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[B-222554]

Contracts—Negotiation—Conflict of Interest Prohibitions—Organizational

Protest that awardee should not have been awarded a contract because of an organizational conflict of interest is denied where the facts do not demonstrate the existence of circumstances that would preclude the awardee from being objective in performing the contract.

Matter of: Spectrum Analysis & Frequency Engineering, Inc., August 1, 1986:

Spectrum Analysis & Frequency Engineering, Inc. (SAFE), protests the award of a contract to the Associated Public Safety Communications Officers, Inc. (APCO), under Federal Emergency Management Agency (FEMA) request for proposals (RFP) No. EMW-86-R-2273.

We deny the protest.

Background

Section "J" of the National Plan of Action on Emergency Mobilization Preparedness (the Plan) requires the development of a national telecommunications system and plan for use during a national disaster. Under section J-10 of the Plan, FEMA is responsible for preparing a plan for the integrated use of the telecommunications resources of federal, state and local governments. FEMA issued the current RFP in connection with this responsibility. This protest is concerned with task "A" of the RFP, which requires the successful contractor to review the Federal Communications Commission (FCC) nongovernment master file database. This database contains information on the radio licenses of all government and commercial licensees other than the federal government. The information includes the licensee's name, location, frequency number, call sign, power output and method of transmission.

The RFP was issued on January 9, 1986. After reviewing the proposals it received, FEMA requested SAFE and APCO to submit best and final offers. FEMA subsequently eliminated SAFE from the competitive range because the firm's final price was 47 percent higher than the government estimate.

FEMA continued to negotiate with APCO and subsequently awarded the contract to the firm.

SAFE filed its protest with this Office on May 7. SAFE alleged that the award to APCO was improper because (1) APCO was a nonprofit organization and, thus, had an unfair cost advantage; (2) APCO had an organizational conflict of interest because it assisted FEMA in developing the RFP's statement of work; and (3) APCO had an organizational conflict of interest because it is an FCC frequency coordinator and, in performing the present contract, it will be reviewing its own performance as a frequency coordinator.

FEMA responded to SAFE's protest in a report to our Office denying all three allegations. In reply, SAFE did not rebut FEMA's denial of the first two bases of protest. We therefore consider these issues abandoned and we will not consider them on the merits. See *Hamilton Sorter Co., Inc.*, B-220253, Nov. 22, 1985, 85-2 C.P.D. ¶ 592.

Concerning the remaining issue, SAFE points out that as an FCC frequency coordinator, APCO is responsible for filing with the FCC radio license applications for members of the public-safety sector. SAFE contends that in this role, APCO is required to review license applications for accuracy and completeness before it submits them to the FCC and notes that once the applicant is granted a license, the information on the application is put into the FCC's database. SAFE also points out that APCO has been an FCC frequency coordinator for many years, and that under new rules promulgated by the FCC, APCO is now the exclusive frequency coordinator for certain segments of the public-safety sector. SAFE reasons that under task "A" of the present contract, the information APCO will be reviewing for accuracy is information which APCO contributed to the FCC database as a frequency coordinator. SAFE concludes that the contract award to APCO therefore was improper.

In response, FEMA disputes that APCO has a conflict of interest that would preclude a contract award to the firm. FEMA refers to a database that APCO created from the FCC nongovernment master file for its own use and asserts that this database is independent of the database that will be validated in performing the contract. As noted by SAFE, however, the protest does not concern APCO's private database, but instead involves the database that APCO has contributed to as a frequency coordinator and which APCO allegedly will be required to validate under the present RFP. We have reviewed the entire record, including the current RFP and APCO's role as a frequency coordinator. Based on our review, we cannot conclude that APCO has a conflict of interest that would preclude a contract award to the firm.

The federal government's policy is to allow all interested qualified firms an opportunity to participate in its procurements. Therefore, unless there is a clearly supportable reason for excluding a prospective contractor, this Office has held that a firm cannot be precluded from receiving a contract award on the basis of a potential or theoretical organizational conflict of interest. *John J. McMullen Associates, Inc.*, B-188703, Oct. 5, 1977, 77-2 C.P.D. ¶ 270. Further, neither a prior or current contractual relationship, nor the fact that a firm will review some of its own completed work, automatically results in a conclusion that a firm has an organizational conflict of interest that precludes the firm from receiving a contract award. See *Power Line Models, Inc.*, B-220381, Feb. 28, 1986, 86-1 C.P.D. ¶ 208. Rather, to find the existence of an organizational conflict of interest, there must be facts demonstrating that

the firm is incapable of objectively performing the contract. See *Battelle Memorial Institute,* B-218538, June 26, 1985, 85-1 C.P.D. ¶ 726; Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.501 (1985).

In the present case, the record does not support a finding that FEMA has acted improperly in awarding a contract to APCO. SAFE argues that because under the new FCC rules APCO is the exclusive frequency coordinator for certain frequencies in the public-safety sector, the database to be reviewed largely would consist of APCO's own input. These rules, however, were released on April 15, 1986, and do not become effective until 6 months after they are published in the Federal Register. Under the protested RFP, task "A" is to be completed within 4 months after June 16, the date the contract was awarded. Since task "A" thus is to be completed before or at about the same time that APCO becomes the exclusive frequency coordinator, this role, in our view, does not provide a basis to find the existence of conflict of interest that would preclude APCO from performing the contract objectively.

Nor do we believe that APCO's role as a frequency coordinator under the old FCC rules precluded APCO from receiving the contract award. The purpose of the present contract is to establish what frequencies are being used and by whom, not to evaluate APCO's or any other contractor's prior performance as a frequency coordinator. Further, under the prior FCC rules, there often was more than one frequency coordinator per service, and individuals desiring licenses could even submit their applications directly to the FCC instead of through a frequency coordinator. When an application was submitted to a frequency coordinator, the coordinator's role was only to recommend the most efficient frequency—the coordinator was not responsible for reviewing the accuracy of the data on the application. Thus, APCO will not be reviewing only its contributions to the database and is not responsible for validating data that it was required to review in its role as frequency coordinator. Finally, we note that in explaining why its new rules were necessary, the FCC itself recognized that much of the data in its database was inaccurate and out of date.

Given these factors, there does not appear to be any advantage that APCO would gain by not providing an accurate and objective analysis of the FCC database. Consequently, we cannot conclude that APCO has a conflict of interest that required the firm to be excluded from the competition. The protest is denied.

[B-219121]

Subsistence—Per Diem—Leaves of Absence—Annual

An employee who elected to travel by privately-owned vehicle rather than common carrier and was charged annual leave for his excess traveltime claims subsistence expenses for that traveltime. The employee's claim may not be allowed, since we have held and the Federal Travel Regulations provide that subsistence expenses

may not be paid during traveltime charged to annual leave. In view of the prohibition against paying subsistence expenses during a period of annual leave, it is not material that the employee's actual costs of travel, including the claimed subsistence expenses, were less than the constructive cost of travel by common carrier.

Matter of: Kelly G. Nobles—Travel by Privately-Owned Vehicle—Expenses for Traveltime Charged to Annual Leave, August 4, 1986:

Mr. E. M. Keeling, Director of Accounting of the Federal Aviation Administration (FAA), has requested our decision concerning Mr. Kelly G. Nobles' claim for subsistence expenses associated with his use of a privately-owned vehicle (POV) rather than common carrier for temporary duty travel. Specifically, the FAA questions whether Mr. Nobles is entitled to receive subsistence expenses for traveltime which exceeded that which would have been required for common-carrier travel and has been charged to annual leave. For the reasons stated below, we hold that Mr. Nobles may not be paid subsistence expenses for his excess traveltime charged to annual leave.

Background

Mr. Nobles, an FAA employee stationed in Terre Haute, Indiana, was scheduled to attend a training course at the FAA Academy in Oklahoma City, Oklahoma, during the period June 6 to June 20, 1984. His travel orders authorized him to use a POV as a matter of personal preference, and indicated that air travel would have been more advantageous to the government. Had Mr. Nobles traveled by air, he would have departed for Oklahoma City on June 5, 1984, and his allowable transportation and subsistence costs would have totaled $1,326.04.

Mr. Nobles left his residence in Terre Haute on June 4, 1984, charging annual leave for his travel that day, and he arrived in Oklahoma City on the afternoon of June 5. He completed his course at the FAA Academy on June 20, and, during the following day, he traveled home. Mr. Nobles submitted a claim for mileage expenses and subsistence costs in the amount of $1,014.26, including $72.97 for the subsistence expenses he incurred during his first day of travel on June 4. The FAA disallowed Mr. Nobles' claim for subsistence expenses on that day since he was in an annual leave status, citing our decision in B-171420, March 3, 1971. In B-171420, discussed below, we held that an employee who travels by POV rather than common carrier may not receive per diem for the excess traveltime involved if that traveltime is charged to annual leave.

The FAA now questions whether it was proper to deny Mr. Nobles' subsistence expenses for the extra day's travel based on our decision in B-171420, cited above. Specifically, the agency suggests that our decision in B-171420 may have been superseded by our

subsequent decision in 55 Comp. Gen. 192 (1975), interpreting para. 1-4.3 of the Federal Travel Regulations, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985) (FTR). In 55 Comp. Gen. 192, discussed below, we applied FTR para. 1-4.3 to hold that an employee who travels by POV as a matter of personal preference may be reimbursed for such travel on the basis of his total actual costs limited to the total constructive cost of travel by common carrier. As the FAA interprets our decision in 55 Comp. Gen. 192 and the provisions of FTR para. 1-4.3, an employee who elects to travel by POV would be entitled to reimbursement for subsistence costs incurred during excess traveltime as long as those costs, when combined with mileage expenses, do not exceed the constructive cost of common-carrier travel. Under the agency's interpretation of 55 Comp. Gen. 192 and FTR para. 1-4.3, Mr. Nobles would be entitled to reimbursement for his subsistence expenses on June 4, 1984, even though he was charged annual leave for that day, because his total actual costs of $1,014.26 were less than the $1,326.04 he would have been allowed had he traveled by air.

Against this background, the question for our determination is whether an employee whose actual costs of traveling by POV are less than the constructive cost of common-carrier travel may, on that basis, be reimbursed for subsistence expenses incurred during excess traveltime which has been charged to annual leave. In order to answer this question, we must decide whether the principles stated in B-171420, cited above, have been superseded by our subsequent decision in 55 Comp. Gen. 192 and the provisions of FTR para. 1-4.3.

Discussion

In B-171420, cited above, we held that an agency may, in its discretion, charge an employee annual leave for excess traveltime attributable to his use of a POV rather than common carrier. We then determined that, under section 6.3 of the Standardized Government Travel Regulations (the predecessor to FTR paras. 1-7.5a and 1-8.4a), an employee may not be paid per diem while he is in an annual leave status. Based on the prohibition contained in the travel regulations, we concluded that an employee traveling by POV may not receive per diem for the excess traveltime involved if that traveltime is charged to annual leave.

In our subsequent decision in 55 Comp. Gen. 192, cited above, we did not address the charging of annual leave for excess traveltime or the regulatory prohibition against paying per diem during traveltime charged to leave. Rather, in 55 Comp. Gen. 192, we evaluated and decided to change our prior rules for computing the "actual versus constructive" costs payable to an employee who travels by POV rather than common carrier. First, we noted that, in our prior decisions in 45 Comp. Gen. 592 (1966) and 47 Comp. Gen. 686

(1968), we interpreted regulations issued by the Bureau of the Budget (now Office of Management and Budget (OMB)) as imposing separate restrictions on the payment of actual per diem and mileage expenses, limiting an employee's reimbursement to the following:

(1) the lesser of actual per diem or the constructive per diem allowable for travel by common carrier; plus

(2) the lesser of actual mileage expenses or the constructive cost of common carrier transportation. We then noted that, subsequent to our decisions in 45 Comp. Gen. 592 and 47 Comp. Gen. 686, OMB issued superseding regulations which prescribed a different method for computing reimbursable costs. These regulations, which eventually became codified in FTR para. 1-4.3, are quoted in 55 Comp. Gen. 192 at 194 as follows:

> * * * Whenever a privately owned conveyance is used for official purposes as a matter of personal preference in lieu of common carrier transportation under 2.2d payment for such travel shall be made on the basis of the actual travel performed * * * plus the per diem allowable for the actual travel but the *total allowable* will be *limited* to the *total constructive cost* of appropriate common carrier transportation including constructive per diem by that method of transportation. * * * [Italic supplied in 55 Comp. Gen. 192.]

Because the above-quoted regulations refer to the "total allowable" and the "total constructive cost," we concluded in 55 Comp. Gen. 192 that an employee electing to travel by POV may be reimbursed for such travel on the basis of his total actual travel costs (transportation and per diem), limited to the total constructive travel costs (transportation and per diem). Accordingly, we overruled our prior decisions in 45 Comp. Gen. 592 and 47 Comp. Gen. 686.

We do not agree with the FAA that our decision in 55 Comp. Gen. 192 and the provisions of FTR para. 1-4.3 have superseded the principles we expressed in B-171420, above. Rather, an examination of our decisions and the applicable travel regulations discloses that, over the years, the principles underlying our determination in B-171420 have been reinforced. Thus, subsequent to our decision in 55 Comp. Gen. 192, we have held that an agency should charge an employee annual leave for excess traveltime occasioned by his use of a POV. See 56 Comp. Gen. 865 (1977); *Department of Energy and International Brotherhood of Electrical Workers*, B-197336, January 28, 1981; and *Timothy W. Joseph*, 62 Comp. Gen. 393 (1983). Furthermore, although the specific travel regulations cited in B-171420 are no longer in effect, the superseding provisions in FTR paras. 1-7.5a and 1-8.4a are substantially the same, prohibiting the payment of per diem or actual subsistence expenses during periods for which a traveler is charged annual leave. Consequently, based on FTR paras. 1-7.5a and 1-8.4a, and in line with our determination in B-171420, we continue to believe that an employee who is charged annual leave for excess traveltime may not be reimbursed for subsistence costs incurred during such traveltime.

Furthermore, we do not agree that FTR para. 1-4.3 or our decision in 55 Comp. Gen. 192 can be read as automatically entitling an employee to full reimbursement for subsistence costs simply because those costs, when combined with mileage expenses, do not exceed the total constructive cost of travel by common carrier. The purpose of the cost comparison required by FTR para. 1-4.3 is to set an upper limit on the government's liability for an employee's travel expenses, rather than to vest employees with an absolute entitlement to those expenses which do not exceed constructive costs. See generally *Frederick Benedict*, B-195908, January 22, 1981; and *James C. Meyers*, B-181573, February 27, 1975. Furthermore, under the specific terms of FTR para. 1-4.3, quoted previously, the actual costs of a traveler's subsistence are reimbursable only to the extent that those costs are otherwise "allowable." Whether subsistence costs are allowable depends upon the various restrictions imposed by the FTR, one of which is the prohibition against paying per diem or actual subsistence expenses during traveltime charged to annual leave.

Based on the foregoing considerations, we hold that an employee who elects to travel by POV and is charged annual leave for the excess traveltime involved may not be reimbursed subsistence expenses for that traveltime, even if his total actual travel costs are less than the total constructive costs of travel by common carrier. Therefore, since Mr. Nobles was charged annual leave for his traveltime on June 4, 1984, he is not entitled to reimbursement for the subsistence expenses he incurred on that day.

Accordingly, Mr. Nobles' claim for subsistence expenses may not be paid.

[B-221945]

Pay—Retired—Survivor Benefit Plan—Children

Eligible beneficiaries under the Survivor Benefit Plan, an income maintenance program for the surviving dependents of deceased service members, include Plan participants' children between 18 and 22 years old who are full-time students. Children over 18 years old who are not attending school may become eligible for an annuity at any time until they reach the age of 22 by undertaking a full-time course of study, since the Congress in establishing the Plan indicated that children aged anywhere between 18 and 22 years old who are students should be regarded as eligible dependents for purposes of annuity coverage.

Pay—Retired—Survivor Benefit Plan—Children

If a Survivor Benefit Plan participant's child who is between 18 and 22 years old becomes a full-time student and thus becomes eligible for an annuity under the Plan, any resulting adjustment that may be necessary in the participant's cost for beneficiary coverage should be made effective on the first day of the month after the child has resumed school attendance, as costs for benefit coverage generally are assessed on a monthly basis and should be predicated on the beneficiary status in being on the first day of a month, for that month.

Pay—Retired—Survivor Benefit Plan—Children

As a general rule, a valid marriage entered into by a Survivor Benefit Plan participant's child terminates the child's annuity eligibility for all time, because a valid marriage operates to end a child's dependence upon its parents, and the relationship of dependency cannot be renewed by a subsequent divorce. Nevertheless, if the marriage is ended not by an ordinary divorce but rather by an annulment, or there is otherwise a judicial decree rendered by a court of competent jurisdiction declaring the marriage void, then there would be a proper basis for concluding the marriage was invalid, and the child's annuity coverage could be reinstated.

Matter of: Department of Defense Military Pay and Allowance Committee Action Number 561, August 4, 1986:

The Department of Defense Military Pay and Allowance Committee presents several questions concerning the reinstatement of annuity eligibility under the Survivor Benefit Plan in situations involving child beneficiaries who have lost their eligibility for an annuity either because of school nonattendance or because of marriage.[1] In response to those questions we conclude, generally, that a Plan participant's children who are over 18 years old may become eligible for an annuity at any time until they reach the age of 22 by undertaking a full-time course of study, since the Congress in establishing the Plan indicated that children anywhere between 18 and 22 years old who are "bona fide" students should be regarded as dependent upon their parents for purposes of annuity coverage. We also conclude that, as a general rule, a valid marriage entered into by a Plan participant's child terminates the child's annuity eligibility for all time, because a valid marriage operates to end a child's dependence upon its parents and the relationship of dependency cannot be renewed by a subsequent divorce.

