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[B-220436]

Bid—Invitation for Bids—Amendments—Failure to Acknowledge—Bid Nonresponsive

Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment.

Bids—Invitation for Bids—Amendments—Acknowledgment—Constructive Acknowledgment

Constructive acknowledgment exception to the general rule requiring bidders formally to acknowledge solicitation amendments may not be invoked when there is substantial doubt that the bidder is aware of the entire amendment and the changes required by it.

Matter of: N.B. Kenney Company, Inc., Feb. 4, 1986:

N.B. Kenney Company, Inc., protests the proposed award of a contract to MacDonald Plumbing and Heating, Inc., under invitation for bids (IFB) No. OARM-85-014-JC, issued September 12, 1985 by the Department of Labor. The IFB called for the replacement of the central heating plant at the Grafton, Massachusetts, Job Corps Center. Kenney contends that the agency should reject MacDonald's bid for failure to acknowledge receipt of amendment No. 1 and failure to include required representations and certifications.

We sustain the protest on the first basis.

The amendment in question changed both the bid opening date and the scope of work at the Job Corps Center. Bid opening was moved up 2 days, from October 19, 1985 to October 17, 1985. In addition, the amendment required removal of additional asbestos and replacement of fan coil heaters. It also changed previously-announced Davis-Bacon wage rates.

In rejecting Kenney's agency-level protest, Labor stated that MacDonald's failure formally to acknowledge receipt of amendment No. 1 might be waived as a minor informality because Kenney's bid and bid bond both reflected the amended bid opening date. The agency states that in granting the waiver, it relied upon our decisions in *Pioneer Fluid Power Co.*, B-214779, Sept. 4, 1984, 84-2 CPD ¶ 246, and *Protimex Corp.*, B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247. In *Pioneer,* we held that the bidder's inclusion in its bid of the amended opening date clearly established that the bidder had received the amendment and constituted an implied acknowledgment, binding the bidder to the terms of the amendment at its bid price.[1] In *Protimex,* we held that the inclusion of an amended

[1] We reversed this decision, however, in *Pioneer Fluid Power Co.—Reconsideration,* B-214779.2, Mar. 22, 1985, 85-1 CPD ¶ 332, holding that the revised bid open-

bid opening date in a bid bond similarly constituted an implied acknowledgment. Labor argues that MacDonald also has impliedly acknowledged the amendment. We disagree because in MacDonald's case, the amended bid opening date was earlier, rather than later, than the original opening date.

Our constructive acknowledgment decisions are based on an exception to the general rule that a bidder's failure to acknowledge a material amendment requires the agency to reject the bid as nonresponsive. The general rule is based on the fact that acceptance of a bid when an amendment has not been acknowledged would afford the bidder the opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. 51 Comp. Gen. 500 (1972). Moreover, if such a bid were accepted, the bidder would not legally be bound to perform in accord with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See *Doyon Construction Co., Inc.,* 63 Comp. Gen. 214 (1984), 84-1 CPD ¶ 194; 42 Comp. Gen. 490 (1963).

The constructive acknowledgment exception applies when the bid itself includes one of the essential items appearing only in the amendment. Thus, we have found that a bidder's failure to acknowledge an amendment could be waived when, for example, the bid included a price for an item that was added by amendment, 34 Comp. Gen. 581 (1955), or for quantities reduced by an amendment. *Nuclear Research Corp. et al.,* B-200793 *et al.,* June 2, 1981, 81-1 CPD ¶ 437. We also have found constructive acknowledgment when the bidder agreed to use materials other than those required by the original solicitation, *W. A. Apple Mfg., Inc.,* B-183791, Sept. 23, 1975, 75-2 CPD ¶ 170, *aff'd on reconsideration,* Mar. 2, 1976, 76-1 CPD ¶ 143, or when the bid included an acceptance period that was different from that imposed by the original solicitation. *Shelby-Skipwith, Inc.,* B-193676, May 11, 1979, 79-1 CPD ¶ 336.

These decisions, in our opinion, are consistent with the regulatory provision that permits a bidder's failure to return an amendment to be waived as a minor informality or irregularity if the bid "clearly indicates that the bidder received the amendment." Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(1) (1984). In permitting constructive acknowledgment, only the bidder's failure to acknowledge the amendment is waived, not the bidder's compliance with the amended solicitation. *Shelby-Skipwith, Inc., supra.*

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ing date entered in Pioneer's unsigned Standard Form 19-B, Representations and Certifications, was contradicted by the date used on the cover of the bid, which was signed. It therefore appeared that the bidder's single use of the new date might be explained by circumstances other than the actual receipt of the amendment and did not clearly indicate the bidder's intent to be bound by all of the material changes in the amendment.

As the Department of Labor points out, we have applied the constructive acknowledgment exception, in numerous cases where bid opening was extended by amendment, holding that submission of a bid either between the original opening date and the extended opening date or on the extended opening date itself is sufficient to charge the bidder with knowledge of the amendment in its entirety. These decisions are based on the theory that no bidder would deliberately submit a late bid. *See,* for example, *Inscom Electronics Corp.,* 53 Comp. Gen. 569 (1974), 74-1 CPD ¶ 56; *Lear Siegler, Inc.,* B-212465, Oct. 19, 1983, 83-2 CPD ¶ 465; B-176462, Oct. 20, 1972.

On the other hand, we have recognized that a bidders's use of the new opening date may not, in itself, be sufficient to indicate clearly that the bidder is aware of other aspects of the amendment or committed to performing in accord with its material terms. In *Kinross Manufacturing Corp.,* B-219937, Dec. 26, 1985, 65 Comp. Gen. 160, 85-2 CPD ¶ 716, we held that the bidder's handwritten insertion of the new bid opening date, along with a notation that it had been advised of this date by an agency official, in the space on the bid form where it should have acknowledged the amendment indicated that the bidder's knowledge was limited to the new bid opening date. We therefore found that the agency had acted properly in rejecting the bid as nonresponsive. As noted in the footnote on page 2, we also found upon reconsideration of *Pioneer Fluid Power Co., supra,* that despite inclusion of the new opening date in one section of the bid, the use of the original date on the cover sheet of the bid created doubt as to the bidder's intent to be bound by all the material changes in the unacknowledged amendment.

Similarly, we think this case falls under the general rule requiring the agency to reject the bid as nonresponsive, rather than under the constructive acknowledgment exception. The constructive acknowledgment decisions, as indicated above, all involve submission of bids after the original opening date. In this case, however, in amendment No. 1, Labor announced a bid opening date (October 17, 1985, instead of October 19, 1985). In our opinion, the October 17 date on MacDonald's bid and bid bond may be explained by circumstances other than the actual receipt of the amendment, since bidders may be expected to date and prepare their bids before the final date for submitting them. They may, for example, allow for time in transit, either in the mail or between the agency's point of receipt and the place designated for bid opening. Therefore, MacDonald's inclusion of the earlier opening date on the bid and bid bond does not, of itself, clearly indicate that MacDonald received the amendment. The additional work, required by the amendment, removal of asbestos and replacement of fan coil heaters, and the change in Davis-Bacon wage rates, in our opinion clearly are material, since they will affect the contract price and the quality and quantity of performance. In the absence of any evidence of MacDonald's actual receipt of the amendment, we do not believe that

the firm could be legally required to provide these changes at its original bid price.

Accordingly, by separate letter to the Secretary of Labor, we are recommending that the agency reject MacDonald's bid as nonresponsive and make award to Kenney if it is the next low responsive, responsible bidder. In view of this recommendation, we need not reach Kenney's second basis of protest.

We sustain the protest.

[B-219667.2]

Contracts—Termination—Resolicitation—Original Evaluation Improper

Agency decision to resolicit after termination of a contract due to procurement irregularities, rather than make an award under the original solicitation, is not objectionable where the agency intends to revise the evaluation scheme and possibly the purchase description for the equipment being procured.

Contracts—Protests—Preparation—Costs—Noncompensable

Recovery of proposal preparation costs and the costs of pursuing a protest is inappropriate when the protester is afforded an opportunity to compete in a reprocurement.

Matter of: Koehring Company, Speedstar Division, Feb. 6, 1986:

The Speedstar Division of Koehring Company protests actions of the United States Army Troop Support Command in regard to the procurement of truck-mounted water well drilling systems. Koehring originally protested a July 30, 1985 award to the George E. Failing Company under request for proposals (RFP) No. DAAJ10-85-R-A023. Before resolution of this protest, the Army terminated the contract with Failing on grounds that deficiencies in the statement of evaluation factors in the RFP and application of those factors during proposal evaluation made any award under the RFP improper.

The Army states that it is revising the evaluation scheme for the well drilling systems and may also revise the purchase description to reflect its needs more accurately; it then expects to resolicit. Koehring now alleges that the Army should instead reinstate the original solicitation and award a contract to Koehring under it.

We deny the protest.

The RFP, issued November 23, 1984, indicated the Army would award a requirements contract for between 6 and 20 well drilling systems. The solicitation listed four factors for evaluation of proposals: technical understanding and compliance, management, logistics, and cost. Technical understanding and compliance, the most important factor, was accorded half the total weight of all evaluation factors. It was divided into a number of subfactors, of which one, "evaluation of system components," was in turn divided

into three components (well drilling machine, support vehicle, and well completion kit) and 35 subcomponents. While the solicitation stated that within each factor subfactors were listed in order of importance, it did not provide any order of importance or evaluation weight for the components and subcomponents.

The Army received three proposals and found those of Koehring and Failing to be technically acceptable. On July 25, 1985, after evaluation of best and final offers, the contracting officer determined that an award should be made to Failing. While Failing's evaluated price was approximately 6 percent more than Koehring's, the contracting officer concluded that Failing's offer was most advantageous to the government for two reasons. First, Failing proposed to provide drilling and support vehicles with "roll on/roll off" capability, *i.e.*, a well drilling system that could be driven on and off transport aircraft without disassembly. The Army believed this would not only reduce the number of aircraft required to transport the well drilling systems but also enhance rapid deployment, lower maintenance, and increase safety in loading and unloading. Second, the contracting officer found that the Koehring system did not have the required capability of being loaded onto transport aircraft and unloaded using only equipment provided with the system. Accordingly, the Army awarded the contract to Failing, and Koehring submitted a protest shortly thereafter.

During consideration of Koehring's protest, the Army concluded that its evaluation of proposals had not been in accord with the evaluation scheme set forth in the solicitation. The agency states that the evaluation factors did not specifically include air transportability or otherwise support the emphasis placed upon "roll on/roll off" capability. The Army also states that it should have indicated the relative weights to be given system components in evaluating technical understanding and compliance.

The agency issued a stop-work order to Failing on August 22 and terminated the contract on September 17, 1985.[1] As noted above, the Army states that it intends to revise the RFP evaluation scheme and possibly the purchase description for the well drilling system in order better to reflect its actual needs before resoliciting.

Koehring argues that it is in the government's best interest to reinstate the original solicitation and to award Koehring a contract under it, rather than to resolicit. The protester asserts that its well drilling systems is reasonably priced and meets the Army's actual needs; that the aspects of Failing's system that the Army is considering for inclusion in the RFP requirements are developmental and

[1] Failing did not protest the termination of its contract. In a letter to our Office dated November 18, filed as a party interested in Koehring's protest, the firm stated its beliefs that the initial award was proper and that the contract should be reinstated. Since Failing did not indicate that it intended to submit a separate protest, we have considered its views only to the extent they are relevant to issues raised by Koehring.

unproven; and that a resolicitation would inevitably delay meeting an urgent Army requirement.

The record does not support Koehring's position. As the Army points out, air transportability was a requirement of the purchase description and in fact was considered by some of the evaluators in the award selection even though it was not listed as a factor in the evaluation. In addition, the solicitation did not disclose the relative importance in proposal evaluation of systems components, although assignment of points ranged from 3 to 30 points per component in the actual evaluation. As a result, the Army concluded that the offerors were not sufficiently on notice of the award factors and their relative importance. To remedy the situation, the Army plans to revise the solicitation evaluation provisions and to resolicit offers. This is consistent with prior decisions of this Office, see *e.g., Hemford Co.,* B-216811, Feb. 8, 1985, 85-1 CPD ¶ 167, and therefore we see no reason to object.

