a registered land surveyor. Cf. *Mounts Engineering,* B-218102.3, May 31, 1985, 85-1 C.P.D. ¶ 622 *aff'd, Mounts Engineering—Reconsideration,* B-218102.4, July 24, 1985, 85-2 C.P.D. ¶ 77 (offeror took no exception to requirement for registered surveyor).

In any case, we note that the West Virginia Board of Examiners on October 8 requested the Attorney General of West Virginia to clarify the relevant state law, noting that Potomac is a "sole proprietorship" which "hires persons licensed and/or registered in both the Engineering and Surveying fields to certify the work or services provided." Further, we also note that the contracting officer indicates that he will take "[a]ppropriate action" once the Attorney General clarifies state law. See *Lewis & Michael, Inc.; Stark Van Lines of Columbus, Inc.—Reconsideration*, B-215134.2, B-215134.3, June 26, 1984, 84-1 C.P.D. ¶ 673 (if contractor is not in compliance with state or local law and, as a result of enforcement action by the state or locality, chooses not to perform the contract or is prohibited from doing so, the contract may be terminated for default).

In these circumstances, the August 26 cease and desist order did not render the subsequent selection of Potomac unreasonable. Cf. *Metropolitan Ambulance Service, Inc.*, B-213943, Jan. 9, 1984, 84-1 C.P.D. ¶ 61 (where a contracting officer determines that enforcement attempts by state or local authorities are likely and that there is a reasonable possibility that such action may delay performance by an unlicensed contractor, he may find the contractor nonresponsible under a solicitation's general licensing requirement).

PRIOR PERFORMANCE

Potomac listed its current work under a contract for mine subsidence survey—the Blacksville project in Pennsylvania and West Virginia—in the sections of its updated SF's 254 and 255 in which offerors are asked to provide examples of projects undertaken in the past 5 years (SF 254) and projects best illustrating the firm's current qualifications for providing the required services (SF 255).[3]

Mounts, however, alleges that the evaluation board was not informed by Interior of certain allegations concerning Potomac's compliance with the requirement in the Blacksville contract for use of a registered surveyor. In particular, Mounts refers to a September 6, 1985, letter from the Bureau of Mines in which the agency informed Potomac that it had received information that the land surveyor whom the firm indicated was supervising the Blacksville project in fact "never certified nor sealed any plans, documents or reports relative to this project." Interior therefore re-

[3] Although Potomac in fact described the Bureau of Mines project in question in its SF's 254 and 255 as "Mine Subsidence Survey, Blacksville, WV [West Virginia]," with an estimated cost of $110,000, we understand the reference to be to contract No. S0156011, awarded to Potomac by the Bureau of Mines for a $110,000 mine subsidence survey at "Blacksville No. 2 Mine" in Greene County, Pennsylvania. We have been informally advised by Potomac that it has received only one contract for a Blacksville mine subsidence survey, but that the project in fact extends over two states, West Virginia and Pennsylvania.

quested Potomac to furnish the agency with "evidence of the actual individual providing these services" so as to assure the agency of "full compliance" with the requirements of the contract.

Interior informs us that the "licensing matter is in question pending further information from the state Board of Professional Engineers" and Mounts reports that state licensing proceedings regarding Potomac's practice in Pennsylvania are pending in that state. Interior therefore argues that since the matter is still "unresolved," it was not for consideration by the evaluation board.

We note that the evaluation board was provided with the updated SF's 254 and 255 by letter of October 25, 1985, and that the chairman of the board reported the evaluation results by letter of November 15. Since Interior viewed the licensing concerns as "unresolved," we do not consider that it was unreasonable for the agency to refrain from reporting these concerns to the evaluation board. Cf. *NJCT Corp.*, B-219434, Sept. 26, 1985, 64 Comp. Gen. 883, 85-2 C.P.D. ¶ 342 (protester failed to demonstrate that agency lacked a reasonable basis for characterization of potential contractor's performance on other contracts).

The protest is denied.

[B-219220]

Compensation—Periodic Step Increases—Upon Reconversion to General Schedule—After Erroneous Conversion to Merit Pay—Propriety of Agency Action

When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system.

Matter of: John R. MacDonald, April 14, 1986:

We have been asked to review a settlement of our Claims Group denying the claim of Environmental Protection Agency (EPA) employee John R. MacDonald for backpay and within-grade step increase waiting time credit arising out of his assignment to the merit pay system. In light of the facts presented, and the applicable provisions of statute and regulation, we deny Mr. MacDonald's claim and sustain our Claims Group's settlement in the matter.

Background

The Civil Service Reform Act of 1978 established a merit pay system for federal supervisors and management officials in GS-13,

14 and 15 positions. Employees assigned to the merit pay system receive pay adjustments based upon performance appraisals and are eligible for cash awards in recognition of superior service. See, generally, 5 U.S.C. §§ 5401-5405.

Mr. MacDonald, a grade GS-13, step 4, employee at the EPA, was determined to be a "management official" and was consequently assigned to the merit pay system on October 4, 1981. As a result he was also found ineligible for membership in his labor-management bargaining unit. He was classified as a GM-13, and placed into a pay scale comparable to GS-13, step 4, which resulted in an increase in his pay at that time equal to the comparability increase applicable to GS-13, step 4, which became effective on that date, under 5 U.S.C. § 5402(c)(2). On November 30, 1982, the American Federation of Government Employees brought charges against the EPA on Mr. MacDonald's behalf before the Federal Labor Relations Authority (FLRA). The union alleged that the EPA improperly removed Mr. MacDonald from membership in a bargaining unit. The charges were subsequently withdrawn on March 29, 1983, and we have been advised that an informal settlement was reached. Based upon the FLRA interpretation of the term "management official" announced in *Department of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 24, October 30, 1981, the agency reviewed its implementation of the merit pay system. Under the new standard, several hundred employees, including Mr. MacDonald, no longer qualified for merit pay, and were reassigned to the General Schedule. The EPA reassigned Mr. MacDonald to the General Schedule on April 3, 1983, in grade GS-13, step 5, pursuant to 5 C.F.R. § 531.204(d).

Mr. MacDonald petitioned the EPA for additional amounts he believed he would have earned if he had not been assigned to the merit pay system. He also asked that the waiting period for his increase to step 6 be deemed to have begun on March 9, 1982, because his grade GS-13 within-grade step increase qualifying date prior to his conversion to merit pay had been March 9.

The EPA referred this claim to the Claims Group of our Office. The Claims Group determined that Mr. MacDonald was not entitled to backpay and restoration of his initial within-grade qualifying date because the EPA did not commit administrative error in assigning him to merit pay status. The Claims Group found that the EPA violated no statutory, regulatory or nondiscretionary policy, and there was therefore no reason for allowing his claim. Mr. MacDonald has now requested a review of our Claims Group's determination.

Discussion

The law governing merit pay was enacted in Title V of the Civil Service Reform Act of 1978, Public Law 95-454, approved October

13, 1978, 92 Stat. 1179, as amended and codified, 5 U.S.C. §§ 5401-5405. It is provided under 5 U.S.C. § 5402 that:

> (a) * * * the Office of Personnel Management shall establish a merit pay system * * *.
>
> * * * * * *
>
> (c)(2) Any employee whose position is brought under the merit pay system shall, so long as the employee continues to occupy the position, be entitled to receive basic pay at a rate of basic pay not less than the rate the employee was receiving when the position was brought under the merit pay system * * *.

Implementing federal regulations issued by the Office of Personnel Management state that when an employee loses merit pay status, "the employee shall receive his or her existing rate of basic pay, plus * * * (4) In the case of an employee whose resulting rate of basic pay falls between two steps of a General Schedule grade * * * the amount of any increase that may be necessary to pay the employee the rate for the next higher step of that grade * * *." 5 C.F.R. § 531.204(d).

Our decisions have generally held that personnel actions cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action for taking effect as originally intended; (2) deprived an employee of a right by statute or regulation; or (3) would result in failure to carry out a non-discretionary administrative regulation or policy if not adjusted retroactively. *Benedict C. Salamandra*, B-212990, July 23, 1984; *Internal Revenue Service*, 55 Comp. Gen. 42 (1975). We have specifically held that agencies have the authority to determine coverage under the merit pay system, and that a redetermination of an employee's status returning him to a General Schedule position is not viewed as resulting from administrative error which would warrant correction of the personnel action. *Benedict C. Salamandra*, B-212990, *supra*.

The determination of whether each individual employee should be under the merit pay system is the responsibility of the head of each agency. 5 C.F.R. § 540.102(c) (1980) (currently 5 C.F.R. § 540.103(b)(1)). That determination is to be made under the definitions of the terms "supervisor" and "management official" as contained in 5 U.S.C. § 7103 (10) and (11) relating to labor-management relations for federal employees. The same definitions are applied by the Federal Labor Relations Authority in determining whether employees are eligible for inclusion in a bargaining unit, *i.e.*, supervisors and management officials may not be included. Under this authority to place positions under the merit pay system, some agencies adopted a broad definition of "management official" which resulted in the inclusion of all or most individuals in General Schedule levels GS-13, 14 and 15 in the merit pay system. A secondary result was the removal of some of these individuals from labor bargaining units. Employee appeals of such removals to the Federal Labor Relations Authority resulted in the adoption of a

narrow definition of "management official" by the Authority for purposes of bargaining unit inclusion. Thus the Authority determined that many individuals included in the merit pay system should not be excluded from the bargaining units of their activities but, in making that decision, the Authority specifically noted that it had no authority to determine whether these same employees were properly included under the merit pay system because this responsibility had been given to the heads of government agencies. 4 FLRA 99, December 16, 1980, as applied in *Department of the Navy, Automated Data Processing Selection Office*, 7 FLRA 24, *supra*.

The agency determination to include the affected employees in the merit pay system was not and could not be overturned by the Federal Labor Relations Authority. However, upon reevaluation in light of the Federal Labor Relations Authority interpretation of the terms being applied, the agency removed hundreds of individuals from the merit pay system.

In similar circumstances, we have held that no administrative error occurs when individuals are converted to the merit pay system based upon reasonable agency classification of positions. Thus, when the employees are returned to General Schedule positions they are not entitled to have their pay recomputed as if they had never been included in the merit pay system. Instead, the employees are subject to the pay computation applied to individuals removed from the merit pay system by authorized administrative action. *Benedict C. Salamandra*, B-212990, *supra*.

In the present case, the EPA established Mr. MacDonald's pay upon conversion to the merit pay system in conformance with 5 U.S.C. § 5402(c)(2). After adopting the FLRA interpretation of "management official," the EPA reassigned Mr. MacDonald to the General Schedule as a GS-13, step 5, as provided by 5 C.F.R. § 531.204(d). Since that action did not involve the correction of an administrative error, recomputation of pay for the period of time Mr. MacDonald was subject to the merit pay system and allowing him pay as if never assigned to that system is not authorized. Accordingly, there is no basis for retroactively adjusting Mr. MacDonald's pay or within-grade waiting credit. We therefore deny the claim of Mr. MacDonald to backpay and within-grade waiting time credit.

[B-219828.3]

Contracts—Protests—Preparation—Costs—Noncompensable

While a protest against the award of a contract to a materially unbalanced offeror was sustained, the protester's subsequent claim for proposal preparation costs and the costs of filing and pursuing the protest is denied where the record shows that the protester did not have a substantial chance of receiving the award and was therefore not unreasonably excluded from the competition because the protester's price proposal was also materially unbalanced, although to a lesser degree.

Matter of: Edgewater Machine & Fabricators, Inc., April 14, 1986:

Edgewater Machine & Fabricators, Inc. (Edgewater) has submitted a claim for proposal preparation costs and the costs of pursuing its protest, including attorney's fees, following our decision, *Edgewater Machine & Fabricators, Inc.*, B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630, sustaining its protest. The protest concerned the award of a contract for missile shipping containers to Precision Machining, Inc., by the Department of the Army under request for proposals (RFP) No. HAAH01-85-R-0430. Essentially, Edgewater had protested that Precision's price for the containers, although low, was not reasonable because its price for units to be delivered for first article testing was so high that Precision would receive a financial windfall by being paid all of its anticipated overhead costs and profit before completing the first production unit.

We deny Edgewater's claim for proposal preparation costs and for the costs of pursuing the protest, including attorney's fees.

By way of background, of the 18 proposals received by the Army, the four lowest priced were rejected or withdrawn. Precision's price of $2,989,139 was then the lowest and was composed of $750,000 for the six first article units at $125,000 each and $2,239,139 for the 7,439 containers at $301 each. Precision's total price without the first article units was $2,983,039 for 7,439 containers at $401 each, or $6,100 less that its bid with first articles. Edgewater's price of $3,128,648.80 included the price of $159,000 for the six first article units at $26,500 each and was the second lowest offer. Its bid without first articles was $2,781 less. The Army awarded a contract requiring the first article units to Precision; Edgewater then filed its protest.

Edgewater conceded in its protest that Precision's total price was low and reasonable, but contended that the loading of the first article units with a price of $750,000 resulted in the other items not carrying their share of the costs of the work and profit.

In sustaining the protest, we found that the actual value of the first articles, as determined from the face of the bids, nowhere approached the amount bid by either Precision or Edgewater. Rather, the bid prices received strongly suggested to us that Precision valued the first articles at about $6,100 (the difference in its total bid with and without first articles). We found that contracts based on bids such as Precision's that are egregiously front-loaded provide the contractor with funds to which it is not entitled if payment is to be measured on the basis of value received. Thus, as in *Riverport Industries, Inc.*, 64 Comp. Gen. 441 (1985), 85-1 CPD 364; *aff'd upon reconsideration*, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108, we held that even if a bid offers the lowest price to the government, but is grossly unbalanced mathematically, it should be viewed as materially unbalanced since acceptance of the bid would

result in the same evils as an advance payment. An advance payment is prohibited by law and occurs where a payment under a contract to provide a service or deliver an article is more than the value of the service already provided or the article already delivered. *See* 31 U.S.C. § 3324(a) (1982). However, we also noted that Edgewater's bid suffered from the same defect because it had valued the first articles at about $2,800 (as compared with its actual bid price of $159,000 for the six first articles). Thus, we did not recommend termination of Precision's contract.

Edgewater now requests that it be allowed recovery of its bid preparation costs and the costs of filing and pursuing its protest, including attorney's fees. We will allow a protester to recover its bid preparation costs only where the protester had a substantial chance of receiving the award, but was unreasonably excluded from the procurement, and the remedy recommended is not one delineated in 4 C.F.R. § 21.6(a) (2-5) (1985). See *EHE National Health Services, Inc.*, B-219361.2, Oct. 1, 1985, 65 Comp. Gen. 1, 85-2 CPD ¶ 362. Our regulations also only permit recovery of the costs of filing and pursuing a protest in situations where the protester is unreasonably excluded from the procurement. 4 C.F.R. § 21.6(e).

Since Edgewater's bid was also front-loaded and, thus, also materially unbalanced (albeit to a lesser degree than the bid of Precision), it is clear that under the *Riverport* standard, Edgewater was not entitled to the award even if Precision's bid was rejected. It follows that Edgewater was not unreasonably excluded from the procurement.

There is, therefore, no basis to recommend the award of proposal preparation costs and the costs of pursuing the protest.

The claim is denied.

[B-221333]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Debriefing Conferences—Issues Providing Protest Basis

Protester may delay filing protest until after debriefing is held where protest is based on information regarding the awardee's proposal and that information was first revealed at the debriefing.

Contracts—Negotiation—Offers or Proposals—Evaluation—Brand Name or Equal—Salient Characteristics-Satisfaction of Requirements

Awardees noncompliance with salient characteristics set out in a request for proposals may not be waived notwithstanding that awardee's product meets the government's needs, since the characteristics were material to protester's and other potential offerors' decision to compete.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—Recovery

Offerors may reasonably rely on request for proposals as indicating the government's needs. Where, based on such reliance, a protester submits a proposal that is in line for award but is not accepted because the government determines that its needs can be met by significantly less expensive equipment of different type, the protester may recover its proposal preparation costs unless it chooses to compete under the revised RFP.

Matter of: Tandem Computers, Inc., April 14, 1986:

Tandem Computers, Inc. protests the award of a contract to Federal Computer Corporation under request for proposals (RFP) No. N00189-85-R-0379, issued by the Navy on a brand name or equal basis for computer hardware, software, training and maintenance for the Navy's Automated Procurement and Accounting Data Entry System. The protester contends that the hardware offered by Federal Computer failed to meet several salient characteristics in the RFP. We sustain the protest.

The RFP called for an indefinite quantity of hardware, software and related services to be provided over a 3-year period from the date of award. The principal hardware items to be furnished were display terminals, identified as Tandem Model 6530, or equal; workstations, identified as Tandem Model 6546, or equal; and cluster concentrators, identified as Tandem Model 6820, or equal.

Proposals were received from three offerors: the protester, Federal Computer, and Federal Data Corporation. The protester and Federal Data offered the brand name terminals, workstations, and concentrators; Federal Computer offered IBM Personal Computers (PCs and PC/XTs (PC)), and Tandem 6600 cluster controllers. The Navy found all three offerors' initial proposals to be technically acceptable but subject to clarification. Following clarification, all three offerors submitted best and final offers, which were found to be acceptable. Award then was made on November 15, 1985 to Federal Computer as the lowest-priced, technically acceptable offeror.

According to Tandem, the PCs and controllers offered by Federal Computer are not equivalent to the brand name products and were not acceptable.

Timeliness

At the outset, we consider the Navy's contention that Tandem was on notice by November 19 of the facts on which its protest is based. The Navy argues that the protest is untimely and should be dismissed because it was not filed until December 9, more than 10 working days after the basis of protest was or should have been known, as provided by our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (1985).