Background

In 1972 the Congress established the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, as an income maintenance program for the families of deceased service members.[2] It was designed to provide a more comprehensive system of survivor protection, and eventually to replace, the then current military survivor annuity program contained in the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-1446. Eligible beneficiaries under these military annuity programs established under statute include the "dependent child" of a program participant. Under the Survivor Benefit Plan this term is defined as follows:

(5) "Dependent child" means a person who is—
(A) unmarried;
(B)(i) under 18 years of age; (ii) at least 18, but under 22, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or

[1] This action is in response to a request for a decision received from the Principal Deputy Assistant Secretary of Defense (Comptroller). The questions are contained in Department of Defense Military Pay and Allowance Committee Action Number 561, which was forwarded with the request for a decision.
[2] Public Law 92-425, September 21, 1972, 86 Stat. 706.

vocational institute, junior college, college, university, or comparable recognized educational institution; or (iii) incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing such a full-time course of study or training; * * * 10 U.S.C. § 1447(5).

This is similar to the definition of a "dependent child" contained in the Retired Serviceman's Family Protection Plan.[3]

In 1983 we expressed the view that, with respect to dependent children receiving annuities on the basis of a mental or physical incapacity, in situations where eligibility for an annuity has been suspended under the military survivor annuity programs because the beneficiary has become capable of self-support, the annuity may properly be reinstated at a later date if the beneficiary again becomes incapable of self-support due to the original disabling condition.[4] The Department of Defense Military Pay and Allowance Committee indicates that other questions have now arisen under the Survivor Benefit Plan concerning the reinstatement of benefit coverage or an annuity in situations involving child beneficiaries who have lost eligibility under the Plan either because of nonattendance at school, or because of marriage.

Suspension of Eligibility Due to School Nonattendance

The first 3 questions presented are:

When Survivor Benefit Plan (SBP) coverage is terminated for a dependent child, age 18-22, for school nonattendance, may that coverage be reinstated if the child resumes school attendance?

Would the child have to resume school attendance before the member participant died to be eligible for the annuity?

Would an annuity to a dependent child which had been suspended because of school nonattendance be reinstated if a child resumed school attendance?

The Survivor Benefit Plan does not preclude an otherwise qualified dependent child between 18 and 22 years of age from seeking reinstatement of either benefit coverage (if the sponsoring Plan participant is alive) or a survivor's annuity (if the Plan participant has died), following a period of suspension of eligibility due to school nonattendance. Moreover, in view of the express observation of the Congress contained in the legislative history of the Survivor Benefit Plan that participants' children anywhere between the ages of 18 and 22 years who are "bona fide" students should be regarded as dependent upon their parents for purposes of annuity coverage, we have no basis to object to the reinstatement of benefit coverage or an annuity in the case of a child under the age of 22 whose eligibility was suspended because of school nonattendance

[3] See 10 U.S.C. § 1435(2).

[4] See 62 Comp. Gen. 302, 305-306 (1983). Among the factors supporting that conclusion was the established national policy concerning employment of handicapped persons, under which the incapacitated dependent children of Plan participants cannot properly be dissuaded from seeking gainful employment, with the goal of becoming self-sufficient, through the threat of a permanent termination of their annuity coverage if they attempt to work, as discussed in 62 Comp. Gen. 193 (1983).

but who subsequently became a full-time student.[5] Further, we are unaware of any basis for disallowing payment of an annuity because the sponsoring Plan participant died before the dependent child aged 18-22 resumed a full-time course of study.[6] Hence, the first 3 questions are answered "yes," "no," and "yes," respectively.

The next question is:

Which effective date presented in the DISCUSSION below should be used to adjust cost if coverage is reinstated?

When service members elect to participate in the Survivor Benefit Plan, they thereby choose to receive retired pay at a reduced rate in order to provide an annuity for their surviving dependents, and this represents the "cost" of coverage. See 10 U.S.C. § 1452. The reduction in retired pay must be adjusted or discontinued, however, during any month in which there is no eligible beneficiary in the classes or a particular class of dependents for which coverage has been elected. 10 U.S.C. § 1452. The question here evidently relates to the situation in which the Plan participant is alive, and the reduction in retired pay is adjusted or discontinued for a time due to the school nonattendance of an otherwise eligible child beneficiary between the age of 18 and 22. The discussion in the Committee Action contains the following comments concerning that situation:

If coverage may be reinstated and cost had previously been adjusted or discontinued based on the child's school status, the Committee recommends three possibilities for adjusting cost:

a. Collect cost retroactive to the effective date that cost was originally suspended.

b. Collect cost retroactive to the first day of the month after child resumed school attendance.

c. Collect cost retroactive for any periods during cost suspension where the child attended school full-time.

In our view the proper method for adjusting cost in the situation described would be under alternative "b," to "(c)ollect cost retroactive to the first day of the month after child resumed school attendance," consistent with the general principles applicable when there is a reinstatement of an eligible beneficiary. See 57 Comp. Gen. 847 (1978), as modified by 59 Comp. Gen. 569 (1980).

The fourth question is so answered.

Suspension of Eligibility Due to Marriage

The next question presented by the Committee is:

May a child who loses SBP eligibility for annuity due to marriage regain eligibility upon termination of that marriage through divorce, annulment or death of the spouse?

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[5] Compare 62 Comp. Gen., *supra*, at page 305; and see also S. Rep. No. 1089, 92 Cong., 2d Sess. 50, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3288, 3313. We also note that under the Retired Serviceman's Family Protection Plan, an "eligible child * * * might become ineligible at age 18 and again become eligible by furnishing proof of pursuit of a full time course of study * * *." See 32 C.F.R. § 48.504(b)(3).

[6] Compare also 32 C.F.R. § 48.504(b)(3), quoted above (footnote 5).

Under the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan, as indicated, only the "unmarried" children of service members are defined as eligible child beneficiaries. This limitation was patterned after a provision of the civil service retirement laws which also restricts eligibility for a child's survivor annuity to the "unmarried" child of a deceased federal employee.[7]

We have examined the legislative history of the military and civil service survivor annuity programs and have found no explanation in the congressional reports, hearings, or debates specifically detailing the reasons why only "unmarried" children were defined as eligible child beneficiaries. It appears, however, that the restriction is consistent with both common-law and statutory rules generally adopted and followed by our states concerning the relationship between parent and child. Under those rules, parents' responsibility to support their children ordinarily ceases when the children reach the age of majority, unless a child remains incapable of self-support because of physical or mental infirmity. A valid marriage contracted at any time by a child terminates the parents' responsibility to support the child, however, since the marriage creates relations inconsistent with that responsibility. The courts have generally held also that this "emancipated" status of a child who marries is unaffected by a subsequent divorce, so that the parents' responsibility of support is not renewed upon the child's divorce.[8] Hence, we conclude that as a general rule a child who lost Survivor Benefit Plan annuity eligibility due to marriage could not regain eligibility upon the termination of that marriage through divorce.

As to annulment of a marriage, while state laws vary somewhat, the general rule is that an annulment decree renders a purported marriage void, rather than merely terminating it as does a divorce.[9] Thus, in such a case, it appears there generally would be a proper basis for concluding that the marriage was void or invalid, and annuity eligibility therefore could be reinstated prospectively from the date of the judicial decree.

Consistent with the foregoing, it is our further view that if the marriage was valid on its face and was terminated by the spouse's death there generally would be no basis for reinstatement of annuity eligibility, in the absence of a decree of a court of competent jurisdiction declaring the marriage void or invalid.

The question is so answered.

The next question is:

Is the answer the same regardless of whether the marriage occurs before or after the member's retirement or member's death?

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[7] See 5 U.S.C. § 8341(a)(3); S. Rep. No. 1089, *supra* (footnote 5), at page 50; and H.R. Rep. No. 481, 92d Cong. 1st Sess. 7 (1971). Civil service retirement and survivor annuity claims are not within our jurisdiction. See 5 U.S.C. § 8347; 41 Comp. Gen. 460 (1962); and 30 Comp. Gen. 51 (1950).

[8] See, generally, 67A C.J.S. *Parent and Child* §§ 8, 51, 62 (1978).

[9] See, generally, 54 Comp. Gen. 600, 601 (1975), and authorities there cited.

As indicated, the Survivor Benefit Plan is an income maintenance program for the surviving dependents of deceased service members, and the Plan legislation thus recognizes dependency relationships that may continue after the Plan participant's retirement or death. Our view is, however, that a valid marriage entered into by a Plan participant's child at any time would terminate the dependency relationship of parent and child, regardless of whether the marriage occurred before or after the Plan participant's retirement or death. Hence, this question is answered "yes."

The last 2 questions are:

Would a child who is eligible for an SBP annuity by virtue of 10 U.S.C. § 1447(5)(B)(iii) lose that eligibility if the incapacitated child marries an individual who is also mentally or physically incapacitated?

If eligibility was terminated by marriage of the incapacitated child, would the termination of such marriage allow eligibility for coverage or annuity to be reinstated?

We are unaware of any responsibility imposed by law upon parents to provide financial support for their married children, even if the children or the individuals they have married might be considered handicapped or disabled. Hence, our view is that if an incapacitated Survivor Benefit Plan child beneficiary entered into a valid marriage, regardless of whether the child's spouse might also be categorized as incapacitated, the child could no longer be regarded as the dependent of the Plan participant and would no longer be eligible for an annuity. Consistent with our answers to the previous questions, it is also our view that the termination of such marriage, absent an annulment or other judicial decree declaring the marriage void, generally could not serve as a basis for reinstatement of either benefit coverage or a survivor's annuity.

The questions presented in this matter are answered accordingly.

[B-222343]

Compensation—Overtime—Traveltime—Administratively Controllable

Entitlement to overtime compensation by Federal employees while in a travel status under 5 U.S.C. 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively and that there be an immediate official necessity requiring travel in connection with the event. Thus, travel performed by an employee to attend a scheduled event conducted by a licensee of the employee's agency does not qualify as travel to or from an event over which the Government had a total lack of control, and the employee may not be paid overtime compensation for that travel.

Matter of: Dr. L. Friedman, August 4, 1986:

This action is in response to a request for an advance decision from the Nuclear Regulatory Commission regarding the claim of an employee for overtime compensation while in travel status.[1] It is

[1] The request was submitted by Graham D. Johnson, Director, Division of Accounting and Finance, Office of Resource Management, U.S. Nuclear Regulatory Commission, Washington, D.C.

our view that the employee may not be paid overtime under the circumstances presented.

Dr. L. Friedman, an employee of the Nuclear Regulatory Commission, traveled from his duty station to observe a procedure conducted by a licensee of the agency on Friday, June 7, 1985. The agency states that the event was scheduled by the licensee with advance notice, so that the agency was able to schedule Dr. Friedman's travel during his regular work hours on Thursday, June 6, 1985.

The procedure apparently extended beyond Dr. Friedman's regularly scheduled work hours on Friday, and he was paid overtime compensation for the overtime hours during which he was actually observing the event. That evening after the procedure was completed, Dr. Friedman returned to his duty station. He now claims additional overtime compensation for the time during which he performed the return travel to his duty station.

The agency notes that pursuant to 5 U.S.C. § 5542(b)(2)(B)(iv), an employee may be paid overtime for travel to an event which cannot be scheduled or controlled administratively, and that a 1984 amendment to that provision expressly provides that both the travel to and the return travel from such an event are to be considered hours of employment for purposes of overtime pay. The agency asks whether Dr. Friedman's return travel qualifies as hours of employment for purposes of overtime pay under the amended statute.

The general rule regarding overtime pay is that employees may not be compensated for time spent on official travel outside their scheduled duty hours when they do not actually perform work during the period of travel. See 55 Comp. Gen. 629, 632 (1976). As an exception, however, employees of the Federal Government are entitled to overtime compensation pursuant to 5 U.S.C. § 5542(b)(2)(B)(iv), which provides that:

> (2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—
>
> . . . . . .
>
> (B) the travel * * * (iv) results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station.

For an event to qualify as administratively uncontrollable there must be a "total lack of Government control." *Barth* v. *United States*, 568 F.2d 1329 (Ct. Cl. 1978). In that case, the plaintiff contended that since a weapons test he was sent to observe was an event scheduled by a contractor of the agency, the event was not administratively controllable. The court found that since the test was performed under contract and the agency was advised in advance of the test dates, there was not a total lack of governmental control. Similarly, in conformity with the court's reasoning in that case we have held that where an employee was required to attend

a meeting scheduled with foreign representatives, although the meeting was a matter of accommodation with the foreign governments, overtime compensation was not payable for the traveltime involved since there was not a total lack of control on the part of the United States Government. *James M. Ray*, B-202694, January 4, 1982.

The 1984 amendment to 5 U.S.C. § 5542 was added to provide overtime pay for all return travel from administratively uncontrollable events. The legislative history of the amendment shows that the provision was in response to our decision B-169419, August 26, 1970, in which we held that although travel by a firefighter to a forest fire for duty associated with its suppression was administratively uncontrollable, travel returning from a fire to the firefighter's duty station was administratively controllable unless lodging facilities at the site of the fire were unavailable. The amendment was designed to authorize overtime compensation for the return travel of firefighters from a forest fire regardless of the availability of lodgings at the site of the fire. See 130 Cong. Rec. S12681 (daily ed. October 2, 1984) (statement of Senator Melcher).

The present case does not involve a forest fire or similar situation. Instead Dr. Friedman attended and observed an event which was scheduled and conducted by an organization operating under a license issued by his agency and the agency was provided with advance notice of this scheduled event. In our view, this precludes a finding of "total lack of Government control" as required under the standard established in *Barth* v. *United States*, *supra*, and thus the travel does not fall within the exceptions authorized by 5 U.S.C. § 5542(b)(2)(B)(iv).

Accordingly, Dr. L. Friedman may not be allowed overtime pay for his return travel.

[B-222860]

Pay—Retired—Re-retirement—Recomputation of Retired Pay

A statute authorizing military and naval reservists who are "qualified" for retirement to be "retained" in an active status and to receive credit "for all purposes" for their subsequent service does not apply to reservists who have in fact been retired, since retirement orders are not subject to cancellation, and while retirees may be recalled to active service from retirement they cannot be retired and "retained" on active duty simultaneously. Hence, that statute provides no authority to permit a retired Navy Reserve officer who was recalled to duty and who then performed 19 years' active service to be "re-retired" anew on the basis of that additional service. 10 U.S.C. 676.

Pay—Retired—Re-retirement—Recomputation of Retired Pay

The Congress has enacted legislation to delete a statutory directive which previously prohibited retired military and naval reservists from receiving additional retirement benefits for active service performed upon a recall to duty, so that a retired Navy Reserve officer who was recalled to active duty for an extended period may now elect to have her retired pay recomputed, with credit for the added service she performed, under the same statutory retired pay recomputation formulas generally applicable

to all retired service members who perform periods of active duty following their retirement. 10 U.S.C. 1402.

Matter of: Rear Admiral Grace M. Hopper, USNR (Retired) (Recalled), August 4, 1986:

The question presented in this matter is whether Rear Admiral Grace M. Hopper, USNR (Retired) (Recalled), is entitled to have her Navy Reserve retired pay recomputed on the basis of the 19 years she has served on active duty with the Navy since the time of her retirement and subsequent recall to active service in 1976.[1] We conclude that she is entitled to a recomputation of her retired pay under the same statutory retired pay recomputation formulas generally applicable to all service members who perform periods of active duty following their retirement.

Background

On July 31, 1967, Admiral Hopper (then Commander Hopper) was recalled from retirement to active duty in the Navy, and she has been in active service continuously since then. Six months prior to her recall to duty she had been retired as a member of the Navy Reserve, and she had been receiving retired pay for non-regular service under the provisions of 10 U.S.C. §§ 1331-1337.

The concerned Navy officials indicate that Admiral Hopper plans to leave active duty in the near future, and that uncertainty has arisen concerning the recomputation of her retired pay. The officials note that 10 U.S.C. § 676 authorizes reservists who are "retained" on active duty after becoming qualified for retired pay under 10 U.S.C. §§ 1331-1337 to be "credited with that service for all purposes." They also note that 10 U.S.C. § 1402(a) generally authorizes the recomputation of the retired pay of service members who are retired and are then recalled to active duty (other than for training) for a period of 6 months or more. The officials further note that in decisions rendered in 1958 and 1961 we nevertheless expressed the view that reservists who had been placed in a retired status under the provisions of 10 U.S.C. §§ 1331-1337 were not eligible on the basis of either 10 U.S.C. § 676 or 10 U.S.C. § 1402(a) for a recomputation of their retired pay to account for any subsequent active duty they performed.[2]

The officials point out that there have been several amendments to the applicable statutes governing the retirement of reservists since the time those decisions were issued, however, and they question whether those amendments will operate to allow Admiral Hopper to receive retired pay credit for the active service she has performed since July 31, 1967.

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[1] This action is in response to a request for an advance decision received from the Comptroller of the Department of the Navy.