As an alternative to award, Koehring requests proposal preparation costs and the costs of filing and pursuing its protest on grounds that the contract was improperly awarded to Failing in the first instance. The Competition in Contracting Act of 1984, 31 U.S.C.A. § 3554 (West Supp. 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.6 (1985), provide authority for our Office to grant such costs. In view of our above conclusions, and since Koehring at a minimum will be given an opportunity to compete when the Army resolicits, recovery of either proposal preparation costs or the costs of filing and pursuing the protest is inappropriate here. *See* 4 C.F.R. § 21.6; *Galveston Houston Co.,* B-219998.4, Nov. 4, 1985, 85-2 CPD ¶ 519.

The protest is denied.

[B-220446]

Contracts—Small Business Concerns—Awards—Set-Asides—Administrative Determination—Reasonable Expectation of Competition

Contracting agency reasonably concluded that adequate small business competition could be expected so as to justify setting aside certain line items in the solicitation exclusively for small business participation where bids from four responsible small businesses were received on identical line items in the prior year's procurement.

Contracts—Small Business Concerns—Awards—Set-Asides—Administrative Determination—Reasonable Expectation of Competition

The contracting agency need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before deciding to set IFB line items aside for small business. The agency is only obligated to make an informed business judgment that at least two responsible small business bidders will compete and will offer reasonable prices.

Matter of: Anchor Continental, Inc., Feb. 6, 1986:

Anchor Continental, Inc. (Anchor), a large business manufacturer of fiberglass-reinforced tape, protests the restriction in invitation for bids (IFB) No. 2FC-EAF-A-A3421-S, setting aside certain line items for small business. We deny the protest.

The IFB was issued by the General Services Administration (GSA) as a requirements contract for the supply of various types of tape. The IFB contained 64 line items, of which 1 through 12 and 20 through 62 were set aside solely for small businesses. Within the set-aside portion, line items 1 through 12 were for quantities of aluminum-backed, pressure-sensitive tape; line items 20 through 36 were for tapes for various specified applications; line items 37 through 47 were for polyester filament reinforced tape; and line items 48 through 62 were for fiberglass filament reinforced tape.

Anchor contends that the set-aside of these line items for small business was improper because at the time GSA made its set-aside decision the agency could not have had a reasonable expectation that bids on these line items would be submitted by at least two responsible businesses as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502 (1984). With respect to line items 48 through 62 in particular, Anchor alleges that there are only two small business manufacturers of fiberglass filament tape in the United States to start with, and that one of the two, RJM Manufacturing, Inc., does not have the requisite resources and production facilities to perform a contract of the magnitude called for by the IFB. According to Anchor, RJM has only 52 employees and its fiscal year 1984 sales were only $10 million; Anchor estimates that the awarded contract for the supply of the government's fiberglass filament tape requirements will be worth approximately $3.5 million. In addition, Anchor points out that RJM had been awarded a large contract for the supply of polyester tape in GSA's prior fiscal year procurement for similar estimated quantities of tape and argues that GSA should have taken into account the fact that RJM would likely also be competing in the instant procurement for the award of a contract for polyester tape when deciding whether to set aside the fiberglass filament tape portion of it.

GSA takes the position that the decision to set aside a significant portion of the IFB for small business was based on ample information which reasonably led the agency to conclude that bids at reasonable prices would be received from a sufficient number of small businesses. With respect to line items 48 through 62, specifically, GSA states that of the eight bids in the prior procurement that were received for fiberglass filament tape, five were from small business firms, including RJM. Based on the extent of the small business participation in the prior procurement, GSA determined that such tape should be set aside for small business; GSA adds

that its decision to set aside was concurred in by its Small Business Administration representative.

For a total small business set-aside, the regulations require that there be a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices. FAR, 48 C.F.R. § 19.502-2. The decision to set aside a procurement for small business is basically a business judgment within the broad discretion of the contracting agency, so that we will not question a decision to set aside unless as a clear showing is made that the agency abused its discretion. *Burrelle's Press Clipping Service*, B-199945, Mar. 2, 1981, 81-1 C.P.D. ¶ 152.

We see no abuse of destruction by GSA in its decision to restrict the protested line items to small businesses. At the outset, we note that while Anchor objects to all the line item set-asides, the company only gives specific reasons with regard to why it believes the set-aside of line items 48 through 62 was inappropriate. In this regard, the types of tapes covered by line items 1 through 12 and 30 through 47 had been set aside by GSA in the prior fiscal year procurement and the agency had successfully received bids on these tapes from several responsible small businesses. Once a product has been acquired successfully by an agency on the basis of a small business set-aside, the procurement regulations provide that in subsequent procurements, the product should be acquired on the basis of a repetitive set-aside, unless the agency cannot expect reasonably priced offers from at least two responsible small business concerns. FAR, 48 C.F.R. § 19.501(g). Since Anchor gives us no basis to question GSA's decision to continue the set-aside of these items, or to set aside line items 20 through 29, we will not review this aspect of the protest further. See *Multinational Business Services, Inc.*, B-221362, Jan. 9, 1986, 86-1 C.P.D. ¶ 25.

Turning to Anchor's protest against the set-aside of line items 48 through 62, prior acquisition history is an important factor in determining whether a reasonable expectation of small business competition exists to justify a set-aside. FAR, 48 C.F.R. § 19.502-2. The record shows that in the prior fiscal year's procurement of fiberglass tape, GSA actually received bids from four responsible small businesses. Although two of those firms were regular dealers instead of manufacturers—Anchor's complaint is based in large part on its contention that there are only two small business manufacturers of fiberglass tape in the United States—responsible small business dealers are eligible for award under a small business set-aside. The Small Business Administration regulations at 13 C.F.R. § 121.3-8 (1985), which provide that a nonmanufacturer bidding on a small business set-aside is considered to be small when it meets the applicable size standard for number of employees and offers the products of a small business manufacturer.

With regard to the responsibility of RJM for purposes of restricting of fiberglass-reinforced tape items 48 through 62, a contracting agency need not make determinations tantamount to affirmative determinations of responsibility before determining to set aside a procurement for exclusive small business participation. *Fermont Division, Dynamics Corp. of America; Onan Corp.*, 59 Comp. Gen. 533 (1980), 80-1 C.P.D. ¶438. While the standards of responsibility enunciated in the FAR may be relevant in making a set-aside determination, the agency is only obligated to make an informed business judgment that there is a reasonable expectation of acceptably priced offers from a sufficient number of responsible small businesses. *Id.*

Here, the record reveals that RJM was the low bidder on the line items for polyester tape in the prior procurement. An award was made to RJM following a favorable preaward survey of the company, and RJM successfully performed the contract. Irrespective of the fact that GSA received bids on those items from a total of four eligible firms on that procurement, we see nothing wrong with GSA, in determining whether a set-aside for fiberglass tape was appropriate, relying on its past experience with RJM and its finding that RJM was responsible for award in the prior procurement, even though the award was for polyester tape rather than fiberglass tape. In addition, we note that in comments on the protest RJM advises that Anchor's description of RJM's size, capacity, and finances is wrong, and that RJM in fact can produce substantially more tape than called for by the solicitation.

In view of GSA's experience in procuring fiberglass-reinforced tape, the agency's expectation of small business competition adequate to satisfy the set-aside regulations was not unreasonable. The protest is denied.

[B-212699]

Compensation—Overtime—Uncommon Tours of Duty

Where General Schedule employees' basic workweek contains hours of work in excess of 8 in a day payable at an overtime rate these overtime hours may not be counted in determining whether the employees have worked hours in excess of 40 hours in an administrative workweek for purposes of computing "title 5" overtime compensation under 5 U.S.C. 5542 and the implementing regulation, 5 C.F.R. 550.111(a).

Compensation—Overtime—Fair Labor Standards Act—Fair Labor Standards Act *v.* Other Pay Laws

An employee who is "nonexempt" under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, must have overtime compensation computed under both title 5 of the United States Code and the FLSA. The employee is then entitled to whichever computation results in the greater total compensation. The claimants here are entitled to payment under the FLSA since their total compensation computed under that Act is greater than under title 5, United States Code.

Matter of: John Nyberg, *et al.*,—Computation of Overtime Under Title 5, United States Code— Comparison With FLSA Overtime, Feb. 10, 1986:

This decision responds to a request by Ms. Margaret Rhine, Authorized Certifying Officer, Bonneville Power Administration (BPA), that we resolve a disagreement between BPA and the Office of Personnel Management (OPM) concerning the overtime pay entitlements of certain General Schedule employees. The issues are: (1) the proper method of calculating "title 5" overtime for the employees under 5 U.S.C. § 5542 (1982); and (2) the basis for comparing title 5 overtime to the employees' entitlements under the Fair Labor Standards Act, 29 U.S. §§ 201 *et seq.* (1982), in order to determine which of these two overtime authorities should be applied.

For the reasons set forth herein, we hold that:

(1) For purposes of calculating title 5 overtime for General Schedule employees, hours worked in excess of 8 hours in a day may not be counted in determining whether an employee worked in excess of 40 hours in an administrative workweek. See 5 U.S.C. § 5542(a) and 5 C.F.R. § 550.111(a) (1985).

(2) These "nonexempt" employees are entitled to be paid for overtime work under the method which gives them the greater total compensation; that is, under either title 5, United States Code, or the Fair Labor Standards Act. Since the Fair Labor Standards Act (FLSA) yields the greater total compensation under the facts of this case, the BPA employees are entitled to payment under that Act.

BACKGROUND

On November 17, 1981, Mr. John Nyberg, a BPA control systems monitor, filed an FLSA complaint with OPM's Northwest Region on behalf of himself and other "nonexempt" (*i.e.,* subject to FLSA) control systems monitors. These employees questioned the method used by BPA to compare their overtime entitlements under title 5 and the FLSA, as well as the resulting determination that title 5 rather than FLSA applied to them. Additionally, the employees questioned whether the comparisons should be made on a pay period or on an administrative workweek basis.

Mr. Nyberg and the other control systems monitors are General Schedule employees who were assigned a 40-hour basic workweek consisting of four 10-hour shifts to be worked within 3 days (Sunday through Tuesday), plus a scheduled 8-hour overtime shift on the fourth day (Wednesday), for a total of 48 hours of work each week. The employees' work schedules looked like this:

Sunday	Monday	Tuesday	Wednesday
12M [1]-10 a.m. (10 hrs.) 8 p.m.-12M	12M-6 a.m. (6 hrs.) 4 p.m.-12M	12M-2 a.m. (2 hrs.) 12N [1]-10 p.m.	8 hrs.

Sunday (4 hrs.)	Monday (8 hrs.)	Tuesday (10 hrs.)	Wednesday
14 hours	14 hours	12 hours	8 hours

There is no dispute in the present case as to the proper FLSA calculations for the employees. At the time in question, these weekly amounts were $174.40 in FLSA overtime compensation and $804.44 in total remuneration. The computation of title 5 overtime is disputed.

[1] "M" means midnight; "N" means noon.

For purposes of title 5, BPA calculated the employees' entitlements as follows:

32 hours of basic pay × $14.06	$449.92
28 hours of night differential pay × $1.41	39.48
8 hours of Sunday differential pay × $3.52	28.16
16 hours of title 5 overtime pay × $14.76 [2]	236.16
Total weekly remuneration	$753.72

Based on the above calculations, BPA determined that the employees' weekly overtime compensation under title 5 ($236.16) was more than it would be under FLSA ($174.40). While the employees' total weekly remuneration was more if FLSA applied ($804.44) than if title 5 applied ($753.72), BPA concluded that the comparison between title 5 and FLSA should be based only on overtime compensation, not total remuneration. Therefore, BPA applied title 5 to fix the employees' overtime entitlements.

[2] The employees' basic rate of pay exceeded the rate for GS-10, step 1. Therefore, under the applicable title 5 formulas (discussed in more detail hereafter), their title 5 overtime rate was 1½ times the hourly rate for GS-10, step 1, or $14.76 at the time.