The protester was first notified of the award during a November 19 telephone conversation with the Navy contract specialist. While the parties disagree as to the precise content of the conversation,

they agree that Tandem was given some information regarding the manufacturer and model number of the major hardware and software proposed by Federal Computer. The parties also agree that Tandem orally requested a debriefing and was told that such a request would have to be made in writing. On November 21, Tandem sent the Navy a telegram requesting a debriefing.

Tandem also on that date telephoned the Navy's project manager. According to Tandem, the purpose of this call was to ensure that Tandem received official notice of the award and a debriefing in a timely fashion. Tandem admits that during the conversation it acknowledged that it was aware of the award to Federal Computer and had been given a partial hardware and software list. The Navy maintains that Tandem's remarks went further, and raised specific objections regarding Federal Computer's compliance with the salient characteristics.

The protester disagrees with the Navy's position, arguing that it had insufficient information on which to formulate its protest until the debriefing, which was held on November 25, and that it then filed a timely protest with our Office on December 9, the ninth working day after the debriefing. Tandem says it could not formulate its protest without obtaining more detailed technical information than was provided earlier, because it had no information concerning Federal Computer's plans to achieve required integration of the products with the Navy's existing system.

We think that the protest is timely. Even assuming, as the Navy argues, that Tandem could have formulated some grounds for its protest based on the information available before the debriefing, the record shows that Tandem had not yet received comprehensive information about the awardee's proposal. Tandem acted in a timely manner to arrange a debriefing. Under these circumstances, we do not believe Tandem was required, in effect, to file its protest piece-meal, as information on Federal Computer's proposal was obtained; it was reasonable for Tandem to delay filing its protest until after the debriefing. See *American Management Systems, Inc.*, B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199. Since the protest was filed within 10 days after the debriefing, the protest is timely. 4 C.F.R. § 21.2(a)(2).

Salient Characteristics

The Navy, in part, concedes Tandem's contention that Federal Computer's proposal did not comply with several of the salient characteristics identified in the RFP. The agency acknowledges that Federal Computer did not comply with characteristics requiring 16 programmable function keys and an adjustable key "click" feature. The Navy also admits that data communications using the proposed equipment will not fully conform to the RFP.

The RFP describes the salient characteristics of the workstation keyboard in relevant part as follows:

The keyboard shall be detachable and low profile, have a two-position tilt angle (5-15 degrees), have sculptured keys, *contain 16 programmable function keys, cursor control and edit keys, adjustable click sound and 10 IBM PC compatible function keys.* [*Italic supplied.*]

The Tandem brand name workstation includes a total of 26 separate keys: one set of 10 IBM PC compatible keys, plus a set of 16 additional keys that are not found on the standard PC keyboard. When the Tandem workstation is being used as a personal computer, the 10 IBM PC compatible keys are activated; the other 16 function key set is activated when the workstation is used as a terminal connected to a mainframe computer.

The protester's argument concerning the keyboard focuses on the requirement for this "16+10" key configuration, and particularly on the requirement that 16 separate function keys be available when the workstation is used as a computer terminal. It says that the equipment accepted not only deviates physically from the salient characteristic, and is therefore unaccepable, but that the IBM PC is not functionally equivalent because, due to the fewer number of keys, operators must strike multiple keys to perform functions that are performed with a single key on the brand name equipment.

In response, the Navy says the IBM PC is acceptable to it because the PC can perform the same functions as the Tandem workstation. It points out that in terminal mode the 16 separate function keys on the Tandem model perform a total of 32 functions when depressed along with an auxiliary key. The 10 function keys included on the IBM PC keyboard, when used in combination with auxiliary keys ("shift", "alt", and "control"), can perform a total of 40 functions. The Navy says, citing *Magnaflux Corp.*, B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4, that it was proper for it to waive Federal Computer's noncompliance with the 16+10 key requirement and award the contract to that firm, since the protester does not make a less expensive IBM-like machine, and thus was not prejudiced by waiver of the requirement.

We find that the IBM PC offered by Federal Computer does not contain the 16 separate programmable function keys identified as a salient characteristic of the Tandem product and that its proposal, therefore, did not conform to the RFP. In brand name or equal procurements, when salient characteristics are listed in terms of specific performance standards or design features, the "equal" product must meet these requirements precisely. *Cohu, Inc.*, B-199551, Mar. 18, 1981 81-1 CPD ¶ 207. Further, a brand name or equal solicitation describing various aspects of a particular firm's approach as salient characteristics is not to be interpreted as expressing only a functional requirement. *Castle/Division of Sybron Corp.*, B-219056, Aug. 7, 1985, 85-2 CPD ¶142; *MII Lundia, Inc.*, B-214715, Jan. 3, 1985, 85-1 CPD ¶ 14. On the contrary, technical requirements, stated in clear and precise terms, are presumed to be material to the needs of the government. *MII Lundia, Inc.*, B-214715, *supra*.

Notwithstanding that negotiated procurement techniques are used, offerors have the right to assume that such requirements will be enforced and, on the basis of them, to anticipate the scope of competition for award. *Squibb-Vitatek, Inc.*, B-205306, July 27, 1982, 82-2 CPD ¶ 81.

We also find that Federal Computer failed to offer the adjustable key click required by the RFP. A key click feature makes a sound when the operator strikes a key. The adjustable click feature permits the operators to control the volume of the sound. The Navy does not argue that the RFP requirement was met, but rather, as in its defense of the function key issue, states that it has determined that it does not require the adjustable click feature. According to the Navy, the requirement was included because the description of the salient characteristics in the RFP was taken directly from the descriptive literature for the brand name model, which has the adjustable feature, without first considering whether the feature was required to meet the Navy's needs.

Finally, the RFP required concentrators to permit multiple terminals to communicate over a single line with a mainframe that, the record shows, presently supports a Tandem 6530 protocol.[1] Specifically, the RFP identified the brand name product as a Tandem 6820 Terminal Cluster Concentrator and stated that the hardware proposed "shall communicate using the 6530 Tandem line protocols."

While Federal Computer originally proposed the Tandem 6820 concentrator, it substituted a Tandem 6600 cluster controller in its best and final offer. It is not clear why it made the substitution, which, as the Navy points out, involves a more expensive unit. It is clear, however, that the 6600 model communicates with mainframe equipment using an IBM protocol and does not support a Tandem 6530 compatible data stream (much less the 6530 protocol) unless additional software is installed on the mainframe. Federal Computer's best and final offer did not propose such software, although the Navy reports that the awardee subsequently indicated it would be furnished without additional cost.

According to Tandem, only its model 6820 concentrator, or one of several fully equivalent competing products, meets the Navy's requirements as stated in the RFP; Tandem insists the equipment offered by Federal Computer does not support the required protocol and is unacceptable. In response, the Navy says that with the software Federal Computer says it intended to include, the controller will support 6530 communications to the PCs, although the Navy admits that communications with the mainframe will not conform to the protocol.

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[1] A protocol is a set of rules governing the operation of a communication system. In order to communicate with each other, the units in the system must follow the same protocol.

Even assuming that Federal Computer would be legally bound to furnish software it does not mention in its proposal (and only confirmed orally), this would only allow the 6600 controller to support the Tandem protocol between the controller and the workstations. Input to the 6600 controller from the mainframe must still conform to the IBM standards. Consistent with the cases cited earlier, we look to the brand name product in interpreting the scope of a listed salient characteristic. The Tandem 6820 supports the 6530 protocol in communicating both with the mainframe and with the terminals connected to it. Tandem's interpretation of the salient characteristic as requiring its 6820 concentrator, or other equipment that is equally capable of using the 6530 protocol, thus appears to be correct. As a result, Federal Computer failed to comply with the salient characteristic since communications between the 6600 model and the mainframe will not conform to the 6530 protocol as required.

In support of its decision to make award to Federal Computer despite its noncompliance with the salient characteristics discussed above, the Navy maintains that waiver of the noncompliance was proper because the awardee's equipment will meet the Navy's needs and Tandem was not prejudiced. We believe, however, that the waiver involved a significant deviation from the salient characteristics and resulted in prejudice to Tandem and other potential offerors. Federal Computer's offer to furnish 10 physical function keys is not substantially equivalent to an offer to furnish a 10+16 key configuration; the differences in the configurations offered have a direct bearing on how the operator uses the equipment, because more keystrokes must be entered. Moreover, differences between protocols have a direct impact on the interchangeability and compatibility of equipment; the record shows, for example, that the 6820 (but not the 6600) concentrators can be cascaded—connected to each other to increase the number of units supported. In view of Federal Computer's failure to comply with these requirements, we need not decide whether, as the Navy contends, the key click discrepancy, standing alone, could have been waived.

Concerning prejudice, we think it is significant, as Tandem points out, that while it is only one of several manufacturers who produce equipment equivalent to the brand name product, there are many manufacturers who offer less expensive units that are functionally similar to the IBM PC offered by Federal Computer. Tandem asserts that if potential offerors had understood that the Navy did not need specialized equipment such as it manufactures, the government would have received many more offers than it did from manufacturers of these PC-type units. For its part, Tandem says that, had it known of the Navy's actual needs, it might well have elected not to compete. Tandem thus was prejudiced by the Navy's action inasmuch as the Navy induced Tandem to incur the cost of competing in a procurement in which it might not have par-

ticipated had it known the Navy did not need the kind of terminals it manufactures.

In these circumstances, it is clear that the Navy acted improperly in relaxing its requirements without amending the RFP. Of course, the Navy should not acquire equipment that exceeds its needs; the proper course of action was to solicit offers under an RFP with salient characteristics that reflected only the government's actual requirements. See *Andrew Corp., et al.*, B-217024, *et al.*, Mar. 25, 1985, 85-1 CPD ¶ 344; *Scanray Corp.*, B-215272, Sept. 17, 1984, 84-2 CPD ¶ 299. Consequently, we are recommending that the contract awarded to Federal Computer be terminated for convenience and that the Navy resolicit using revised specifications that will permit competition from vendors who may be capable of meeting the government's needs but who could not have met the unduly restrictive requirements set out in the original solicitation.

We also find Tandem entitled to its proposal preparation costs and the costs of filing and pursuing its protest, including attorney's fees.

First, we allow recovery of bid or proposal preparation costs if the protester was improperly excluded from the competition and none of the remedies listed in section 21.6(a)(2)-(5) of our regulations, 4 C.F.R. § 21.6(a), is appropriate. *EHE National Health Service, Inc.*, B-219361.2, Oct. 1, 1985, 85-2 CPD ¶ 362. Although we are recommending recompetition, a remedy specifically provided for in section 21.6(a)(3), in this case that remedy may not benefit the protester since Tandem generally does not compete in the market for PC-type units. Since by using the specifications it did the agency improperly induced Tandem to incur the expense of competing, we concluded that Tandem should recover its proposal preparation costs.

If Tandem does decide to participate in the recompetition, however, as it indicated it might attempt to do, Tandem may not also recover its proposal preparation costs.

Second, regardless of whether Tandem participates in the recompetition, our sustaining its protest here will further the purpose of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1174, by broadening competition. Under these circumstances, Tandem is entitled to its protest costs. *Washington National Arena Ltd. Partnership*, B-219136, Oct. 22, 1985, 65 Comp. Gen. 25, 85-2 CPD ¶ 435. Tandem should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

[B-221133]

Travel Allowances—Military Personnel—Enlistment Extension—Discharge, Reenlistment, etc.

Travel allowances payable in advance to enlisted service members at the time of their final discharge for their subsequent personal travel home may not properly be subjected to offset on account of their debts to the Government, since it has long been recognized as a matter of public policy that it is impermissible to discharge enlisted service members at their last post of duty without the means of returning home. This policy has no application to former enlisted members who have completed their separation travel. however. and travel allowances remaining due to them after they have returned home may be withheld and applied against their debts.

Matter of: Department of Defense Military Pay and Allowance Committee Action Number 559, April 15, 1986:

The question presented in this matter is whether—

In the case of an enlisted military member being separated from the Service while indebted to the United States, may an administrative offset from final pay include payments for the member's separation travel due after completion of travel? [1]

We conclude that separation travel allowances which remain due to the former enlisted members, after they have been discharged and have completed their travel home from their last duty station, may properly be withheld and applied toward the satisfaction of their debts. This, however, does not extend to travel allowances payable in advance to enlisted service members at the time of their final discharge for their subsequent personal travel home.

Background

Subsection 404(a) of title 37, United States Code, currently provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services are entitled to allowances for their personal travel upon separation from service from their last duty station to their home or the place from which they were called or ordered to active duty. Subsection 404(f)(2)(A) of title 37 further provides, however, that only transportation in kind by the least expensive mode of transportation available, or a monetary allowance that does not exceed the cost to the Government of such transportation in kind, may be furnished to enlisted members who (1) on the date of their separation have not served a period of active duty equal to at least 90 percent of the period of time for which they initially enlisted, or (2) are separated from the service under other than honorable conditions.

Implementing regulations are contained in Volume 1 of the Joint Travel Regulations. Paragraph M1100-1 of those regulations generally authorizes full payment of service members' personal travel al-

[1] This question was submitted by the Principal Deputy Assistant Secretary of Defense (Comptroller). The circumstances giving rise to the question are described in Department of Defense Military Pay and Allowance Committee Action Number 559, which was forwarded with the request for a decision.

lowances in advance of the performance of separation travel, subject to certain limitations and conditions. Paragraph M1100 also provides specifically, however, that those service members described by 37 U.S.C. §404(f)(2)(A), who elect to receive a monetary allowance rather than to be provided with transportation in kind for their separation travel, may only be advanced an amount equal to 75 percent of the least costly mode of common carrier transportation available.

The Department of Defense Military Pay and Allowance Committee notes that in 1954 we held that travel allowances payable to enlisted members upon discharge for their personal travel home are not subject to setoff against their debts to the Government, and this holding has been incorporated in the regulations governing their pay entitlements.[2] The Committee further notes, however, that in 1955 we subsequently held that allowances payable under the statutes and regulations then in effect to former service members after their separation as reimbursement for the transportation of their dependents and household goods could be subject to set off against the members' debts, since "(t)he fact that reimbursement is claimed shows that the members had sufficient funds [in advance] to obtain the necessary transportation." [3]

The Committee indicates the belief that when former enlisted service members have returned to their homes after being discharged and then seek reimbursement of their personal travel expenses, there should similarly be no need for concern about the possibility of their having insufficient funds to travel home. The Committee consequently questions whether amounts remaining due to former enlisted service members for their separation travel, after that travel is performed, may properly be withheld and applied toward the satisfaction of their debts to the Government. The Committee indicates that this question primarily concerns former members who fail to complete their initial terms of enlistment or are discharged under other than honorable conditions, and who are consequently eligible to draw only a part of their authorized monetary travel allowance in advance of their actual performance of travel under the current regulations. However, the issue would relate generally to all former enlisted members applying for reimbursement of their personal traveling expenses after completing their travel home.

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[2] See 34 Comp. Gen. 164, 167 (1954); and table 7-7-6 (rules 1 and 4), Department of Defense Military Pay and Allowances Entitlements Manual.

[3] See 34 Comp. Gen. 504, 506-507 (question 2) (1955). There we also noted that the longstanding policy against withholding travel allowances due enlisted members upon separation had never been extended to and did not apply to officers of the uniformed services.

Analysis and Conclusion

It is well settled that amounts due from the Government to former members and under certain circumstances to current members of the uniformed services, including travel allowances which may be payable to them, are subject to setoff against their debts to the Government.[4] Nevertheless, the accounting officers of the Government have long held that the debts of enlisted members may not properly be charged against the allowances payable to them at the time of their discharge for the purpose of providing them with return travel to their home or place of enlistment.[5] This principle is not specifically prescribed by statute, but is predicated on the longstanding and uncontroverted view that the Congress, as a matter of public policy, did not intend that enlisted members should be discharged, often far from home, without sufficient funds to return to their homes.[6] This policy was founded on an observation that it would be highly injurious to the service, to say nothing of the country at large, to discharge enlisted service members in places distant from their homes and leave them without the means of returning there.[7]

In the present matter it is therefore our view that under the statutes and regulations currently in effect, enlisted service members may be paid advance travel allowances at the time of their final discharge for their travel home to the extent authorized under paragraph M1100-1 of the Joint Travel Regulations, without any checkage on account of debts they owe the Government. Our further view is, however, that amounts due former enlisted members on claims for reimbursement submitted after they have completed their separation travel should be subjected to offset if they are indebted to the Government. In that situation where the separation travel has been completed there can be no basis for invoking the policy of exempting travel allowances from setoff to avoid the possibility of stranding former service members at their last post of duty without the means of returning home.

The question presented is answered accordingly.

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[4] See 58 Comp. Gen 501, 503 (1979); and *David J. DuCharme*, B-188257, July 7, 1977.

[5] See, e.g., 20 Comp. Dec. 707 (1914) and 8 Comp. Dec. 624 (1902).

[6] 36 Comp. Gen. 106, 107 (1956); 34 Comp. Gen. 164, *supra*, at 167.

[7] 8 Comp. Dec. 624, *supra*, at 625. In addition, it has long been the rule that if indebted enlisted members are given an option at the time of their discharge of receiving either a monetary allowance or transportation in kind for their travel home, they need not choose transportation in kind and may instead elect to receive the full amount of the advance travel allowance authorized without checkage on account of their debts. 20 Comp. Dec. 707, *supra*, at 709.

[B-221538]

Contracts—Negotiation—Late Proposals and Quotations—Rejection Propriety—Competitive System

A quotation that is submitted 7 months after the date it was due, and after the agency's repeated solicitation of the offeror during that period, is not a late offer, since it essentially was not submitted in response to the solicitation. The quotation therefore cannot be accepted without first surveying the market and permitting other potential suppliers to submit quotations.