[2] The officials refer specifically to 38 Comp. Gen 159 (1958); 41 Comp. Gen. 118 (1961); and B-147232, October 6, 1961.

Service Credit Under 10 U.S.C. § 676

As indicated, 10 U.S.C. § 676 authorizes reservists who have "qualified" for retired pay for non-regular service under 10 U.S.C. §§ 1331-1337 to be "retained" on active duty or in service in a reserve component, and provides that a reservist "so retained shall be credited with that service for all purposes."

We have held that this provision applies only to reservists who have met the qualifications for retirement under 10 U.S.C. §§1331-1337 but have not actually been retired, since a reservist following retirement cannot be "retained" on duty but can only be recalled to duty.[3] This is consistent with the fundamental rule that a fully executed military retirement order, if regular and valid, is final and can be reopened only upon a showing of fraud, mistake of law, mathematical miscalculation, or substantial new evidence of error.[4] Service members recalled to an active duty status following retirement cannot, for the purpose of obtaining retirement benefits for the additional active duty, have their original retirement orders superseded or cancelled by new "re-retirement" orders. Rather, if they are recalled to active duty following retirement they simply become eligible to elect recomputation of their retired pay under the appropriate formula prescribed by 10 U.S.C. § 1402.[5]

In the present case, there is no suggestion of irregularity in Admiral Hopper's original retirement, and there consequently appears no proper basis for canceling her original retirement orders on account of her subsequent recall to active duty or for any other reason. Also, she cannot properly be considered to have been "retained" in an active status during her retirement and the period when she was receiving retired pay, so that she may not be allowed retirement credit for her later active duty under the provisions of 10 U.S.C. § 676 as a reservist "retained" in active service. It is therefore our view that any retired pay benefits due to her based on that later active duty would be available to her, if at all, only through a recomputation of her retired pay under 10 U.S.C. § 1402.

Recomputation of Retired Pay Under 10 U.S.C. § 1402(a)

Provisions of law governing the recomputation of retired pay to reflect active duty performed after retirement are contained in 10 U.S.C. § 1402.[6] Subsection 1402(a) prescribe a recomputation formu-

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[3] See B-147232, October 6, 1961.

[4] See, e.g., 44 Comp. Gen. 258, 260 (1964); and 31 Comp. Gen. 296 (1952).

[5] See, e.g., 48 Comp Gen. 99 and 398 (1968); 43 Comp. Gen. 442 (1963); B-204055, May 17, 1982.

[6] 10 U.S.C. § 1402 applies to individuals who first became members of the uniformed services before September 8, 1980. Alternate computation formulas applicable to those who have become service members since that date are contained in 10 U.S.C. § 1402a.

la applicable to service members who retire and who thereafter serve on active duty (other than for training) for 6 months or more without incurring a physical disability during the later period of active duty. That formula provides for the recomputation of the service member's retired pay based on the monthly basic pay of the grade in which the member would be eligible to retire if he or she were retiring upon release from the later period of active duty. In the recomputation of their retired pay, that amount is multiplied by 2½ percent of the member's years of creditable service performed prior to retirement, plus the years of active service after retirement.[7]

The terms of 10 U.S.C. § 1402(a) do not exclude retired reservists from coverage, and the formula it contains is amenable for use in recomputing a reservist's years of service under the method prescribed by 10 U.S.C. § 1333. Nevertheless, in the decisions rendered in 1961 to which the Navy officials refer, we expressed the view that reservists could accrue no retired pay benefits based on active service they performed following their retirement.[8] This conclusion was not predicated on the terms of 10 U.S.C. § 1402(a), however, but was instead required by the language of 10 U.S.C. § 1334(b) then in effect which specifically directed that time spent after retirement or transfer to the retired reserve may not be credited in any computation of years of service under 10 U.S.C. §§ 1331-1337.

In 1962 the Congress deleted the prohibition contained in 10 U.S.C. § 1334(b) against reservists receiving retirement benefits for active service performed upon a recall to duty after their retirement.[9] The legislative history of the 1962 amendment reflects that it was "designed to compensate for the failure in the original military codification act to conform section 1334(b) of title 10 to its source law. This has resulted in the denial to members of the reserve components of credit in computing retired pay * * * for time spent on active duty after they have been granted retired pay * * *."[10]

The Congress thus amended 10 U.S.C. § 1334(b) in 1962 for the specific purpose of making reservists eligible for a recomputation of their retired pay if they are recalled to active service after being retired. The amending legislation removed the statutory basis for the conclusion reached in our 1961 decisions that reservists could receive no retired pay credits for active duty performed subsequent to their retirement. It follows that Admiral Hopper will be entitled to have her retired pay recomputed under the provisions of 10

[7] Navy officials indicate that Admiral Hopper plans to apply for a recomputation of her retired pay under subsection 1402(a), if she is eligible to do so, rather than under any of the alternative formulas provided by section 1402.

[8] See 41 Comp. Gen. 118, *supra*; and B-147232, *supra*.

[9] Public Law 87-651, § 108, September 7, 1962, 76 Stat. 506, 509.

[10] See S. Rep. No. 1876, 87th Cong., 2d Sess. 6, *reprinted in part in* 1962 U.S. Code Cong. & Ad. News 2456 (quoted material not included).

U.S.C. § 1402(a) when she leaves active duty, and in the recomputation she will be eligible to receive credit for the years of service she performed and the promotions she received following her retirement.

The question presented is answered accordingly.

[B-220809.2 et al.]

Contracts—Protests—Preparation—Costs—Noncompensable

Protester is not entitled to recover the costs of filing and pursuing its successful protest even though the General Accounting Office (GAO) recommended that the protested contracts be awarded to the protester and the protester did not receive the awards. The protester entered into a voluntary agreement with the agency whereby it waived its right to the contract awards in exchange for an alternative, mutually agreeable remedy, and under these circumstances, GAO finds that the protester has obtained a sufficient remedy and is entitled to no further recovery.

Matter of: Baurenovierungsgesellschaft, m.b.H., August 5, 1986:

Baurenovierungsgesellschaft, m.b.H. (BRG) requests recovery of the costs of filing and pursuing its successful protest against the Department of the Army's negative responsibility determinations under request for proposals (RFP) Nos. DAJA76-85-R-0411, DAJA76-85-R-0444, and DAJA76-85-R-0596. See *Decker and Co.; Baurenovierungsgesellschaft, m.b.H.*, B-220807 *et al.*, Jan 28, 1986, 86-1 CPD ¶100. We deny BRG's request.

In our prior decision, we found that the negative responsibility determinations were based on inaccurate and misleading information. Specifically, the negative preaward survey report relied on by the contracting officers did not disclose that the unsatisfactory performance cited in the report was that of Decker, an affiliated firm, rather than BRG's. We rejected the agency's assertion that it was reasonable to attribute Decker's performance to BRG because the two firms had common management and therefore were affiliates. We noted that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(d) (1984), provides that affiliated concerns normally are considered separate entities for purposes of responsibility, and we concluded that even if the firms were affiliates, affiliation *per se* did not provide a proper basis for a nonresponsibility determination. We also noted that the contracting officers clearly had never considered BRG's own record of performance in making their responsibility determinations for the protested contracts, but that when the agency later investigated BRG's record in connection with four other contracts, the firm was found responsible. Therefore, we sustained the protest. We recommended that the Army reconsider the nonresponsibility determinations based on accurate information. We also recommended that if BRG was found responsible, the protested contracts should be terminated and reawarded to BRG.

Generally, we will allow the recovery of the costs of filing and pursuing a protest, including attorney's fees, where the protester unreasonably is excluded from the procurement, except where we recommend that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e) (1986). BRG bases its request for recovery of its protest costs on two theories. The first of these is that our Office did not recommend that BRG receive the contract awards, but instead recommended that the nonresponsibility determinations be reconsidered. The second theory is that even though BRG was found responsible upon reconsideration by the agency, BRG in fact did not receive the contract awards.

We find no merit to BRG's contention that our recommendation was not a recommendation that BRG receive the contract awards. Although we did recommend that the agency first reconsider BRG's responsibility based on accurate information, as we specifically stated in a footnote to our recommendation, an affirmative responsibility determination is a prerequisite to any contract award. Accordingly, if a firm is reasonably found nonresponsible, it is not entitled to contract award in any event.[1] In other words, even in cases where the basic protest does not concern responsibility and we simply recommend that a protester receive the award, it must be understood that the recommendation is contingent upon the protester's first being found responsible. We therefore consider BRG's argument, that our recommendation was something other than that the BRG receive the contract award, to be clearly unreasonable.

BRG's second theory supporting its request for recovery of protest costs is that even though the agency did reconsider the firm's responsibility and reach an affirmative determination, BRG did not in fact receive the contract awards. While this theory appears on its face to be reasonable, the circumstances surrounding BRG's failure to receive the award are somewhat unusual. When these circumstances are taken into account, we conclude that the theory lacks merit.

After BRG filed its original protests with our Office, it also filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief (*Baurenovierungsgesellschaft, m.b.H.* v. *United States Department of the Army,* Civil Action No. 85-3835).[2] This action, which was still pending at the time of our decision on BRG's protest, was subsequently dismissed with prejudice pursuant to a settlement agreement between the parties. As part of the settlement, BRG agreed "to waive its rights to the

[1] Of course, a firm in that position could not then reasonably claim that it was entitled to recover its protest costs because it did not receive the recommended contract award.

[2] The lawsuit involved essentially the same issues as those raised in BRG's protest. We continued our consideration of the case because, in a stipulation approved by the court, the court indicated that it wanted our opinion. *See* 4 C.F.R. § 21.9(a).

[protested] contracts." In exchange, the Army agreed to award contracts to Decker under RFP Nos. DAJA76-85-R-0445 and DAJA76-85-R-0593. Decker previously had been found nonresponsible under these solicitations and had protested these determinations. We denied those protests in the same decision in which we sustained BRG's protests. See *Decker and Co. et al.*, B-220807 *et al.*, *supra*. It appears that, nevertheless, the Army changed its mind and reconsidered the nonresponsibility determinations regarding Decker, finding the firm responsible. In other words, in exchange for the award to Decker of the two contracts that Decker was not entitled to under our original decision, BRG agreed to waive its rights to the award of the contracts we recommended in that same decision.

As part of the settlement agreement, the Army also agreed to pay BRG's attorneys' fees and expenses incurred in bringing the civil suit. In addition, the parties agreed "that this settlement and dismissal . . . shall not, in any way, prejudice BRG's right to apply for, and obtain from the Department of the Army, pursuant to the Competition in Contracting Act and 4 C.F.R. § 21.6, payment of the attorneys' fees it incurred regarding its bid protests filed with the General Accounting Office [GAO]. . . ."

The Army argues that BRG's waiver of its rights to the contract awards under the protested procurements in return for the awards to Decker should preclude BRG's recovery of its protest costs. The Army notes that its contention that BRG and Decker are under common management apparently is correct and asserts that BRG is a beneficiary of the contract awards to Decker. In addition, the agency states that the language in the settlement agreement concerning BRG's right to pursue a claim for its protest costs was not intended to acknowledge any actual entitlement to such costs. Rather, it simply was recognition that the rules governing recovery of attorneys' fees in the District Court and before the GAO are different and that each proceeding should be treated as a separate matter.

BRG characterizes the agency's comment about the apparent correctness of its contention that BRG and Decker are under common management as "unjustified editorializing." BRG states that it entered into "arms-length negotiations with Decker, an independent company" only after the Army complained about the substantial costs it would have to pay in order to terminate the protested contracts and reaward them to BRG.[3] BRG also contends that the Army's position is a breach of its agreement that BRG was free to apply for and obtain payment of its attorneys' fees for the bid protest at GAO.

To the extent BRG is arguing that the Army is precluded from opposing the firm's request for recovery of its protest costs because

[3] The contracts protested by Decker apparently were still unawarded and thus not subject to the same basis for complaint.

of the language in the settlement agreement that there would be no prejudice to BRG's right to apply for and obtain such costs, we disagree. We think the agency's position concerning its intent is reasonable and we find that the language in question simply does not preclude the Army's opposition to BRG's request. Rather, we think the language merely indicates that the settlement agreement is not a bar to BRG's right to request a ruling concerning its entitlement to recovery of its protest costs.[4]

Concerning the effect of BRG's waiver of its right to the contract awards in exchange for the award to Decker, we note that neither the agency nor BRG has provided anything more than a cursory explanation of how this agreement came about. We do consider it significant, however, that there is no evidence that the Army either refused to follow our recommendation that the awards be made to BRG, or that BRG was in any way coerced into waiving its rights to the awards. In fact, the evidence in the record suggests that BRG was amenable to the arrangement and in fact did benefit from it.

Specifically, the agency has submitted a copy of an affidavit of the Army contracting officer who was given responsibility over the contracts challenged by BRG. The affidavit originally was taken in connection with BRG's civil suit. In the affidavit, the contracting officer states that he met with Mr. Liedtke and Ms. Martinez of BRG to discuss the settlement of their protest to GAO and the actions to be taken in response to the GAO decision. The contracting officer also states that he informed the BRG representatives that he had found BRG responsible for the contested contracts. He states that after some further general discussion, he informed the BRG representatives that the terminations would cost the Army $800,000 in fiscal year 1985 funds, and that funds for the award to BRG would come from "scarce" fiscal year 1986 funds.

At some point, according to the contracting officer, the conversation drifted into a "what if" mode:

> The question came up as to whether there were any other satisfactory resolutions to the situation other than terminating and reawarding the contracts. I do not recall who first posed this question. BRG expressed regret that the process was going to be so costly to the Government. I requested Mr. Liedtke to tell me if he couldn't perform and didn't want these contracts before we terminated them. He said he wished he had won on the Decker cases and then he would be in a better position to deal with the BRG cases. In this phase of the discussion the question of solutions other than terminating and awarding to BRG surfaced clearly. They were clearly interested in knowing what my latitude of action was and wanted to know if they could still be considered for the two Decker cases or if we could reach some

[4] BRG also argues that the agency cannot rely on the settlement agreement at all in opposing the firm's application for protest costs, and that we should render our decision without regard to the agreement. We find this position totally without merit since BRG's own argument, that it is entitled to recover its costs because it did not receive the contract awards, necessarily requires our consideration of the effect of the agreement. We can hardly overlook the fact that it is because of the agreement that BRG did not receive the awards.

settlement for costs on the BRG cases. I told them I didn't think I had much room to maneuver at this point but I said I would discuss it with my legal advisers.

Based on the information in the record, we think it is reasonably clear that the agreement between the Army and BRG was one that was viewed by the parties as mutually beneficial and that BRG's participation in it was arrived at freely. Further, we also think it is reasonably apparent that whatever the legal relationship between Decker and BRG may or may not be, at the very least, there is some mutuality of interest between the firms. This is supported by Mr. Liedtke's statement that he wished he had won on the Decker cases as he would then be in a better position to deal with the BRG cases, as well as his question concerning whether "they could still be considered for the two Decker cases." In addition, we note that it is Mr. Liedtke who the agency has alleged is the common management link between BRG and Decker, and BRG has admitted that Mr. Liedtke is the managing director and a shareholder of BRG, as well as the owner of Decker.

Under these circumstances, we do not consider BRG to be entitled to recovery of the costs of filing and pursuing its protest. The thrust of our regulation providing for the recovery of protest costs where the protester is unreasonably excluded from the procurement, except where we recommend that the contract be awarded to the protester and the protester receives the award, is that in cases where the protester obtains an award, the award is a sufficient remedy in itself. *See Federal Properties of R.I., Inc.*, B-218192.2, May 7, 1985, 85-1 CPD ¶508. In that same vein, although BRG did not actually receive the contract awards here, we think its interests have been sufficiently protected by the awards to Decker, in exchange for which BRG voluntarily agreed to waive its rights to the contract awards recommended in our decision. Cf. *The Hamilton Tool Co.*, B-218260.4, Aug. 6, 1985, 85-2 CPD ¶132 (where we recommended recompetition of a procurement under which the protester's proposal was improperly rejected, but denied recovery of protest costs even though other potential contractors benefited from the resolicitation, because we concluded that the protester's interest was sufficiently protected by our recommendation, so that there was no need to allow protest costs). While the extent to which BRG will derive any direct benefit from this arrangement is not clear, the record as least supports a conclusion that BRG considered the agreement to be in its own interest. We therefore find that BRG has obtained a sufficient remedy as a result of the settlement agreement and that the additional recovery of its protest costs is inappropriate.

Furthermore, we do not agree with BRG's implicit assertion that our Bid Protest Regulations should be interpreted to provide for the recovery of protest costs where a protester, such as itself, does not receive the contract award we recommended because it freely enters into an alternative agreement with the contracting agency.

In effect, BRG struck a bargain with the Army for a remedy different from the one recommended in our decision. Having done so, we are not persuaded that it has any basis for obtaining any further remedy from our Office.

We deny BRG's request for recovery of the costs of filing its protest, including attorneys' fees.

[B-223214]

Bids—Responsiveness—Failure to Furnish Something Required

Where a solicitation for surgical evacuators required bid samples to conform to the specifications listed in the solicitation, the agency properly rejected as nonresponsive a bid that was accompanied by a sample that did not meet those specifications. Moreover, the bid cannot be corrected after bid opening to make it responsive.

Matter of: Heritage Medical Products, Inc., August 5, 1986:

Heritage Medical Products, Inc. (Heritage), protests the Veteran Administration's (VA) decision to reject Heritage's bid under solicitation No. M1-83-86 for surgical wound evacuators. We deny the protest.