The Northwest Region of OPM issued its FLSA decision on May 31, 1983. The OPM agreed with BPA that, contrary to the employees' assertion, overtime comparisons should be based on the workweek, not the pay period. However, OPM rejected BPA's method of calculating title 5 overtime. As discussed in detail hereafter, OPM arrived at an alternate method that resulted in a greater overtime entitlement for the employees under FLSA than under title 5. In any event, OPM also opined that the title 5-FLSA comparison should be based on total remuneration, not just overtime pay. Since total remuneration was greater by application of FLSA, OPM concluded that the employees in question should be compensated under FLSA.

The OPM directed BPA to identify all current and former employees affected by its decision and to compute their backpay enti-

tlements in accordance with its decision. The BPA disagreed with the OPM decision and submitted the matter to us for resolution.

ARGUMENTS OF BPA AND OPM

As noted above, BPA and OPM agree on the proper FLSA computations in this case. They also agree that all computations are to be made on a workweek basis. The two agencies disagree on the method to be used in calculating title 5 overtime and on the basis for comparing title 5 and FLSA entitlements.

BPA's Position

With reference to the calculation of title 5 overtime, BPA contends that under the governing statutory provisions and implementing regulations, as well as Comptroller General decisions, title 5 overtime consists of hours of work which are either in excess of 8 in a day or 40 in a week—not both. Work hours that already have been counted as overtime since they exceeded 8 hours in a day are not counted again toward hours worked in excess of 40 for the week. Accordingly, BPA treated the 16 hours worked by the employees which were in excess of 8 hours on the 3 days of their basic workweek—*i.e.*, 6 on Sunday, 6 on Monday and 4 on Tuesday—as overtime hours payable at the employees' full title 5 overtime rate. Since under BPA's approach these 16 hours do not count toward hours worked in excess of 40 in a week, BPA did not allow the employees any title 5 overtime for the 8-hour shift on Wednesday.

In sum, BPA calculated the employees' title 5 entitlements for their 48-hour workweek based on 32 hours of basic pay and 16 hours of overtime, plus the applicable night and Sunday premium payments which remain constant in all the comparisons. The BPA recognizes that this method yields weekly overtime compensation that is greater under title 5 than FLSA but total weekly remuneration that is greater under FLSA. However, it contends that title 5 must prevail over FLSA because the applicable OPM regulations specifically require the comparison to be made on the basis of the greater overtime entitlement.

OPM's Position

The OPM disputes two fundamental aspects of BPA's approach. First, OPM argues that the general rule against counting title 5 overtime hours in excess of 8 in a day toward hours in excess of 40 in a week should not apply where the hours over 8 in a day make up part of the employees' basic 40-hour workweek. The OPM points out that 5 U.S.C. § 6101 (1982) requires agencies to schedule a basic 40-hour workweek. It follows, according to OPM, that employees

are entitled to at least 40 hours of basic pay for each week.[3] The BPA's approach grants employees only 24 hours of basic pay for their basic 40-hour workweek; the remaining 16 hours are treated as overtime. In OPM's view, this approach incorrectly understates the employees' basic pay and overstates their title 5 overtime compensation.

OPM's alternative method of calculating title 5 overtime in this case consists of the following three steps:

1. Allow the employees basic pay ($14.06 per hour) for all 40 hours that make up their basic workweek.

2. Allow the employees an additional amount ($.70 per hour) over their basic pay for the 16 hours of their basic workweek that constitute hours in excess of 8 in a day. This additional amount represents the difference between the employees' basic rate of pay and their full title 5 overtime rate.

3. Pay the employees the full title 5 overtime rate ($14.76) for the 8 hours worked on Wednesday, which represents 8 hours worked in excess of 40 in the week.

This method of calculation yields the following results:

Basic pay	40×$14.06	=		$562.40
Night differential pay	28×$1.41	=		39.48
Sunday differential pay	8×$3.52	=		28.16
Overtime pay:				
	16×$.70	=	$11.20	
	8×$14.76	=	118.08	
			$129.28	129.28
Total weekly remuneration				$759.32

Under the OPM method, title 5 overtime ($129.28) now is less than FLSA overtime ($174.40) and total remuneration using title 5 ($759.32) still remains less than FLSA ($804.44). Thus, FLSA would apply regardless of whether the comparison is made between overtime compensation or total remuneration. However, OPM does assert that total remuneration is the proper basis for comparison, citing as support for this approach example 3 and 4 in Attachment 5 to FPM Letter 551-1 (May 15, 1974).

[3] See also, in this regard, Appendix H to Book 550, FPM Supp. 990-2 (Inst. 68, March 7, 1983) at para. b(1)(a), which states that "[a]n employee is entitled to basic pay for work performed during his or her 40-hour basic workweek."

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ANALYSIS AND CONCLUSIONS

1. *Computation of Overtime Pay under title 5*

The statutory basis for the title 5 calculation of overtime for General Schedule employees in 5 U.S.C. § 5542(a) (1982), which provides in part:

"For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or [with exceptions not relevant here] in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

"(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

"(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10, the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10, and all that amount is premium pay."

The implementing OPM regulations provide, at 5 C.F.R. § 550.111(a) and (b) (1985):

(a) Except as provided by paragraph (d) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is:

"(1) Officially ordered or approved: and

"(2) Performed by an employee. *Hours of work in excess of eight in a day are not included in computing hours in an administrative workweek.*

"(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113." [Italic supplied.]

Section 550.113 of 5 C.F.R. tracks the language of 5 U.S.C. § 5542(a)(1) and (2) in generally fixing the overtime rate as the lower of 1½ times an employee's basic hourly rate of pay or 1½ times the minimum basic rate for GS-10.

The language of 5 U.S.C. § 5542(a) strongly implies, and the OPM regulation explicitly provides, that hours of work in excess of 8 in a day are not included in computing hours in excess of 40 in a week. We adopted the same interpretation of substantively identical statutory language in 42 Comp. Gen. 329 (1962). OPM's method of computing title 5 overtime in the present case clearly is inconsistent with this interpretation. OPM counts a total of 24 hours of the employees' 48-hour workweek as overtime hours for purposes of title 5. This includes both the 16 hours worked in excess of 8 in a day for Sunday through Tuesday and the full 8-hour shift worked on Wednesday. We disagree with OPM for the following reasons.

Under the provisions of the 5 U.S.C. § 6101 (1982), the head of an agency is required to establish a basic administrative workweek of 40 hours for each full-time employee in his organization, and provide that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days. this requirement has been upheld by the Court of Claims. In *Acuna v. United States,* 479 F.2d 1356, 202 Ct. Cl. 206 (1973), *cert. denied,* 416 U.S. 905 (1974); and by this office in *James E. Sommerhauser,* 58 Comp. Gen. 536 (1979).

Neither the statute nor the OPM regulations provide for an exception to the above rules when an employee's basic 40-hour work-

week includes some hours that qualify for overtime compensation. Nothing in the statute precludes an agency from making hours in excess of 8 in a day part of the basic workweek. However, since an employee is entitled to basic pay for work performed during the 40-hour basic workweek,[4] the actual overtime pay is the difference between the basic rate of pay and the overtime rate for those hours. In this context, we believe that 40 hours of basic pay represents nothing more than a floor on an employee's entitlement for the basic workweek; it does not prevent an agency from paying additional compensation for hours within the basic workweek that qualify as overtime work under title 5. Thus, BPA's structuring of the employee's basic workweek in the present case does not detract from their entitlements under 5 U.S.C. § 6101 [5]

Thus, the rule as properly applied to these BPA employees with uncommon tours of duty may be stated as follows: Hours that are both included in the basic workweek and are in excess of 8 hours in a day may not be counted in determining whether or not an employee has exceeded 40 hours in an administrative workweek. Applying this rule to the facts here, the BPA employees are entitled to title 5 overtime pay for the 16 hours worked in excess of 8 hours in a day during the tours of duty worked Sunday through Tuesday. However, since those overtime hours may not be counted twice, only 24 of the hours worked during that period may be counted in determining whether the employees exceeded 40 hours of work during the administrative workweek. Therefore, they may receive only basic pay for the 8 hours worked on Wednesday.

Comparison of Overtime Entitlements under Title 5 and under FLSA

The second issue is whether overtime compensation or total remuneration provides the correct basis for deciding which of the statutory authorities applies.

As far as we can determine, this is the first case to directly present the issue. Shortly after enactment of the 1974 amendments which made FLSA applicable to Federal employees, the Civil Service Commission issued FPM Letter 551-1, *supra,* which instructed agencies to calculate Federal employee overtime entitlements under both title 5 and FLSA and to apply the authority that provided the greater benefit. Our decision in 54 Comp. Gen. 371 (1974) endorsed the concept of comparing FLSA and title 5 entitlements and applying the more beneficial; however, we did not address how this comparison should be made.[6]

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[4] See Footnote 3 above.

[5] We have been informally advised that BPA reports 40 hours of work each week for these employees for retirement purposes. Therefore, the employees are not receiving proper retirement credit.

[6] The issue in 54 Comp. Gen. 371 was whether FLSA applied at all to the overtime entitlements of Federal employees or whether, as one agency maintained, the existing title 5 overtime provisions preempted FLSA.

As OPM points out, two examples in Attachment 5 to FPM Letter 551-1 indicate that the FLSA-title 5 comparison should be made on the basis of total weekly remuneration. In fact, BPA states that it also compared overtime on this basis until OPM issued final regulations on Federal pay administration under FLSA in December 1980.[7] According to BPA, however, these regulations now require that the comparison be made on the basis of overtime compensation alone. The BPA points to 5 C.F.R. § 551.513, which provides:

§ 551.513 Payment of greater overtime pay entitlement.

An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter [title 5 overtime], or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority.

The OPM's position, notwithstanding the provisions of section 551.513, is that the basic principle in applying title 5 and the FLSA is that employees are to be paid by whichever method provides the greater total remuneration. The OPM also found that, under proper methods of computation, both overtime entitlement and total remuneration for these claimants are less under title 5 than under FLSA. We agree that whether overtime pay or total pay under title 5 and FLSA are compared, the results of the comparisons should be the same if both types of overtime are properly computed. Additionally, as set our in 5 C.F.R. § 551.513, quoted above, the comparison is to be made on a workweek basis, not a pay period basis as contended by Mr. Nyberg.

However, because it is not safe to say that comparing overtime will always achieve the same result as comparing total compensation, and because the plain language of 5 C.F.R. § 551.513 is at variance with the OPM position stated above, we believe that the regulation is inconsistent with the intent of Congress in applying FLSA to Federal employees and may be confusing to employing agencies as illustrated by this case. Therefore, we strongly recommend that OPM revise the regulation to make it clear that the greater total benefit is to be controlling.

In applying our above-stated interpretation to the instant case, the correct computation of title 5 overtime compensation is set out below. Since there is no dispute as to the computation of FLSA overtime, we will not reproduce the entire calculation, merely the result. Repeating the work schedule, it consists of four 10-hour shifts worked within Sunday, Monday and Tuesday, resulting in total hours worked of 14 on Sunday, 14 on Monday and 12 on Tuesday, with an additional 8-hour shift worked on Wednesday. For Mr.

[7] See 5 C.F.R. Part 551, published at 45 Fed. Reg. 85659 (December 30, 1980). The overtime provisions of the current regulations, 5 C.F.R. §§ 551.501-551.541 (1985), are the same as the December 1980 version for purposes here relevant.

Nyberg (grade GS-11, step 10), at the then current October 1980 pay rates, the computation is as follows:

[8] Since only 24 of the hours worked Sunday through Tuesday are counted toward 40 hours for title 5 overtime purposes (see p. 9 above), the 8 hours worked Wednesday are paid at the regular rate.

[9] With respect to the hours of work included in the 40-hour basic workweek which are in excess of 8 in a day, the only compensation included as overtime is the difference between the rate of basic pay and the overtime rate.

[10] Only the employees' hours of work in excess of 40 in the week count as FLSA overtime hours. Thus, while the employees in this case have 16 hours of title 5 overtime, they have only 8 overtime hours for purposes of FLSA.