Contracts—Requests for Quotations—Purchases on Basis of Quotations—Evaluation Propriety

Where a drawing accompanying a timely small purchase quotation from the protester is in need of clarification; the agency does not make award for 7 months after receiving the drawing; and the agency actively solicits the awardee's quote during the delay, the protester should have been given an opportunity during the delay to clarify its drawing.

Matter of: BWC Technologies, Inc., April 15, 1986:

BWC Technologies, Inc. (BWC), protests the placing of a purchase order with the Elliott Company (Elliott) under request for quotations (RFQ) No. DLA-700-85-Q-EL10, issued by the Defense Logistics Agency (DLA) under small purchase procedures for the procurement of 28 dirt and liquid deflectors. BWC principally complains that its low quote improperly was declared technically unacceptable since DLA solicited a quote from Elliott over a period of months, while engaging in almost no communication with BWC concerning its quote. We sustain the protest.

The RFQ, issued March 25, 1985, sought quotations on Elliott part number 44B-3521-253C on or before April 25. Although the solicitation warned that this manufacturer's part number was the only part number approved for the solicitation and that no drawings were available at the field activity, DLA considered alternate parts acceptable provided offerors established the technical acceptability of such parts. BWC was the only firm to respond by the closing date, and offered an alternate part produced by Unique Systems, Inc. (Unique), for $209.71 each, but furnished no drawings for the part. DLA requested drawings from BWC on May 31, and by letter of June 5 BWC sent a drawing, which appeared to be a copy of the original drawing for Elliott's part, as well as the name and phone number of its contact person at Unique should additional information be needed. In the meantime, DLA requested a quote from Elliott by phone on May 31. On July 7, DLA again spoke to Elliott concerning a price for the parts.

On September 19, BWC asked DLA whether an order had been placed and, if so, with whom, and at what quantity and price. Another conversation took place between DLA and Elliott on September 27, during which Elliott indicated that a written quote was on the way. BWC's quote was sent for technical review on October 2, and on October 17 the technical evaluator determined that he did

not have enough data to evaluate the quote, particularly in the presence of certain handwritten dimensions on the drawing BWC submitted. A fourth conversation between Elliott and DLA took place on December 3, during which DLA again requested a price from Elliott. A telex of the same date from Elliott proposed a price of $374 per item.

BWC received notice of its technical unacceptability on December 26, and filed its protest with our Office on January 2, 1986. Though a purchase order was placed with Elliott on January 8, DLA has directed Elliott to cease performance.

BWC takes the position that Elliott's offer was late and should not have been accepted. BWC also argues that it was at least unfair for DLA to go to great lengths to secure a late offer from Elliott without engaging in a similar effort to obtain clarification of BWC's drawing. In this regard, BWC points out that since it submitted a Bureau of Shipping number with its drawing, DLA itself could have cleared up any doubts about the drawing BWC submitted by obtaining the original part drawing from the government's drawing archives or from another agency. DLA did not attempt to do so and never contacted BWC for clarification or more information.

DLA asserts that BWC was on notice from the solicitation that DLA kept no technical drawings, and that BWC thus should have known, in offering an alternate part, that it was required to establish that part's technical acceptability. DLA reports that the rejection of BWC's offer was based on BWC's failure to include that technical data necessary for evaluation of the part with its offer. It is DLA's view, apparently, that it was not required to afford BWC a second opportunity to furnish all the necessary technical information. At the same time, DLA points out, the solicitation expressly reserved the right of the government to consider late quotes, such as Elliott's, if "in [the government's] best interests."

The small purchase procedures of the Federal Acquisition Regulation (FAR) set forth abbreviated competitive requirements designed to minimize administrative costs that otherwise might equal or exceed the cost of relatively inexpensive items. For example, competition is deemed sufficiently maximized where the contracting officer orally solicits quotations from a reasonable number of sources (three or more). FAR, 48 C.F.R. § 13.106(b) (1984). Notwithstanding the streamlined nature of small purchase procedures, we will review a small purchase to assure that it was conducted in a manner consistent with principles of fair and open competition. See *Gradwell Company, Inc.*, B-216480, Feb. 8, 1985, 85-1 C.P.D. ¶ 166. We find that BWC was not treated fairly.

We cannot accept DLA's characterization of Elliott's December quotation as simply a late quotation whose acceptance was authorized by the solicitation, which DLA never had canceled. Solicitations that establish due dates for offer submission contemplate that

the field of competition, and at least initial prices, will be drawn as of that particular time. The rules that govern acceptance of late offers address offers that are prepared and received close enough to that time so that all firms that timely wanted to compete could, and on an equal footing in terms of their current capabilities and pricing strategies.

Where an agency, however, itself actively solicits a quotation from a firm that chose not to compete, and is only able to secure a price from that firm more than 7 months after the solicitation involved has closed, the agency has, in effect, conducted a new procurement, and on an improper sole-source basis; the fact that the solicitation never was formally canceled is irrelevant. The quotation in such case really is not submitted in response to the solicitation to which timely offerors responded, and its submission and acceptance occur at a time so removed from the closing date that changes in economic conditions, and in the number of potential competitors and suppliers, may warrant another review by the agency of the market to ascertain whether an open competition is appropriate. In this case, for example, by the time the Elliott quote came in, BWC may have secured other drawings or made arrangements with other suppliers, or other firms may have entered the field.

We also do not think it was reasonable for DLA to solicit a quote from Elliott repeatedly over a period of 7 months without also permitting BWC an opportunity to clarify the dimensions shown on its drawing, or to provide other information during this lengthy delay. That is, once DLA determined that award could be delayed significantly beyond the closing date to enable Elliott to compete, we believe fairness required that DLA also permit BWC to benefit from the delay; the agency at least should have telephoned BWC for clarification, since the evaluator determined only that it was unclear from BWC's drawing whether BWC's alternate part was acceptable. Time certainly does not appear to have been a factor in the decision not to seek clarification since, even ignoring the fact that DLA was in possession of BWC's drawing as of June 5, the technical review was conducted October 17, almost 3 months prior to the January 8 award to Elliott. The failure to permit BWC to clarify its offer constituted unequal treatment under the circumstances, and was improper.

In view of our conclusion, by separate letter to DLA we are recommending that the agency survey the market to determine whether there is new interest in the requirement since the RFQ first was issued and, if there is such interest, permit those firms to submit quotations. In any case, BWC should be afforded an opportunity to clarify its drawing and establish that its alternate part will meet DLA's needs. If BWC's or some other offeror's part meets DLA's requirements, Elliott's contract should be terminated and award should be made to the low offeror.

The protest is sustained.

[B-221753]

Contracts—Protests—Interested Party Requirement—Suspended, Debarred, etc. Contractors

Protest is dismissed where debarment proceeding against the protester has been initiated because, pending a debarment decision, the firm is not eligible for government contract awards.

Contracts—Small Business Concerns—Awards—Responsibility Determination—Nonresponsibility Finding—Referral to SBA for COC Mandatory Without Exception

Under the Small Business and Federal Procurement Competition Enhancement Act of 1984, contracting agencies must refer to the Small Business Administration nonresponsibility decisions against small business concerns even though small purchase procedures are used.

Matter of: Semtex Industrial Corp., April 15, 1986:

Semtex Industrial Corp. (Semtex) protests the award of 51 purchase orders from November 22 to December 31, 1985, pursuant to requests for quotations (RFQ's) issued by the Defense Logistics Agency (DLA) for electronic components. Semtex asserts that it submitted the low quotation for each solicitation, but was improperly denied the contracts.

We dismiss the protest.

The 51 purchase orders were awarded by DLA pursuant to small purchase procedures, which apply to awards anticipated as less than $25,000 and under which an agency has broad discretion with respect to making purchases, including the authority to solicit only particular suppliers. *Gradwell Company, Inc.*, B-216480, Feb. 8, 1985, 85-1 C.P.D. ¶ 166. DLA reports that due to past performance problems, contracting officials recommended to the agency's debarring official that Semtex, a small business concern, be debarred. As a result, Semtex was not requested to submit quotations for the solicitations in question. DLA further states that it nevertheless received and evaluated offers from Semtex for 17 of the RFQ's. DLA reports that Semtex did not submit the low quotation for three of them and, although Semtex was low for the remaining 14, the firm was not awarded contracts because the contracting officer determined that Semtex was not a responsible concern. Finally, DLA has informed our Office that on March 24, 1986, the DLA debarring official formally initiated debarment action against Semtex.

Semtex argues that DLA improperly subjected Semtex to a *de facto* debarment by declaring the firm nonresponsible for the 14 solicitations under which its quotations were low. Semtex complains that DLA neither made the nonresponsibility determinations on a case-by-case basis nor referred them to the Small Business Administration (SBA) for a certificate of competency (COC) decision.

Under our Bid Protest Regulations, a protesting party must have some legitimate interest in the matter before this Office will consider the protest. 4 C.F.R. § 21.1(a) (1985). A firm for which debarment has been initiated is precluded from receiving any government contract awards pending a final debarment decision. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406-3(c)(7) (1984). We will not consider Semtex's protest on the merits because, even if we sustain the protest, Semtex is not eligible to receive awards under any of the protested solicitations. See *Ikard Mfg. Co.*, B-213017, July 23, 1984, 84-2 C.P.D. ¶ 80.

Despite our conclusion, we find it necessary for the purpose of future procurements to point out a deficiency in the procedures followed by DLA. In its report to this Office, DLA submits that it did not refer the nonresponsibility determinations concerning Semtex to the SBA for a COC because the agency was using small purchase procedures. To justify this action, DLA relies on FAR, 48 C.F.R. § 19.602-1(a)(2), which provides that referral to SBA for COC consideration, normally required when a small business is found nonresponsible by a contracting officer, is not required in small purchases.

The exception in the FAR, however, no longer applies. Under the Small Business and Federal Procurement Competition Enhancement Act of 1984, 15 U.S.C.A. § 637(b)(7)(C) (West Supp. 1985), all nonresponsibility determinations must be referred to the SBA for review regardless of the dollar value of the contract unless the business concern does not want its application considered. *The W. H. Smith Hardware Co.*, B-219654, Nov. 12, 1985, 85-2 C.P.D. ¶ 536.

The protest is dismissed.

[B-222483]

Contracts—Protests—Authority to Consider—Activities not Involving Federal Procurement

General Accounting Office has no authority to consider a protest of the award of a contract by the Government of Egypt to be financed under the Foreign Military Sales program because the solicitation was issued and the award made by other than a federal agency.

Matter of: Environmental Tectonics Corp., April 16, 1986:

Environmental Tectonics Corp. protests the award of a contract for aeromedical equipment to Technology, Inc. by the Government of Egypt. The contract is to be financed by the Defense Security Assistance Agency under the Foreign Military Sales program.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985) and our implementing Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1985), an interested party may protest to this Office a solicitation issued by or for a federal agency for the procurement of property or services, or the proposed award or award of such a contract. A "federal agency" is defined to

mean any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction. *See* 4 C.F.R. § 21.0(b).

Here, although it appears that the contract may be financed through a loan made by a "federal agency," the solicitation was issued and the award was made by the Government of Egypt, which clearly is not a "federal agency." Since the protest does not concern a solicitation issued by or for a federal agency, it does not fit within our bid protest authority under CICA. See *Chas. G. Stott & Co., Inc.*, B-220302, Sept. 24, 1985, 85-2 CPD ¶ 333.

The protest is dismissed.

[B-221855]

Bids—Responsiveness—Failure to Furnish Something Required—Manufacturer, Authorized Dealer, etc. Representations

Failure of the low bidder to list specific manufacturers and suppliers of equipment the bidder was required to supply does not require rejection of the bid where the listing requirement was not intended to prevent bid shopping, but rather was intended to insure the use of acceptable suppliers and manufacturers, and the low bidder agreed to use suppliers which had been given prior approval by the procuring agency and were on a list included in the invitation.

Bids—Responsiveness—Test to Determine—Unqualified Offer to Meet All Solicitation Terms

The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. The required commitment to the terms of the invitation need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements.

Contracts—Protests—Moot, Academic, etc., Questions—Protester Not in Line for Award

Protest that second low bid is nonresponsive is academic and not for consideration where the protester has not presented a basis upon which to question a prospective award to the low bidder.

Matter of: Challenger Pipings, Inc., April 18, 1986:

Challenger Piping, Inc. (Challenger), protests the proposed award of a contract to Fred B. DeBra Company (DeBra) under invitation for bids (IFB) No. 539-84-101, issued by the Veterans Administration Medical Center (VA), Cincinnati, Ohio for all necessary labor, material, equipment, and supervision to modernize a VA boiler plant. Challenger contends that the bids of the proposed awardee, DeBra, and the second low bidder, H. F. Randolph Co. (Randolph) are nonresponsive for failure to comply with an IFB special instruction which requires bidders to list the manufacturers and sup-

pliers of major equipment and materials, thereby allegedly making Challenger's third low bid the lowest priced responsive bid. The VA is withholding award pending the resolution of this protest.

We deny the protest.

The IFB contained special instructions which required bidders to supply certain information with their bids and stated that a bid would be considered nonresponsive if it lacks the required information. Special instruction No. 2 required bidders to:

> List manufacturers and suppliers of major equipment and materials, including burners, deaerator, instrumentation, pumps, emergency generator, motor control center and temporary boilers [upon] which bid is based. If manufacturers or suppliers are different from those listed in section 15052 of this specification, bid shall include sufficient qualifying information about each to assure full compliance with the specifications. Bid will be considered non-responsive if any equipment or material on which bid is based is determined by the A/E [architect/engineer] Professional to not meet specification.

Section 15052 of the IFB listed acceptable manufacturers/suppliers of the major equipment for the boiler project. Under most of the required types of equipment, more than one manufacturer/supplier was listed as acceptable to the VA.

In response to special instruction No. 2, DeBra's bid stated that it would supply equipment of manufacturers/suppliers "in accordance with those listed in section 15052 of the specification." DeBra's bid did not specifically list which of the optional acceptable manufacturers/ suppliers of the various products outlined in section 15052 that it proposed to use.

Challenger argues that one of the VA's reasons for requiring a list of manufacturers/suppliers was to prevent bid shopping. (Bid shopping refers to the seeking after award by the prime contractor of lower-price suppliers or subcontractors than those originally considered in the formulation of the prime contractor's bid). *A. Metz, Inc.*, B-213518, Apr. 6, 1984, 84-1 C.P.D. ¶ 386). Challenger contends that, since the list of suppliers which DeBra referenced in its bid (section 15052 of the IFB) contained many acceptable suppliers, acceptance of DeBra's bid would permit DeBra to bid shop.

The VA states that the purpose of the manufacturers/suppliers listing clause was "to insure that acceptable equipment would be furnished by the acceptable bidder." The agency argues that the solicitation sought to encourage bidders to use suppliers that were listed in section 15052 of the IFB and states, therefore, that the listing requirement was not an anti-bid shopping device, but a device to guaranty the use of acceptable suppliers. The VA states that all of the equipment items listed in section 15052 are standard commercial products and, therefore, there would not be a need for an anti-bid shopping provision. The VA concludes that DeBra's offer to use the suppliers listed in section 15052 is responsive to the IFB requirement.

We find that the clause in question, by its language, was not directed against bid shopping. The clause states that a bid will be

considered nonresponsive if the equipment or material on which the bid is based is determined by the VA's A/E professional not to meet the specifications. We agree with the VA that this provision evidences an intention to insure that the commercially available equipment conforms to the government's specifications and not to prevent bid shopping. The VA also indicates, and Challenger does not dispute, that the equipment solicited is standard and commercially available. Thus, the danger of bid shopping—that the awardee may substitute a supplier after award which could lead to shoddy workmanship or other cost cutting measures—is not a significant concern. *George E. Jensen Contractor, Inc.*, B-187653, Mar. 10, 1977, 77-1 C.P.D. ¶ 181. Under these circumstances, we think DeBra's bid need not be rejected for failure to state specifically which of the manufacturers/suppliers it planned to use. See *John W. Cowper Co.*, B-190614, May 18, 1978, 78-1 C.P.D. ¶ 382; *Dubicki & Clarke, Inc.*, B-190540, Feb. 15, 1978, 78-1 C.P.D. ¶ 132.

Challenger also argues that, although DeBra referenced the list of acceptable suppliers in section 15052 of the IFB, it did not comply strictly with the solicitation requirement for the submission of a list of manufacturers or suppliers. Challenger states that the requirement is for a list and the submission at anything else does not meet the literal terms of the solicitation. Challenger argues that such noncompliance should render DeBra's bid nonresponsive. We disagree.

Responsiveness concerns whether a bid constitutes an offer to perform, without exception, the exact thing called for in the invitation. *Central Mechanical Construction, Inc.*, B-220594, Dec. 31, 1985, 85-2 C.P.D. ¶ 730; 49 Comp. Gen. 553, 556 (1970). Unless something on the face of the bid, or specifically a part of it, limits, reduces, or modifies the bidder's obligation to perform in accordance with the terms of the invitation, the bid is responsive. *Energy Efficient Improvements*, B-218014.3, Apr. 24, 1985, 85-1 C.P.D. ¶ 466; 49 Comp. Gen 553, 556, *supra*. The required commitment to the terms of the invitation need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements. *Fisher Berkley Corp; International Medical Industries*, B-196432; B-196432.2, Jan. 9, 1980, 80-1 C.P.D. ¶ 26; *A. A. Beiro Construction Co., Inc.*, B-192664, Dec. 20, 1978, 78-2 C.P.D. ¶ 425. Furthermore, a solicitation requirement is not necessarily material simply because it is accompanied by a warning that failure to comply will result in rejection of the bid. *Fisher Berkeley Corp.; International Medical Industries*, B-196432; B-196432.2, *supra*.