The solicitation provided that bid samples were required and would be evaluated to determine compliance with the characteristics listed in the bidding schedule. The solicitation also provided that failure of these bid samples to conform to the required characteristics would result in rejection of the bid. Included in the schedule description for the surgical wound evacuators was a requirement for a patient attachment clip. Although Heritage submitted the lowest bid, its bid sample did not contain the patient attachment clip and the VA, therefore, rejected Heritage's bid as nonresponsive.

Heritage challenges the VA's rejection of its product based on the potential savings to the government if the VA were to award the contract to the firm and has offered to supply a patient attachment clip at no charge. Heritage also believes that it should be awarded the contract because its product had been approved in previous dealings with the VA.

Where a solicitation lists definitive specifications and requires that bid samples strictly comply with those specifications, a sample that does not so comply renders a bid nonresponsive. *Cherokee Leathergoods, Inc.*, B-205960, Aug. 13, 1982, 82-2 C.P.D. ¶129. The failure of a bid with bid samples to meet salient characteristics is therefore a proper ground for bid rejection. *Easton Box Co.*, B-213423, Apr. 10, 1984, 84-1 C.P.D. ¶406. Here, the specifications required that the surgical evacuators include a patient attachment clip; Heritage's bid sample did not conform to the VA's specifications, and thus was nonresponsive.

It is not relevant that the VA could save money by accepting Heritage's bid and offer to furnish the clip. First, to permit a

bidder the opportunity to change, correct or explain a nonresponsive bid after bid opening would allow the firm to accept or reject the contract after bids have been exposed by correcting or refusing to correct the bid. *Sullair Corp.*, B-214121, Apr. 17, 1984, 84-1 C.P.D. ¶ 436. Thus, it is well-settled that a nonresponsive bid may not be corrected to make it responsive. *Id. Jewel Associates.*, B-213456, Mar. 20, 1984, 84-1 C.P.D. ¶335. Heritage therefore cannot cure its bidding deficiency through its post-bid-opening offer. Second, the possibility that the government might realize monetary savings if a material deficiency is allowed to be corrected or waived is outweighed by the importance of maintaining the integrity of the competitive bidding system. See *Lane Blueprint Co.*, B-216520, Oct. 23, 1984, 84-2 C.P.D. ¶454; *Union Metal Mfg. Co., Electroline Division*, B-209161, Nov. 2, 1982, 82-2 C.P.D. ¶402.

Heritage also asserts that its product had been approved in previous dealings with the VA. That Heritage's product may have been approved or purchased by the VA previously is irrelevant, however, since a bid has to be responsive to the particular solicitation to which it responds in order to be considered for award. Federal Acquisition Regulation, 48 C.F.R. §§14.301, 14.404-2 (1984).

The protest is denied.

[B-222616]

Contracts—Architect, Engineering, etc. Services—Procurement Practices—Brooks Bill Applicability—Procedures

Since the Brooks Act requires contracts with architect-engineer firms of demonstrated competence, and implementing regulations require agencies to consider past performance in terms of cost, quality of work, and compliance with performance schedules, protest based on failure of Commerce Business Daily request for expressions of interest to state that past performance will be evaluated is without merit.

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

When protesting architect-engineer firm proposes five individuals as key personnel, specialists, or consultants for a particular project, while awardee plans to do 100 percent of the work himself, agency's evaluation of top three individuals proposed by protester, rather than only one as for awardee, is not improper.

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

When selection criterion involving equitable distribution of architect-engineer contracts among small and minority business firms that have not previously had government contracts is no longer included in applicable regulations, consideration of this factor is not legally required.

Matter of: Tierra Engineering Consultants, Inc., August 12, 1986:

Tierra Engineering Consultants, Inc. protests the award of a contract for architect-engineer services to Claude A. Fetzer. The Bureau of Reclamation, Department of the Interior, selected Mr. Fetzer to analyze and assess the performance of existing embankment dams under solicitation No. 6-CA-81-08510, a small business set-aside.

Tierra, which initially protested to the agency, makes three broad allegations, all based on its debriefing. First, the protester alleges that the Bureau of Reclamation improperly evaluated responses to a Commerce Business Daily (CBD) request for expressions of interest in the procurement. Second, the protester alleges that the selection process favored current and previous contractors and did not attempt to distribute work equitably among small, minority business concerns such as itself. Third, the protester argues that the Bureau of Reclamation should have rejected Mr. Fetzer because he did not submit a required standard form 255, detailing his qualifications for this procurement.

We deny the protest.

Statutory and Regulatory Background

Procurements for architect-engineer services are conducted pursuant to the Brooks Act, 40 U.S.C. §§ 541-544 (1982), and the implementing Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 36.6 (1985). After publicly announcing a requirement, the contracting agency convenes an evaluation board that reviews performance data and statements of qualifications submitted in response to the announcement, as well as data already filed by firms that wish to be considered for architect-engineer contracts. The board must hold discussions with no less than three firms (known as the "short list"), then rank and submit their qualifications to a selection official, who determines the most highly qualified offeror. If the agency is not able to negotiate a satisfactory contract at a fair and reasonable price with the preferred offeror, it is required by statute to enter into negotiations with the second-ranked firm, and so on until an agreement is reached. See *Oceanprobe, Inc.*, B-221222, Feb. 26, 1986, 86-1 CPD ¶197.

CBD Announcement

In this case, the CBD request for expressions of interest, published October 18, 1985, stated that the Bureau of Reclamation would award an indefinite quantity contract for an initial and 2 option years. Under the contract, the agency will issue delivery orders directing the successful architect-engineer firm to assess in-

strumentation data and programs for specific dams and to present conclusions regarding their performance.

The request for expressions of interest listed selection criteria as including, in descending order of importance, (1) qualifications of personnel and (2) past experience involving embankment dams. It referenced CBD Note 63, which states that architect-engineer firms that meet the requirements in a particular announcement are "invited to submit" standard form 254 (Architect-Engineer and Related Services Questionnaire) and standard form 255 (Architect-Engineer and Related Services Questionnaire for Specific Project), and any requested supplemental data. The note further states that selection of a firm for negotiation shall be based on "demonstrated competence and qualifications necessary for the satisfactory performance of the type of professional services required, including any special qualifications required by the procuring agency."

Evaluation of Responses

In debriefing Tierra, the Bureau of Reclamation provided the firm with a blank copy of the evaluation sheet that it had used to select a short list of 5 firms (out of 26 expressing interest) with whom to conduct discussions. This form provided for assessment of technical qualifications and past performance of the engineers that each offeror proposed for the project.

Individuals were rated on a scale of 100, as follows:

Criterion	Maximum points
A. Technical Qualifications	
1. Experience in analysis of embankment dam performance based on instrumentation data	25
2. Experience with embankment dam instrumentation systems and equipment	20
3. Experience in the design, analysis, modification, inspection, and/or rehabilitation of embankment dams	20
4. Educational and professional background	10
B. Past Performance on Contracts	
1. Contracting experience	10
2. Quality of performance	15

Evaluators then multiplied each engineer's total point score by the percentage of work to be performed by that individual. Except for the awardee, as discussed below, or other individuals whom offerors indicated would perform a specific portion of the work under the contract, evaluators selected the top three proposed by the offeror, assumed that each would perform one-third of the work, and

averaged their scores to obtain a numerical rating. Under this scheme, Mr. Fetzer was found most highly qualified; he received almost twice as many points as Tierra, which ranked 14th among offerors.

Tierra's Protest

Allegedly Improper Evaluation

Tierra contends that the evaluation was improper because past performance was not listed as a criterion in the CBD request for expressions of interest. According to Tierra, the agency awarded points for quality of performance only if the offeror had previously performed Bureau of Reclamation contracts or included in its expression of interest testimonials from other previous employers. The fifth-ranked firm received 4 points because it did provide such a testimonial; this firm would not otherwise have been included on the short list.

The Bureau of Reclamation responds that it encountered considerable difficulty in evaluating quality of past performance without relying on the personal knowledge of evaluators or considering information other than that submitted by offerors. It therefore gave 0 points, indicating satisfactory past performance, to all but the one offeror that provided a laudatory letter from another federal agency.

We do not find the evaluation improper in this regard. The Brooks Act requires contracts with architect-engineer firms of demonstrated competence. 40 U.S.C. § 542. Note 63 of the CBD also refers to demonstrated competence. In addition, the FAR requires agencies, in selecting architect-engineer firms, to consider past performance on contracts with government agencies and private industry in terms of "cost control, quality of work, and compliance with performance schedules." 48 C.F.R. § 36.602-1(a)(4). Offerors therefore are charged with at least constructive knowledge of this criterion, and Tierra cannot argue that it was unaware of it or that the Bureau of Reclamation may not consider past performance. See *Tri-State Laundry Services, Inc.*, B-218042, Feb. 1, 1985, 85-1 CPD ¶ 127, *aff'd on reconsideration*, Mar. 11, 1985, 85-1 CPD ¶ 295.

In addition, we believe that past performance is reasonably related to the evaluation criterion announced in the CBD, i.e., past experience on embankment dams. An unstated criterion may be applied if it is reasonably related to or encompassed by a stated criterion. See *Oceanprobe, Inc., supra.*

While it might have been preferable for the Bureau of Reclamation to advise offerors specifically that it wished them to demonstrate the quality of performance on past contracts, the agency was not required to go outside offerors' submissions for this information. *FACE Associates, Inc.*, 63 Comp. Gen. 86 (1983), 83-2 CPD ¶ 643. Since the Bureau of Reclamation received 26 expressions of

interest, we believe it reasonably concluded that it would be too much of a burden to contact agencies or private industries for whom offerors had previously performed.

Tierra alleges that evaluators' personal knowledge of the awardee's performance may be reflected in their selection. There is no support for this allegation in the record; Mr. Fetzer and all but one firm on the short list also received 0 points for quality of past performance. Tierra has the burden of proving bias on the part of evaluators, *Power Line Models, Inc.*, B-220381, Feb. 28, 1986, 86-1 CPD ¶ 208, and it has not done so here.

Tierra further contends that the agency improperly evaluated the qualifications of a different number of engineers for different offerors. Tierra apparently was told during its debriefing that while the embankment dam experience of two of the engineers whom it proposed for the project was highly regarded, that of the third was considered weak.

The Bureau of Reclamation responds that the awardee, a consulting geotechnical engineer, will perform 100 percent of the work himself; therefore he was evaluated on that basis. The agency defends its evaluation of the top three individuals proposed by Tierra and other firms as the only way it could treat offerors equally.

We do not find this aspect of the evaluation unreasonable. Again, it might have been preferable for the Bureau of Reclamation to asks offerors themselves to estimate the percent of work to be done by proposed engineers, rather than make assumptions. However, the record shows that Tierra submitted information on five different individuals in that section of its standard form 255 where it was asked to list "key personnel, specialists, and individual consultants anticipated for the project." Tierra identified the two engineers whose experience was favorably evaluated as its proposed project manager and assistant project manager. The third individual, who was evaluated as having no experience with embankment dams, was specifically identifed by Tierra as a geologist who would be working on the project.

The Bureau of Reclamation states that if Tierra and other offerors had been rated only on the experience of their two top engineers, Tierra would still not have been included on the short list. Rather, the protester would have tied with two other offerors for sixth place in the evaluation. Thus, Tierra was not prejudiced by the allegedly deficient evaluation. See *Y.T. Huang & Association, Inc.*, B-217122 *et al.*, Feb. 21, 1985, 85-1 CPD ¶ 220, *aff'd on reconsideration*, B-218310 *et al.*, Apr. 4, 1985, 85-1 CPD ¶ 392.

Bias Toward Known Contractors

Tierra contends that the selection process favored current and prior contractors. It supports this allegation by pointing out the number and dollar volume of Bureau of Reclamation Contacts

awarded to one firm under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (1982). This particular procurement, while set aside for small business, was not conducted pursuant to section 8(a). Tierra is therefore not entitled to any preference as a minority firm, *Y.T. Huang & Assoc., supra*, and the evidence concerning contracts awarded to one 8(a) firm is not relevant here.

Tierra apparently believes there should be an equitable distribution of architect-engineer contracts among small and minority business firms that have not previously had government contracts. There is no current regulatory policy on this matter. The Defense Acquisition Regulation, § 18-402.1(v) (DAC 76-31, Oct. 30, 1981), formerly included such a policy, but the superseding FAR section, 48 C.F.R. § 36.601, does not include this consideration. Compare *Dhillion Engineers*, B-209678, Mar. 16, 1983, 83-1 CPD ¶ 268; *R. Christopher Goodwin & Assoc., et al.*, B-206520, Nov. 5, 1982, 82-2 CPD ¶ 410 (both involving an equitable distribution criterion). Thus, the basis for selection now is strictly which architect-engineer firm is most highly qualified. 40 U.S.C. § 543; 48 C.F.R. §§ 36.602-1, 36.602-4.

Requirement for Standard Form 255

Finally, Tierra urges that the Bureau of Reclamation should have rejected the awardee for failure to submit information as to his qualifications for this procurement on standard form 255. The agency responds that the FAR, 48 C.F.R. § 36.702(b), limits the requirement for standard forms to architect-engineer services for the "construction, alteration, or repair of real property." The agency argues that the awardee here will analyze and assess the performance of embankment dams, based on instrumentation data, rather than construct, alter, or repair the dams. The agency adds that it is its policy not to reject expressions of interest for failure to submit the standard forms, but rather to accept any response that provides the necessary information concerning an offeror's qualifications.

We do not find the failure to submit a standard form 255 fatal to the awardee. This was a negotiated procurement, so the concept of immediate rejection of an offeror as nonresponsive is not applicable. See, e.g., *Fort Wainwright Developers, Inc., et al.*, B-221374, *et al.*, May 14, 1986, 65 Comp. Gen. 573, 86-1 CPD ¶ 459. We also note that Note 63 of the CBD states that offerors are invited to submit the standard forms, not that they are required to do so.

We have reviewed Mr. Fetzer's expression of interest, provided as part of the protest record, and find that it contains information concerning his experience in evaluation of instrumentation data on embankment dams, including copies of the articles from professional journals and papers presented at international conferences. So long as the Bureau of Reclamation had sufficient information on which to make a reasonable determination as to which offeror was

most highly qualified, we do not believe that the agency was required to reject the awardee for failure to complete a standard form 255.

Conclusion

Our review of the selection of architect-engineer contractors is limited to an examination of whether the agency's determination was reasonable; we will question the selection only if the protester shows that it was arbitrary. *Mounts Engineering,* B-218489.4, Apr. 14, 1986, 65 Comp. Gen. 476, 86-1 CPD ¶358. We conclude that the Bureau of Reclamation's selection here was reasonable; Tierra has not shown it to be arbitrary.

The protest is denied.

[B-219140]

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

Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 assume risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work by charging losses to the Arsenal's industrial fund overhead account since claims made pursuant to 31 U.S.C. 3721 are properly chargeable to the appropriation for "Claims, Defense" and may not be charged to some other fund or appropriation. Charging them to industrial fund's overhead account would result in their payment from another appropriation.

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

Watervliet Arsenal, Department of the Army, may not under 31 U.S.C. 3721 purchase insurance to pay claims for loss or damage to employee-owned tools or tool boxes used on the Arsenal's premises in the performance of Government work and charge the cost of premiums to the industrial fund as an operating expense since claims for loss of employee-owned property incident to service in the absence of any other law is for consideration under 31 U.S.C. 3721 and payment warranted must be charged to the "Claims, Defense" appropriation.

Property—Private—Damage, Loss, etc.—Personal Property—Claims Act of 1964

We recommend Watervliet Arsenal, Department of the Army, seek a reconsideration of the determination by the U.S. Army Claims Service that losses of employee-owned tools may not be paid under authority of 31 U.S.C. 3721 since it involves the refusal of the Army to hear an entire class of claims based upon a policy determination that has as far as we can determine never been officially adopted or endorsed by the Department of the Army.

Matter of: Request for Advance Decision Concerning Loss or Damage to Personally-Owned Tooling, August 13, 1986:

This advance decision is in response to a request from Earl T. Hilts, Counsel, Watervliet Arsenal, Department of the Army (submitted on behalf of the Comptroller) asking:

—Whether the Army may assume the risk of loss or damage to employee-owned tools or tool boxes used on the Arsenal's

premises in the performance of Government work, by charging losses to the Arsenal's industrial fund overhead account.
—Whether the Arsenal may purchase private insurance and charge the cost as an operating expense to the Arsenal's industrial fund.

For the reasons given below, we answer both questions in the negative. However, we also recommend that the Arsenal seek a review of the position of the U.S. Army Claims Service on the compensability of this class of claims.

Background

The submission indicates that the Watervliet Arsenal has for decades required some production shop employees to provide a small complement of employee-owned hand tools to perform their required duties.[1] In the past, claims for lost, stolen, or damaged employee-owned property were processed under 31 U.S.C. § 3721 (1982), popularly referred to as the Military Personnel and Civilian Employees Claims Act of 1964. However, by letter of February 27, 1985, Colonel James McCune, Command Staff Judge Advocate/ Deputy Command Counsel, U.S. Army Materiel Command, Department of the Army, notified all Army Materiel Command Legal Offices that payments of claims for lost or stolen employee-owned tools and equipment used in the performance of official duties and stored in Army facilities would be improper, based on a decision rendered by the U.S. Army Claims Service. The Colonel's letter points out that the basis of the Army Claims Service's opinion is:

> The Government is responsible to provide its employees with the tools necessary to perform their duties. Employees should not be required or encouraged to bring their personal tools to work. The payment of claims for lost personal tools would constitute improper use of the DOD Claims Appropriation to fund operational requirements.