Hourly rate of pay

Basic pay	$14.06
Night pay	1.41
Sunday pay	3.52
Overtime pay (GS-10/1 times 1½)	14.76

Title 5 Overtime Pay Computation

Basic pay (for Sun, Mon., and Tues.) 40 hours×$14.06	$562.40
Night pay 28 hours×1.41	39.48
Sunday pay 8 hours×3.52	28.16
Straight time 8 hours for Wed.[8]×14.06	112.48
Overtime pay 16 hours×$.70 [9]	11.20
Total Pay	$753.72

FLSA Overtime Pay Computation

Basic pay	$562.40
Night pay	39.48
Sunday pay	28.16
FLSA overtime [10]	174.40
Total Pay	$804.44

Pay Comparison

Total Compensation

FLSA	$804.44
Title 5	753.72

Overtime Compensation

FLSA	174.40
Title 5	11.20

Accordingly, the computation of overtime entitlement under title 5, United States Code, should be made based upon the rules and principles set forth in this decision. Inasmuch as the computation

of overtime under the Fair Labor Standards Act results in greater total compensation, Mr. Nyberg and other control systems monitors are entitled to the payment of overtime compensation under the Fair Labor Standards Act.

[B-217484]

Officers and Employees—Transfers—Real Estate Expenses—House Title in Name of Another

An employee, between the time he received notice of his transfer and the date he reported to his new duty station, married the woman whose home had been his residence at the time he received notice of his transfer. He may not be reimbursed for real estate expenses associated with the sale of that residence since he did not acquire his interest in the residence prior to the date he was definitely informed of his transfer. At that time he had neither a direct nor a derivative interest in the property and, thus, did not satisfy the requirements of Federal Travel Regulations paragraph 2-6.1c. *53 Comp. Gen. 90 (1973)* is overruled.

Matter of: Joel O. Brende—Real Estate Title Requirements, Feb. 11, 1986:

The Veterans Administration has requested a decision concerning the claim of a transferred employee, Dr. Joel O. Brende, for reimbursement of real estate associated with the sale of a residence at his old official duty station. The residence in question was originally owned solely by the woman Dr. Brende married after he received notification of his transfer. We hold that Dr. Brende may not be reimbursed for any of the real estate expenses associated with the sale of that residence since he did not acquire his interest in the residence prior to the date he was definitely informed of his transfer, as required by paragraph 2-6.1c of the Federal Travel Regulations (Supp. 4, August 23, 1983), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984) (FTR).

Dr. Brende was transferred from the Veterans Administration Medical Center in Topeka, Kansas, to the Veterans Administration Medical Center in Montrose, New York, with a reporting date of September 18, 1983. Dr. Brende signed the service agreement required by 5 U.S.C. § 5724(i) on September 7, 1983, and, on his application for reimbursement, listed that date as the date he was notified of his impending transfer. His travel authorization was issued on September 9, 1983. Dr. Brende married Jacqueline Kershner on September 16, 1983.

On August 29, 1983, prior to her marriage to Dr. Brende, Jacqueline Kershner entered into an agreement to sell her Topeka, Kansas, residence. At that time, title to the property was in her name alone. On September 9, 1983, the date Dr. Brende's travel orders were issued, she transferred title to Dr. Brende and herself as tenants-in-common. Dr. Brende has furnished a sworn statement that the property had been his residence for several months prior to September 9, 1983, and that he was residing there when he was first notified of his transfer.

The statutory authority for reimbursement of real estate expenses is found at 5 U.S.C. § 5724a(a)(4) (1982), which provides for reimbursement of the expenses for the sale of an employee's residence at the old duty station and the purchase of a residence at the new duty station. The regulations which implement that statute are found in Chapter 2, Part 6, of the FTR, paragraph 2-6.1 of which provides as follows:

Conditions and requirements under which allowances are payable. To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to be paid by him/her in connection with the sale of one residence at his/her old official station, * * * *Provided, That:*

* * * * * * *

b. *Location and type of residence.* The residence or dwelling is the residence as described in 2-1.4i, * * *.

c. *Title requirements.* The title to the residence or dwelling at the old or new official station, * * * is in the name of the employee alone, or in the joint names of the employee and one or more members of his/her immediate family, or solely in the name of one or more members of his/her immediate family. For an employee to be eligible for reimbursement of the costs of selling a dwelling * * * the employee's interest in the property must have been acquired prior to the date the employee was first definitely informed of his/her transfer to the new official station.

d. *Occupancy requirements.* The dwelling for which reimbursement of selling expenses is claimed was the employee's residence at the time he/she was first definitely informed by competent authority of his/her transfer to the new official station.

Paragraph 2-1.4i of the FTR defines official station or post of duty, including an employee's residence at that post of duty, as follows:

Official station or post of duty. The building or other place where the officer or employee regularly reports for duty. * * * With respect to entitlement under these regulations relating to the residence and the household goods and personal effects of an employee, official station or post of duty also means the residence or other quarters from which the employee regularly commutes to and from work. * * *.

Thus, the prerequisities for reimbursement of house sale expenses are listed above, and all must be met before reimbursement may be allowed. First of all, the house the employee sells must be located at the employee's old duty station and, as provided in FTR para. 2-1.4i, it must be the one from which the employee regularly commutes to and from his worksite. Secondly, the employee must have been residing in the house for which he claims reimbursement of selling expenses at the time he was notified of his transfer. Finally, title to the house must be in the name of the employee alone, in the joint names of the employee and a member of his immediate family or solely in the name of a member of his immediate family. This provision is qualified by the requirement that the employee must have acquired his interest in the property prior to the date he was definitely informed of his transfer.

Although the residence in question was located at Dr. Brende's old duty station and although it appears that he was residing there at the time he was notified of his transfer and regularly commuted from that residence, he did not acquire his interest in that residence prior to notification of his transfer. Dr. Brende's future wife transferred title to him on September 9, 2 days after the date he

says he received transfer notification. Their marriage took place 7 days later, on September 16.

We held in a similar case that it was not sufficient for purposes of FTR para. 2-6. 1e that an employee's future wife owned the residence at the time the employee was notified of his transfer. *Ellis Slater*, B-216577, March 11, 1985. We stated that to hold that such ownership was sufficient would render the requirement that an employee must have an interest in the property meaningless since in such situations the employee's interest is derivative of the spouse's interest. Thus, an employee must have an interest in the property either direct, that is in his own name, or derivative, that is in the name of a member of his immediate family, at the time he was first notified of his transfer. Since the owner of the residence here was not a member of Dr. Brende's immediate family when he was first notified of his transfer, he had neither a direct nor a derivative interest in the property at that time.

As stated in the Veterans Administration's submission, we held in 53 Comp. Gen. 90 (1973) that an employee is not precluded from receiving reimbursement for the expenses of a sale of residence where the employee, subsequent to receiving notice of a transfer but prior to the actual date of transfer, marries and thereafter establishes a residence in a dwelling which had been owned and occupied by his wife at the time he was first officially informed of the transfer. In that case, the employee and his wife actually occupied the dwelling at the time of transfer. Dr. Brende's situation does not fall squarely within the purview of this case because he did not reside in the Topeka property after the date of his marriage. More fundamentally, however, we believe that 53 Comp. Gen. 90 should be overruled.

In 53 Comp. Gen. 90 we did not apply the regulatory requirements that an employee must have an interest and reside in the property at the time he is notified of his transfer because of the particular set of facts involved in that case. The agency had delayed the employee's transfer for six months; it was clear that the employee did not acquire the dwelling he sold for the purpose of obtaining financial gain; and he had in fact established a bona fide residence in his wife's home after their marriage and prior to transfer. Although these facts did make this employee's case a sympathetic one, upon reexamination of this decision, we now believe that the requirement that the employee have an interest in the property when he is first notified of his transfer must be strictly applied. As a result, we have decided to overrule 53 Comp. Gen. 90 (1973).

For the reasons stated above, we conclude that Dr. Brende's case does not meet the applicable regulatory requirements and, therefore, he is not entitled to the real estate expenses he seeks.

[B-217904]

Officers and Employees—Transfers—Miscellaneous Expenses—Auto Registration, etc. Expenses

Use taxes, excise taxes, license fees, and related registration costs imposed on boats and trailers brought into the state where the transferred employee's new duty station is located may be reimbursed as part of the miscellaneous expenses allowance. These items are reimbursable because they are substantially the same as those expressly authorized for automobiles and are directly related to the relocation of the employee's residence. They may be reimbursed regardless of the fact the boats and trailers were not transported to the new duty station at Government expense.

Matter of: John F. Manfredi and Delewis A. Gudgel, Feb. 11, 1986:

Mr. John F. Manfredi and Mr. DeLewis A. Gudgel, employees of the Bureau of Reclamation, paid taxes and related fees on boats and trailers they brought into the State of Washington when they were transferred from locations outside the State to Yakima, Washington. The amounts they were assessed as use taxes, as well as initially assessed excise taxes, license fees, and related registration costs for the boats and trailers may be reimbursed as part of the miscellaneous expenses allowance.[1]

Mr. Manfredi was transferred from Klamath Falls, Oregon, to Yakima, Washington, in November 1984. He transported two boats and two boat trailers to his new duty station. Upon registering the boats and boat trailers in the State of Washington he was assessed use taxes of $787.80 as well as registration and licensing related fees totaling $58.90. In addition, he paid $10.35 for boat numbers.

Mr. Gudgel was transferred from Ashton, Idaho, to Yakima, Washington, in December 1984. He brought his camping trailer with him to Yakima. Upon registering his trailer at his new duty station he was assessed a Washington State use tax of $573.38 together with an excise tax and other fees totaling $85.50.

Applicable Regulation

The issue is whether the above items are reimbursable relocation costs within the category of miscellaneous expenses. Distinguishing between the items covered and not covered by the miscellaneous expenses allowance, Federal Travel Regulations, paras. 2-3.1(b)-(c) (Supp. 4, August 23, 1982), *Incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984), provide in part:

> b. *Types of cost covered.* The allowance [miscellaneous expenses] is related to expenses that are common to living quarters, furnishings, household applicances, and to other general types of costs inherent in relocation of a place of residence. The types of costs intended to be reimbursed under the allowance include but are not limited to the following:
>
> . . . . . .

[1] Florence K. Entwistle, Authorized Certifying Officer, requested this advance decision.

(6) Costs of automobile registration, driver's license, and use taxes imposed when bringing automobiles into certain jurisdictions.

(c). *Types of costs not covered.* This allowance shall not be used to reimburse the employee for costs or expenses incurred which exceed maximums provided by statute or in these regulations; costs or expenses that the employee incurred but which are disallowed elsewhere in these regulations * * * costs or expenses incurred for reasons of personal taste or preference and not required because of the move * * * or any other expenses brought about by circumstances, factors, or actions in which the move to the new duty station was not the proximate cause. * * *

Discussion

A use tax is imposed on the value of tangible property, including boats and trailers, transported into the State of Washington for use there. It is paid only once in lieu of the state sales tax. Revised Code of Washington Annotated, Chapter 82.12. The State of Washington also imposes an annual excise tax on boats, trailers, travel trailers, and campers in connection with their registration and licensing. Revised Code of Washington Annotated, Chapters 82.44 (motor vehicles defined to include ordinary trailers), 82.49 (watercraft), and 82.50 (travel trailers and campers).

Use taxes, excise taxes, license fees, and related registration costs imposed by the State of Washington on the boats and trailers in this case are reimbursable because they are substantially the same as those expressly allowed for automobiles under FTR, para. 2-3.1b(6). They are expenses directly related to the relocation of the employee's residence since payment of the State-imposed fees is a condition to use of the boats and trailers in the vicinity of the employee's new residence. On this same basis we have allowed reimbursement as a miscellaneous expense of use taxes paid upon a mobile home transported to the new duty station. See 47 Comp. Gen. 687 (1968).

Concerning the employees' claim for excise taxes, license fees, and related registration costs, we point out that only the initial payment due upon relocating the boats and trailers to Yakima, is reimbursable. Accrual of these items in subsequent years is a part of the employee's everyday cost of living unrelated to the change of residence. *Thomas A. Shaver,* B-195851, October 29, 1980. In Mr. Manfredi's case, the $10.35 amount he paid for boat numbers also may be reimbursed. Upon registering the boat, the registration number issued by the state is required to be displayed on the vessel. As an integral part of that process the purchase of boat numbers may be regarded as a cost associated with registration of the boat. The expenses here in issue may be allowed even though the trailers and boats were not transported to the employee's new duty station at Government expense. B-174665, January 20, 1972.