Here, as noted above, the material requirement in question was that the bidder commit itself to use manufacturers/suppliers that either were on the invitation's list of approved sources or to designate other manufacturers/suppliers and then include sufficient information to show full compliance with the specifications. The list

itself was not the material requirement; evidence of competent and satisfactory manufacturers and suppliers was the material requirement. DeBra agreed in its bid to use only contractors that were already approved by the VA, and DeBra therefore committed itself to the material requirements found in special instruction No. 2. Consequently, we conclude that DeBra's bid was responsive to the requirement outline in special instruction No. 2.

Because we find that Challenger's contentions concerning the responsiveness of DeBra's low bid are without merit and thus DeBra is in line for award, we need not address Challenger's contention concerning the responsiveness of the second low bid since the issue is academic. *Hawthorne Aviation,* B-211216, Apr. 5, 1983, 83-1 C.P.D. ¶ 369.

The protest is denied.

[B-200650]

Meetings—Attendance, etc. Fees—Meals Included

An employee of the Forest Service who conducted at his duty station a General Management Review meeting with timber associations and other private users of the Mt. Baker-Snoqualmie National Forest may not be reimbursed for the cost of a meal served at the meeting. The general rule is that in the absence of specific statutory authority the Government may not pay for meals of civilian employees at their headquarters. Reimbursement has been allowed where the meal was incident to a formal meeting or conference that included substantial functions separate from the meal. This case did not meet this threshold requirement.

Meals—Headquarters

An employee may not be reimbursed for a meal at his headquarters solely by virtue of having met the three-part test established in Gerald Goldberg, et al., B-198471, May 1, 1980. Rather, the employee must first show that the meal was part of a formal meeting or conference that included not only functions such as speeches or business carried out during a seating at the meal, but also included substantial functions that took place separate from the meal. See Randall R. Pope and James L. Ryan, 64 Comp. Gen. 406 (1985).

Matter of: J.D. MacWilliams, April 23, 1986:

This decision is in response to a request from C.E. Tipton, an authorized certifying officer of the Forest Service, U.S. Department of Agriculture. The issue presented is whether payment of the cost of expenses incurred for a dinner meal by an employee while attending a meeting held at the employee's official duty station may be allowed. Because the meal involved here was not part of a formal meeting or conference involving substantial functions outside of the meal, we conclude that payment may not be allowed.

In August 1983, Mr. J.D. MacWilliams, Forest Supervisor, Mt. Baker-Snoqualmie National Forest, Washington, participated in a General Management Review (GMR) involving the Mt. Baker-Snoqualmie National Forest. During the GMR, a Forest Service team meets with representatives from various timber associations and firms to provide an update of Forest Service activities in the National Forest. Likewise, the meeting enables the GMR team to hear

presentations from the industry about their concerns and their relationship with the Mt. Baker-Snoqualmie National Forest. Mr. MacWilliams attended this meeting and submitted a travel voucher claiming $14 for the cost of a meal served at the meeting.

As a general rule, an employee may not be paid a per diem allowance or actual subsistence expenses at his permanent duty station as such expenses are considered personal to the employee. Paragraph 1-7.6a, Federal Travel Regulations, FPMR 101-7 Supp. 1, Sept. 28, 1981, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983). We have repeatedly held that in the absence of specific statutory authority, the Government may not pay subsistence expenses or furnish free meals to employees at their official duty stations even where unusual working conditions are involved. 53 Comp. Gen. 457 (1974); *Sandra L. Fergerson, et al.*, B-210479, December 30, 1983; and *J.D. MacWilliams*, B-200650, August 12, 1981. Compare 53 Comp. Gen. 71 (1973).

There are, however, several exceptions. One permits reimbursement of registration fees that include costs of a meal. Thus, we have held that 5 U.S.C. § 4110 (1982) permits the reimbursement of registration fees for attendance by employees at meetings held at their official duty station where meals are provided at no additional charge and represent an incidental part of the meeting. 38 Comp. Gen. 134 (1958).

Another exception permits reimbursement under 5 U.S.C. § 4110 where meals are not included in a registration fee for attendance, but a separate charge for the meal is made. However, in order for reimbursement to be made under this exception the agency must find that: (1) the meals are incidental to the meeting; (2) attendance of the employee at the meals is necessary for full participation in the business of the meeting; and (3) the employee was not free to partake of his meals elsewhere without being absent from essential formal discussions, lectures or speeches concerning the purpose of the meeting. *Gerald Goldberg, et al.*, B-198471, May 1, 1980.

Goldberg involved employees who participated in an annual meeting of the President's Committee on Employment of the Handicapped conducted over a 3-day period at their headquarters. There was no charge or registration fee to attend the meeting but there was a charge for three meals served at the event. The question raised in that case was whether the agency could legally pay for the meals which were determined to have been an integral part of the overall conference.

After citing the general rule that an employee may not be paid a per diem allowance in lieu of subsistence at his permanent duty station, we noted that in exceptional circumstances, payment for meals that are incidental to meetings and conferences has been permitted. We found that the 3-day conference in *Goldberg* met this test.

Recently, employees have claimed reimbursement relying on *Goldberg's* three-part test for meals taken during the course of routine meetings held at headquarters. *Randall R. Pope and James L. Ryan*, 64 Comp. Gen. 406 (1985), involved attendance by representatives of the Midwest Region of the National Park Service at monthly meetings of the Omaha-Lincoln Federal Executive Association. These luncheon meetings were organized to permit representatives of various Government agencies to discuss issues of common concern. In denying reimbursement for the meal, we held that in order to meet the three-part *Goldberg* test, "a meal must be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal." 64 Comp. Gen. at 408. We noted the difficulty in determining whether the meetings were incidental to the luncheon or whether the luncheon was incidental to the meeting. We concluded that a meeting that lasts no longer than the meal certainly does not qualify for reimbursement.

Thus, the test of *Pope and Ryan* must precede the application of the *Goldberg* three-part test. While the record of this case indicates that the participants conducted business during a seating at a meal and for a brief time thereafter, there is no evidence that any substantial functions occurred separate from the meal. Thus, the meeting in this case does not compare with the elaborate 3-day conference presented in *Goldberg*, where the meals clearly were incidental to the conference, nor does it meet the standard set forth in *Pope and Ryan*. We therefore conclude that Mr. MacWilliams may not be reimbursed for meal expenses.

[B-221459]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Significant Issue Exception—For Application

A protest involving a questionable application of definitive responsibility criteria by the contracting agency raises an issue significant to the procurement system, 4 C.F.R. 21.2(c)(2) (1985), and will be considered on the merits even though it is untimely filed.

Contractors—Responsibility—Determination—Definitive Responsibility Criteria

Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the solicitation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Solicitation Improprieties—Apparent Prior to Bid Opening/Closing Date for Proposals

Protest that firm lacks sufficient time to prepare its bid concerns and apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely.

Contracts—Protests—Moot, Academic, etc. Questions—Award Made to Protester

Allegation that agency improperly relaxed specifications and sought to preclude protester from competition is rendered academic by award to protester.

Matter of: Topley Realty Co., Inc., April 23, 1986:

Topley Realty Co., Inc. (Topley), protests the award of contracts by the Department of Housing and Urban Development (HUD) under invitation for bids (IFB) Nos. 02-85-033 (South Allegheny County area), 05-85-033 (Beaver County area), and 06-85-033 (McKean County area), and the solicitation of offers under IFB No. 04-85-033 (Westmoreland County area). These solicitations were issued by HUD to provide management broker services related to the inspection, repair, maintenance and disposition by sale or lease of HUD-acquired single family homes in Pennsylvania. We sustain the protest in part and deny it in part.

IFB No. 02-85-033

Under IFB No. 02-85-033, HUD solicited offers to provide management broker services for approximately 20 HUD-acquired homes in the South Allegheny County area, including certain wards of the City of Pittsburgh, Pennsylvania. The solicitation required the potential contractor to meet certain "special standards" of responsibility, including:

1. *CONSTRUCTION COST ESTIMATING TECHNIQUES*

The contractor, or a member of his staff who has been in his/her employ for at least two years, must possess five years of verifiable experience in construction techniques and cost estimating which would qualify him/her to:

(a) Prepare comprehensive repair specifications for 1 to 4 family structure
(b) Coordinate and supervise repair work as required, including emergency repairs relative to health and safety hazards to tenants and/or the public
(c) Arrange for maintenance and custodial services
(d) Insure payment of utility and other service bills.

2. *APPRAISAL*

The contractor must possess five years of verifiable experience in property appraisal which would qualify him/her to accurately determine the following values on 1 to 4 family properties:

(a) "As-is" fair market value
(b) "Repaired" fair market value
(c) Fair Market "rental" value
(d) Damage estimates.

HUD received offers from four firms. Phoenix Real Estate (Phoenix)—N. Jorinda Saunders, owner—submitted the low bid of

$197.50 per house, while Topley submitted the second low bid of $225 per house. The contracting officer, making an affirmative determination of Phoenix's responsibility, made award to that firm on September 26, 1985. Topley initially protested the award to the agency and subsequently filed a protest with our Office.

The president of Topley alleges that he was informed by a contracting official that it was HUD policy to award the South Allegheny contract to a member of a minority group.

Topley argues that HUD, so as to assure that a minority firm received the contract, failed to apply the special responsibility standards set forth in the solicitation. It contends that the agency made award to Phoenix even though Saunders had been "in the real estate business" for only 3½ years. Topley refers us to a September 13, 1985, article from a Pittsburgh newspaper stating that Saunders "has been in the real estate business for 3½ years, the last 6 months as the broker of her own business, Phoenix Real Estate." Topley also alleges that Phoenix's successful bid was the "result of inside information."

HUD initially questions the timeliness of Topley's protest to our Office. We agree that there is a serious question as to the timeliness of Topley's protest to our Office. Our Bid Protest Regulations, however, provide that where a protest raises issues significant to the procurement system we may consider that protest even if it was untimely filed. 4 C.F.R. § 21.2(c). Since it appears to us from the record of Topley's initial protest that a serious question is raised as to the application of definitive responsibility criteria which led to the award, we will consider the merits of its protest.

First, HUD denies that Topley was the victim of racial discrimination. The agency believes that Topley may instead be misinterpreting the agency's Minority Business Participation Plan for the Pittsburgh Office, pursuant to which the agency encourages the participation of minority firms by providing copies of solicitations. HUD notes that the solicitation was provided to Phoenix not under the Minority Business Participation Plan, but rather in response to a request from Phoenix. In addition, HUD defends the determination that Phoenix met the special responsibility standards set forth in the solicitation.

As for compliance with the special responsibility standards, we note that our Office will review an agency's affirmative determination or responsibility only if possible fraud on the part of the contracting officials is shown or if the solicitation contains definitive responsibility criteria which allegedly have not been applied. Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement for the measurement of a bidder's ability to perform the contract. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. We have previously found

requirements that a contractor possess specific experience in a particular area to constitute definitive responsibility criteria. See *Vulcan Engineering Co.*, B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403 (requirement that contractor have experience in successfully installing six specific foundry process systems); *Urban Masonry Corp.*, B-213196, Jan. 3, 1984, 84-1 C.P.D. ¶ 48 (requirement that installer have 5 years experience in the erection of precast concrete units similar to those required under solicitation).

The scope of our review is limited to ascertaining whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that the definitive responsibility criteria had been met. Although we have indicated that the relative quality of the evidence is a matter for the judgment of the contracting officer, we have insisted upon the presence of objective evidence from which the contracting officer could find compliance with the definitive responsibility criteria, *Vulcan Engineering Co.*, B-214595, *supra*, 84-2 C.P.D. ¶ 403 at 7, and we have sustained protests against affirmative determinations of responsibility where such evidence is lacking. *Id.*; *Ampex Corp.*, B-212356, Nov. 15, 1983, 83-2 C.P.D. ¶ 565; *Power Systems*, B-210032, Aug. 23, 1983, 83-2 C.P.D. ¶ 232.

In her submission to the contracting officer, Saunders indicated that Phoenix had been in business since March 30, 1985. Saunders informed the contracting officer in regard to the first special responsibility standard, that either the contractor or a staff member in the contractor's employ for at least 2 years must possess 5 years of experience in construction cost estimating techniques, that a licensed salesperson employed by her, Steven Forbes, had a separate business providing contracting services, had been in business for 5 years, and possessed the required experience in construction cost estimating techniques. In regard to the second special responsibility standard, that the contractor possess 5 years of experience in property appraisal, Saunders cited her own experience and further indicated that she employed a licensed salesperson who had been licensed since 1978 and who had served as an appraisal assistant for 3 years. Saunders went on to add, however, that:

> my real estate experience was gained from the following periods of apprenticeship;
>
> 1981—General Development Corporation-Interstate Land Sales
> 1982-1983—Quality Real Estate-Residential, Commercial Sales
> 1983-1984—Allegheny Landmark Realty-Residential, Commercial Sales Extensive Experience
> 1984—Until Opening of Phoenix-Northern Shore Realty-Residential, Commercial Sales, Rentals Development Packaging.
>
> I have V.A. and HUD sales experience from all of these agencies I was affiliated with.

The contracting officer emphasizes that in making an affirmative determination of Phoenix's responsibility, he determined that the "backgrounds and experience of Ms. Saunders and her staff *in its totality*" [italic supplied] met the responsibility standards, that

Phoenix "has the qualifications to fulfill its contract," and that "satisfactory performance of the HUD contract requirements can be reasonably expected" from the firm.

Despite the contracting officer's conclusion, since Saunders was employed by another firm prior to Phoenix's commencement of business in March 1985, Forbes presumably had not been in the employ of either Phoenix or Saunders for the 2 years specified under the first special responsibility standard. Further, since Saunders indicated that her real estate experience commenced in 1981, she apparently lacked at the time of award 5 years of experience in either construction cost estimating techniques or property appraisal. Thus, although we find no basis for the protester's allegation that the determination of Phoenix's responsibility was racially motivated, it appears that Phoenix in fact did not meet the definitive criteria established in this procurement.

Where, however, a bidder is found to be responsible even though it does not meet definitive responsibility criteria set out in the solicitation, such criteria may be deemed to exceed the agency's minimum needs and to be unduly restrictive of competition. See *Haughton Elevator Division, Reliance Electric Co.*, 55 Comp. Gen. 1051 (1976), 76-1 C.P.D. ¶294; *International Computaprint Corp.*, B-185403, Apr. 29, 1976, 76-1 C.P.D. ¶289. We note that not only did the contracting officer here make an affirmative determination of Phoenix's responsibility, thereby waiving the definitive responsibility criteria, but in subsequent solicitations for management broker services he deleted the requirements that the contractor or a member of his staff possess a specific minimum number of years of experience in construction cost estimating techniques and property appraisal and that a staff member be in the contractor's employ for a specific prior period of time. This convinces us that the definitive responsibility criteria in the South Allegheny solicitation overstated the agency's minimum needs and unduly restricted competition. On that basis, we sustain Topley's protest as it relates to the South Allegheny contract.

We do not recommend a resolicitation here since there is no indication that Phoenix and Topley would have bid different prices on the basis of lesser experience requirements. Since Topley was led to compete on the basis of an agency's statement of its needs which was in excess of what it actually required, however, we find that Topley should be allowed to recover its costs of filing and pursuing this protest before our Office and of preparing its bid in response to the South Allegheny solicitation. 4 C.F.R. § 21.6(d)(e). Topley should submit its claim for such costs directly to HUD. 4 C.F.R. § 21.6(f).

IFB Nos. 05-85-033 and 06-85-033

Under IFB Nos. 05-85-033 and 06-85-033—issued as small business set-asides on November 14, 1985—HUD solicited offers to pro-

vide management-broker services for an estimated 21 HUD-acquired houses in the Beaver County area (05-85-033) and one HUD-acquired house in the McKean County area (06-85-033).

Since the proposed contract actions were not expected to exceed $10,000, HUD was exempt from the requirement to synopsize the procurements in the Commerce Business Daily. *See* 41 U.S.C.A. § 416 (West Supp. 1985); Federal Acquisition Regulation (FAR), § 5.201 (FAC No. 84-5, Apr. 1, 1985). The agency instead posted notices of the proposed contract actions at the main post office in Pittsburgh and at HUD's Pittsburgh area office, and mailed copies of the solicitation to all firms on the bidder's mailing list. Seven firms were solicited for Beaver County and five firms for McKean County.

By bid opening at 2 p.m. on December 16, HUD had received two bids in response to the Beaver County solicitation and one bid in response to the McKean County solicitation. Topley did not submit a bid for either area.

Shortly after bid opening, however, Topley filed this protest at our Office. Although its protest letters were dated December 10 and December 11, they were received by us at 3:10 p.m. on December 16. Notwithstanding Topley's protest, the contracting officer subsequently made award to the low bidder under the Beaver County solicitation—Ed Shields Realtor—and to the only bidder under the McKean County solicitation—Scott and Chase Real Estate Agency.

Topley contends that as a result of its dispute with the contracting officer over the award of the South Allegheny contract, the contracting officer attempted to preclude the firm from bidding for the Beaver County and McKean County areas.

In its initial protest to our Office, Topley contended that although the contracting officer knew of Topley's interest in responding to solicitations for management broker services in all areas, he did not send the firm a copy of the solicitations. In particular, the protester alleged that it was "already too late to bid on the Beaver or McKean contracts which we did not receive [bid] packages for."

In its administrative report responding to this protest, however, HUD denied that the contracting officer sought to preclude Topley from bidding. The contracting officer reported that after discussing the procurements with Topley on December 10, he had sent Topley a copy of the solicitation for Beaver County on December 11 and the solicitation for McKean County on December 12.

We note that Topley, in its comments on the administrative report, now expressly admits that it received a copy of the Beaver County bid package 2 days before bid opening. It nevertheless maintains that this allowed "insufficient time to investigate, prepare and submit a bid." In addition, it impliedly admits that it also received the McKean County bid package, stating that "[a]gain, two days is insufficient time to bid on such a project."