The Colonel's letter then goes on to advise claims officers to ensure that these claims not be adjudicated as proper for payment and also advises that:

> Just as important is the necessity to ensure that the tool owner is apprised of the fact that a potential claim for loss or damage to his privately owned tools used in the course of official duties may be denied. It is suggested that a notice be published periodically in the installation, unit, or command bulletin or other locally generated information media.

We have been informally advised by two officials of the Arsenal that its agreement with the employee's union contains a "past practice" provision to the effect that nothing in the agreement should be considered as superseding existing management-employee practices and relationships at the Arsenal except as specifically provided in the agreement. These officials also advised us that

[1] The Arsenal produces large artillery and tank cannon components and maintains a vast inventory of special tooling, gauges and measuring instruments. The employees are required to provide basic items such as rulers, wrenches, pliers, measuring tools and tool boxes.

nothing in the agreement addresses the matter of whether employees are required to furnish their own tools or, if they do, whether the Army would hear employee claims for losses submitted under 31 U.S.C. § 3721. However, it was indicated that this has been the practice for quite some time on both these matters. We have also been informally advised that the Arsenal has not provided the employees the tools in question and employees continue to use their own tools.

The Arsenal's Counsel point out that the estimated cost to the Arsenal to purchase the tools and tool boxes now provided by the employees would be in excess of $315,000 and that this figure does not include any costs for the development of the administrative system to issue, record and control the tool sets, or the costs of the personnel dedicated to managing this responsibility.[2] On the other hand, the Arsenal's Counsel points out that claims for lost, stolen or damaged employee-owned tooling processed under 31 U.S.C. § 3721 totaled only $4,100 in the previous 5½ years. Thus the Arsenal would like to find some way to continue to permit employees to use their own tools and to pay claims for theft or damage to employee-owned tools when appropriate.

Discussion

The submission indicates that claims for employee-owned tools and tool boxes previously have been processed under 31 U.S.C. § 3721, which provides that:

> (b) The head of an agency may settle and pay not more than $25,000 for a claim against the Government made by a member of the uniformed services under the jurisdiction of the agency or by an officer or employee of the agency for damage to, or loss of, personal property incident to service. A claim allowed under this subsection may be paid in money or the personal property replaced in kind.

Usually claims presented under authority of 31 U.S.C. § 3721 are paid from the operating appropriations available to the agency whose activities gave rise to the claim since, as a general rule, the Congress does not establish a specific fund for payment of these types of claims by agencies. *See* B-174762, January 24, 1972. However, in the present case, all noncontractual claims against the Department of Defense, as authorized by law (other than claims relating to civil functions), are to be paid out of annual appropriations to the Department of Defense for "Claims, Defense." This account represents the consolidated requirements of the Secretary of Defense and the Departments of the Army, the Navy, and the Air Force. *See* S. Rep. No. 99-176, 99th Cong., 1st Sess. 83 (1985), accompanying H.R. 3629, the Department of Defense Appropriation Bill, 1986, which was enacted into Public Law No. 99-190, December 19, 1985, 99 Stat. 1185.

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[2] Such costs would be absorbed in the overhead account and passed on to its customers. *See* 10 U.S.C. § 2208.

As a general rule of appropriation construction, when an appropriation has been made for a specific purpose (among others), no other appropriation which might otherwise be considered available for the same purpose may be used instead, even if the proper appropriation is exhausted or unavailable in a particular case for some other reason. *See, for example,* 31 Comp. Gen. 491 (1952).

Although the Arsenal's industrial fund is charged with paying most of the costs incurred in operating the Arsenal, which are then reimbursed pursuant to an agreement by industrial fund customers from their own appropriations,[3] claims by employees for lost or damaged tooling presented pursuant to 31 U.S.C. § 3721 are noncontractual in nature. Payment, if authorized, is properly chargeable only to the appropriation for "Claims, Defense". Consequently, the Arsenal is not authorized to make payment of these claims from the industrial fund and charge them as overhead. Thus the first question is answered in the negative.[4]

Regarding the purchase of insurance, we note that the Government generally assumes the risk of loss for actions of its employees resulting in damage or loss of property. This is known as the rule on self-insurance, a rule founded on the policy:

> * * * that it does not make economic sense to expend appropriated funds for the purchase of insurance to cover loss or damage to Government-owned property or for the liability of Government employees for damage to someone else's property. The extent of the Government's resources is generally sufficient to absorb such a loss or liability should the contingency actually occur. *See* B-158766, February 3, 1977; 19 Comp. Gen. 798, 800 (1940) * * *. 63 Comp. Gen. 110, 113 (1983).

Under the self-insurance concept, claims settled under 31 U.S.C. § 3721 are to be paid from the appropriation available for that purpose and the agency is precluded from purchasing insurance to cover such claims. Where the agency has decided not to hear the claim or that the claim does not merit payment under 31 U.S.C. § 3721, then it has decided that either there should be no risk to the Government or even where there is a risk, the claim is meritless. In either case, the agency cannot purchase insurance to cover these types of claims since it would be doing indirectly through insurance what it has determined it would not do directly through settling the claim under 31 U.S.C. § 3721.

Therefore, the Arsenal may not purchase insurance to cover risks of loss to employee-owned property occurring incident to service and charge it to the industrial fund operating expense account

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[3] *See* Department of Defense Regulation entitled "Industrial Fund Operations", DOD 7410.4-R., chapter 4, Section H (April 1982).

[4] We note that the arsenal has not suggested that it may settle the claims in question under 31 U.S.C. § 3721 and charge the payment against the "Claims, Defense" appropriation account itself. Whether the Arsenal has this authority is doubtful. Army Regulation (AR) 27-20, chapter 11 sets forth criteria for settling claims under 31 U.S.C. § 3721 and delegates authority to various specific officials of the Department of the Army to settle these claims. We do not think that an official of the Arsenal is included. *See for example,* AR 27-20 paragraphs 11-4 and 11-45. *See also* AR 27-20 paragraph 1-3. For these reasons we are not advancing this as an option for resolving the Arsenal's dilemma.

since any payments under 31 U.S.C. § 3721 must be paid out of the appropriation available for this purpose, in this case "Claims, Defense". The second question is therefore answered in the negative.

Recommendation

We recommend that the Arsenal seek a reconsideration of the position expressed by the U.S. Army Claims Service as to the compensability of this class of claims. Generally, whether a particular claim is payable under this provision of law is within the administrative discretion of the agency concerned and not reviewable by this Office. However, we have also held that the concept of administrative discretion does not permit an agency to refuse to hear all claims filed by its employees under the act. While we will not tell an agency how to exercise its discretion, in our opinion, it does have a duty to exercise its discretion. See 62 Comp. Gen. 641 (1983). While the present situation does not involve the Army's refusal to hear *all* claims under the law, it does involve the refusal of the Army to hear an entire class of claims based on a policy determination that has as far as we can determine from the submission, never been officially adopted or endorsed by the Department of the Army.

While employees could not be *required* to provide their own tools for Army's work, there is no question that the Army could, if it chooses, either permit or prohibit the *voluntary* use of personally-owned tools by employees. Similarly, Army could have prohibited its component organizations from agreeing to the use of employee-owned tools pursuant to a union agreement or otherwise. To permit such use is tantamount to agreeing that the Army considers the tools to be used for the Army's benefit ("incident to service") and that, especially in view of the apparent past practices, it will consider any losses incurred for payment under 31 U.S.C. § 3721. Consequently, any change in Army policy on this issue should be prospectively applied from the date that the Army notifies its employees by regulation or other written document, that they are prohibited from further use of their own tools in performing Government work.

As indicated earlier, it is our understanding that at Watervliet employees have for many years been required or permitted to use their hand tools, and claims for loss or damage to these tools have been considered and paid under 31 U.S.C. § 3721 at least for the past 5½ years. This raises another question about the application of the Claims Service opinion to currently pending claims. If this is in fact the "past practice" at Watervliet, there is a question as to whether the "past practice" provision in the applicable labor-man-

agement agreement has effectively limited the discretion that Army might otherwise have had.[5]

Should the Claims Service affirm its prior position, the Army must determine (a) precisely what the "past practice" at Watervliet was, and (b) whether a refusal to consider claims during the life of the current labor-management agreement would violate that agreement. If it is determined that the "past practice" provision applies, then the Claims Service's decision with respect to Watervliet (and similarly situated installations) should be deferred until expiration of the present union agreement, and an appropriate provision disavowing the past practice should be included in future agreements.

[B-219474]

Payments—Prompt Payment Act—Interest Payment

Provision in interagency agreement between Federal Emergency Management Agency (FEMA) and General Services Administration (GSA) required FEMA to reimburse GSA for "expenses incurred by GSA in providing the requested assistance." Under this provision, FEMA should reimburse GSA for interest penalties incurred under Prompt Payment Act, since late payment interest is an ordinary business expense and thus within scope of reimbursement provision. 63 Comp. Gen. 338 (1984) distinguished.

Matter of: Liability for Prompt Payment Interest Penalties Under Interagency Agreement, August 18, 1986:

In separate submissions, officials of the Federal Emergency Management Agency (FEMA) and the General Services Administration (GSA) have sought our opinion regarding which agency is ultimately liable for late payment interest penalties owed to a private contractor under the Prompt Payment Act. The contract under which these interest penalties were incurred was executed by GSA on behalf of FEMA, pursuant to an interagency agreement between the two agencies. For the reasons given below, we find that FEMA must reimburse GSA for the interest penalties at issue.

Background

Under the Disaster Relief Act of 1974, GSA and FEMA entered into an interagency agreement intended to assist FEMA in carrying out its responsibilities in the event of a disaster. In that agreement, GSA agreed to provide various services at FEMA's request. The relevant portion of the interagency agreement states:

[5] It is settled that an agency can limit its discretion by regulation. *Service* v. *Dulles*, 354 U.S. 363 (1957); *Accardi* v. *Shaughnessy*, 347 U.S. 209 (1954); *California Human Development Corp.* v. *Brock*, 762 F.2d 1044, 1049 (D.C. Cir. 1985); *Criffin* v. *United States*, 215 Ct. Cl. 710 (1978); B-202039, May 7, 1982. It should follow that it can do the same by contract.

III. Provision of Administrative Services by GSA

GSA, upon the request of [FEMA], shall provide a full range of administrative services and materials in order to support the disaster field operation. These services ordinarily shall include:

. . . . . .

E. *Procurement support.* This will be provided in accordance with GSA procurement regulations * * * which provide for appropriate waivers from 'sole source' restrictions in emergency or disaster situations. It is understood that GSA Contracting Officers will perform this function and frequently the services will be required at the disaster field location.

In return for GSA's assistance, Part V of the agreement provides:

C. *Reimbursement.* Expenses incurred by GSA in providing the requested assistance * * * shall be reimbursed [by FEMA] and shall be applicable to both emergencies and major disasters.

According to the submissions, pursuant to the interagency agreement, GSA entered into a contract with a private contractor named Wholesale Distribution. Apparently due to administrative error on the part of GSA, the contractor was not paid in a timely fashion and filed a claim for interest penalties under the Prompt Payment Act. GSA billed FEMA for the interest penalties incurred in this case. FEMA, citing 63 Comp. Gen. 338 (1984) as support, has disputed its liability, arguing that the penalties were incurred due to administrative error on the part of GSA, a matter over which it has no control.

When we received these requests, we requested comments from the Office of Management and Budget (OMB). OMB advised us that in its opinion, FEMA must accept responsibility for the payment of interest penalties resulting from contracts executed by GSA under the interagency agreement. Nevertheless, OMB added that GSA should take whatever actions are necessary to "eliminate inefficient and ineffective procedures" that may have caused the late payments and interest penalty charges in this case.

Discussion

The Prompt Payment Act, 31 U.S.C. ch. 39 (1982), generally requires a Government agency to pay "interest penalties" when it fails to make timely payment for goods or services. Interest penalties are to be paid "out of amounts made available to carry out the program for which the penalty was incurred." 31 U.S.C. § 3902(d). GSA and OMB construe this language to mean that FEMA, as the agency whose programs were being implemented (with the assistance of GSA), must be liable for the interest penalties incurred in this case. There is, however, as FEMA points out, no "privity" between FEMA and the GSA contractor. In other words, the contractor lacks any basis on which to press a claim against FEMA because it has no contractual relationship with FEMA. *Cf.* 63 Comp. Gen. at 340. Moreover, as FEMA argues, the agreement did not call upon GSA to deal with contractors in an untimely fashion. There-

fore, since late payments occurred through the fault of GSA, FEMA argues GSA must bear the costs.

Nevertheless, we agree with GSA and OMB that FEMA must bear the ultimate liability for the interest penalties incurred in this situation. As quoted above, the agreement provides that FEMA will reimburse GSA for "[e]xpenses incurred by GSA in providing the requested assistance * * *." This language should be construed, according to its plain, ordinary meaning, to contemplate ordinary business expenses that might be incurred in performing the obligations described in the agreement. Interest on a late payment is in the nature of an ordinary business expense. As such, we think it falls within the scope of the reimbursement provision of the agreement.

FEMA's reliance on our decision in 63 Comp. Gen. 338 is misplaced. In that decision we noted that even though the Department of Treasury was "at fault" in failing to issue a check to a contractor within the contractually stipulated discount period, the contracting agency would have to bear the cost of the lost discount because Treasury did not have a contractural relationship with the contractor. The decision noted parenthetically that most of the services there at issue were acquired before passage of the Prompt Payment Act and therefore did not discuss the Act's provisions. In this case, as in 63 Comp. Gen. 338, the contracting agency is obligated to pay additional amounts to the contractor for untimely payments. However, the difference between the two cases is that FEMA agreed to reimburse GSA for its expenses. There was no such agreement in the earlier case and therefore no obligation on the part of Treasury to reimburse the contracting agency.

In view of the foregoing, we conclude that FEMA, under the agreement, must reimburse GSA for the interest penalties incurred in this case.

[B-221191]

Appropriations—Availability—Educational Programs

General Accounting Office (GAO) will not question HUD's use of appropriated funds to obtain a certificate of authority to grant continuing education credits to attendees of seminars HUD conducts, provided HUD administratively determines such expenditure constitutes a necessary expense.

Matter of: Continuing Education Credits to Attendees of HUD's Real Estate Seminars, August 18, 1986:

The Director of the Office of Finance and Accounting, Department of Housing and Urban Development (HUD) requests an advance decision as to whether HUD may pay the State of California $500 for a certificate authorizing HUD to grant continuing education credits incident to certain seminars it conducts. Consistent with our discussion below, we will not question the proposed expenditure.

Recently, HUD officials in California have conducted training seminars for real estate professionals on the subject of HUD's programs and procedures. In order to increase attendance at these seminars, HUD wishes to apply to the State of California for authority to grant continuing education credits to attendees. The credits could be used to meet California's real estate licensing requirements. California's 2-year certificate of authority to grant such credits would cost HUD $500.

HUD officials ask whether the proposed expenditure may properly be made from HUD's appropriated funds. They acknowledge that since the seminar is designed for real estate professionals, HUD would essentially be spending appropriated funds in order to confer a private benefit on select non-Government employees, i.e., those who attend the seminars. Nonetheless, HUD officials suggest that granting the credits "would not only increase attendance [at the seminars], but would increase business for HUD programs and disseminate more current information into the real estate field which would assist HUD in carrying out its mission."

The letter of request from HUD's Office of Finance and Accounting does not identify any specific source of authority under which the training seminars are conducted. Accordingly, we must assume the seminars are conducted pursuant to HUD's general authority "to encourage private enterprise to serve as large a part of the Nation's total housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department." Pub. L. No. 89-174, 79 Stat. 667, 668 (1965) (codified at 42 U.S.C. §3531 (1982)). We were informally advised that the account to be charged with the proposed expense would be HUD's "Management and Administration" account. This account provides for "necessary administrative and non-administrative expenses of the Department of Housing and Urban Development." Pub. L. No. 99-160, 99 Stat. 914 (1985).

Except as otherwise provided by law, appropriations may be used only for the objects for which they were made. 31 U.S.C. § 1301(a) (1982). A well-established corollary to this rule is that an appropriation confers authority to incur expenses which are necessarily incident to achieving an authorized objective. B-211531, July 18, 1983; 6 Comp. Gen. 619 (1927). In this context, we have construed the term "necessary expense" to be a "current or running expense of a miscellaneous character arising out of and directly related to the agency's work." 52 Comp. Gen. 504, 505 (1973).

An agency has considerable discretion in determining how it will achieve the objects of its appropriations. Accordingly, GAO will grant substantial deference to an agency's administrative determination that a given expenditure consititutes a necessary expense. 63 Comp. Gen. 110 (1983); B-130053, Dec. 20, 1956.

In the present case, it appears that HUD's activities in actually conducting the seminars are directly related to the statutory au-

thority directing HUD's interaction with the private sector. *See* Pub. L. No. 89-174, *supra*. In view of this, we cannot conclude that the cost of providing continuing education credits to seminar attendees is so removed from the agency's mission as to preclude it from constituting a necessary expense.

Accordingly, if HUD administratively determines that the cost in question is a necessary expense, we will not question the expenditure.