The claims submitted by Messrs. Manfredi and Gudgel may be paid to the extent they are otherwise allowable under FTR para. 2-3.3.

[B-219477]

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Computation of Allowable Amount

Employee of the Department of Interior requests reimbursement of temporary quarters subsistence expenses incurred in connection with his occupancy of lodgings furnished by a coworker. Although the employee claims that the lodgings were not furnished on the basis of a friendship between the two, applicability of the rules for reimbursement for temporary quarters does not depend upon the relationship between the employee and the person supplying the lodgings. When the lodgings are provided in a personal residence by a host who does not have a history or make a practice of renting out accommodations in his private home, the employee's claim should be supported by information indicating that the lodging charges reflect expenses incurred by the host.

Matter of: Jerome R. Serie, February 11, 1986:

This action is in response to a request for an advance decision from the U.S. Department of the Interior, Fish and Wildlife Service, regarding the claim of Jerome R. Serie for temporary quarters subsistence expenses in conjunction with his change of permanent duty station.[1] Upon transferring to a new duty station, Mr. Serie entered into an agreement under which he was provided temporary lodgings and meals in the home of a fellow employee.

The issue presented is whether the agency, in reliance on receipts presented by the employee, may pay him a temporary quarters subsistence expense allowance based on lodging costs of $22.50 per day and meal costs totaling as much as $15.10 per day. The agency's doubt in this matter relates to whether the standards of reasonableness applied by this Office in cases involving temporary lodgings and meals furnished by friends or relatives are applicable to noncommercial lodgings and meals which the employee claims were not furnished on the basis of a friendship. It is our view that, regardless of the nature of the relationship between the employee and the host, claims involving noncommercial lodgings and meals must meet the standards of reasonableness applied to lodgings and meals furnished by friends or relatives unless the host has a history or makes a practice of providing accommodations in his residence on a fee basis consistent with the charges for which reimbursement is claimed.

Mr. Jerome R. Serie, an employee of the Fish and Wildlife Service, U.S. Department of the Interior, was transferred from Jamestown, North Dakota, to Laurel, Maryland. After arriving in Maryland on April 25, 1984, and exploring costs of commercial lodgings in the Laurel area, Mr. Serie states that he approached Mr. Matthew C. Perry, a fellow employee at the Fish and Wildlife Service, about renting out part of Mr. Perry's private residence as temporary lodgings.

[1] The request was made by Edward L. Davis, Assistant Director, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C.

After Mr. Perry discussed the matter with his family, he and Mr. Serie agreed to an arrangement whereby Mr. Serie would pay $22.50 per day for lodgings. In addition he agreed to pay for meals based on the direct cost of food plus preparation.

Mr. Serie provided hand-written receipts for lodging and meal expenses with his claim. The Department of the Interior paid the claimed amounts for the first two 30-day periods that Mr. Serie occupied temporary quarters. However, upon discovering that Mr. Serie was residing in the home of a fellow employee, rather than a commercial establishment, the agency withheld payment of his claim for yet a third period and has requested an advance decision from us on the propriety of paying these expenses.

Pursuant to 5 U.S.C. 5724a(a)(3) (1982), a transferred employee may be authorized subsistence expenses for himself and his family while occupying temporary quarters at the new station. Applicable regulations are found in the Federal Travel Regulations (FTR), para. 2-5-1, *et seq.*, FPMR 101-7, September 1981, as amended, Supp. 4, August 23, 1982, *incorp. by ref.*, 41 C.F.R. § 101.7003 (1984). Under these regulations, temporary quarters may be obtained from either private or commercial sources. Employees may be reimbursed for temporary quarters and subsistence expenses which are actually incurred and are reasonable as to amount. See FTR para. 2-5.2c and 2-5.4.

In cases where an employee occupies temporary quarters in a private residence we have allowed reimbursement for rental or lodging charges where they are considerably less than charges for commercial accommodations and reflect additional costs actually incurred by the host. More often than not, these cases have involved accommodations and meals furnished by friends or relatives. In 52 Comp. Gen. 78, 82 (1972) we pointed out that it does not seem reasonable or necessary for employees to agree to pay friends and relatives the same amounts they would pay for lodging in motels or meals in restaurants or to base payments to friends or relatives on the maximum amounts that may be paid as temporary quarters subsistence expenses.

The types of expenses incurred by one who provides lodging in his private home are not the same as those incurred by a commercial establishment. In general, the expenses incurred by an individual in accommodating another in his private home are similar to those he incurs in maintaining that home for his and his family's use. The presence of a guest might increase his use of utilities and the wear and tear on household furnishings. However, the host does not incur many of the expenses incurred by a commercial establishment, such as license fees, salaries of reservation personnel, advertising, etc. Therefore, while a private host may be inconvenienced and may incur some additional expenses in providing lodgings, we are unable to agree with the view that the cost of commer-

cial lodging reflects a fair standard of compensation. *Allen W. Rotz*, B-190508, May 8, 1978.

Regardless of the character of the relationship between the employee and his host we have consistently held that claims involving noncommercial lodgings should be supported by information indicating that the lodging charges are the result of expenses incurred by the party providing the lodging. 55 Comp. Gen. 856 and *Constance A. Hackathorn*, B-205579, June 21, 1982. In *Constance A. Hackathorn*, an employee rented a room in the private residence of an acquaintance of a friend. We found that the applicability of the rules for reimbursement did not depend upon the relationship between the employee and the person supplying the lodgings, but upon whether the quarters were furnished as a business proposition or whether they were furnished as a personal accommodation to the employee. We noted that the best evidence that a purely business arrangement is involved would be evidence of a continuing practice of the homeowner renting out the room for an established price.

Stating this rule in terms of obtaining lodgings from friends or relatives is misleading. As held in *Hackathorn* we do not consider that such relationship will govern. In fact it would be impossible for us to determine whether a friendship exists in any given case. Thus, this rule has been applied when employees occupy quarters in private residences, not in commercial establishments.

In this case, there is no evidence that Mr. Serie's coworker and host made a practice of renting out space in his private residence or, in fact, that he did so prior to or after this arrangement with Mr. Serie. In the absence of such evidence the charges must be considerably less than for commercial accommodations and supported by information indicating that they were the result of expenses incurred by Mr. Perry in providing the lodging. In this case we note that the daily rental rate of $22.50 claimed by Mr. Serie is only a few cents a day less than the rental rate for a furnished apartment which Mr. Serie has indicated he could have rented without signing a 1-year lease. This fact alone raises a serious question about the reasonableness of the amount claimed since there is no indication that $22.50 a day reflects additional costs occasioned by Mr. Serie's occupancy.

With regard to the meals purchased, Mr. Serie states that meals were to be charged at direct cost plus preparation. On a daily basis he has claimed amounts totaling as much as $15.10 for breakfast, lunch and dinner. There is no explanation of how these costs were calculated which would provide the agency with information to make a determination that the meal costs were reasonable under the circumstances.

In conclusion, we find that the agency was correct to question whether payment was proper. It is our view that there is insufficient information in the record to allow payment of the claim since

the record shows that lodgings were provided to the employee in a private residence and not as a continuing business of the individual whose residence was occupied. Accordingly, Mr. Serie's claim is denied.

[B-220518]

Contracts—Labor Stipulations—Davis-Bacon Act—Minimum Wage Determinations

Under a solicitation for base operations and maintenance, job assignments ordinarily should be categorized in accord with the basic nature of the resulting contract, i.e., service work, and laborers performing those assignments classified as Service Contract Act workers. It is not proper to categorize all job assignments in a given area of activity as covered by the Davis-Bacon Act's minimum wage requirements applicable to construction workers without regard to that Act's $2,000 threshold for each severable construction, reconstruction, renovation, or repair project.

Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Criteria

In a contract for base operations and maintenance covered by the Service Contract Act, agency procedures for managing "project" work, including the use of written work orders and payment only upon inspection and acceptance of the final product, do not establish that the minimum wage requirements of the Davis-Bacon Act for construction workers should apply. Other criteria, such as the $2,000 Davis-Bacon Act threshold for severable projects and whether the service is incidental to maintenance, also must be considered.

Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Criteria

Where solicitation for base operations and maintenance services covered by the Service Contract Act includes routine maintenance of railroad tracks at the installation, such maintenance work should be considered service work covered by the Service Contract Act, rather than construction work under the Davis-Bacon Act.

Contracts—Negotiation—Requests for Proposals—Evaluation Criteria—Cost

Protest that solicitation fails to specify the relative importance of cost in the procuring agency's evaluation is denied where provisions of the request for proposals regarding the extent to which cost will be independently considered in the evaluation are unambiguous.

Contracts—Negotiation—Requests for Proposals—Quantity Estimates—Best Available Information Requirement

Protest that solicitation contains insufficient information for offers intelligently to estimate material costs is denied where the record shows that offerors have been given access to all information reasonably available to the agency and that the information, together with the offeror's business knowledge and experience, should permit them to prepare proposals intelligently and on an equal basis. The mere presence of risk in a solicitation does not make the solicitation inappropriate, and specifications are not rendered materially deficient because the agency's prior cost experience cannot be fully determined from the solicitation.

Matter of: Dynalectron Corporation, Feb. 11, 1986:

Dynalectron Corporation protests the terms of request for proposals (RFP) No. DAKF06-85-R-0052, issued by the Department of the

Army in connection with a cost comparison under Office of Management and Budget Circular A-76, to determine whether it should continue performing base maintenance services at Fort Carson, Colorado, with government personnel or have them performed by a commercial firm. The protester alleges that the RFP contains terms that unfairly favor continued government performance over commercial performance. Dynalectron contends that the Army cannot justify the Davis-Bacon Act staffing levels imposed upon offerors; that the solicitation fails to indicate clearly the relative importance of cost in the evaluation; and that the solicitation should stipulate the amount of materials and supplies needed to operate the base, rather than require each offeror to estimate that amount.

We sustain Dynalectron's protest on the first ground and deny it on the last two grounds.

The Contracting Division, Fort Carson, issued the solicitation on February 1, 1985, seeking offers to perform base operations and maintenance services. These include such services as operation of the water system, the wastewater treatment plant, and the landfill; maintenance and repair of buildings, roads, kitchen equipment, and other items; and minor construction, alteration, repair, and renovation projects. The contractor will be required to operate its own supply system incident to performance of the work. If performance of the work by contract is found to be more economical than performance by government employees, the solicitation contemplates a cost-plus-award-fee contract for a base year, with 4 option years.

Davis-Bacon Act

Dynalectron contends that the solicitation improperly requires offerors to estimate their labor costs for certain categories of work using wage levels required under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982). Dynalectron argues that the Army has classified approximately 40 percent of the work under that act, an amount that is appreciably greater than the 5 to 15 percent under comparable contracts at other Army installations.

According to Dynalectron, this misclassification means that a disproportionate amount of the offerors' estimated labor costs must reflect Davis-Bacon Act wages, which are generally applicable to construction workers, rather than wages that the offerors will actually be required to pay under provisions of the Service Contract Act, 41 U.S.C. 351, *et. seq.* (1982). Dynalectron states that Davis-Bacon Act wages are appreciably higher than those for comparable skills under either the Service Contract Act or the government salary schedule. The firm argues that the government has an unfair competitive advantage in the cost comparison, since it has artificially inflated the wage rates private firms must propose.