A protest that a firm lacks sufficient time to prepare its bid concerns an apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely. See *P&P Brothers General Services*, B-219678, Oct. 22, 1985, 85-2 C.P.D. §438 (copy of solicitation received 1 day prior to bid opening). Topley, however, did not file its protest at our Office until shortly after bid opening on December 16. Although in its comments on the administrative report Topley states that "[t]he protest was filed immediately, verbally on the date of bid openings and in writing to HUD through" Topley's congressional representatives, oral protests are no longer provided for under the FAR and Topley's letters to its congressional representatives concerned the South Allegheny procurement, not the Beaver and McKean Counties procurements. Topley's protest as it relates to these two areas is therefore untimely. In any case, it lacks merit.

In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Competition in Contracting Act of 1984 provides for the adoption of simplified procedures for small purchases not exceeding $25,000. 41 U.S.C.A. § 253(g)(1) (West Supp. 1985). Although agencies must nevertheless "promote competition to the maximum extent practicable," 41 U.S.C.A. § 253(g)(4), they need not synopsize proposed contract actions not expected to exceed $10,000, 41 U.S.C.A. § 416, and solicitation of at least three sources generally may be considered to promote competition to the maximum extent practicable. FAR, § 13.106(b)(5) (FAC No. 84-5, Apr. 1, 1985).

As indicated above, HUD solicited seven firms for the Beaver County procurement and five firms for the McKean County procurement, receiving two bids for the former and one bid for the latter. Further, Topley apparently received copies of the solicitations 2 days prior to bid opening. We note in this regard that HUD reports that Topley's office is only approximately 10 miles from HUD's Pittsburgh office and that the firm submitted a bid for the Westmoreland County area the day after the agency had sent it a copy of that solicitation.

The contracting officer determined that the low bids offered fair and reasonable prices. Although only one bid was received for the McKean County area, the bid price was the same as the price under the prior contract even though the agency had expected a 10 percent increase to account for inflation. *See* FAR, § 13.106(c). In any case, Topley has not alleged that the bid prices were unreasonable.

Topley has failed to demonstrate that HUD made a deliberate or conscious attempt to preclude the protester from competing. In view of these circumstances, we conclude that Topley has not shown that the agency failed to act so as to promote competition to the maximum extent practicable. Cf. *S.C. Services Inc.*, B-221012, Mar. 18, 1986, 86-1 C.P.D. ¶ ——.

IFB No. 04-85-033

Topley alleges that HUD improperly relaxed its usual special responsibility standards when drawing up the solicitation—IFB No. 04-85-033—for management broker services for the Westmoreland County area and that the agency sought to preclude Topley from bidding for this area. Since, however, HUD has awarded the contract for Westmoreland County to Topley, its protest in this regard is academic and will not be considered on the merits. *See Lion Brothers Company, Inc.*, B-220576, Oct. 10, 1985, 85-2 C.P.D. ¶402.

The protest is sustained in part and denied in part.

[B-221525]

Compensation—Rates—Highest Previous Rate—Administrative Discretion

Employee accepted grade GS-3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS-3 based on her highest previous rate (grade GS-6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion. This decision distinguishes B-202863, January 8, 1982.

Matter of: Barbara J. Cox—Claim for Retroactive Salary Adjustment, April 23, 1986:

ISSUE

The issue in this decision concerns the claim of an employee to receive the benefit of her highest previous rate upon appointment to a position with the Veterans Administration (VA). We hold that since payment of the employee's highest previous rate by the VA is discretionary under the circumstances, the employee is not entitled to the benefit of her highest previous rate, absent evidence that the agency action was arbitrary, capricious, or an abuse of discretion.

BACKGROUND

This decision is in response to a request from the National Federation of Federal Employees (NFFE), reference: 153-RE-53, seeking a retroactive salary adjustment and backpay based on the highest previous rate rule for Mrs. Barbara J. Cox. The request for our decision was filed under our labor-management procedures contained in 4 C.F.R. Part 22 (1985).

The letter from NFFE states that, in 1979, Mrs. Cox transferred from her position as an Accounting Technician at the National Security Agency (NSA), Ft. Meade, Maryland, to a similar position at the Naval Air Station in Jacksonville, Florida. Both positions were permanent positions, but the transfer involved a downgrade from

her grade GS-7, step 6, position with NSA to a grade GS-5, step 10, position with the Naval Air Station. Mrs. Cox was subsequently promoted at the Naval Air Station in 1980 to the level of grade GS-6, step 8.

On April 21, 1981, Mrs. Cox was granted leave without pay for 90 days from her position at the Naval Air Station, and effective June 14, 1981, she received a temporary appointment as a Clerk-Typist, grade GS-3, step 1, with the Veterans Administration (VA) Regional Office in St. Petersburg, Florida. In December 1981, Mrs. Cox transferred to another temporary appointment as an Accounting Technician, grade GS-4, step 1, at MacDill Air Force Base, Florida. Finally, in February 1981, Mrs. Cox received a permanent appointment at MacDill AFB as a Budget and Accounting Technician, grade GS-7, step 1.

The union argues that the VA improperly denied Mrs. Cox the benefit of her highest previous rate and should have fixed her salary in grade GS-3 at a step comparable to her highest previous rate of pay. The union states that by denying Mrs. Cox the benefit of her highest previous rate, she has lost step increases and pay in the VA position and in her subsequent positions at MacDill AFB.

The union concedes that the VA has discretion in applying the highest previous rate rule, but the union argues that the VA granted another employee this benefit and that all employees must be treated equally. The union points out that Mrs. Cox should have been paid the highest previous rate since she has 5 years of prior Federal service as clerk-typist. The union also cites several prior decisions from our Office as precedent for granting employees the benefit of their highest previous rate upon transfer, promotion, demotion, or other personnel action. Therefore, the union seeks a retroactive adjustment in Mrs. Cox's rate of pay in her VA position based on her previous rate of grade GS-6, step 8, along with retroactive adjustments to her rates of pay in her subsequent positions.

We requested and received comments from the Personnel Officer, VA Regional Office, St. Petersburg, Florida, and that report states that under agency regulations, salary rates received in non-VA positions *may* be taken into account in mixing salary rates, if appropriate in the judgment of the authorizing official, but there is no vested right to receive a higher rate based on that service. In addition, the VA report also states the authorizing official must determine that the experience gained in the prior position would enhance the employee's qualifications for the new position. The VA report concludes that based on these regulations, Mrs. Cox was denied her highest previous rate, but that consistent with these regulations, the other employee cited by the union, Mrs. Joie A. Stiles, received a higher rate for a similar position.

OPINION

Under the provisions of 5 U.S.C § 5334(a) (1982) and 5 C.F.R. § 531.203(c,d) (1985), an employee who is reemployed, reassigned, promoted, or demoted, or who changes the type of appointment *may* be paid at the highest rate of the grade which does not exceed the employee's highest previous rate. This is referred to as the highest previous rate rule. *Carma A. Thomas*, B-212833, June 4, 1984.

Our decisions have consistently held that it is within the agency's discretion to fix the initial salary rate at the minimum salary of the grade to which appointed and that an employee has no vested right upon transfer or reemployment to receive the highest salary rate previously paid to the employee. See 31 Comp. Gen. 15 (1951), *Thomas*, cited above, and *Barbara S. McCoy*, B-196686, January 17, 1980. Each agency may formulate its own policy regarding application of the highest previous rate rule, and such policy may allow for mandatory or discretionary application of the employee's highest previous rate. *Thomas*, cited above.

The VA regulations applicable to Mrs. Cox's appointment provide, as noted above, that salary rates received in non-VA positions may be taken into account in fixing salary rates, if appropriate in the judgment of the authorizing official. VA Regulation MP-5, Part I, chap. 531, sec. B, para. 4c. The VA regulations also provide the earned rate (highest previous rate) rule will be controlling:

> * * * only where the record indicates, in the authorizing official's judgment, that the experience gained in the position on which the rate is proposed to be based was of such quality and duration that the individual's total qualifications were likely thereby to have been enhanced.* * * VA Regulation MP-5, Part I, chap. 531, sec. B, para. 4d.

As noted above, the report from the VA Regional Office states that the grades and step rates for Mrs. Cox and the other employee cited by the union were selected in accordance with these regulations. The report continues by stating that the authorizing official "apparently determined that Mrs. Cox's experience would not enhance her ability to perform basic typing duties in this office."

The agency regulations in this case are clearly discretionary with respect to applying the highest previous rate rule to an employee whose previous rate was earned in a non-VA agency. Our decisions have held that where the agency exercises its discretion to set the salary rate below the highest previous rate, there may be no retroactive adjustment of the salary rate in the absence of administrative error. 31 Comp. Gen. 15, cited above, *McCoy*, cited above, and *Crystal G. Sharp*, B-190257, September 13, 1978. Administrative error would be found only where the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 54 Comp. Gen. 310 (1974), and *McCoy*, cited above.

There is no evidence in the record before us to indicate that the VA's action in setting Mrs. Cox's salary rate at step 1 of grade GS-

3 was arbitrary, capricious, or an abuse of discretion. The union has submitted documents showing that the other VA employee in question, Mrs. Stiles, was placed in step 4 of grade 3 under the applicable VA regulations concerning use of the highest previous rate cited above. However, there is no evidence before us to indicate that granting the highest previous rate to Mrs. Stiles and denying the rate to Mrs. Cox was arbitrary, capricious, or an abuse of discretion. Therefore, in the absence of evidence supporting Mrs. Cox's claim, we have no legal basis to overturn the VA's pay-setting determination in this case.

The union cites four decisions of our Office holding that it is within the discretion of the employing agency to use the highest previous rate rule upon the employee's transfer, promotion, demotion, or reinstatement. B-61181, November 27, 1946 (26 Comp. Gen. 368); 26 Comp. Gen. 530 (1947); B-11354, March 3, 1953, and B-118245, February 24, 1954. We agree that these prior decisions have not been overruled or modified, but these decisions provide no basis to allow Mrs. Cox's claim, as discussed above.

Finally, the union cites our decision in *Bobby M. Siler.* B-202863, January 8, 1982, sustained upon reconsideration, B-202863, February 8, 1984, where we held an Internal Revenue Service (IRS) employee was entitled to a rate of pay within grade GS-3 based on his highest previous rate of grade GS-4, step 1. We believe our decision in *Siler* is distinguishable since we held in *Siler* that, under the applicable IRS regulations concerning use of the employee's highest previous rate, the appointing official must use the employee's highest previous rate for the grade GS-3 position if the employee was eligible for appointment at the grade GS-4 level based on prior experience and education.

In the present case, the VA regulations do not require the mandatory or nondiscretionary use of the employee's highest previous rate in Mrs. Cox's situation, and, therefore, the application of the highest previous rate under these circumstances is discretionary. Accordingly, we must deny Mrs. Cox's claim for a retroactive adjustment and backpay.

[B-217447]

Transportation—Household Effects—Military Personnel—Reshipment of Effects Without a Station Change

Under current regulations service members who have their household goods and automobiles shipped to an overseas duty station in anticipation of the family move are not entitled to return transportation if the family, for personal reasons, changes its plans and does not join the member. The applicable statute, 37 U.S.C. 406(h), is broad enough to provide authority for regulations authorizing return transportation of the household goods and privately owned vehicle independent of travel by the member or the dependents in these circumstances when the service finds that the transportation is in the best interest of the member or the dependents and the United States. To the extent they are inconsistent herewith, 49 Comp. Gen. 695

(1970) and 44 Comp. Gen. 574 (1965) are overruled. 45 Comp. Gen. 442 (1966) is overruled in part.

Matter of: Transportation of Household Goods, April 24, 1986:

This action is in response to a request from the Department of Defense asking that we reconsider our conclusions in 49 Comp. Gen. 695 (1970) regarding shipment of household goods and privately owned vehicles independent of travel by a member or his dependents.[1] In that decision we found that advance transportation of uniformed services members' household goods and privately-owned vehicles may not be provided from overseas independent of travel of members' dependents. Upon reconsideration of the matter we find that the applicable statutory authority does not prohibit transportion of household goods and vehicles under the circumstances described. Therefore, we do not object to amendment of travel regulations to provide for such transportation.

Background

We have been requested to reconsider the question of whether the Joint Travel Regulations may be amended to provide for return of household goods at Government expense from an overseas station to a designated place in the United States when dependents, for personal reasons, do not join the member as originally intended. The Defense Department points out that it is a recurring problem for members and their dependents when household goods have been shipped in anticipation of the member's permanent change of station from the United States to an overseas location and the family, for personal reasons, does not join the member.

The Department notes that the member is faced with a number of problems when the household goods may not be shipped back at Government expense. The member must either pay for storage of his goods, while his family does without them, he must pay for their return shipment or he may be forced to sell his household goods and have his family replace them. In addition, the Department points out that a rising number of dependents perform travel overseas and, upon arrival, almost immediately request an advance return to the United States, traveling essentially to qualify for return shipment of their household goods. This causes the services to incur the extra expense of the dependents' transportation, an expense which could be avoided by changing the current rule.

Authority For Transportation

Authority for travel and transportation of dependents, baggage, household effects, and privately-owned vehicles is found at 37

[1] The request was submitted by Assistant Secretary of the Air Force, Tidal W. McCoy, Chairman, Per Diem, Travel and Transportation Allowance Committee.

U.S.C. § 406. The transportation at Government expense may be authorized in connection with a change of duty station for the member. Exceptions to the requirement that the transportation be in connection with a change of duty station are found in sections 406(e) and 406(h).

Section 406(e) provides that when orders directing a permanent change of station for a member have not been issued or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage and household effects, the Secretaries of the Services may authorize movement of dependents, baggage and household effects in cases involving "only unusual or emergency circumstances" incident to some military operation or requirement.

Section 406(h) of title 37, as added by Public Law 88-431,[2] provides authority for transportation beyond the limited authority provided in 406(e) for "unusual or emergency circumstances." Section 406(h) provides in pertinent part:

> (h) In the case of a member who is serving at a station outside the United States or in Hawaii or Alaska, if the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States, he may, when orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects—
>
> (1) authorize the movement of the member's dependents, baggage, and household effects at that station to an appropriate location in the United States or its possessions and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, as the case may be, as authorized under subsection (a) or (b) of this section; and
>
> (2) authorize the transportation of one motor vehicle that is owned by the member (or a dependent of the member) and is for the personal use of the member or his dependents to that location by means of transportation authorized under section 2634 of title 10.

Analysis

As is indicated above, the issue presented here, whether the Joint Travel Regulations may be amended to allow return transportation of household goods when dependents do not perform the travel as originally scheduled, has been addressed by this Office in 49 Comp. Gen. 695. In that case we found that there was no authority to allow amendment of the regulations to authorize movement of household effects independently of the movement of dependents. That decision relies heavily on a prior decision, 44 Comp. Gen. 574 (1965), in which we held that section 406(h) did not provide authority for evacuation of the household effects and vehicle of a member without dependents. In 44 Comp. Gen. 574 we noted that section 406(e) had been interpreted in the regulations to authorize transportation of household effects and vehicles contingent on an authorization for transportation of dependents. We reviewed the legislative history of section 406(h) and came to the conclusion that sec-

[2] § 1(a), 78 Stat. 439 (1964)

tion 406(h) was not intended to have any broader scope in that respect.

Subsequent to the decision in 49 Comp. Gen. 695, we reexamined the scope of section 406(h) in considering whether it provided authority for the shipment of the household effects and vehicle of members without dependents when they are discharged under other than honorable conditions while stationed overseas. See 55 Comp. Gen. 1183 (1976). We noted that in adding section 406(h), Congress primarily was concerned with providing authority, in addition to the limited authority in section 406(e), for the advance movement of dependents, and thus the legislative history is primarily concerned with that specific subject. Upon reexamination of our previously held positions, and in view of facts presented there, we found that the language of section 406(h) was broad enough to provide authority for transportation of household effects and vehicles of members without dependents in the circumstances of that case.

To the extent they were inconsistent with the above, we therefore overruled 44 Comp. Gen. 574, 49 Comp. Gen. 695, and another related decision, 45 Comp. Gen. 442 (1966). See 55 Comp. Gen. 1183, at 1185-86. Thus, we have modified somewhat our original position concerning the scope of section 406(h) so that it is now considered to apply to members without dependents in certain cases.

We have again examined the language and legislative history of section 406(h). We find that there is no language in the statute which makes dependent travel a prerequisite for movement of household goods, baggage or a vehicle. It provides that dependents, household goods, baggage and privately-owned vehicles may be transported at the discretion of the Secretary under certain conditions.

The legislative history of Public Law 88-431, which added section 406(h), shows that Congress recognized the limitations of section 406(e) and provided broader authority for transportation of dependents, household goods, baggage and privately-owned vehicles.

The Senate Armed Services Committee report on the bill which became Public Law 88-431 emphasizes that the Department of Defense felt that advance movement of dependents, baggage and household goods was desirable under conditions which did not qualify as unusual or emergency circumstances. Such transportation would be provided under this addition to the statute. The report specifically mentions compelling unforeseen family problems, financial or marital problems and changes in a member's status which, at times, make advance return of dependents, baggage, household goods and vehicles in the best interest of the member and the United States. S. Rep. No. 1284, 88th Cong. 2d Sess. 1-2 (1964).

The House Armed Services Committee report on that bill explains that the limitations of the then-current authority had been found to be too restrictive to meet the needs of the services. It

points out also that the problems caused by the dependents, their baggage, household goods and vehicles can place an additional administrative burden on the overseas commander and have adverse effects on the sponsor's performance and the operational readiness of combat forces. H. Rep. No. 415, 88th Cong. 1st Sess. 1-2 (1963).