[B-221698]

Vehicles—Rental—Damage Claims

An Army employee was authorized to rent a car for use with other employees while on temporary duty in Germany. A tire on the rental car was damaged while being driven to the duty assignment and the gas cap was stolen from the car while parked. Under the rental agreement, the employee was required to reimburse the rental company for any tire damage and any other damage not caused by accidents. Since the damages occurred while the vehicle was being used for official business, he may be reimbursed for the expenses.

Matter of: Louis G. Fiorelli, August 18, 1986:

An Army employee was authorized to rent a car for his use together with other employees while on a temporary duty assignment in Germany. While the rental car was being driven to the temporary duty site, the tire on the car was severely damaged by a sidewall tear. Further, the gas cap was stolen while the car was parked on an American Army base. We are asked whether the Government may reimburse the employee for the amounts paid to the rental company for the tire damage and stolen gas cap.[1] We conclude that payment may be made since the damages occurred while the vehicle was being used for official business.

Mr. Louis G. Fiorelli, an Army employee, was ordered to perform temporary duty to support operations in Heidelberg, Germany. Mr. Fiorelli was authorized a rental car on his travel orders for his use together with other Army employees while on the assignment.

Mr. Fiorelli rented a car from Eurorent Rent a Car, Frankfurt, Germany, on September 10, 1985. Mr. Fiorelli declined the collision damage waiver, which was offered under the car-rental contract for an additional fee to relieve the renter for damages caused by accidents only to the rented vehicle. Further, the rental agreement specified that any tire damage would be at the hirer's expense.

On September 21, 1985, Mr. Fiorelli passed through a construction site in Heidelberg on a one lane road where a pipe welded to a workman's sign sticking from the curbside struck his tire, causing a tear in the sidewall. He was required by the rental company to pay $80 for the cost of a new tire. He was also required to pay

[1] Mr. Paul J. Dominick, Finance and Accounting Officer, Headquarters, Tobyhanna Army Depot, Tobyhanna, Pennsylvania, submitted the request for a decision and it has been assigned control number 86-2 by the Per Diem, Travel and Transportation Allowance Committee.

$13.80 for a new gas cap to replace the gas cap stolen from the rental car while he was at dinner in an Army base in Heidelberg. Mr. Fiorelli paid the usual rental charges and has been reimbursed. He has submitted his claim for $93.80, the amount he became contractually obligated to pay the rental company and paid from personal funds.

The submission states that costs for maintenance and operation of rental vehicles are usually limited to gasoline and oil, garage rent, hanger or boathouse rent, and similar expenses by Volume 2, Joint Travel Regulations, paragraph C4702, and questions whether tire damages required to be paid by the employee under the rental agreement may be reimbursed. Further, they question whether payment for the gas cap is a non-collision loss covered by the renter's comprehensive policy.

Mr. Fiorelli was authorized the use of the rental car as advantageous to the Government by his travel orders. Our review of the record indicates that no insurance covered the losses for which Mr. Fiorelli was required to pay the rental company. Since the car was being used for official travel when the tire damage occurred and the gas cap was stolen, Mr. Fiorelli may be reimbursed the $80 for tire damage and $13.80 for the gas cap he was required to pay the rental company. 47 Comp. Gen. 145 (1967).

Accordingly, the voucher submitted with the claim is returned to the finance officer for payment.

[B-221982]

Equal Employment Opportunity—Commission—Authority—Judgment Payments

The Equal Employment Opportunity Commission (EEOC) is not required to withhold employee payroll taxes or pay employer excise taxes under the Railroad Retirement Tax Act, 26 U.S.C. 3201-3233, when it distributes judgment proceeds to the employees of railroad companies unless provided for in the judgment.

Appropriations—Availability—Expenses Incident to Specific Purposes—Necessary Expenses

The Equal Employment Opportunity Commission (EEOC) appropriation is not available to pay employment taxes on amounts distributed to employees from back pay judgments paid to the EEOC in enforcement actions brought by the EEOC. Appropriations can be used only for their intended purposes. Payment of these taxes cannot be viewed as a "necessary expense" under EEOC's appropriations because it would not contribute to fulfilling the purposes for which those appropriations were made.

Matter of: Equal Employment Opportunity Commission—Withholding of Taxes From Judgments, August 18, 1986:

The Equal Employment Opportunity Commission (EEOC) has requested our decision on whether the EEOC may pay certain employment taxes from its appropriated funds. The Internal Revenue Service (IRS) has determined that under the Railroad Retirement

Tax Act, 26 U.S.C. §§ 3201-3233 (1982) (RRTA), the EEOC must pay employer excise taxes, and should have withheld employee payroll taxes, on judgment proceeds it distributed to 220 former employees of 2 railroad companies. The proceeds were deposited with the EEOC when it settled an age discrimination case against those companies. We hold that the EEOC is not required to withhold employee taxes when the judgment involved does not provide for withholding. We also hold that the EEOC's appropriations are not available to pay either tax.

Statement of Facts

On March 9, 1984, a judgment which incorporated the terms of a settlement reached between the parties was rendered in the case of *Equal Employment Opportunity Commission* v. *The Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railway Company,* No. N-74-637 (D. Md. 1984). Under the judgment, the companies were to pay to the EEOC $3.5 million, $3 million in settlement of Age Discrimination in Employment Act back pay claims of former employees and $500,000 in interest on the back pay. Under the judgment, the EEOC was required to distribute the funds to the 220 former employees according to a specified formula. In making these distributions, the EEOC was required to withhold Federal income taxes. By the end of 1984, the EEOC had withheld a total of $630,005 and distributed the balance of the settlement funds to the employees.

On March 22, 1985, the EEOC asked for ruling from the IRS on whether the EEOC or the railway companies were responsible for paying the employee's and employer's portions of any other taxes on the back pay awards. On December 23, 1985, the IRS replied that the EEOC was responsible for paying employer's excise and withholding the employee's taxes under the RRTA. The EEOC then wrote to our Office to determine whether it could pay out of its appropriations both the employer excise taxes and the employee taxes which were not withheld from judgment proceeds.[1] Although the IRS has not stated that EEOC must pay the employee taxes which were not withheld, the EEOC has assumed it is liable for these payments.

Summary of IRS Position

The IRS position is based on two separate conclusions. First, the IRS holds that the distributions of the settlement proceeds to the

[1] The EEOC also asked whether certain employer excise taxes under the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-367 (1982), could also be paid out of EEOC's appropriated funds. The Railroad Retirement Board, which administers this Act, has not asserted this tax against the EEOC. If the Board does assert this tax, our analysis of the excise taxes under the RRTA will control the availability of appropriated funds. The language of the applicable sections of these two Acts are substantially similar and our analysis of the two would be identical.

railroad employees were taxable as wages under the applicable statutes, regulations, and IRS rulings. Second, the IRS holds that the EEOC, as the party which controlled the payment of the judgment proceeds to the employees, was the "employer" responsible for the withholding and excise taxes.

The latter conclusion is based on the IRS's reading of section 3401(d)(1) of the Internal Revenue Code (26 U.S.C. § 3401(d)(1) (1982)) and several cases which construe that section. Section 3401(d)(1) provides that, for income tax withholding purposes, the person who controls the payments of wages to employees is the employer responsible for withholding. In *Otte* v. *United States*, 419 U.S. 43 (1974), the Supreme Court construed § 3401(d)(1) to uphold a district court order requiring a trustee in bankruptcy to withhold Federal income taxes from the payment of wages due to former employees of the bankrupt. The Court also held that the definition of "employer" for Federal income tax purposes should be applied to require the trustee to withhold amounts required under the Federal Insurance Contribution Act (FICA), 26 U.S.C. §§ 3101-3126 (1982). In *In Re Armadillo Corporation*, 410 F. Supp. 407 (D. Col. 1976) *aff'd.* 561 F.2d 1382 (10th Cir. 1977), the district court applied *Otte* to require a trustee in bankruptcy to withhold both Federal income and FICA taxes from payments of wages to former employees of the bankrupt. The court then expanded this holding to require the trustee, as the employer for FICA purposes under *Otte*, to pay the FICA excise tax on employers.

The IRS has applied these cases by analogy to hold that the EEOC controlled the payment of wages to the railroad companies' former employees. IRS therefore concludes the EEOC is required to withhold Federal income tax under 26 U.S.C. § 3402 (1982), withhold the RRTA tax on employees under *Otte*, and to pay the RRTA excise tax on employers under *In Re Armadillo*. Since only the Federal income taxes were withheld by the EEOC, the IRS apparently considers the withholding and excise taxes under the RRTA to be due from the EEOC.

GAO Analysis

At the outset, we of course accept the determinations of the IRS as to what is or is not taxable under the various tax laws it administers. Our comments are directed solely at the obligations of the EEOC under the circumstances presented, and at the availability of its appropriations. Because the issues involved are not limited to this one case, we think it is important, before reaching the appropriations issue, to address the EEOC's obligations in more general terms.

1. Requirement That EEOC Withhold Taxes

To begin with, we note that the EEOC's powers to enforce the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (1982), are the same as those granted to the Secretary of Labor to enforce the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1982). These powers include the ability to bring suit in any court of competent jurisdiction, and to deposit any sums recovered on behalf of an employee into a special account to be paid "directly to the employee or employees affected." If applied literally, this authority to accept and distribute proceeds paid by defendants might prohibit payment by EEOC to anyone other than employees, including the United States. Under this interpretation the EEOC would lack authority to withhold any employee taxes.

However, we do not believe that this authority need be so strictly construed. The authority of the courts to order income tax withholding under the Fair Labor Standards Act awards has long been upheld. E.g., *Martin* v. *HMB Construction Co.*, 279 F.2d 495 (5th Cir. 1960). We have previously stated our views that back pay awards are properly subject to taxation and therefore withholding when the judgments entered so provide. B-124720/B-129346, Sept. 23, 1981.

However, we do not agree with the IRS that withholding is required even though the judgment does not expressly provide for it. A similar situation was considered in our decision B-124720/B-129346, *supra*. In that case the IRS sought reversal of a prior decision that GAO would not deduct amounts for income tax withholding when certifying back pay judgments against the United States. We declined to reverse our decision on the grounds that the judgments, which had become final, did not provide for withholding. These judgments were fully binding on the parties and could not be altered by GAO. *See*, B-124720/B-129346, *supra*. In our view, this principle applies equally in this case. We believe that EEOC's involvement in the distribution of judgment proceeds under 29 U.S.C. § 216(b) is analogous to GAO's function in certifying the payment of judgments against the United States. Here the judgment only provided for Federal income tax withholding and had become final. EEOC was then bound to comply with the terms of the judgment and could not withhold amounts under the RRTA.

We do not think that the *Otte* and *In Re Armadillo* decisions, on which the IRS relies, alter this conclusion. As we pointed out in B-124720/B-129346, *supra*, the *Otte* case involved a ruling by the referee that the trustee in bankruptcy was not required to withhold, which was reversed by the district court prior to becoming final. Likewise, the decision of the bankruptcy judge in *Armadillo* that the trustee was not liable for FICA excise employers taxes was reversed by the district court prior to becoming final. These cases are

therefore inapplicable to the situation in this case where the judgment has become final and does not provide for withholding.

To accept the IRS conclusion is to place the EEOC in the position of risking court-imposed sanctions for violating the terms of the judgment. As we stated in our 1981 decision, the time to raise a tax withholding issue is before the judgment has become final. If this has not been done, even though the Government may have lost a significant collection device, unilateral action by a Government agency which is at variance with the terms of the judgment is not the solution.

2. Availability of Appropriated Funds

Even if we were to conclude that the EEOC was required to withhold and pay the taxes as asserted by the IRS, we would still be required to hold that the EEOC appropriation is not available to pay these taxes. 31 U.S.C. § 1301(a) (1982) limits the use of appropriated funds to the purposes for which they were appropriated. The annual EEOC appropriation provides funds for the necessary expenses of the EEOC as authorized by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. *See, e.g.*, 99 Stat. 1136, 1160 (1985).

Under 31 U.S.C. § 1301(a), an expenditure is proper if it is expressly authorized in the appropriation act or some other applicable statute, or if it can be viewed as reasonably necessary to carry out the purposes of the appropriation. *E.g.* 6 Comp. Gen. 619 (1927); 56 Comp. Gen. 111 (1976). Our review of the EEOC authorizing legislation and appropriation does not reveal any authority to pay the taxes asserted by the IRS. Thus, the expenditure would be authorized only if it could be justified as a "necessary expense" of the EEOC. While the payment would certainly further a purpose of the IRS, we cannot see how it would materially contribute to fulfilling the objects of EEOC's appropriation, i.e., to administer and enforce certain anti-discrimination laws. In the absence of specific legislative authority, therefore, we hold that these taxes cannot be paid from the EEOC appropriation. *See* 54 Comp. Gen. 205 (1974).

Conclusion

The EEOC cannot pay the Railroad Retirement Tax Act withholding tax on employees and excise tax on employers out of its appropriation. Despite the IRS's assertion that the EEOC was the employer for tax purposes when it distributed judgment proceeds to employees it represented, the final judgment did not provide for withholding and EEOC cannot unilaterally change the terms at the request of the IRS.

In litigating similar cases in the future, we recommend that the EEOC consider all relevant taxes and seek to assure that they are reflected in any judgment or settlement. EEOC management

should take appropriate steps to bring this matter to the attention of its litigating personnel.

[B-222087]

Officers and Employees—Transfers—Leases—Surcharges

A relocated IRS employee is not entitled to reimbursement for a reletting fee incurred by the premature settlement of a lease when moving from temporary to permanent quarters at his new duty station since it is a security deposit, as distinguished from a subsistence expense in the nature of rent for lodging, and since it did not occur at the old duty station. The employee may also not be reimbursed for a telephone installation charge in temporary quarters at his new duty station since it is not for a service ordinarily included in the price of a hotel or motel room.

Matter of: David E. Nowak—Expenses Incurred in Connection With Temporary Quarters, August 18, 1986:

This decision is in response to a request from Mr. Larry W. Faulkner, Chief of the Internal Revenue Service (IRS), Southwest Regional Office Accounting Section, concerning the disallowance of certain travel expenses claimed by Mr. David E. Nowak, an IRS employee.

The issues in this decision are whether Mr. Nowak is entitled to claim a reletting fee of $361.25, and telephone installation charges of $69, that were incurred in his temporary quarters at his new duty station. For the reasons that follow we hold that the reletting fee and telephone installation charges are not allowable subsistence expense.

Background

On October 10, 1983, Mr. Nowak was authorized moving expenses for his relocation from Detroit, Michigan, to Houston, Texas. In Houston, he signed a 6-month lease for temporary quarters from February 4, 1984, through July 31, 1984. The record is unclear as to when Mr. Nowak actually terminated his lease but he submitted a voucher covering the 60 days from February 4, 1984, through April 2, 1984. The IRS disallowed a reletting fee of $361.25, and telephone installation charge of $69. However, the IRS allowed a forfeited security deposit of $150.

Mr. Nowak submitted a supplemental voucher on October 10, 1984 and resubmitted it on January 8, 1985, each time attaching an explanation of his claim. Mr. Nowak contends that the reletting fee should be reimbursed since it is a cost of renting temporary quarters for the period of occupancy, and is in the nature of a nonrefundable security deposit or additional rental premium for the privilege of renting an apartment month-to-month. He contends that the $69 telephone expense should be reimbursed since it is for telephone service and not for telephone installation.

Discussion

Our decisions have consistently held that the premature settlement of an unexpired lease is not allowable when moving from temporary to permanent quarters at a new duty station. 55 Comp. Gen. 779 (1976); and *Walter V. Smith*, B-186435, February 23, 1979. Thus, an employee who is reimbursed for temporary quarters subsistence expenses at his new duty station is not entitled to reimbursement for settlement of an unexpired lease since the governing statute only applies to an unexpired lease at the old duty station. 5 U.S.C. § 5724a(a)(4) (1982).

Further, the Federal Travel Regulations, FPMR 101-7, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985), provides in para. 2-5.4a that only actual charges for meals, lodging, and other items not applicable here, are allowable subsistence expenses. Thus, a reletting fee, which is in the nature of a security deposit, is distinguished from a subsistence expense in the nature of rent for lodging, and also cannot be reimbursed since it did not occur at the old duty station.

Further, as the agency correctly points out, we have also denied reimbursement of a security deposit on temporary quarters for the same reasons shown above. 55 Comp. Gen. 779, *supra*, at 783. Therefore, Mr. Nowak's claim for reimbursement of a reletting fee is denied, and the amount he was reimbursed for the security deposit should be collected back.

As with lease settlements, our decisions have consistently held that telephone installation charges in temporary quarters are not allowable as a lodging expense. *James L. Palmer*, 56 Comp. Gen. 40, 42 (1976); and 52 Comp. Gen. 730 (1973). Thus, we held in the latter decision that the cost of lodgings reimbursable under the statutes and regulations includes those items of expense which are for accommodations or services ordinarily included in the price of a hotel or motel room. We therefore held that a telephone user charge, but not the cost of installation, is reimbursable as a cost of lodging.

Mr. Nowak characterizes the $69 fee as a user charge and claims that it is therefore reimbursable. However, we note that it is a one-time charge for work done on January 8, 1984, and consists of $5 for equipment, $40 for order processing, and $24 for telephone office line connection. This cost would not be billed on a monthly basis, and therefore it is a phone installation charge. Accordingly, Mr. Nowak's claim for the $69 fee is denied.