The Army explains that in developing the solicitation, it divided the work into three categories: (1) "project" work; (2) maintenance, plant operations, and service (including maintenance of the railroad); and (3) repair work. The Army classified both the "project" work and the maintenance of the railroad at Fort Carson as subject to the Davis-Bacon Act. The Army states that in making this determination, it has taken care to comply with a consent decree that resolved a suit alleging that Fort Carson had evaded the requirements of the Davis-Bacon Act by improperly categorizing contracts as nonconstruction and by dividing projects into a series of contracts to place them below the $2,000 minimum for Davis-Bacon Act applicability. *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419* v. *Carmen,* No. 77-F-1197 (D. Colo. Apr. 19, 1982) (consent decree).[1]

The responsibility for determining whether the Davis-Bacon Act provisions should be included in a particular contract rests primarily with the contracting agency, which must award, administer, and enforce the contract. *Yamas Construction Co., Inc.,* B-217459, May 24, 1985, 85-1 CPD ¶ 599. It follows that the determination of whether items of work fall within the coverage of the Service Contract Act, or within the scope of the Davis-Bacon Act, is fundamentally a matter of agency judgment. In challenging the Army's estimate of work subject to the Davis-Bacon Act, Dynalectron must show that the Army did not use the appropriate statutory and regulatory criteria, *D.E. Clarke,* B-146824, May 28, 1975, 75-1 CPD ¶ 317, or that the estimates are not based on the best information available, or otherwise misrepresent the agency's needs, or result from fraud or bad faith. *Yamas Construction Co, Inc.,* B-217459, supra.

Regulations of the Department of Labor provide that, where contracts principally for services also involve substantial construction work, the provisions of both the Davis-Bacon Act and the Service Contract Act apply. 29 C.F.R. § 4.116(c)(2) (1985). Nonprofessional work under service contracts should be classified under the Service Contract Act except for construction, reconstruction, alteration, or repair work that is "physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract." 29 C.F.R. § 4.116(c)(2)(ii). Consequently, to be covered by the Davis-Bacon Act in a service contract, each work project must individually satisfy the requirements of that act. In other words, the work must involve construction activity as distinguished from servicing or maintenance work, 29 C.F.R. § 5.2(i), and it must include all work done in the construction or development of a project, including, without

[1] The consent decree imposes a number of obligations on Fort Carson, including a good-faith obligation to assure that contractors performing work under service contracts are properly classifying work under those contracts that is governed by the Davis-Bacon Act.

limitation, altering, remodeling, and installation work. 29 C.F.R. § 5.2(j). Further, each minor project is subject to the statutory threshold of $2,000 applicable to the Davis-Bacon Act work. *D.E. Clarke*, B-146824, Oct. 17, 1974, 74-2 CPD ¶ 212; *modified on other grounds*, B-146824, May 28, 1975, 75-1 CPD ¶ 317.[2]

The Fort Carson solicitation is primarily for installation support and maintenance work covered by the Service Contract Act, with incidental minor construction, reconstruction, alteration, or repair work covered by the Davis-Bacon Act. *See* 29 C.F.R. § 4.116(c)(2). Since the construction work is performed as part of a service contract, the Davis-Bacon Act will only apply to work that is physically and functionally separate from the service work called for by the contract. *Id.* In this context, a job assignment must satisfy both the test of severability from the Service Contract Act work and the $2,000 threshold in order to fall under the Davis-Bacon Act.

A. *"Project" Work*

Based upon provisions of the solicitation, we conclude that the Army did not properly apply the threshold in estimating the amount of the Davis-Bacon Act work to be performed. In modification No. 3 to the RFP, the Army responded to a question from a prospective offeror by stating that it applied the $2,000 threshold to the line item representing "project" work rather than to anticipated work orders to be issued under the line item. In modification No. 5, the Army stated that as long as the total contract exceeded $2,000, no individual repair task had to exceed the threshold to be subject to the Davis-Bacon Act. This means, for instance, that all "project" work, involving hundreds of unrelated activities, is classified under the Davis-Bacon Act irrespective of whether each "project" independently meets the statutory $2,000 threshold.

Another example of this improper classification is found in Technical Exhibit 29, incorporated into the solicitation by modification No. 7. It indicates that all exterior electrical work on street lights, area lights, and traffic lights is outside of the Service Contract Act, as is all interior plumbing work on piping and fixtures, as well as unstopping drains. This would mean that the simple replacement of a lamp in a street light, or the unclogging of a difficult drain beyond the capabilities of the building occupants' capabilities,

[2] On September 9, 1985, the Department of Defense promulgated a uniform policy specifically limiting the application of the Davis-Bacon Act in contracts for installation support, maintenance, and repair calling for Davis-Bacon Act services performed in response to a service call or work order to those service calls and work orders in excess of $2,000. Memorandum for Secretaries of the Military Departments from the Assistant Secretary of Defense for Acquisition and Logistics (Sept. 9, 1985); *see also* Memorandum for Director of the Army Staff from the Deputy Assistant Secretary of the Army for Programs and Commercial Activities (October 1, 1985).

The parties here differ on the application of the policy because it was issued after the procurement was initiated. Since we previously held in *D.E. Clarke* that the Davis-Bacon Act applies to work orders for construction that exceed $2,000 in operation and maintenance contracts, we consider the Defense Department policy statement to merely restate a preexisting requirement.

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would be covered by the Davis-Bacon Act. All air-conditioning repair work and all work on heating systems, hot water heaters, piping systems, and controls under the contract are included within the Davis-Bacon Act coverage, even though at least some failures of these systems must involve very minor adjustments or repairs well below the $2,000 threshold.

In addition to failing to apply the $2,000 threshold, it appears that the Army also did not properly distinguish between construction, reconstruction, alteration, and repair work that is subject to the Davis-Bacon Act and maintenance or repair that is subject to the Service Contract Act. Technical Exhibit 26 lists typical "projects" performed during 1981-1983. Large numbers of these appear clearly to be services in the nature of maintenance or repair work related to maintenance, or to be below the $2,000 Davis-Bacon Act threshold. The Army states that some Service Contract Act work was included in the exhibit because of the difficulty of classifying work from its historical data, and some, such as changing light bulbs, will be performed in the future by building occupants. However, the number of minor projects described in Technical Exhibit 26 that appear clearly to be maintenance in nature—from rebuilding a meat slicer to replacing a garbage disposal—leads us to conclude that the Army did not properly differentiate the Davis-Bacon Act work from other work to be performed.

This improper classification appears to have resulted from the Army's belief that Fort Carson's procedures for ordering, directing, and approving the "projects" establish their Davis-Bacon character. We agree that these procedures—employing written orders, specifications, specified completion date, staffing estimates, and separate inspection and acceptance before payment—are appropriate for Davis-Bacon Act work. However, such procedures can also be apropriate for Service Contract Act work. Moreover, it may be appropriate to give oral directions for Service Contract Act work as well as Davis-Bacon Act work in many instances. The employment of more complex, written procedures, therefore, does not convert Service Contract Act work into Davis-Bacon Act work, or vice versa. In the case of a plumber assigned to unclog a stopped drain, it is the nature of the work assignment, not the procedure used for directing the plumber to carry out that assignment, that determines whether the Davis-Bacon Act or the Service Contract Act applies.

B. *Railroad Maintenance*

The other major contract item that the Army believes should be covered by the David-Bacon Act is railroad maintenance. This item includes periodic inspection of the 7 miles of track at Fort Carson; realigning and regauging track; replacing washed-out ballast; replacing and resetting spikes; oiling and tightening track bolts; and replacing deteriorated equipment, such as an estimated 2 switches, 100 ties, and 240 linear feet of rail a year.

Paragraph C.5.2.1.1.2 of the performance work statement lists railroad maintenance as "service-type" work, along with other work items normally covered by Service Contract Act, i.e., landfill operations, grounds maintenance and snow removal. Much of the railroad maintenance work appears consistent with this classification, in that it involves continuing inspection and minor maintenance (such as tightening bolts) of the railroad tracks throughout the year. Even for those aspects which entail more significant activity, such as the replacing of switches, the work is of a continuing nature, with replacement performed as needed to maintain the line, rather than as a separate project directed by the government. Moreover, Fort Carson proposes to supervise railroad maintenance work with methods that, it argues elsewhere, apply to Service Contract Act work. The contractor is to schedule its own railroad maintenance work, without benefit of written orders, cost estimates, or specifications issued by Fort Carson. Similarly, there is no inspection and acceptance of a completed product; rather, the contract objective is the continued functioning of the railroad line throughout the period of performance. Again, payment for railroad maintenance is made periodically and not upon the accomplishment of identified work items or projects.

Fort Carson's classification of railroad maintenance as Davis-Bacon Act work is inconsistent with our decision in 40 Comp. Gen. 565 (1961), in which we held that the Davis-Bacon Act did not apply to the railroad maintenance subcontract issued under a contract for the operation of a government-owned ammunition plant. In that case, the track was badly deteriorated due to past failures to perform periodic maintenance. Hence, it was necessary to perform by subcontract a relatively significant amount of repair work to bring the line up to standards. We held that the track repair work was incidental to the purpose of the prime contract, which was the operation of the plant, and thus the Davis-Bacon Act was not applicable.

We believe that the Army's classification of all "project" work and all railroad maintenance as covered by the Davis-Bacon Act is unreasonable. We sustain this portion of Dynalectron's protest. By separate letter to the Secretary of the Army, we are recommending that the agency reevaluate the amount of services that should be classified as the Davis-Bacon Act work in accordance with the criteria discussed above and revise the solicitation to reflect the reevaluation.

Cost Evaluation Criteria

Dynalectron also contends that the solicitation fails to indicate the relative importance of cost, as opposed to other considerations,

in the evaluation of proposals.[3] The RFP lists four evaluation factors in their order of importance: technical, management, quality control, and cost. Dynalectron argues that a subsequent modification made the relative importance of cost ambiguous. In modification No. 14, the Army added a provision regarding relative order of importance of evaluation factors, stating that the "technical" factor was twice as important as any other factor; management was more important than quality control; and cost would not be weighted or scored. The modification stated that cost would be fully evaluated and considered in relation to each offeror's technical, management and quality control approach without stating that it was more or less important than any other factor. Dynalectron argues that the failure to restate the relative importance of cost leaves the solicitation ambiguous.

The protester also states that how significant cost will be is further confused by another provision, "Basis of Award." That provision states that "the selection of the proposal for cost comparison will be based upon both scores and a subjective analysis of the relative merits of the proposals."

The Army argues that the solicitation satisfactorily conveys the relative importance of cost in evaluation, since it did not directly modify the list of four evaluation factors, in which cost came last in order of importance. The agency also states that the other provisions merely reflect the discretion accorded procuring agencies in assessing the role of cost in a cost-type contract, where the agency considers precise numerical scoring to be inappropriate.

Solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them so that they can compete on an equal basis. *Dynalectron Corp.*, B-198679, Aug. 11, 1981, 81-2 CPD ¶ 115. The Federal Acquisition Regulation (FAR) requires that the relative importance of all factors be stated, including cost or price. 48 C.F.R. § 15.406-5(c) (1984). It is particularly important that offerors be informed of the relative significance of cost in procurements used in the cost comparison process, since the evaluated cost of the most advantageous offer will determine whether the work will be performed by contract or continue to be performed by the Army itself.

We do not believe that modification No. 14 introduced an ambiguity by stating the relative importance of all factors except cost. The original RFP provisions stating that cost was the least important factor remained unchanged, and modification No. 14 is consist-

[3] One of the interested parties to the protest asserts that when comparing the government's cost of in-house performance to that of a commercial firm, only the lowest cost, technically acceptable proposal may be used. Although this issue was not protested in a timely manner, we note that Circular A-76 (Aug. 1983), part IV, para. B.2.d, provides that where, as here, an award fee is proposed, the contract price for cost comparison purposes is "the most advantageous offer to the government," not the "low negotiated estimated cost plus fee" used otherwise.

ent with that provision. Also, while the statement that cost will not be weighted is not as clear as it might be, the Army reports that it intended to indicate that cost will not be "numerically weighted," and we believe that this is the only reasonable interpretation of the provision.

The FAR requires that agencies select the offer that is most advantageous to the government, and they must consider price in this determination. 48 C.F.R. § 15.611. In view of this obligation on procuring agencies, we do not think that the statement in this case, that award will be based on scores and a "subjective analysis" of relative merit, establishes an ambiquity or misleads offerors so as to warrant sustaining the protest on this ground.

We recognize, however, that the meaning of the term "subjective analysis" in the context of a procurement is not clear. In view of the fact that we are recommending that the solicitation be revised for other reasons, we are also recommending that the Army consider revising the solicitation language to state that cost will not be "numerically" weighted or scored if this remains the Army's intention and to define "subjective analysis" or omit the use of the term.