The legislative history shows that Congress was concerned about the restrictive limitations of section 406(e) and intended to provide flexibility for movement of dependents and their effects when it was found in the best interest of the member or his dependents, and the United States. Thus, section 406(h) was intended to allow the personal problems of the member and his dependents to be considered, unlike the strictly military occurrences or emergencies covered by section 406(e). As pointed out by the Department in its submission, the same considerations (personal family problems, administrative burdens on the overseas commander and adverse effects on the member) arise in the situation where the dependents originally intend to accompany the member, but for personal reasons are unable to perform the travel and the household effects have already been shipped in anticipation of the move.

It is now our view, therefore, that 37 U.S.C. § 406(h) is broad enough to provide authority for transportation of household goods for members stationed outside of the continental United States independent of the travel of dependents, where the family originally intends to accompany the member but is unable to perform the travel and the service finds that such transportation is in the best interest of the member or his dependents and the United States. Thus, we would not oppose the suggested amendment to the regulations.

To the extent that the holdings in 44 Comp. Gen. 574 and 49 Comp. Gen. 695, *supra*, are inconsistent with this decision, they no longer will be followed.

[B-222323]

Appropriations—Authorization—Programs, etc. Without Authorization

Fiscal year 1986 funds appropriated to the Treasury Secretary to purchase Fund Anticipation Notes used to finance the Department of Transportation's Redeemable Preference Share Program, are available to buy Notes and thus continue the rail improvement projects financed under the Program in 1986, despite the expiration of the Program's organic authority on September 30, 1985. A specific appropriation for an expired program provides a sufficient legal basis to continue that program, absent a contrary expression of congressional intent. 55 Comp. Gen. 289 (1975).

Appropriations—Obligation—Definite Commitment

Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriation act, but obligated balances remain available to liquidate outstanding obligations.

Matter of: Railroad Rehabilitation and Improvement Fund—Authority to Issue Fund Anticipation Notes, April 24, 1986:

The General Counsel of the Department of Transportation (DOT) requested our legal opinion on the Secretary of Transportation's authority to issue and sell Fund Anticipation Notes (Notes) to finance the Redeemable Preference Share Program (Program) in fiscal year 1986. The question arises in the context of an apparent conflict between the Program's enabling act, which expired on September 30, 1985, and the fiscal year 1986 DOT Appropriations Act, which provided new 1986 funds for the purchase of Notes and authority to use the proceeds of the sale of Notes for the Program. For the reasons explained below, we conclude that the Secretary is authorized to issue and sell Notes, despite the expiration of the Program's organic authority. We also considered a related issue on the status of prior year funds and conclude that obligated balances remain available to carry out the projects for which they were originally obligated.

The funds in question were proposed for rescission in the Special Message transmitted to the Congress on February 5, 1986. Since the Congress did not approve the proposed rescission within 45 days, the funds must now be released. 2 U.S.C. § 683 (1982).

MECHANICS OF THE PROGRAM

The Secretary of Transportation administers the Railroad Rehabilitation and Improvement Fund (Rail Fund) to provide financial assistance to marginal railroads. The Rail Fund is capitalized in several ways including the use of Fund Anticipation Notes, a kind of promissory note. As needed, Congress appropriates money to the Secretary of the Treasury to purchase these Fund Anticipation Notes. The Secretary of Transportation then issues the Notes, sells them to the Treasury and deposits the proceeds in the Rail Fund. The Rail Fund provides financial assistance to railroads by purchasing a special class of preferred stock, called "Redeemable Preference Shares," from the railroads. The shares are deposited in the Rail Fund and held until repurchase by the issuing railroad on an agreed date. The Secretary of Transportation will eventually repay the Treasury on the original Notes with either the repayments on redemption, or with funds raised by issuance of Fund Bonds (if statutorily authorized at a later date). Appropriations may also be provided in the future for the purpose of satisfying the Notes. This whole procedure constitutes the "Redeemable Preference Share Program." 45 U.S.C. §§ 822, 825–27, and 829 (1982).

Issuance of the Fund Anticipation Notes is authorized by 45 U.S.C. § 827(a) which provides:

> The Secretary shall, until September 30, 1985, issue and sell, and the Secretary of the Treasury until such date shall, to the extent of appropriated funds, purchase

Fund anticipation notes in an aggregate principal amount of not more than $1,400,000,000 * * *.

A bill extending the September 30, 1985, expiration date for 2 years passed the House on September 5, 1985, but was tabled.[1]

The purchase of these Notes by the Treasury is authorized by 45 U.S.C. § 829(a) which provides:

> There is authorized to be appropriated to the Secretary of the Treasury for the purposes of the Fund not to exceed $1,400,000,000 and the Secretary of the Treasury is authorized and directed to purchase, from time to time, prior to September 30, 1985, from the Secretary, out of such moneys in the Treasury as are appropriated under this sentence, Fund anticipation notes * * *.

Use of funds derived from the sale of Notes was made further contingent on prior approval in an annual appropriations act. *Id.* To satisfy this latter requirement, DOT appropriation acts have always contained both an authorization to use the Rail Fund and appropriations to the Secretary of the Treasury to purchase the Notes. The 1986 act is no exception. The Department of Transportation and Related Agencies Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1280 and 1284 contained the following language authorizing use of the Rail Fund and appropriating funds for the purchase of Notes:

> *Redeemable Preference Shares*
>
> Notwithstanding any other provision of law, the Secretary of Transportation is hereby authorized to expend proceeds from the sale of fund anticipation notes to the Secretary of the Treasury and any other moneys deposited in the Railroad Rehabilitation and Improvement Fund pursuant to sections 502, 505-507, and 509 [45 U.S.C. 822, 825-27 and 829] of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), as amended * * * for uses authorized for the Fund, in amounts not to exceed $33,500,000; and
>
> ## DEPARTMENT OF TREASURY
>
> *Office of the Secretary*
>
> *Investment in Fund Anticipation Notes*
>
> For the acquisition, in accordance with section 509 of the Railroad Revitalization and Regulatory Reform Act of 1976, as amended, * * * of fund anticipation notes, $33,500,000.

The Chief Counsel of the Federal Railroad Administration (FRA) analyzed the enabling language and the appropriations act language and concluded that the authority provided in the appropriations act was insufficient to justify continuation of the Redeemable Preference Share Program beyond the expiration date in the enabling act. We disagree.

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[1] 131 Cong. Rec. H7285 (daily ed. Sept. 5, 1985). This program has been extended five times since its inception in 1976. Four out of the five renewals have been late. *See, e.g.*, Pub. L. No. 97-468, signed on January 14, 1983, extending the September 30, 1982, expiration date and the fiscal year 1983 appropriation act, Pub. L. No. 97-369, signed on December 18, 1982, providing $5 million in "new money" for the expired program during the fiscal year already in the progress.

EFFECT OF AN APPROPRIATION

It is a well-settled rule of appropriations law that when Congress has appropriated funds for a program whose authorization has expired there is sufficient legal basis to continue the program, absent an expression of congressional intent to the contrary. 55 Comp. Gen. 289 (1975); B-137063, May 21, 1966; B-171019, June 29, 1976.

The rule was explained in 55 Comp. Gen. 289, in which we considered a similar situation. The enabling act for the School Breakfast Program expired on June 30, 1975. The continuing resolution for fiscal year 1976 appropriated funds to the Agriculture Department for general food programs "and the School Breakfast Program." Meanwhile, a bill extending the authorization for the School Breakfast Program had passed, but experienced major delays at the conference and would not be completed until well into the fiscal year, if at all. On these facts, we held the School Breakfast Program should continue for as long as the continuing resolution was in effect, whether the authorization was signed during that period or not.

Our rule draws on two other established principles. First, a prior authorization act, although traditional, is not required by law to support each activity conducted with appropriations, although by reason of House and Senate Rules, the lack of a prior authorization act may give rise to a point of order which, if sustained, may defeat the proposed appropriation. B-202992, May 15, 1981. No such challenge was upheld in the instant case, however. Second, since one Congress cannot bind a future Congress, the most recent expression of congressional intent (in this case the appropriation act) controls. In other words, a specific appropriation can become its own authorization when an authorization act is lacking.

Here Congress appropriated funds to the Secretary of the Treasury to purchase Notes, the initial action in the funding of the Redeemable Preference Share Program. The FRA Chief Counsel's Memorandum, which reached the contrary result, does not contest the Congress' intent to continue the program. It simply concludes that although the act provided the "requisite appropriation language" to buy the Notes, this is "clearly distinguishable from the requisite program authorizing language."

In our view, the language in the appropriation act itself, which authorizes the Secretary of Transportation to "expend proceeds from the sale of fund anticipation notes to the Secretary of the Treasury," necessarily presupposes the issuance of Notes to the Treasury. Since unobligated balances in the Rail Fund apparently lapsed on September 30, 1985, authority to use the proceeds of the sale of Notes would be meaningless unless new sales were authorized with the newly appropriated funds. The Secretary could hardly use the proceeds of sales of Notes without first issuing and selling the Notes to obtain the proceeds. Moreover, the appropria-

tion language incorporates by reference section 507 (45 U.S.C. § 827), the section of the organic act which authorized the Secretary to issue and sell Notes in the first place. While it is true that the organic act has expired, it is not unusual for subsequently-passed legislation to utilize a provision or authority contained in the expired act as a short-hand way of describing the purpose of the new appropriation. *See, e.g.,* the School Breakfast Program, discussed, *supra.*

AVAILABILITY OF PREVIOUSLY APPROPRIATED FUNDS

As the FRA acknowledges, the 1984 DOT appropriations Act authorized DOT to expend proceeds from Note sales obtained with appropriations made in previous years. We also agree with FRA that any such proceeds which were not obligated by September 30, 1985 must be considered to have lapsed. A lapsed appropriation cannot be revived by the use of the phrase "Notwithstanding any other provision of law," enacted several months after the funds in question are moribund.

We differ with FRA, however, about the fate of the amounts in the Rail Fund that were validly obligated prior to the September 30, 1985 expiration date. It is an elementary rule of appropriations law that obligated balances remain available to liquidate the obligation well beyond the period for which the appropriation is available to incur new obligations. *See, e.g.,* B-212151, July 11, 1983. We cannot agree, therefore, that "the conclusion is inescapable that Congress intended the 1984 DOT Act to reach *all* unspent funds, whether unobligated or awaiting deobligation." It is true that had such funds been deobligated, they too would have lapsed after September 30, 1985. However, the funds in question have not been deobligated. Accordingly, we find that obligated prior year funds remain available to carry out the projects for which they were originally obligated.

CONCLUSION

Based on the foregoing, it is our conclusion that because the proposed recission of these funds was not approved, the Secretary of Transportation must take action to draw on the funds in a timely and reasonable manner by issuing Fund Anticipation Notes.[2]

[B-221745]

Officers and Employees—*De Facto*—Compensation—Retention of Compensation Received

An employee was temporarily and then permanently promoted from a GS-4 position to a GS-5 position. It was later discovered that the promotion was erroneous

[2] A sequestration of $1.4 million under Pub. L. No. 99-177, 99 Stat. 1037 has reduced the amount available to $32,059,000.

because she did not meet the general experience requirement of the position to which she was promoted. The error was corrected and a Bill of Collection issued. Because she performed the duties of the GS-5 position based on the apparent authority of the promoting personnel, she is to be regarded as a *de facto* employee and is therefore entitled to retain the compensation of a GS-5.

Matter of: Janice M. Simmons—Erroneous Promotion—*De Facto* Employment, April 28, 1986:

This decision is in response to a request from the Controller, Department of Energy, that a waiver be granted under 5 U.S.C. § 5584 (1982), for overpayments to Janice M. Simmons totaling $1,409.31. Ms. Simmons received the excess payments between February 8, 1981, and September 16, 1983, due to an erroneous promotion. The Department requests a waiver because the overpayments resulted from an administrative error by the servicing personnel office and there was no indication of fraud or fault on the part of Ms. Simmons. We find that the issue of waiver need not be reached since Ms. Simmons is entitled to retain the compensation received for the services performed as a *de facto* employee.

BACKGROUND

The record reveals that on February 8, 1981, Ms. Simmons, a GS-4 for the Western Area Power Administration—Phoenix Office, was temporarily promoted to GS-5 Support Services Specialist position. On July 12, 1981, Ms. Simmons was permanently promoted to the Support Services Specialist position. Apart from other miscellaneous pay adjustments, Ms. Simmons received within grade increases—in increments of one step each—on February 21, 1982, and February 20, 1983. A personnel management evaluation conducted at the servicing personnel office in March 1983 culminated in a report issued on September 9, 1983, which indicated that Ms. Simmons did not qualify for her promotion. Although she fully performed the duties and responsibilities of the position to which she was promoted, apparently Ms. Simmons lacked the requisite 3 years general experience for the Support Services Specialist position until November 8, 1981. Consequently, on September 16, 1983, the improper personnel actions were cancelled and corrected personnel actions were issued. A Bill of Collection in the amount of $1,409.31, representing the total amount of wage overpayments from the erroneous promotion, followed on March 21, 1984. Subsequently, on April 4, 1984, Ms. Simmons requested a waiver of the entire overpayment.

ANALYSIS

A promotion is a new appointment to a position of higher rank and pay. B-168953, April 10, 1970. Ms. Simmons promotion was, therefore, a new appointment to the Support Services Specialist, GS-5 position. Her appointment was later found to be invalid be-

cause she lacked the general experience requirement of the position. We have held that where an appointment is invalid, but the invalidity does not result from an absolute statutory bar, an individual who performs the duties of the position with apparent right and a claim of title to the position is considered a *de facto* employee and is entitled to retain compensation already received. *See* 30 Comp. Gen. 228, 229 (1950); 52 Comp. Gen. 700, 701 (1973). Recoupment of payments is only necessitated where there exists an absolute statutory bar which either expressly prohibits the payment of appropriated funds to the employee or requires a refund by the employee. *Department of Labor,* B-195279, September 26, 1979, citing, 18 Comp. Gen. 815 (1939).

According to the record, Ms. Simmons performed the duties of the position to which she was promoted, and did so in good faith based on the apparent authority of the appointing officer to so promote her. She had no reason to suspect the personnel office's mistake. In short, Ms. Simmons performed the duties of the position under color of appointment with apparent right and claim of title to the position. See *Marie L. Vaughn,* B-219565, February 11, 1986. The invalidity of Ms. Simmons' appointment did not result from an absolute statutory bar expressly prohibiting the payment of appropriated funds to her or requiring a refund from her. Thus, Ms. Simmons is entitled to retain the pay of Support Services Specialist, GS-5, as a *de facto* employee.

Hence, the Bill of Collection sent to Ms. Simmon on March 21, 1984, was incorrect. Ms. Simmons is, therefore, entitled to retain the additional compensation of $1,409.31 that she received between February 8, 1981, and September 16, 1983.

[B-222308, et al.]

Bidders—Debarment—Contract Award Eligibility—Proposed Debarment—Suspension of Contractor by One Agency Effect

A firm proposed for debarment from government contracting generally is precluded from receiving government contracts pending a final debarment decision.

Bidders—Debarment—Extension

Where actions of a debarred firm following an initial debarment so warrant, the debarment may be extended in order to protect the government's interests.

Bidders—Debarment—Affiliates of Debarred Firm—Eligibility

The Federal Acquisition Regulation, 48 C.F.R. 9.406-1(b), provides that a debarring official may extend the decision to debar a contractor to all of its affiliates only if each affiliate is specifically named on the notification of proposed debarment. The failure of the debarring official to comply with this requirement is a mere procedural defect, not affecting the validity of the proposed debarment of the affiliate, where the affiliate is otherwise on notice of proposed action and is afforded the opportunity to respond.

Matter of: S.A.F.E. Export Corporation, April 28, 1986:

S.A.F.E. Export Corporation protests the decision of the U.S. Army Contracting Agency, Europe, not to consider it for award under four solicitations: DAJA37-86-R-0321, -0322, -0333, and -0425. S.A.F.E. Export contends that although it previously has been debarred, it was eligible for award under these solicitations because it had been removed from the debarred bidders list before the awards were to be made. The Army rejected the firm's offer or refused to solicit it, advising the firm that it was once again being considered for debarment. While conceding that the Army is currently proposing debarment of S.A.F.E. oHG, an affiliate, S.A.F.E. Export maintains that it is not a party to this action

We dismiss the protests.

The record indicates that S.A.F.E. oHG, its affiliated companies, and Mr. E.J.P. Tierney, the president of S.A.F.E. Export and a partner in S.A.F.E. oHG, were debarred and thus ineligible for contract award from June 5, 1984 through February 10, 1986. By letter dated February 7, 1986, a copy of which the Army has furnished us, the agency advised Mr. Tierney that pursuant to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406-4(b)[1] (1984), he, S.A.F.E. oHG, and affiliated companies were being proposed for debarment for an additional 3-year period for new and independent reasons. Among these, the Army stated, was the fact that although S.A.F.E. oHG was debarred in June 1984, it had continued to solicit and enter into government contracts. In so doing, the Army continued, S.A.F.E. oHG willfully deceived contracting and ordering officers about its eligibility to receive contracts and blatantly disregarded the June 5, 1984 debarment order and the procedures set forth in the FAR, 48 C.F.R. § 9.406-4(c) for seeking relief from debarment.

As further justification for this proposed action, the Army referred to several of S.A.F.E. oHG's subsequent business dealings with the military that it believed demonstrated the continued lack of business integrity and business responsibility necessary for award of government contracts. For example, the Army stated, the firm accepted a $750 order for electronic locks, issued by a contracting officer who was not aware of the debarment. Although the Army paid for the supplies, the firm attempted to recover interest in a proceeding before the Armed Services Board of Contract Appeals (ASBCA), alleging that payment had not been timely. According to the Army, it subsequently rescinded the contract, and the ASBCA dismissed the claim for lack of jurisdiction. The Army notes that during these proceedings, S.A.F.E. oHG asserted that it

[1] This regulation provides in pertinent part that where the actions of a debarred firm since the imposition of its initial debarment so warrant, a debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to further protect the government's interests.

did not recognize the debarment as legal and that it intended to continue to accept Army contracts.