[B-222184]

Funds—Imprest—Availability

Imprest funds are available to pay the costs of recruitment advertising so long as that advertising is authorized under 44 U.S.C. 3702 and the payment otherwise meets applicable requirements for imprest fund payments.

Advertising—Newspapers, Magazines, etc.—Authorization Requirement—Delegation of Authority

Where the authority under 44 U.S.C. 3702 to authorize publication of advertisements in newspapers has been properly delegated to Internal Revenue Service contracting officers, exercise of that authority in any written form satisfies the statute even though under internal agency procedures, the wrong form may have been used. In any event, the authorization requirement of 44 U.S.C. 3702 is not a limitation of the method by which the advertising may be procured.

Signatures—Vouchers

The handwritten initials of a vendor's agent on a receipt are sufficient to support the reimbursement of an imprest fund. Although a full handwritten signature represents the maximum protection of the Government, the initials were sufficient evidence of the vendor's intent to acknowledge receipt of payment.

Payments—Advance—Prohibition

Advance payments for advertisements were not authorized by an appropriation act or other law and were therefore improper under 31 U.S.C. 3324(a). However, upon verification that the advertisements paid for were published, no loss to the Government will have occurred and the imprest fund which made the improper payment may be reimbursed.

Matter of: Internal Revenue Service—Imprest Fund Reimbursement for Advertising Services, August 18, 1986:

An authorized certifying officer of the Internal Revenue Service (IRS) has requested our decision on whether certain employment advertising costs paid out of two IRS imprest funds may be reimbursed out of appropriated funds. We hold that the use of imprest funds for recruitment advertising was proper, that the procurement of advertising was properly authorized, and that the receipts submitted by the vendors were legally sufficient. We also hold that the payments for advertising out of imprest funds in advance of the services being provided were improper but that the payments may be reimbursed upon verification that the services were in fact performed.

The payments in question were made from two separate imprest funds, one at the Cincinnati District Office and the other at the Cincinnati Service Center. All of the payments were authorized on a Treasury Form 1334, Requisition for Equipment, Supplies or Services, signed by a contracting officer. The payments made at the Cincinnati District were in the amounts of $56 paid to the *Cincinnati Herald,* and $349.44 paid to the *Cincinnati Enquirer.* Both of these payments were made on September 24, 1985, for advertisements to run on September 26 and 27. The *Cincinnati Herald* submitted an invoice which was stamped "paid." A Standard Form 1165, Receipt for Cash—Subvoucher, acknowledging payment was signed by the *Herald's* agent and was attached to the invoice. The *Cincinnati Enquirer* did not submit an invoice, but a Standard Form 1165 acknowledging payment was signed by the *Enquirer's* agent. The payment made at the Cincinnati Service Center was in the amount of $80, paid to *The Northerner,* a newspaper at North-

ern Kentucky University. The payment was made on October 4, 1985 for advertisements which had already run on September 3 and 10. *The Northerner* submitted an invoice which was stamped "paid" and was annotated "Rec'd $80.00, JZ, 10-4-85" by an agent of *The Northerner.*

The IRS first questions whether recruitment advertising is a proper use of imprest funds. The IRS notes that its Small Purchases Imprest Fund Handbook does not specifically provide for or prohibit the use of imprest funds for recruitment advertising. The IRS handbook does provide that imprest funds are available for procurement of supplies or nonpersonal services "when vendors are reluctant to honor small purchase orders * * *" or "when the imprest fund method of small purchase procurement is advantageous to the government * * *." This handbook is consistent with the general regulations on the use of imprest funds. *See,* GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 22 (TS No. 7-40, July 14, 1983); Treas. Fiscal Requirements Manual, vol. 1, §§ 4-3000 *et seq.;* and 48 C.F.R. Subpart 13.4 (Federal Acquisition Regulation). These regulations show that imprest funds may be used to make contract payments so long as they are in small amounts and the applicable documentation of payments is provided. There is no subject matter limitation on the services which may be paid for out of imprest funds. Therefore, use of imprest funds in the situation presented is not legally objectionable.

The IRS also questions whether the advertising services were properly contracted for. The IRS Fiscal Audit Handbook and Administrative Accounting Handbook require that recruitment advertising "be authorized by SF 147, Order for Supplies or Services, or other contractual arrangement (e.g., oral purchase, formal contract, etc.) signed by a contracting officer." The advertising services here were authorized by using Form 1334. The IRS notes that Form 1334 is typically used to document oral purchases but states that, although the Forms 1334 in this case were signed by contracting officers, the purchases were not oral. The IRS asks what the phrase "formal contract" in its handbook section on authorizing advertising means, and whether the Form 1334 used here was sufficient to authorize the advertising procurement.

In order to respond to these questions we must distinguish between authorizing the use of newspaper advertising and contracting for that advertising. 44 U.S.C. § 3702 (1982) requires all newspaper advertisements placed by an executive department to be authorized in writing by the head of the department. 5 U.S.C. § 302(b)(2) (1982) authorizes the head of an agency to delegate the authority to authorize advertisements to subordinate officials. Treasury Department Order Number 150-51, January 11, 1960, delegated to IRS contracting officers the authority to authorize advertisements for the recruitment of IRS personnel. It is this authorization of advertising under 44 U.S.C. § 3702 (1982) that the IRS hand-

books are discussing. The handbooks merely specify that the necessary authorization will be documented by the contract to procure the advertising services. The handbook should not be viewed as a limitation on the form in which contracts for advertising will be awarded. Since the IRS states that the Forms 1334 at issue were properly prepared and signed by a contracting officer, 44 U.S.C. § 3702 has been satisfied. In light of the above, we do not consider the term "formal contract" in the IRS handbooks to be a limitation on the means that a contracting officer uses to procure advertising. The advertisements were authorized in writing by officials to whom the authority had been properly delegated. This is all that 44 U.S.C. § 3702 requires. The fact that the wrong form may have been used does not, in these circumstances, affect the propriety of what was done.

The IRS further questions whether the advance payments for advertising made to the *Cincinnati Herald* and the *Cincinnati Enquirer* were proper. IRS notes that advance payments are allowed for periodical subscriptions and post office box rental and asks if there are other exemptions.[1] IRS also asks whether, in the event that the advance payments were improper, it can reimburse the Cincinnati District Imprest Fund because the services have been received.

31 U.S.C. § 3324 (1982) generally prohibits advance payments unless authorized by a specific appropriation or other law. We have held that the prohibition against advance payments applies to contracts for advertising services. B-180713, April 10, 1974. Our research has not revealed any appropriation act or other law which would allow the IRS to make advance payments for advertising. Therefore the advance payments made by the Cincinnati District were improper.

In B-180713, *supra*, we noted that the purpose of the advance payments prohibition was to avoid losses to the Government which would result if contractors failed to perform the services which had been paid for. In this case, the *Cincinnati Herald* and *Cincinnati Enquirer* have apparently performed their obligations by publishing the requested advertisements. If so, there would be no loss to the Government and we would not object to IRS reimbursing the imprest fund. Therefore, upon verifying that the advertisements have in fact been published, the IRS may reimburse the Cincinnati District Imprest Fund.

The final question raised by the IRS is whether the receipts executed by the newspapers were adequate to support the imprest fund payments. The IRS imprest fund handbook requires that each payment be documented by a receipt itemizing the supplies or serv-

[1] It is not feasible to discuss in this decision other exceptions which do not relate to the particular case. The certifying officer can find a detailed discussion in our publication, *Principles of Federal Appropriations Law*, at chapter 4 (1982).

ices obtained, the amounts charged, and, for payments over $15, the signature of the vendor or the vendor's agent. This receipt will normally be noted on the vendor's invoice or, if no satisfactory invoice is available, on Standard Form 1165, Receipt for Cash-Subvoucher. The handbook also provides that if any of the required information cannot be noted on the receipt, it should be placed on an attachment.

The invoice of the *Cincinnati Herald* does not contain the signature of the *Herald's* agent. That signature is present on a SF 1165 which was attached to the invoice. We believe that these two documents together satisfy the documentation requirements of the IRS handbook.

The invoice of *The Northerner* does contain the required receipt information but is noted with the initials "JZ" rather than the signature of *The Northerner's* agent. The IRS asks whether the full signature of the vendor or its agent is required. A signed receipt is necessary in order to protect the Government from a second presentation for payment. The signature of the vendor acts as an acknowledgement of payment and releases the Government from any further obligation to pay. The most universally accepted form of signature in the United States is, of course, the handwritten full name of the person signing. A receipt with a full signature, therefore, represents the maximum protection for the Government and should be solicited from a vendor whenever possible. However, we do not believe that the use of initials in lieu of a full signature on the receipt here is adequate grounds to refuse to reimburse the imprest fund. Our decisions have not dealt with precisely the issue of whether initials are sufficient to act as a signature on a receipt. We have held that a facsimile rubber stamped signature which had been adopted by a vendor was a proper signature on an invoice, 33 Comp. Gen. 297 (1954), and that initials appearing on an unsigned bid were adequate evidence of the bidder's intent to be bound by its bid, B-184488, Oct. 17, 1975. These decisions are applications of the rule, as stated in B-104590, Sept. 12, 1951, that "any symbol adopted as one's signature when affixed with his knowledge and consent is a binding and legal signature." For purposes of interpreting Federal statutes, the rule is codified in 1 U.S.C. § 1 (1982). Based on these authorities, we hold that the initials of *The Northerner's* agent on the receipt here adequately reflect the intent of *The Northerner* to acknowledge receipt of payment. The Cincinnati Service Center imprest fund may therefore be reimbursed for the amount of this receipt.

[B-223503]

Disbursing Officers—Relief—Erroneous Payments—Not Result of Bad Faith or Negligence

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and recertified checks. Proper procedures were followed in the issuance of the recertified check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division.

To: Mr. Clyde E. Jeffcoat, August 18, 1986:

This responds to your request of June 19, 1986, that we relieve Lieutenant Colonel (LTC) T.S. Sharp, Jr., Finance Corps, Finance and Accounting Officer, U.S. Army Finance and Accounting Center, 1st Infantry Division and Fort Riley, Fort Riley, Kansas, under 31 U.S.C. § 3527(c) for an improper payment of a $511.25 check payable to Mr. George J. Bruce. For the reasons stated below, relief is granted.

The loss resulted when the payee negotiated both the original and a recertified check. This is our first opportunity to consider a relief request involving the new recertification procedures. A recertified check, unlike a substitute check, bears a different check serial number from the original instrument and is disbursed from a new budget clearing account. Under Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, Bulletin No. 83-28, the Treasury Department redelegated authority to administrative agencies to certify replacement payments to payees who claim nonreceipt, loss, theft, mutilation, destruction or forgery of U.S. Treasury checks and made the agency certification of replacement checks mandatory. To implement the new recertification procedures, the Army issued a Letter of Instruction on February 6, 1985.

Under these instructions, a finance officer when notified by the payee or claimant of nonreceipt of an original check will require the payee or claimant to complete and sign DA Form 3037 (Statement of Claimant Requesting Stoppage of Payment on Check). On the basis of the DA Form 3037, the finance officer may issue a replacement check immediately or delay the new payment until a later time. After the form(s) are signed, the finance office will prepare and process a SF 1184, "Unavailable Check Cancellation."

Under the recertification procedures, upon receipt of the SF 1184, the Treasury Department, Division of Check Claims processes the check cancellation form to determine the payment status of the check. The payment status of the check and the action to be taken by Treasury is then transmitted to the finance officer by means of the Daily Advice of Status (DAS). If the payment status of the check is "outstanding" the Treasury Department is to credit the

Army's budget clearing account. If, after credit has been given by Treasury, the check is negotiated, Treasury will issue a chargeback to the Army's budget clearing account and the finance officer should begin collection action at that time.

In this case, nonreceipt of the original check was claimed on April 12, 1985. The DAS from Treasury, dated April 19, 1985, indicated that the check was outstanding. The recertified check was issued May 6, 1985, on the basis of the claimant's original allegation that the first check for damaged household goods had not been received. On July 17, 1985, the finance officer was informed by means of a chargeback from Treasury that both the original and recertified check had been negotiated.

It appears that the issuance of a recertified check in this case was within the bounds of due care as established by the Army's Letter of Instruction on the Recertification of Checks Disbursing and Accounting Procedures, February 6, 1985. There was no indication of bad faith on the part of the disbursing officer and adequate collection efforts are now being made. Although we have granted relief to the disbursing officer in this case, we do not believe that the Army's collection procedures, taken together, meet the diligent claims collection requirement of 31 U.S.C. § 3527(c). Once the chargeback was received from Treasury, it took Army over 10 months to refer the matter to your collection division. As we previously indicated to you, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division. However, since this case occurred prior to that date, we will not deny relief here.

[B-223873]

Disbursing Officers—Relief—Erroneous Payments—Not Result of Bad Faith or Negligence

Relief is granted Army disbursing official under 31 U.S.C. 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts are being pursued. However, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division.

To: Mr. Clyde E. Jeffcoat, August 18, 1986:

This responds to your request of August 1, 1986, that we relieve Lieutenant Colonel (LTC) R.C. Lee, Finance Corps, DSSN 5008, Finance and Accounting Officer, 1st Infantry Division (MECH) and Fort Riley, Fort Riley, Kansas, under 31 U.S.C. § 3527(c) for an improper payment of a $208.96 check payable to Ms. Mary J. Milner. For the reasons stated below, relief is granted.

The loss resulted when the payee negotiated both the original and a substitute check. Both checks were in the same amount. The substitute check was issued on the basis of the payee's allegation that the original check had not been received and a request for stop payment had been made. Both checks were issued by the Army under authority delegated by the Department of the Treasury. 31 C.F.R. § 245.8.

It appears that the request for stop payment and the issuance of a substitute check in this case were within the bounds of due care as established by Army Regulations. See AR 37-103, paras. 4-161, 4-162 and 4-164. There was no indication of bad faith on the part of the disbursing officers and it appears that adequate collection efforts are now being made. Accordingly, we grant relief.

Although we have granted relief to the disbursing officers in this case, we do not believe that the Army's collection procedures, taken together, meet the diligent claims collection requirement of 31 U.S.C. § 3527(c). Once the debit voucher was received from Treasury, it took Army 8 months to refer the matter to your collection division. As we previously indicated to you, for losses recorded after June 1, 1986, where the payee has left the Army or its employ, we will no longer grant relief if Army delays more than 3 months in forwarding the debt to your collection division. However, since this case occurred prior to that date, we will not deny relief here.

[B-222138]

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

Services may not calculate a social security offset against a Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment when that payment has actually been reduced because the sponsoring retired member had elected to receive a reduced social security benefit prior to reaching full eligibility age. Similarly, the services may not calculate the offset as if the beneficiary were receiving an unreduced social security payment when the retired member had never received social security benefits, but the spouse of the retired member elected to receive reduced benefits prior to reaching full eligibility age.

Matter of: Lucille Eaton, August 26, 1986:

This action is in response to a request for an advance decision regarding the social security offset to be made against the Survivor Benefit Plan annuity of Mrs. Lucille H. Eaton.[1] Mrs. Eaton elected

[1] The request was made by Lieutenant Colonel J.N. Johnson, USAF, Accounting and Finance Officer, United States Air Force Accounting and Finance Center, who questions the propriety of approving a voucher in favor of Mrs. Lucille H. Eaton in the amount of $353, representing additional Survivor Benefit Plan annuity monies due her for the period from November 1, 1981, to September 30, 1985, if it may properly be concluded that the social security offset may not exceed her actual social security entitlements. The request has been assigned submission number DO-AF-1460 by the Department of Defense Military Pay and Allowance Committee.

to receive a reduced social security widow's benefit at the age of 60. The question is whether the offset against her Survivor Benefit Plan annuity should be based on the actual amount of her social security benefit or the larger benefit she would have received if she had not delayed her social security application until age 62. It is our view that the social security offset in her case may not exceed the actual amount of her social security benefits.

Background

Mrs. Lucille Eaton is the widow of the late Colonel Alfred F. Eaton, USAF, who retired from the Air Force in 1977. When Colonel Eaton retired from the service he elected to participate in the Survivor Benefit Plan in favor of Mrs. Eaton. Colonel Eaton received reduced retired pay due to the deduction for Survivor Benefit Plan participation costs. He did not receive any social security benefits during his lifetime. On October 28, 1979, Colonel Eaton died. A Survivor Benefit Plan annuity became available to Mrs. Eaton on October 29. On November 17, 1979, Mrs. Eaton reached age 60 and shortly thereafter began receiving social security benefits, apparently based solely on her late husband's service in the Air Force. On November 17, 1981, Mrs. Eaton reached age 62 and under the provisions of 10 U.S.C. § 1451 the service began offsetting social security benefits against her Survivor Benefit Plan annuity.

Mrs. Eaton receives a monthly payment of $470 from social security. The social security deduction from her Survivor Benefit Plan annuity has been $478, however, which is the amount of the monthly social security benefit she would have been eligible to receive if she had delayed her social security application until age 62. The Social Security Administration and the service have both verified that the amounts concerned are correct. Mrs. Eaton questions whether the service is properly deducting a larger amount from her annuity than that which she is receiving as a social security benefit and has requested an adjustment of the social security offset based on our decision *Dora M. Lambert,* 62 Comp. Gen. 471 (1983).