Estimated Supply Costs

Finally, Dynalectron contends that offerors should not be required to estimate the quantities of supplies and materials to be used by the contractor to perform the contract, excluding project work. Instead, Dynalectron states that Fort Carson should estimate the quantities of supplies and materials required and apply that estimate to the evaluation of all proposals, including the government's proposal for in-house performance.

In this regard, Dynalectron complains that the information the Army has supplied on material usage is inadequate for offerors to prepare a realistic cost proposal, and that this informational deficiency was not cured by the 2-day inspection of Fort Carson permitted during the procurement process. Dynalectron points out that much of the historical information Fort Carson has provided fails to identify either the particular work required or the supplies and materials needed to accomplish the work. For example, the documents simply list "repair doors." In these circumstances, Dynalectron complains, any estimate of the cost of supplies prepared by an offeror can amount to no more than "guesstimating," which could very well cause its proposal to be viewed as unreasonably high (or low) in cost. For these reasons, Dynalectron urges that Fort Carson follow the example of numerous other military installations conducting similar cost comparisons and treat the cost of supplies and materials as a "wash" item, established by the agency in advance for all proposals.

The Army responds by pointing out the numerous instances where the solicitation and its accompanying documents indicate es-

timated quantities of supplies. Examples of such estimates include the number of railroad switches to be replaced; the square footage of pot holes to be patched; the acres of ground to be fertilized; and the number of telephone poles to be replaced each year.

For those instances where estimated quantities have not been indicated, the Army notes that offerors have been given access to a complete computer printout which lists all repair jobs performed at Fort Carson during 1981, 1982 and 1983. While this printout does not list the supplies used to perform each item of work, it does identify the nature of the work in general terms. The Army contends that with this information, an offeror should be able to prepare realistic cost estimates for supplies based on its own knowledge of the industry and experience performing comparable work elsewhere. The Army further notes that because those records which have not been released do not segregate the costs of supplies in the same manner as the contract work is organized, they would be of no use to offerors in any event.

The Army also argues that its performance-oriented work statement encourages offerors to propose the best possible means for satisfying its requirements. Offerors should be free to propose alternate means of satisfying their supply needs, such as bulk purchasing, which would result in differing supply costs. The Army believes that offerors may propose differing methods for performing base operations and maintenance functions that could affect both the frequency of the need for supplies and the nature of the supplies needed. Moreover, the Army argues, Fort Carson has no preferential position in this regard. When developing the government's in-house cost proposal under A-76, the agency is required to use only the information available to the offerors.

As noted above, a solicitation must contain sufficient information to allow offerors to compete intelligently and on equal terms. *Analytics Inc.*, B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3. Specifications should be free allow ambiguity and should describe the agency's minimum needs accurately. *Klein-Seib Advertising and Public Relations, Inc.*, B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251. There is no legal requirement, however, that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor, or that the procuring agency remove every uncertainty from the minds of every prospective offeror. *Security Assistance Forces & Equipment International, Inc.*, B-199366, Feb. 6, 1981, 81-1 CPD ¶ 71.

While we recognize areas of uncertainty in the information available to offerors here, particularly with respect to the actual quantities of materials consumed in base operations, maintenance and minor repair work, we cannot say that the information that was provided does not give offerors an adequate basis for preparing intelligent proposals on equal terms. Further, since Fort Carson's historical records and accounts do not segregate its use of supplies in

a manner consistent with the structure of this contract, it is not clear that any greater precision is possible.

The protest is sustained in part and denied in part.

[B-221667]

Disbursing Officers—Relief—Eligibility Determination

If a disbursing officer complies with appropriate Department of Treasury and service regulations, request for relief will not be denied solely on the ground that the amount of a check is not written in words.

To: Deputy Assistant Secretary, Accounting and Audit, Department of the Air Force, Feb. 12, 1986:

In your letter of December 30, 1985, to our Office, you ask whether we intend to deny relief for military disbursing officers found liable for altered paper checks if the checks do not bear the amount of the check written in words. You note that a prior decision by our Office suggested that accountable officers might be denied relief from liability for altered card checks which do not spell out the amount in words. 62 Comp. Gen. 476 (1983). If a disbursing officer complies with appropriate Treasury and service regulations, relief will not be denied solely on the ground that the amount of a check does not appear in written words.

An accountable officer is liable for any erroneous payments made by him or by those under his control. 54 Comp. Gen. 114 (1974). As you know, the GAO is statutorily authorized to relieve military disbursing officers from liability for a loss or deficiency resulting from an illegal or incorrect payment when the loss was not caused by the official's fault or negligence. 31 U.S.C. § 3527(c) (1982).

In the cited decision, in which we relieved accountable officers liable for altered card checks, we cited the absence of the inscription of the amount spelled out in words on the face of the check, alongside the amount represented in numbers. We did not say that we would deny relief on this basis at that time. We suggested that adoption of this inscription would be a prudent deterrent to check alteration.

While applicable U.S. Department of Treasury regulations recommend writing amounts out in words, they also provide that—

> * * * if it is determined by the disbursing office that a substantial saving in the cost of issuing checks would result from the writing of the medial amount in figures, either of the following forms may be used: "$50 and $75 cents or $50 and 75/100. Treasury Financial Manual for Guidance of Departments and Agencies, (TFM), 4-5050.45c.

As you noted, last year the Department of Treasury began switching from card checks to paper checks, and the Air Force plans to convert to paper checks this year. Because the paper checks contain chemical properties designed to deter alteration, the Department of Treasury is currently reviewing existing regulations

regarding printing the amount of the check in words. Only numbers are presently written on Treasury paper checks.

We have long held that an accountable officer who conforms to Federal regulations does not act negligently, and may be relieved of liability. *See, e.g.,* B-193380, Sept. 25, 1979. Because applicable Treasury Department regulations permit use of figures without words to indicate check amounts upon a finding that savings will result, an Air Force disbursing officer may not be denied relief solely for using numbers if Air Force regulations conform to this standard. If numbers, alone, are printed on checks, no spaces should appear between numbers and letters. TFM 4-5050.45c

[B-218228.4]

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

The General Accounting Office (GAO) denies a request for reconsideration of a decision and affirms that decision recommending termination of an incumbent's contract because the agency should have allowed waiver of the protester's mistake claim, where the incumbent's request fails to establish convincingly that the prior decision contains errors of law or of fact that warrant its reversal or modification.

Matter of: Colbar, Inc.—Reconsideration, Feb. 13, 1986:

Colbar, Inc., requests reconsideration of our decision *United Food Services, Inc.,* B-218228.3, Dec. 30, 1985, 65 Comp. Gen. 167, 85-2 CPD ¶727, in which we sustained United's protest challenging the rejection of its bid as nonresponsive and recommended termination of a contract awarded to Colbar for full food and dining services at Fort Knox, Kentucky.

We deny the request for reconsideration.

In making our recommendation, we found that the Army should have allowed United to waive the omission of option year prices for an item (covering one of a total of 123 buildings) added to the bid schedule by an acknowledged amendment. Since United's intended price within an extremely narrow range was determinable from the pricing pattern of the bid itself and since its intended bid would have been the lowest, we sustained United's protest. This, we stated, prevented an obvious clerical error of omission from being converted to a matter of responsiveness where the bidder clearly intended to obligate itself to provide the services in question.

In its reconsideration request, Colbar contends that United's bid was not responsive because the solicitation specifically required bidders to include prices for each line item in the bid schedule. According to Colbar, we failed to apply established precedent of this Office concerning such a requirement. Colbar further alleges that we should not have applied the mistake in bid procedures in this case because United did not present clear and convincing evidence

that it had formulated a price for the omitted item and its intended price could not be determined from the bid itself.

In order to prevail in a request for reconsideration, the requesting party must convincingly show either errors of law or of fact that warrant reversal or modification of our prior decision. *DLI Engineering Corp.—Reconsideration,* B-218335.2 *et al.,* Oct. 28, 1985, 85-2 CPD ¶468. Colbar has not done so here.

First, in our decision, we did not ignore established precedent concerning responsiveness. We specifically recognized the general rule, relied on by Colbar and supported in cases cited by that firm, that a bid must be rejected as nonresponsive if it does not include a price for every item requested by the IFB. However, we relied on a limited exception to that rule under which a bidder may be permitted to correct an omitted price where a pattern of pricing, determinable from the bid itself, indicates the possibility of error, the nature of the error, and the intended bid price. Moreover, we noted that where the intended bid would have been the lowest, even though the amount of the intended bid cannot be precisely proven, we have long recognized an exception to the general rule that a bidder may not waive a mistake claim after opening and stand on is original bid price. *Bruce Andersen Co., Inc.,* 61 Comp. Gen. 30 (1981), 81-2 CPD ¶310.

Our application of mistake in bid procedures to United's bid was based on our review of the firm's base and option year prices for buildings in the same category of dining facility as the omitted item. The pattern of pricing that was discernible from the bid itself established the existence and nature of United's error within an extremely narrow range. No external evidence of United's price for the option years was required. The firm's prices were identical for all 4 option years, the increase in option years over base year prices for the omitted building was ascertainable within a $4 range, and United's intended price would have been the lowest by 11 percent. We concluded that even though the amount of the intended bid could not be precisely proven for the purpose of bid correction, the firm clearly had intended to obligate itself to provide the services in question. Pursuant to the rule in *Bruce Andersen Co., Inc., supra,* since United's intended bid would have been lowest, we sustained the protest, allowing United to waive its mistake claim and stand on its original bid price.

Colbar has not shown that our prior decision contains errors of law or of fact. We therefore deny the request for reconsideration of our decision, with its recommendation that corrective action be taken.

[B-217884]

Leases—Rent—Limitation—Economy Act Restriction

Provision in a lease between the Federal Aviation Administration and the lessor incorporating section 322 of the Economy Act, which limits the amount of rent the Government is authorized to pay and which was suspended on Oct. 1, 1981, is not applicable to rental adjustment period beginning Oct. 1, 1983.

Leases—Rent—Adjustment—Cost of Living Indices

Language of a rental adjustment provision in a lease between the lessor and the Federal Aviation Administration allowed but did not require the FAA to deny a rental adjustment because the request for the adjustment was not timely filed. The FAA's denial of the rent adjustment was proper for the 1-year period following the year in which the adjustment was to be made, but not for the entire period before the next adjustment is to be considered.

Matter of: Federal Aviation Administration—Limits on Rent Payments, Feb. 18, 1986:

A Federal Aviation Administration (FAA) contracting officer asks us the following questions about a lease between the FAA and Mr. James N. Routh, the lessor, for space for an FAA Airway Facilities Sector and General Aviation District Office at Riverside Municipal Airport, Riverside, California: (1) Whether the denial of the lessor's request for a rental adjustment, because of the limitation in section 322 of the Economy Act, was proper; (2) whether the FAA contracting officer was bound to deny the request for a rental adjustment because it was not timely filed; and (3) assuming application of the Economy Act and our decision that a rental adjustment should be made, whether the award date of the lease or the date of the rental adjustment would be the appropriate date to use for establishing the fair market value of the property and fair annual rent.

For the reasons given below, we find that section 322 of the Economy Act no longer applies to the lease. We also find that while the FAA was legally permitted to refuse a rental adjustment for the rental period beginning October 1, 1983 because the request was not timely filed, it was not bound to do so. On the other hand, the FAA was only permitted to deny a rent increase for the 1-year period beginning October 1, 1983, not for the entire 5-year adjustment period. As we find section 322 no longer applies to the lease, there is no need to answer the third question.

Background

In September 1978, the FAA Western Region entered into a new construction lease providing space for an Airway Facilities Sector Office and a General Aviation District Office at Riverside, California. The lease provided that the United States pay the lessor $72,049.68 per year.

Paragraph 2 of the lease provides that the rental term was to begin on February 1, 1979 and run through September 30, 1979.

Thereafter the lease is renewable at the Government's option from year to year until September 30, 1998 at the annual rental of $72,049.68 subject to adjustment as set forth in the lease. The Government's option is deemed to be exercised and the lease renewed unless the Government gives 30 days' notice that it will not exercise its option. The lease also permits the Government to terminate by giving at least 1 year's notice in writing to the lessor.