The FAR provides that agencies will not solicit offers from, award contracts to, renew or otherwise extend contracts with, or consent to subcontracts with, contractors proposed for debarment. 48 C.F.R § 9.406-3(c)(7). The Army maintains that it was thus precluded from awarding contracts under the protested solicitations to S.A.F.E. oHG and affiliated companies, including S.A.F.E. Export, and that its rejection of S.A.F.E. Export's offers submitted in response to these solicitations was therefore proper.

S.A.F.E. Export responds that under the FAR, 48 C.F.R. § 9.406-1(b), affiliates of contractors proposed for debarment are not automatically precluded from receiving government contracts. To be so precluded, the affiliate must be specifically named and given written notice of the proposed debarment, as well as an opportunity to respond. S.A.F.E. Export contends that the Army did not comply with this procedural requirement when it proposed to debar affiliates of S.A.F.E. oHG, since its February 7 letter to S.A.F.E. oHG did not specifically name S.A.F.E. Export. S.A.F.E. Export concludes that this proposed debarment consequently does not affect its eligibility for contracts to be awarded under the protested solicitations.

Our review of this matter is restricted to an examination of whether the contracting officer's determination that S.A.F.E. Export was ineligible for contract award was reasonable. See *Solid Waste Services Inc.*, B-218445 *et al.*, June 20, 1985, 85-1 CPD ¶ 703. In examining the reasonableness of the agency's action here, we recognize that the Army, by not specifically naming S.A.F.E. Export in the February 7 notice of debarment, indeed failed to conform to the precise requirements of the regulation. We view this failure as a mere procedural defect, however, not one that affects the validity of the Army's decision to exclude S.A.F.E. Export from the subject competitions.

The thrust of the regulation that debarments may be extended to affiliated firms only where the affiliate is specifically named is to ensure that the affected affiliate has notice of the proposed action so that it may respond to it. Here, we think the Army's February 7 letter, by referring to affiliated companies of S.A.F.E. oHG, was sufficient to place S.A.F.E. Export on notice of the proposed debarment. In this regard, we particularly note that S.A.F.E. Export is nothing more than a mail drop in Baltimore, Maryland, for correspondence that is to be forwarded to S.A.F.E. oHG in Frankfurt, Germany, and that Mr. Tierney is the principal officer and employee of both companies. See *S.A.F.E. Export Corp.*, B-203346, Jan. 15, 1982, 82-1 CPD ¶ 35. Thus, we believe that Mr. Tierney's receipt of the letter was sufficient to ensure that S.A.F.E. Export was on notice of the proposed debarment.

Accordingly, we conclude that the Army properly viewed the February 7 notification of proposed debarment as applying to S.A.F.E. Export as well as S.A.F.E. oHG. Under applicable regulations, FAR, 48 C.F.R. ¶ 9.406-3(c)(7), S.A.F.E. Export, therefore, was generally precluded from being solicited for or receiving government contracts pending the debarment decision. *Titan Construction Co.*, B-220691 *et al.*, Oct. 15, 1985, 85-2 CPD ¶ 412.

The Army now informs us that the debarment proposed in February 1986 has become final. As S.A.F.E. Export thus has been continually ineligible for contract award since the inception of its initial debarment in June 1984, we have no legal basis to object to the Army's actions under the protested solicitations. Moreover, given its status, S.A.F.E. Export is not an interested party under our Bid Protest Regulations, and we will not consider future protests from the firm while it remains debarred. *See* 4 C.F.R. § 21.0(a) (1985); *Solid Waste Services, Inc., supra.*

The protests are dismissed.

[B-219235]

Payments—Erroneous—Recovery—Government's Right to Recover

Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on overpayment, were withdrawn by the Indian in good faith but were subsequently recovered by the Interior Department from monies deposited in the Indian's Individual Indian Money account from an unrelated proceeding, may be returned to Indian overpaid.

Payments—Erroneous—Recovery—Government's Right to Recover

Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on the overpayment, the Interior Department subsequently recovered from monies in the Indian's Individual Indian money account attributable to the same proceeding, may not be returned to Indian overpaid.

Interest—Indian Affairs—Trust Funds

Consistent with general rule that Government cannot be charged interest without a specific waiver of sovereign immunity either in a statute, treaty, or contract, and decisions of this Office and the United States Claims Court strictly applying the rule, Government cannot be charged interest on monies it pays to Indian notwithstanding Government breached its trust responsibilities to Indian.

Disbursing Officers—Relief—Appropriation Adjustment

Monies returned to Indian, which earlier were improperly recovered, should be repaid from the current lump-sum appropriation to the Bureau of Indian Affairs for "Operation of Indian Programs." Since such repayment would not be improper or incorrect, there is no need for the disbursing officer to request relief under section 3527(c) of title 31 of the United States Code or for this Office to grant relief.

Matter of: Bureau of Indian Affairs Questions on Payments to Indians, April 29, 1986:

Under the authority of section 3529 of title 31 of the United States Code, the Indian Service Special Disbursing Agent (ISSDA), Interior Department Bureau of Indian Affairs (BIA), asks numerous questions about his duties and responsibilities in rectifying erroneous disbursements of funds from Individual Indian Money (IIM) accounts. The key issue provoking these questions is whether he should overdraft his account and refund $19,457.26 to Linda Slockish and $2,238.62 to Carmen Johnson, plus interest accruing from May 1981 to the present, and whether he would be granted relief for these payments under section 3527(c) of title 31 of the United States Code. Since this issue is pressing, as agreed with the ISSDA, we will respond to it in this opinion. If necessary we will answer the other questions raised in a later decision.

For the reasons given below, we conclude that the ISSDA may refund $19,457.26 to Ms. Slockish, representing both an overpayment to her of $13,374.21 and imputed interest of $6,083.05, both of which were recovered from her in May 1981. On the other hand, Interior may not refund to Ms. Johnson the $2,238.62, representing an overpayment of $1,538.79 and accrued interest, that was recovered from monies in her IIM account. Consistent with the general prohibition on the Federal Government's payment of interest, the ISSDA may not pay accrued interest from May 1981 to the present to Ms. Slockish. Furthermore, since the refund to Ms. Slockish is a proper payment, there is no reason for BIA to request relief for the ISSDA making the payment or for us to grant relief. The refund to Ms. Slockish should be paid from the lump-sum appropriation currently available to the BIA for "Operation of Indian Programs."

Background

Section 372 of title 25 of the United States Code authorizes the Secretary of the Interior to ascertain the legal heirs of intestate decedents holding allotments of lands held in trust by the United States. This authority has been delegated to the Interior Department Office of Hearings and Appeals. *See* 43 C.F.R. § 4.1.

On December 5, 1975, in a proceeding before the Office of Hearings and Appeals involving the Estate of Harvey Kaiser Phillips, an administrative law judge rendered an Order Determining Heirs. *Estate of Harvey K. Phillips,* IP PO 008L 76-9 (Off. Hearings App. Dec. 5, 1975). The Order made several mistakes [1] resulting in larger distributions of property to Ms. Slockish and Ms. Johnson than were warranted, and underdistributions to other heirs. As neither Ms. Slockish nor Ms. Johnson were enrolled members of the

[1] The judge reversed two categories of heirs, and the probate clerk misinterpreted ancestral distribution.

Yakima Tribes, under section 607 of title 25, the Tribes properly exercised their right to buy the distributed trust lands at the fair market value. By Order of December 28, 1976, the same administrative law judge ordered distributed the trust funds arising from sale of the lands. The monies awarded to Ms. Slockish and Ms. Johnson, including the overpayments of $13,374.21 and $1,538.79 respectively were placed in their IIM accounts. The monies in these accounts are held in trust by the United States. On March 8, 1977, payment was made directly to Ms. Slockish by Treasury check from her IIM account. As she was a minor, Ms. Johnson's money was left on deposit in her IIM account.

On July 19, 1978, the same administrative law judge issued a Modification Order correcting the heirship interest erroneously described in the Order of December 5, 1975. *Estate of Harvey K. Phillips,* IP PO 008L 76-9 (Off. Hearings App. July 19, 1978). This procedure was consistent with regulations which allowed administrative law judges to reopen probate cases within 3 years from the date of the final decision, on their own motion or at the request of the BIA to prevent "manifest error." 43 C.F.R. § 4.242(d). Interior Department administrative precedent [2] also required redistribution to proper heirs where there existed a reasonable possibility for correction of interests. *Estate of Tennyson B. Saupitly,* 6 IBIA 140, 143 (1977). At time of the Modification Order Ms. Slockish had no funds on deposit on her IIM account. The distribution to Ms. Johnson was still in her account.

Subsequently, in October 1978, the BIA Superintendent, Yakima Agency, requested the comments of the Portland Area Office staff concerning recovery of the overpayments. The request suggested it would be necessary to debit the accounts of Ms. Slockish and Ms. Johnson. Since Ms. Slockish has withdrawn her funds and was not known to possess any assets, the requests suggested that any funds later inherited could be used to defray the overpayment.

Between the date of the Superintendent's request and May 1, 1981, the day the overpayments were recovered, there transpired considerable correspondence between the BIA Portland Area Office and the Department of the Interior Office of the Solicitor. The correspondence focused on the policy set forth in a memorandum of January 6, 1960, from the BIA Commissioner. In effect, the policy stated that any private distribution made under a legal order should stand, and that no collection action would be initiated against those receiving erroneous payments, at least to the extent that erroneously distributed funds did not remain in trust accounts.

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[2] BIA policy also mandated immediate adjustment action when credit to an individual account was found to be in error, and stated that erroneous payments should not delay payment of funds to rightful owners.

Apparently in disregard of the January 6, 1960 memorandum, the Yakima Agency recovered the overpayment to Ms. Slockish of $13,374.21 by offset against her inheritance from the estate of her father, Edward E. Johnson. The agency also withheld $6,083.05 of her inheritance to cover lost interest on the overpayment, from the time of distribution in March 1977 to recovery in May 1981.[3] An amount of $1,538.79 plus interest of $699.83 was recovered from the IIM account of Ms. Johnson for the overpayment to her. The submission states that neither Ms. Slockish nor Ms. Johnson was notified of the offsets nor were provided opportunity to challenge them. The recovered funds were paid to the heirs of the Harvey K. Phillips estate who originally had been underpaid.

On September 11, 1981, the BIA Associate Solicitor issued an opinion affirming the policy expressed in the January 6, 1960 memorandum. The opinion said that orders for redistribution would only apply to undistributed funds or funds subsequently credited to an estate but not to funds distributed pursuant to a valid though erroneous order. Under this interpretation only funds in an IIM account attributable to an erroneous probate order could be recovered.

Several years later, in March 1985, Ms. Slockish requested the BIA Portland Area Office to review the propriety of the recovery of the overpayment and the interest assessment. Ms. Slockish contended she should not have had to repay the funds since the Government was at fault in making the error in distribution.

Based on various internal memoranda, the Department now suggests that recovery of the overpayment to Ms. Slockish was improper, and that she should be repaid the entire amount recovered from her. Although the Department was less conclusive about the recovery from Ms. Johnson, at least the BIA Yakima Agency Superintendent recommends that she also be repaid the entire amount recovered.

Legal Discussion

It is a fundamental rule that persons who receive monies erroneously paid by a Government agency or official acquire no right to such money, and the courts consistently have held that such persons are bound in equity and good conscience to make restitution. For example, in *DiSilvestro* v. *United States*, 405 F.2d 150, 155 (2d Cir. 1968), *cert. denied*, 396 U.S. 964 (1969), the court said:

> It is, of course, well established that parties receiving monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them, and that no specific statutory authorization upon which to base a claimed right of set-off or an affirmative action for the recovery of these monies is necessary.

[3] The interest was computed on the amount that would have been earned over the 4.2-year period if the monies had been placed in an IIM account and held for the other heirs. The Department informs us that IIM funds are invested and interest rates are determined every 6 months.

Accord, United States v. *Bentley*, 107 F.2d 382, 384 (2d Cir. 1939) (payments made through mistakes of United States officials are recoverable and hardship of refunding what the defendant may have spent cannot stand against injustice of keeping what never rightfully was his). *See also* B-176867, Oct. 12, 1972. This principle is embodied in the general requirement of the Federal Claims Collection Act, codified at 31 U.S.C. §§3711-19, as amended by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749, 1754-56, that Federal agencies try to collect debts for money or property arising from their activities.

It is also well-settled that the Federal Government has the same right belonging to every creditor to apply undisbursed monies owed to a debtor to fully or partially extinguish debts owed to the Government. *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Gratiot* v. *United States*, 40 U.S.C. (15 Pet.) 336, 370 (1841). Consistent with this principle, on several occasions we have held that the United States could set off monies it was holding in trust for Indians for debts the Indians otherwise owed the United States though the funds involved were not held in IIM accounts. 34 Comp. Gen. 152, 154 (1954) (nothing in Act of June 17, 1954, Public Law 83-399, authorizing $1,500 per capita payments to members of Menominee Indian Tribe precludes Government from exercising its right of setoff to liquidate indebtedness of tribe members to United States); B-121910, Nov. 29, 1954 (Osage headright payment to Indians may be setoff against debt Indians owed for fines and penalties levied by Court).

General trust principles are in accord. If a trustee makes an overpayment to a trust beneficiary, the beneficiary would be unjustly enriched if permitted to retain the amount overpaid. III Scott, *Law of Trusts* §254 (3d ed. 1967); *Restatement (Second) of Trusts* §254 (1959). Thus, in most circumstances, a trustee should be able to set off against the sums due a beneficiary a debt of the beneficiary to the trustee in the trustee's representative capacity. Bogert, *Law of Trusts and Trustees* §814 (Rev. 2d ed. 1981).

Notwithstanding these considerations, consistent with the United States' general and particular trust responsibilities to American Indians, we think improper Interior's recovery of the overpayment from Ms. Slockish as well as the interest assessed on the overpayment.

In its management of Indian trust funds the United States has charged itself with "moral obligations of the highest responsibility and trust," and its conduct in dealing with Indians should be judged by the "most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942). Where the Federal Government has control or supervision over tribal monies or properties, the Government's fiduciary relationship normally exists even though nothing is expressly said in the authorizing statute about a trust fund, a trust or fiduciary relationship. *Navajo*

Tribe v. *United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). There is no dispute that the Federal Government through the Interior Department was trustee of the monies in the IIM accounts of Ms. Slockish and Ms. Johnson.

Consistent with these general trust responsibilities, by statute, regulation, and precedent of the Interior Board of Indian Appeals, the Secretary of the Interior is authorized to waive use of IIM account monies to satisfy indebtedness of Indians to the United States. Section 410 of title 25 of the United States Code states:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against such Indian contracted or arising during such trust period * * * except with the approval and consent of the Secretary of the Interior.

Moreover, section 115.9 of title 25 of the Code of Federal Regulations authorizes but does not require the Secretary of the Interior to apply IIM account monies against indebtedness to the United States. Funds accruing from the sales of lands held in trust by the United States often are placed in IIM accounts as occurred in this case.

The Interior Department Board of Indian Appeals has characterized the statute and the regulation [4] together as requiring the Secretary's approval before funds derived from trust property may be applied against debts owed by an Indian. *United States* v. *Mossette*, 9 IBIA 151, 153-54 (Bd. Ind. App. Jan. 8, 1982). As described earlier, the Interior Department policy [5] in effect at the time the overpayments to Ms. Slockish and Ms. Johnson were recovered was that distribution under a legal probate order should stand, and recoveries of overpayments could only be effected through transfers of funds remaining in IIM accounts from the original distributions.

We think the authorities described prevail over the Federal Government's general debt collection responsibilities. In *United States* v. *Mossette*, 9 IBIA 151, 153-54 Appeals held that neither the Federal Claims Collection Act nor its implementing regulations repealed or overrode the Secretary's trust duties to American Indians, or affected the Secretary's authority to approve or disapprove use of IIM funds including approval of payment of debts. Furthermore, while the GAO decisions cited above permitted setoff of Indian debts to the Federal Government, neither involved setoffs from IIM accounts nor the same compendium of statute, regulation, and policy that imposed particular trust responsibilities on

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[4] When the case was decided the proper citation of the section was 25 C.F.R. § 104.9 (1980).

[5] Interior's policy has some analogous support in statute. For example, section 5584 of title 5 of the United States Code permits waiver of an overpayment to a Federal Government employee when collection would violate equity and good conscience and would not be in the best interests of the United States. Furthermore, both the Federal Claims Collection Act and the general principles of private trust law allow for waiver of collection when a debtor does not have the present or prospective ability to pay. 31 U.S.C. § 3711(a)(3); III Scott, *Law of Trusts* § 254.1 (3rd ed. 1967); *Restatement (Second) of Trusts* § 254 (1959).

the Secretary of the Interior. Accordingly, we have no objection to Interior paying to Ms. Slockish the $19,457.26 which Interior agrees was erroneously recovered from her; that is, both the principal amount of the overpayment and the assessed interest.