The concerned service officials note that the *Lambert* decision is limited to situations in which the service member has drawn social security benefits prior to his death. They ask whether the deductions should also be recalculated for widows or widowers whose member spouses had not received social security benefits, but the widow or widower elected to receive reduced benefits prior to reaching age 62, thus decreasing the actual amount of social security payments received by the individual.

Survivor Benefit Plan and Social Security Offset

Pursuant to 10 U.S.C. §§ 1447-1455, a retired service member may elect to provide an annuity for his dependents under the Sur-

vivor Benefit Plan. The member accepts a reduced amount of retired pay during his life and upon his death, an annuity is payable to his spouse, former spouse or his other dependents. However, as in Mrs. Eaton's case, when a widow is eligible for social security benefits based upon the member's military service in addition to the Survivor Benefit Plan annuity, 10 U.S.C. § 1451 provides for the deduction of an amount equal to the social security benefit from the Survivor Benefit Plan annuity. In Mrs. Eaton's case, the deduction from the annuity imposed when she attained the age of 62 years was in excess of the actual amount which she received from the social security benefit.

In *Dora M. Lambert, supra,* a widow was receiving a reduced benefit from social security due to the fact that her spouse had been receiving a reduced benefit prior to the time he reached full eligibility age. We held that the computation of setoffs from the Survivor Benefit Plan annuities which were required to be made must take into account the reduction in the spouse's social security benefits when the retiree received reduced benefits. We held that when a widow's benefit was reduced because of the reduction in the retiree's benefit, the services could not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment.

In the present case, Colonel Eaton did not receive any social security benefit prior to his death. However, his widow elected to receive a reduced social security benefit prior to reaching age 62. The service officials ask whether adjustments to the amount deducted for the social security offset should be made under these circumstances. It is our view that the rationale of the *Lambert* decision should also be applied under the circumstances presented here and that the deductions made from Mrs. Eaton's Survivor Benefit Plan annuity should not be in excess of the amount she actually received.

The Survivor Benefit Plan was established in 1972 as an income maintenance program for the dependents of members of the uniformed services, through the enactment of Public Law 92-425, September 21, 1972, 86 Stat. 706. It was designed to complement the social security benefits received by the surviving spouses and dependents of retired military members, and active duty personnel who die while eligible to retire. The Survivor Benefit Plan annuity and social security benefit were integrated since the government contributes to both programs on behalf of the member for his service. The history of the original Plan legislation shows that the social security offset against the annuity was intended to be the equivalent of the social security payment which was attributable to the retired member's military service. The method of computing the offset was intended to be a "most generous formula * * * to assure that a widow will receive at least 55 percent of the man's military retired pay." See H.R. Rep. No. 481, 92d Cong., 1st Sess. 14 (1971). Similar statements appear on pages 30, 31, and 53 of S. Rep.

No. 1089, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong., & Ad. News 3288, 3304-3305, 3316.

In the *Lambert* decision, *supra*, we observed that if a Plan participant elected to receive social security benefits prior to full eligibility age, this would operate to reduce the social security benefit of the surviving spouse, but that if the social security offset were instead calculated as though the spouse-beneficiary were receiving unreduced benefits, then the spouse-beneficiary's combined entitlements would be reduced to an amount less than 55 percent of the Plan participant's military retired pay. We concluded that this result would be impermissible, since it would be contrary to the statute and the intent of the Congress, in light of the legislative history described in the previous paragraph.[2]

Just as the surviving spouse's social security annuity is reduced as a result of the member's election to receive benefits prior to full eligibility age, under 42 U.S.C. § 402(q) the surviving spouse's annuity is also reduced if he or she elects to draw benefits before attaining age 62. It would seem that regardless of whether the social security annuity is reduced on account of the early election of benefits by the military retiree or by the surviving spouse, the survivor benefit annuity of the surviving spouse should take into account the actual amount of the social security annuity received.

Consistent with the foregoing, our view is that in the case of Mrs. Eaton, the social security offset should have been set at $470, the actual amount of her monthly social security benefit, rather than at some higher amount predicated on her hypothetical receipt of unreduced social security benefits. We therefore conclude that she is entitled to a retroactive recomputation of her Survivor Benefit Plan annuity using the lower social security offset figure in the computation of her entitlements. We further conclude that other annuitants in the same situation as Mrs. Eaton may receive the same type of retroactive adjustment in their annuities. Compare *Sergeant Franklin L. Secrest, USMC,* B-210827, September 21, 1983.

The voucher presented for decision is returned for payment, if otherwise correct.

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[2] We note that in amending 10 U.S.C. § 1451 through legislation contained in Public Law 99-145, § 711, November 8, 1985, 99 Stat. 666, Congress eliminated the social security offset and established a two-tier system under which the survivor would receive 55 percent of retired pay before age 62 and 35 percent thereafter in recognition of entitlement to social security. See H.R. Rep. No. 81, 99th Cong., 1st Sess. 251, *reprinted in* 1985 U.S. Code Cong., & Ad. News 472, 527-528. Provision was made, however, to retain the social security offset for persons who, like Mrs. Eaton, were eligible Plan beneficiaries on October 1, 1985, if that were advantageous to them. See 10 U.S.C. § 1451(e) (current).

[B-222570, B-222571]

Contracts—Negotiation—Administrative Determination—Advertising v. Negotiation

Agency decision to negotiate for the procurement of hazardous waste disposal services, requesting competitive proposals instead of sealed bids, is appropriate under the Competition in Contracting Act of 1984 where complex requirements demand discussions to assure the quality and safety of performance and award is based on both technical and price-related factors.

Matter of: G.W., Inc., August 26, 1986:

G.W., Inc. (GWI), protests the Defense Logistics Agency's method of acquiring hazardous waste disposal services for over 50 military installations under requests for proposals (RFP) No. DLA200-86-R-0035 (B-222570) and DLA200-86-R-0029 (B-222571), issued by the Defense Reutilization & Marketing Service, Battle Creek, Michigan. GWI contends that DLA should have asked for sealed bids instead of competitive proposals. We deny the protest.

Both RFP's require technical proposals and unit prices for hazardous waste disposal services. The contractor has to pick up the waste at various military installations and transport it from there to approved disposal sites. Different sites are approved for particular kinds of hazardous waste. The waste consists of toxic, flammable, and corrosive materials and includes asbestos, cyanide, items contaminated with PCP, flame powder, magnesium chips, and sulfuric acid.

Offerors were advised that the lowest, single responsible offeror submitting a technically acceptable proposal would receive the award. The following equally weighted criteria determine technical acceptability: (1) disposal methods and sites plan; (2) transporters; (3) interim storage sites; (4) safety procedures; and (5) operations plan.

GWI advances several arguments why DLA's decision to procure the services by competitive proposals instead of sealed bids is improper. GWI argues that by law sealed bidding is the preferred method of procurement. Moreover, it maintains, the services are not so unduly complicated or technical as to require discussion or negotiation. GWI urges that procurement of hazardous waste disposal is a simple process because the activity is "mature, highly refined, and thoroughly regulated." GWI contends that DLA does not need technical proposals, but only has to assure itself that offerors have required licenses and permits because state and federal environmental agencies will affirmatively determine an offeror's technical capability and understanding before issuing those documents. GWI points out that the services were previously procured using sealed bid procedures.

DLA reports that it acted under the aegis of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. § 2304(a)(2) (West Supp. 1985), and Federal Acquisition Regulation (FAR), § 6.401(b)(1) (FAC

84-5, Apr. 1, 1985, pursuant to which it decided to use competitive proposals because it needed to conduct discussions with responding offerors. DLA admits that it used sealed bidding in the past, but states that it obtained unsatisfactory results. The agency reports that it needed detailed technical data concerning the ability of offerors and their subcontractors (transporters and disposal facilities) to comply with constantly changing state and federal environmental regulations. Under sealed bidding procedures, bidders had only one opportunity to provide all of the required technical data and DLA had to reject as nonresponsive any bid which failed to include all the required data. DLA reports that this adversely impacted on competition because the bulk of the offers received are capable of being made acceptable through negotiation. A related problem was the bidder's inability to change its price should DLA disapprove of a proposed subcontractor.

In the past there was a statutory preference for formal advertising (sealed bidding); however, CICA eliminates that preference. *The Saxon Corp.*, B-221054, Mar. 6, 1986, 86-1 C.P.D. ¶ 225. CICA directs agencies to ask for sealed bids only if four conditions are simultaneously present—(i) time permits, (ii) the award will be based on price, (iii) discussions are not necessary, and (iv) there is a reasonable chance of receiving more than one bid. 10 U.S.C.A. § 2304(a)(2)(A). In the absence of any of the four conditions, an agency is required to request competitive proposals. *Integrity Management International, Inc.*, B-219998.2, Feb. 18, 1986, 10 U.S.C.A. § 2304(a)(2)(B). Where an agency's service requirements demand both the evaluation of technical proposals, to assure the adequacy of offerors' technical capabilities, and discussions to assure understanding of complex requirements, the use of competitive proposals is proper for two reasons—the award is not based on price alone, and discussions are required. *United Food Services, Inc.*, B-220367, Feb. 20, 1986, 86-1 C.P.D. ¶177.

We find that DLA properly asked for competitive proposals instead of sealed bids because of its need to conduct discussions and to evaluate technical proposals. In our view, DLA's concerns regarding offerors' understanding of state and federal regulations governing the environmental activities they were offering to undertake is a sufficient basis for conducting discussions. We have found this area complex and subject to conflicting interpretations. See *Monterey City Disposal Service, Inc.*, 64 Comp. Gen. 813 (1985), 85-2 C.P.D. ¶ 261 (federal agencies compliance with local environmental requirements).

Further justification for discussions lies in two solicitation provisions. First, the RFP contains a Use of Subcontractor provision granting DLA a veto power over the offeror's use of proposed subcontractors. The identities and capabilities of proposed subcontractors are disclosed in the offerors' respective technical proposals. Without the ability to conduct discussions concerning the identity,

capabilities and cost of a substitute subcontractor, the presence of a single objectionable subcontractor could prevent DLA from accepting an otherwise advantageous offer. Likewise, the RFP's Clean Air and Water Certification provision requires the offeror to notify DLA immediately, before award, if a proposed subcontractor is under consideration for listing on the Environmental Protection Agency's List of Violating Facilities. This notice, which could result, at DLA's option, in the preaward substitution of another subcontractor for the proposed subcontractor, also requires discussions between the offeror and DLA. GWI does not question DLA's inclusion of either of the above provisions in the RFP.

We further find it appropriate for DLA to evaluate the technical capabilities of both offerors and proposed subcontractors in view of the danger that improper performance of their duties can pose to the public health. An award following such an evaluation is necessarily based on both technical and price factors.

In our judgment, DLA properly solicited competitive proposals.

The protest is denied.

[B-221846.2]

Contracts—Protests—Preparation—Costs—Noncompensable

Although original protest was sustained, subsequent claim for the recovery of protest costs on the ground that the recommended corrective action—non-exercise of options and resolicitation—is an ineffective remedy is denied where the protester was largely responsible for the substantial performance of the base year of an improperly awarded contract due to the fact that the firm's submission alleging material defects in the solicitation had been untimely filed, and the General Accounting Office (GAO) only considered the merits of the protest under its "significant issues" exception to its filing requirements because this was the first instance in which the contracting agency was before GAO in a bid protest matter.

Bids—Preparation—Costs—Noncompensable

Claim for the recovery of bid preparation costs is denied where there has been no reasonable showing that the protester would have had a substantial chance of receiving the award but for the agency's utilization of a materially defective method for evaluating bids.

Matter of: Temps & Co.—Claim for Costs, August 28, 1986:

Temps & Co. submits a claim for the recovery of its protest and bid preparation costs pursuant to our decision in *Temps & Co.*, B-221846, June 9, 1986, 65 Comp. Gen. 640, 86-1 CPD ¶535. In that decision, we sustained Temps' protest against the award of a contract for temporary clerical services to Woodside Temporaries, Inc., under invitation for bids (IFB) No. C66025, issued by the Federal Home Loan Bank Board (FHLBB). We concluded that the IFB was materially defective, as alleged by Temps, because the method for evaluating bids involved only a simple numerical averaging of submitted labor category hourly rates, and did not provide for the extension or "weighting" of those hourly rates by the government's best estimate of the quantities of hours required to determine the

bid that would result in the lowest ultimate cost to the government. Thus, since Woodside's submitted hourly rates had no direct relationship with the total amount of work to be performed, the agency had no reasonable assurance that the award to Woodside would, in fact, result in the most favorable acquisition cost.

Accordingly, we recommended that no options be exercised under Woodside's current contract and that any remaining requirement be resolicited under a properly constructed IFB. The agency has advised this Office that it is implementing our recommendation.

Temps now claims the recovery of its costs for filing and pursuing the protest, including attorney's fees, and its bid preparation costs, on the ground that so little time remains until the end of the base year of performance that termination of Woodside's contract and resolicitation at this point will not provide Temps with meaningful relief. The firm also asserts that it is entitled to its costs, regardless of whether other effective relief will be afforded, on the basis that it is the prevailing party in the protest.

In the circumstances, we deny the claim for costs.

Our Bid Protest Regulations provide for the recovery of the costs of filing and pursuing a protest, including attorney's fees, in situations where the contracting agency has unreasonably excluded the protester from the procurement, except where this Office recommends that the contract be awarded to the protester, and the protester receives the award. 4 C.F.R. § 21.6(e) (1986). The recovery of protest costs may be allowed where, because recompetition of the base year of performance is not feasible, we have recommended that the agency not exercise any options under the contract and resolicit using proper procedures after the initial contract term expires. *EHE National Health Services, Inc.*, 65 Comp. Gen. 1 (1985), 85-2 CPD ¶362; *E.H. Pechan & Assoc., Inc.*, B-221058, Mar. 20, 1986, 86-1 CPD ¶278.

Temps urges that those cases are applicable here. Temps contends that Woodside's substantial performance of the base year was the direct result of the FHLBB's failure to provide Temps with timely notice of the award, thus precluding the firm from filing its protest within 10 calendar days of the award so as to invoke an immediate suspension of further contract performance. *See* 31 U.S.C. § 3553(d)(1) (Supp. III 1985); 4 C.F.R. § 21.4(b).

We do not believe that Temps is entitled to its protest costs. Despite any delay on the agency's part in providing notice of the award,[1] the firm itself was largely responsible for Woodside's substantial performance of the base year. As noted in our June 9 decision, Temps' protest alleged improprieties existing in the IFB

[1] The record does not support Temps' assertion. The FHLBB stated in its administrative report on the protest that written notice of the award to Woodside was mailed to all unsuccessful bidders 1 day after the award had been made.

which should have been apparent to the firm prior to the bid opening date, but Temps did not file its protest with this Office until 1 month later. However, while the protest submission was clearly untimely, 4 C.F.R. § 21.2(a)(1), we considered the matter under our "significant issues" exception to our timeliness requirements, 4 C.F.R. § 21.2(c), because this was the first occasion when the FHLBB was the affected "federal agency" in a bid protest matter. If Temps had protested the alleged IFB defects in a timely manner prior to bid opening, the agency, absent a determination of urgent and compelling circumstances, would have been required to withhold the making of any award while the protest was pending, 31 U.S.C. § 3553(c)(1); 4 C.F.R. § 21.4(a), and the result of which Temps now complains, the near expiration of the base contract term, would not have occurred.

Therefore, although Temps has lost the opportunity to compete for the base year of performance as did the protesters in *EHE National Health Services, Inc.*, 65 Comp. Gen. 1, *supra*, and *E.H. Pechan & Assoc., Inc.*, B-221058, *supra*, we conclude that recovery of the firm's protest costs is not warranted.

To the extent Temps also seeks to recover its bid preparation costs, we will allow the recovery of bid or proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended by this Office is not one delineated in our Regulations at 4 C.F.R. § 21.6(a)(2-5). *Asbestos Abatement of America, Inc.*, B-221891, *et al.*, May 7, 1986, 86-1 CPD ¶ 441.

We never determined in our prior decision that Temps would have had a substantial chance of receiving the award if the agency had utilized a proper method for evaluating bids. Given the defective nature of the solicitation, there is nothing to establish that Temps would have been in line for award. Hence, because the "substantial. chance" test has not been reasonably met, we also conclude that Temps is not entitled to recover its bid preparation costs. *Cf. Motorola, Inc.*, B-222181, July 11, 1986, 86-2 CPD ¶59 (proposal preparation costs recoverable where protester should have received the award under the specifications as written).

Finally, Temps asserts that, regardless of the effectiveness of the relief provided, it is entitled to its costs as the prevailing party. Temps refers to a recent decision by the General Services Board of Contract Appeals (GSBCA), which held that the Competition in Contracting Act of 1984 (CICA) should be construed as permitting the recovery of attorney's fees by the prevailing party even where an adequate remedy has been afforded the party. (In the case in question, the agency agreed to conduct a new procurement on an unrestricted basis.) *NCR Comten, Inc.*, GSBCA No. 8229, Feb. 10, 1986, 86-2 BCA ¶ 18822.

However, it is our standards for the recovery of costs that govern here, in reflection of the express authority granted to this Office under section 2741(a) of CICA to determine whether a solicitation for a contract, proposed award, or award of a contract complies with statute or regulation, and, if not, to declare whether an appropriate interested party is entitled to its costs. 31 U.S.C. §§ 3554 (b) and (c). Applying those standards to the facts of the case, we have determined that Temps is not so entitled.

The claim for costs is denied.

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