On the other hand, refund to Ms. Johnson of the $2,238.62 recovered from her is not warranted. Although it is arguable from a strict reading of the January 6, 1960 BIA memorandum that the overpayment and the accrued interest attributable to the overpayment should not have been recovered, we think the better view is the memorandum contemplated that collection would take place if there still remained monies in an IIM account from the original distribution. This was the interpretation reached by the BIA Associate Solicitor in the September 11, 1981 opinion. Moreover, this view accords with the general requirement that overpayments should be recovered if possible. Thus, since the overpayment and the accrued interest still were in her IIM account, recovery from her was proper.[6]

We next consider the ISSDA's question about whether Ms. Slockish should be awarded interest from May 1981 to date on the $19,457.26 that was improperly recovered. It is well recognized that a private trustee who breaches a fiduciary relationship to a beneficiary would be liable for interest. *Restatement (Second) of Trusts* § 207 (1959); III Scott, *Law of Trusts* § 207 (1967). In this instance, Interior did breach its trust responsibilities to Ms. Slockish.[7] Interior did not provide her with an opportunity to contest recovery of the overpayment and assessment of interest, nor with notice of the recovery by setoff. This violated her procedural due process rights guaranteed by the Fifth Amendment to the United States Constitution. *Matthews* v. *Eldridge*, 424 U.S. 319, 332 (1976); *Kennerly* v. *United States*, 721 F.2d 1252, 1257 (9th Cir. 1983).

Nevertheless, it is well settled that absent a treaty, statute, or specific provisions therefor in a contract, interest as interest or as an element of damages may not be awarded against the United States or its agencies. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1315-16 (Ct. Cl. 1975) *cert. denied* 425 U.S. 911 (1976). The rule, which is based on the doctrine of sovereign immunity, 518 F.2d at 1315, does not permit payment of interest on equitable grounds and applies even where the Government unreasonably has delayed payment. *E.g.*, *Grey* v. *Dukedom Bank*, 216 F.2d 108, 110 (6th Cir. 1954); *Muenich* v. *United States*, 410 F. Supp. 944, 947 (N.D. Ind. 1976). Futhermore, it has been held that the character of interest cannot be changed by calling it damages, loss, earned increment, just compensation, discount, offset, penalty or any other

[6] As suggested by the ISSDA, there may be some inequity in this since the reason the monies still were in her account probably was because she was a minor and thus her ability to withdraw the funds was restricted.

[7] This was also true of Ms. Johnson.

term. *Mescalero Apache*, 518 F.2d at 1322. The interest prohibition has been applied frequently and consistently by this Office as well as the courts. *E.g.*, 59 Comp. Gen. 380, 382 (1980).

In two major cases the Indian Claims Commission and the United States Court of Claims were in conflict about awards of interest to Indian claimants when the United States was a trustee for the Indian monies in question. In other instances the Court of Claims reversed Indian Claims Commission rulings that interest should be assessed. *United States* v. *Gila River Pima-Maricopa Indian Community*, 586 F.2d 209 (Ct. Cl. 1978) *rev'gt* 33 Ind. Cl. Comm. 1 (1976); *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975) *rev'g* 31 Ind. Cl. Comm. 417 (1973).

The Court differentiated between interest that was required to be paid by statute and that assessed by the Commission where there was no statute. Thus, it sustained the award of interest on monies erroneously paid from "Indian Moneys, Proceeds of Labor" funds, as section 161(b) of title 25 of the United States Code requires interests to be paid on those funds; but reversed the award for interest on monies erroneously paid from IIM accounts, there not being any statute that required interest to be paid on those monies. 586 F.2d at 216-17; *accord, American Indians Residing on Maricopa-AK Chin Reservation* v. *United States*, 667 F.2d 980, 1003 (Ct. Cl. 1981).

This Office is not bound to follow precedents set by the United States Court of Claims; however, we do give them careful consideration and generally will follow those that are consistent with longstanding administrative interpretations of law.

In view of the longstanding practice of both the courts and this Office not to award interest unless it is clearly authorized by treaty, statutes or contracts, we will follow the rulings of the United States Claims Court. In this regard, we deem it crucial that the United States is not specifically required to pay interest on IIM accounts.

A question remains about how payment to Ms. Slockish should be made. The ISSDA suggests that he overdraft his account and request relief for this action under section 3527(c) of title 31 of the United States Code, the provision dealing with relief of accountable officers for improper payments. If relief were granted, the overdrafted accounts would be replenished from the lump-sum appropriation for "Operation of Indian Programs," the appropriation used for the accountable officer function covering Indian programs.

Initially, we would point out that since the refund to Ms. Slockish would not be an improper or incorrect payment, there would be no reason for Interior to request relief for the disbursing officer from liability for making the payment or for us to grant it. The payment can be made from appropriations currently available for the activity involved. We understand this would be the yearly appropriations for "Operation of Indian Programs." *E.g.*, Pub. L. No.

98-473, 98 Stat. 1837, 1847. In this regard, we have held that where the United States is not obligated to pay a claim until a final determination of the Government's liability is made, the appropriation current when such final action is taken is the appropriation properly chargeable with payment. B-174762, Jan. 24, 1972; Comp. Gen. 338, 340 (1958). This is how we handle both payments of tort claims, 38 Comp. Gen. 38, 340 (1958), and adjustments of accounts of accountable officers granted relief either for physical losses of funds or illegal, improper or incorrect payments when no appropriation is specifically available for the charge. 31 U.S.C. § 3527(d)(1)(B). Although the payment to be made here is not technically a claim award, we think it sufficiently similar to warrant application of the same principle.

[B-221264]

Interest—Payment Delay—Employee Benefits

When the allotment check of an Army employee was not received by his bank, the employee requested that the check be reissued. He did not receive the reissued check until several months later. The Army may not pay interest on the amount of the allotment since interest may only be paid under express statutory or contractual authorization and no such authorization exists under these circumstances.

Matter of: Charles Wener, April 29, 1986:

This action is in response to a request for an advance decision regarding whether interest may be paid to Charles Wener.[1] We are aware of no authority which would allow the payment of interest in the particular circumstances.

Mr. Wener, an employee of the Army Corps of Engineers, had arranged for an allotment of $300 to be deducted from his pay and sent directly to his bank. Check No. 71729185 was issued on August 10, 1984, to be deposited in Mr. Wener's account. Mr. Wener made inquiry of the Army when he learned that the bank had not received the check. A replacement check was not issued until April 1985. Because it has been unable to provide a justification for the delay in reissuing the check, the Army asks whether interest may be paid to Mr. Wener.

The Army states that it is aware of the well-established rule that payment of interest by the Government on its unpaid accounts or claims may not be made except when interest is provided for under express statutory or contractual authorization. The Army refers, however, to a settlement by our Claims Group which allowed payment of interest in the case of an Army employee under circumstances involving a delay in the payment of amounts owed to him by the Government.

The case referred to by the Army involved a member of the Uniformed Services who had deposited money with the Army under

[1] The request was made by J.M. Burke, Finance and Accounting Officer, U.S. Army, Omaha District Corps of Engineers, Omaha, Nebraska.

the Uniformed Services Savings Deposit Program established pursuant to 10 U.S.C. § 1035 (1970). That statute authorized payment of interest prescribed by the President, not to exceed 10 percent a year on amounts deposited under the program. Although the law was not repealed, the program was phased out for most depositors as of June 30, 1974, when funds for the payment of interest were reduced and amounts on deposits were returned to the service members. In the particular case before this Office, the funds which had been deposited by the individual were not returned to him until September 20, 1974. Payment of interest for the period between June 30, 1974, and September 20, 1974, was authorized by our Claims Group based on office memorandum B-183769-O.M., April 6, 1976, cited by the Army. In that memorandum we found that the Government had specific statutory authority to pay interest on funds deposited under the program until they were returned to the service member.

In the present case, the employee arranged for an allotment to be deducted from his pay and sent to his bank for deposit. Authority for such deductions is found in 5 U.S.C. § 5525 and implementing regulations at 32 C.F.R. § 89.1 *et seq.* This authority, unlike the savings program established by 10 U.S.C. § 1035, does not provide for depositing funds with the Government, nor does it provide for payment of interest. In the case of an allotment made under this authority, there is neither a contractual agreement nor statutory authority which would provide a basis for payment of interest when the issuance of an allotment check is delayed.

Further, we note that the courts have held that delay by the United States in making payment, even if that delay can be termed unreasonable, does not create an entitlement to interest. See *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947); *Economy Plumbing and Heating Co.* v. *United States*, 470 F. 2d 585, 594 (Ct. Cl. 1972).

In conclusion, we find that there is no authority for payment of interest on the amount of the allotment check issued to Mr. Wener's account, even though there apparently was a delay by the Government in reissuing that check.

[B-220869]

Compensation—Increases—Limitations—Applicability

Civilian faculty members of the Uniformed Services University of the Health Sciences question whether their pay is subject to statutory pay caps imposed on federal salaries for fiscal years 1979-1981. Although the salaries of the faculty members are set by the Secretary of Defense under 10 U.S.C. 2113(f) to be comparable with other medical schools in the vicinity of the District of Columbia, we hold these salaries are subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981. Pay increases for these positions were also limited by administrative determination for fiscal year 1980 to be comparable with other Federal executive pay increases. A recent court decision involving backpay for Senior Executive Service employees is not applicable to these faculty members.

Matter of: Uniformed Services University of the Health Sciences—Application of Pay Caps to Faculty Members, April 30, 1986:

ISSUE

The issue in this decision is whether statutory limitations on pay increases apply to the salaries of civilian faculty members of the Uniformed Services University of the Health Sciences. We hold that the salaries of the civilian faculty members were properly capped in fiscal years 1979–1981 and that they are not affected by a recent court decision awarding backpay to members of the Senior Executive Service.

BACKGROUND

The decision is in response to a request from the General Counsel of the Department of Defense (DOD) for an advance decision concerning the application of certain statutory pay caps to civilian faculty members of the Uniformed Services University of the Health Sciences (USUHS). The question arose in connection with an inquiry by a faculty member as to the possible application of the decision in *Squillacote* v. *United States* [1] involving backpay to Senior Executive Service employees whose pay was capped under statutory pay limitations in fiscal years 1979, 1980, 1981, and 1982.

The USUHS employs both military and civilian professors, instructors, and administrative staff. Under the provisions of 10 U.S.C. § 2113(f) (1982), the civilian members of the faculty and staff receive salary rates and retirement and other benefits prescribed by the Secretary of Defense which shall be comparable "with the employees of fully accredited schools of the health professions within the vicinity of the District of Columbia." However, since 1978 the Department of Defense has limited pay increases to these faculty members based on pay caps applicable to salaries paid at rates equal to or in excess of the rate for level V of the Executive Schedule.

The request from DOD sets forth two opposing arguments: (1) that the salaries of the USUHS faculty members are capped by the statutory pay limitations; and (2) that these salaries are not limited under the pay freeze legislation and the faculty members are entitled to backpay. In addition, we requested and received comments on this matter from the Office of Personnel Management (OPM), and those comments are set forth below.

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[1] 562 F. Supp. 338 (E.D. Wis. 1983), *aff'd in part and rev'd in part*, 739 F.2d 1208 (7th Cir. 1984), *reh'g denied*, 747 F.2d 432 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2021 (1985).

Argument against pay cap

The DOD argument against application of the pay caps is that the salaries of civilian faculty members of USUHS are to be fixed on a comparable basis with other faculty members in schools of the health professions in the vicinity of the District of Columbia as prescribed by statute, and application of a pay cap would make it impossible to follow this legislative mandate. In addition, DOD argues that the USUHS salary rates are not fixed at or limited to rates equal to or greater than rates payable for level V of the Executive Schedule as prescribed in the applicable pay legislation, and, thus, the faculty salaries are not subject to that legislation. Finally, DOD argues that the specific statutory provision for fixing USUHS faculty salaries takes precedence over general legislation imposing a pay cap on federal salaries.

Argument in favor of pay cap

The DOD argument in favor of applying the pay caps cites the legislative history to the fiscal year 1979 pay cap as intending a pay cap for all persons employed by the Federal Government whose salaries were equal to or greater than the rate for level V of the Executive Schedule. In addition, we note that the DOD has applied this and other pay caps to the salaries of the USUHS faculty since late 1978.

OPM Comments

In response to our request for comments, the Deputy General Counsel of OPM states that the *Squillacote* decision applies only to the Senior Executive Service (SES) and does not extend to other employees under SES-type pay systems. The comments from OPM also state that since the pay system of the USUHS faculty members is outside of OPM's purview, OPM cannot comment further as to any backpay entitlement.

OPINION

As noted above, the statutory authority for fixing the salaries of USUHS faculty members is contained in 10 U.S.C. § 2113(f) (1982). There is nothing contained in the legislative history of section 2113(f) to indicate whether the Congress intended that these civilian faculty members receive salaries and other benefits without regard to the limitations imposed on other federal executives and employees. We note, however, that the USUHS may obtain the services of military professors, but there is no specific authority to compensate such military officers in any manner different than that provided under 37 U.S.C. §§ 201-209 and 302-303a (1982).

The pay cap first cited by the DOD was a general limitation on salary increases for fiscal year 1979 contained in section 304(a) of

Public Law 95-391, 92 Stat. 788-789, September 30, 1978, which provides as follows:

> No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978, if the rate of salary or basic pay for such office or position is—
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> (1) fixed at a rate which is equal to or greater than the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code, or
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> (2) limited to a maximum rate which is equal to or greater than the rate of basic pay for such level V (or to a percentage of such a maximum rate) by reason of section 5308 of title 5, United States Code, or any other provision of law or congressional resolution.

We believe section 304(a) by its very terms applies to the civilian faculty positions at the USUHS. First, the pay cap is imposed on funds appropriated under that Act or any other act for the fiscal year. Second, the pay cap refers to the salary of pay of any individual in any office or position in the legislative, executive, or judicial branch of Government, and the USUHS, established under the Department of Defense, is clearly part of the executive branch. For these two reasons, we disagree with the DOD argument that the specific statutory authority for fixing USUHS faculty salaries takes precedence over general legislation imposing a pay cap on federal salaries.

Next, DOD argues the pay cap is not applicable since the faculty salary rates are not fixed at or limited to rates equal to or greater than level V of the Executive Schedule. However, the pay cap refers to a *rate* of salary which is fixed at a rate equal to or greater than level V of the Executive Schedule or limited to a maximum rate which is equal to or greater than level V. Thus, we disagree with the DOD argument on this point since it is the rate of salary for each position which is determinative of whether the pay cap will apply, not whether the pay scales have been fixed at rates equal to or greater than level V of the Executive Schedule.

Finally, the DOD argues that application of the pay cap would make it impossible to follow the statutory requirement to fix salaries on a comparable basis to salaries of certain faculty members in the health professions. However, this factor is not sufficient to overcome the plain language of the pay cap legislation cited above.

The language of the pay cap for fiscal year 1981 is comparable to the language for fiscal year 1979.[2] We hold that this pay cap applies to the USUHS positions for the same reasons cited above in the discussion of the fiscal year 1979 pay cap.

Although the language of the pay cap for fiscal year 1980 is different than the pay caps in other years cited above, we believe the

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[2] See Public Law 96-369, § 101(c), October 1, 1980, 94 Stat. 1352; Public Law 96-536, § 101(c), December 16, 1980, 94 Stat. 3167; Public Law 97-12, § 401, June 5, 1981, 95 Stat. 95, cited in the note to 5 U.S.C. § 5318 (1982).

salaries of these faculty members were properly capped for that year as well, for the reasons that follow. By its terms, the pay cap for fiscal year 1980 refers to executive employees whose pay would have increased by 12.9 percent but who, because of the pay cap, were not to receive more than a 5.5 percent increase. Public Law 96-86, § 101(c), October 12, 1979, 93 Stat. 657. As noted by the Court of Appeals in *Squillacote*, cited above, the pay cap for fiscal year 1980 refers to pay set under the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301-5308, or the Executive Salary Cost-of-Living Adjustment Act, 5 U.S.C. § 5318. Since the pay of the USUHS civilian faculty members is set by the Secretary of Defense and not under these two statutory authorities, the pay cap for fiscal year 1980 does not specifically apply to these faculty positions.

We note, however, that for fiscal year 1980, the Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, by memorandum dated November 6, 1979, approved the salary schedules for USUHS faculty and staff members, but limited the increase called for by these schedules to 5.5 percent for positions whose salary was equal to or greater than $47,500 "in order to achieve equitable treatment of all federal executive employees." We conclude that it was within the discretion accorded to the Secretary of Defense (or his designee) by 10 U.S.C. § 2113(f) to set the pay of these faculty members and to limit the pay increases of these faculty members for fiscal year 1980. See, for example, *Bureau of Engraving and Printing*, B-211956, October 21, 1983. Therefore, we conclude that the salaries of these faculty members were properly capped during fiscal years 1979, 1980, and 1981.

Finally, we are not persuaded that the *Squillacote* decision has any application to the salaries of the civilian faculty positions at the USUHS. In *Squillacote* v. *United States* the Court of Appeals ruled that SES members were subject to the fiscal year 1979 pay cap contained in section 304(a) of Public Law 95-391 and were thus limited to salary rates based on a maximum rate for level V of the Executive Schedule instead of level IV.[3] However, the Court of Appeals ruled that SES members were not described in the applicable pay cap contained in section 101(c) of Public Law 96-86 for fiscal year 1980 and, therefore, were not capped at level V of the Executive Schedule.[4] The court's decision means that the salaries of the SES members for fiscal year 1980 were only subject to the level IV limitation on SES pay contained in 5 U.S.C. § 5382(b).

As noted in the comments from OPM, the court's decision in *Squillacote* applied only to the Senior Executive Service in the Executive Branch under 5 U.S.C. §§ 3131-3136 (1982), and we believe the court's decision has no general application to positions outside of the SES or positions whose salaries have no relation to the SES.

[3] 739 F.2d 1208, at 1211-1215.
[4] *Id.*

The court in *Squillacote* did not overturn the pay cap generally; rather, the court held that SES members were not specifically covered by the level V pay cap and the cap imposed on executive level salaries. Therefore, we decline to apply either the holding or the rationale of the *Squillacote* decision to positions outside of the SES such as civilian faculty members of the USUHS.

Accordingly, we conclude that the salaries of the civilian faculty members of the USUHS were subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981, and to the administratively imposed pay cap for fiscal year 1980.

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