Paragraph 14 of attachment No. 1 to the lease provides for adjustment of rent upward or downward beginning October 1, 1983, and for each succeeding 5-year period, so long as the lease is in effect, consistent with the changes in the consumer price index described in paragraph 14. Requests for adjustment of the rent must be made in writing at least 60 days prior to expiration of the adjustment term. Failure to make a timely request is good cause for refusal to adjust the rental for the succeeding rental term.

The lease also contains various standard provisions including General Provision 14, which made the limitation in section 322 of the Economy Act applicable to the lease. Section 322, codified at 40 U.S.C. § 278a, prohibited appropriations from being obligated or expended for rent of any building occupied for Government purposes at a rental exceeding the annual rate of 15 percent of the fair market value of the rented premises, computed as of the date of the lease under which the premises are to be occupied by the Government.

The 15 percent limitation, however, was suspended for fiscal year 1982 by Pub. L. No. 97-51, 95 Stat. 958.[1] The suspension was repeated for fiscal year 1983, Pub. L. No. 97-377, 96 Stat. 830; and was made permanent in fiscal year 1984, Pub. L. No. 98-151, 97 Stat. 964, 982.[2] The legislative history of the suspension provides no substantive discussion but states only that it saves the Government money. H.R. Rep. No. 417, 98th Cong., 1st Sess. 64 (1984).

On August 20, 1983, the FAA received a letter from Mr. Routh, apparently postmarked August 18, 1983, requesting an adjustment in rent consistent with paragraph 14 of Attachment No. 1. The request was denied, however, because the request letter was not timely filed and the lease had reached the limits of section 322 of the Economy Act at the time it first was concluded. FAA's position was that the award date of the lease, in this case September 11, 1978, controlled applicability of the lease provision which incorporated section 322, notwithstanding the suspension.

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[1] The suspension was part of the law continuing appropriations for fiscal year 1982. The law incorporated the Treasury, Postal Service, and General Government Appropriations Act, 1982, H.R. 4121, 97th Cong., 1st Sess. (1981). That bill contained the suspension.

[2] For fiscal years 1983 and 1984, the laws continuing appropriations incorporated the Treasury, Postal Service, and General Government Appropriation Acts for the specific appropriations. S. 2916, 97th Cong., 2d Sess. (1982); H.R. 4139, 98th Cong., 1st Sess. (1983).

Mr. Routh renewed his request by letter of July 11, 1984. The FAA again denied the rent adjustment, by letter of July 23, 1984, on the ground that the 15 percent limitation was to be applied to the building's fair market value as of the date the lease commenced. However, this action was in conflict with a later memorandum, dated August 2, 1984, of the FAA's Office of Chief Counsel. That memorandum concluded that the Economy Act did not prohibit a rental adjustment so long as the increase in rent did not exceed 15 percent of the fair market value of the leased premises at the time an adjustment is made. It also found that paragraph 14 did not preclude the contracting officer from adjusting the rental in cases where 60 days' notice was not given.

Legal Discussion

There is nothing in the legislative history of the provision suspending section 322 of the Economy Act that shows whether it was intended to apply to leases entered into prior to its enactment. Nevertheless, in this instance, we think it is crucial that the period of rental adjustment in question was to begin on October 1, 1983, several years after the Economy Act limitation was suspended.

Moreover, consistent with the plain language of the limitation and the statute suspending the limitation, we think the better view is that section 322 was a limitation on appropriations that could be spent on rent rather than a limitation on rent *per se.* Thus, the language of section 322 begins "[n]o appropriation shall be obligated or expended for the rent of any building * * *"; and the statute suspending the limitation begins "[f]unds made available * * * for the payment of rent * * *". As there no longer was a limitation on the amount of appropriated funds available for leases when adjustment was to be made in October, 1983, we see no reason why the adjustment called for could not have been made.

The holding of the General Services Board of Contract Appeals, 84-1 BCA ¶ 17,059 (1984) that suspension of section 322 does not apply to leases entered into before October 1, 1981, is distinguishable from this case. That decision involved rental for an adjustment period in a lease that was to commence in September 1980, a year before the Economy Act limitation was suspended. Since section 322 still was in effect when the rental adjustment was to be made, clearly the limitation applied. Conversely, in this instance the limitation had been suspended several years before the first request adjustment was to be made. Further, the Board of Contract Appeals decision stressed that the Economy Act limitation had only been suspended, not repealed. As stated above, however, the suspension was subsequently extended for an additional fiscal year and ultimately it was made permanent. Pub. L. No. 98-151, *supra,* which made the suspension permanent, became effective on No-

vember 14, 1983, some 9 months before Mr. Routh's request for a rental adjustment as of October 1, 1984.

Concerning the lessor's failure to make a timely request for the rental adjustment, we think the language of paragraph 14 of Attachment No. 1 clearly shows that this failure did not bar the Government from making an adjustment but merely constituted good cause for not doing so. Although the FAA's refusal to make an adjustment for the rental period beginning October 1, 1983 was therefore proper, we see nothing in the lease or in the law which would preclude the *FAA* from reconsidering the matter of an adjustment in the rent particularly now that it knows that an adjustment would not be otherwise barred by the section 322 ceiling.

Moreover, we think the phrase in the lease describing the period for which an adjustment may be denied because it was not requested on time—"the succeeding rental term"—means the 1-year period following the Government's exercise of its option to renew the lease rather than for the entire period before the next 5-year adjustment interval begins We see nothing in the lease or otherwise in the law indicating that the succeeding rental term is equivalent to the full 5-year adjustment period. The effect of such an interpretation would be to preclude the lessor from obtaining the adjustment provided for in the lease because of a minor procedural failure. We note that the request was received some 40 days before the adjustment was to take place.

Consistent with our conclusions, there is no need to determine whether the value of the property at the time the lease was concluded, or the current market value, is the appropriate date to use for computing the amount of the adjustment. The adjustment is not limited by the 15 percent limitation formerly provided by section 322 of the Economy Act.

[B-220633]

Contracts—Negotiation—Requests for Proposals—Specifications—Restrictive—General Accounting Office Recommendation of Less Restriction

Solicitation requirement that ADP service contractor's proposed personnel combine recent battle group experience and experience with "JOTS II Plus" software is unduly restrictive of competition. The restriction limits competition to a sole source of supply, and the agency has not shown convincingly that its needs cannot be met by firms possessing other than the exact experience specified.

Matter of: Daniel H. Wagner, Associates, Inc., Feb. 18, 1986:

Daniel H. Wagner, Associates, Inc., protests the provisions of request for proposals (RFP) No. N00189-85-R-0514, issued by the Naval Supply Center, Norfolk, Virginia. The solicitation contemplates a fixed level of effort contract for training, maintenance and other services to support the Navy's Joint Operational Tactical System (JOTS) II Plus program. The protester contends that the solicitation is unnecessarily restrictive of competition and results in

an improper sole-source award to Inter-National Research Institute (INRI). We sustain the protest.

Background

JOTS is a shipboard command and control system designed to assist aircraft carrier group commanders in battle management. The system consists of a network of microcomputers integrated with the imbedded shipboard combat systems. JOTS software permits the system to function as a tactical decision aid.

The protester developed the initial JOTS software and provided training on its use under a 1983 contract with the Navy. With further development, also under contract with the protester, the system came to be known as JOTS II. In April 1984, two of the protester's personnel who had been involved in supporting JOTS II resigned to work for INRI. The Navy then awarded a contract for JOTS support services to INRI. Under this latter contract, the JOTS software evolved to become JOTS II Plus.

Through an August 5, 1985, notice in the *Commerce Business Daily* (CBD), the Navy announced its intention to issue a sole-source solicitation to INRI for JOTS II Plus training and maintenance for 1 year, with 1 additional option year. The notice stated that in-depth knowledge of JOTS II Plus software was required, as was specific knowledge of other JOTS features. The agency prepared a justification for use of other than competitive procedures, as required by 10 U.S.C.A. § 2304(f) (West Supp. 1985), as amended by the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1187, indicating that the required property or services were available from only one responsible source and no other type of property or services would satisfy its needs. *See* 10 U.S.C.A. § 2304(c)(1).

The protester responded to the CBD synopsis by asserting that it was qualified to perform the required JOTS II Plus services. It described in some detail the qualifications of two subcontractors that it proposed to use in this effort and objected to the sole-source nature of the procurement.

After consulting with the using activity, the contracting officer concluded that the requirements in the solicitation issued to INRI reflected the Navy's needs, and thus, were not overly restrictive. The requirements in question, to which the protester objects, specify that the offeror's project manager have previous experience in the installation of JOTS II Plus and in training battle group staff in its use. The solicitation also requires the project manager to have at least 3 years of first-hand experience with carrier group staff across all warfare areas, and states that the experience "must be recent, within the last 6 months preceding this solicitation." In addition, the solicitation requires both the project manager and the project analyst/computer programmer to have "detailed knowledge

of the JOTS II Plus program, including system architecture, program code, tactical applications, and documentation." Finally, the solicitation requires the project analyst/computer programmer to have experience within the last 6 months with aircraft carrier battle group staff.

According to the protester, carrier group operations do not change so rapidly that personnel with experience within the last 2 years, rather than the last 6 months, could not meet the agency's training needs. In addition, the protester says the Navy has restricted the procurement to INRI by requiring detailed knowledge of JOTS II Plus. The protester argues that JOTS II Plus is not significantly different from JOTS II, the system it designed and with which it is familiar.

There appears to be no question but that the experience requirements were intended to describe the qualification of the two employees who, having once worked for the protester, are now employed by INRI. The Navy justifies the restriction on the basis that the rapidly changing threat it faces has meant that battle group operations are constantly changing. Specifically, the Navy says that operational plans as well as fighting instructions changed significantly during the 6 to 8 months prior to issuance of the solicitation. The Navy says that integration of current tactics with the JOTS II Plus network is considered the "heart" of its requirement. It argues therefore that it is reasonable to require the successful contractor to have a complete and up-to-date understanding of battle group responses and tactics.

In addition, the agency defends its requirement that the contractor's personnel have detailed knowledge of JOTS II Plus as opposed to JOTS or JOTS II on the basis that JOTS II Plus includes an entirely new operating system, new decoders, and a new communications system permitting automatic transmission of data throughout the network of combat centers and manual data transmission from station to station. The agency says that given the scope of the changes, familiarity with JOTS II cannot be substituted for detailed knowledge of JOTS II Plus.

Analysis

Generally, when a solicitation provision is challenged as unduly restrictive of competition, the initial burden is on the procuring activity to establish *prima facie* support for its contention that the restriction is justified. The adequacy of a justification is determined by examining whether the agency's explanation can withstand logical scrutiny. *R.R. Mongeau Engineers, Inc.*, B-218356, B-218357, July 8, 1985, 85-2 CPD ¶ 29. Once this *prima facie* support is established, however, the burden shifts to the protester, to show that the allegedly restrictive provision is unreasonable. *Logistical Support Inc.*, B-208763, Apr. 22, 1983, 83-1 CPD ¶ 436.

A stricter rule is appropriate, however, when the effect of a restriction is to limit the procurement to a sole source of supply. To justify a sole-source award, an agency must establish convincingly that there is (or that at the time of award it reasonably believed there was) clearly but one possible contractor. *ROLM Corp., and Fisk Telephone Systems, Inc.*, B-202031, Aug. 26, 1981, 81-2 CPD ¶ 180, *aff'd* Oct. 9, 1981, 81-2 CPD ¶ 291; *Lear Siegler Inc.*, B-209524, Sept. 1, 1983, 83-2 CPD ¶ 285. Moreover, under the CICA provision the Navy cites, a sole-source award is justifiable only if the services are available from but one source and no other type of services will satisfy the agency's need. 10 U.S.C.A. § 2304(c)(1). Sole-source procurements under CICA are subject to close scrutiny by our Office. *WSI Corp.*, B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626.

As indicated, it is clear from the record that the Navy at all times contemplated a sole-source award to INRI and drafted the disputed requirements with only INRI in mind. The Navy has not shown convincingly, however, that its needs can be satisfied only by the two employees of the incumbent on whose background the requirements are based. It has not justified the exclusion of firms such as the protester whose JOTS II and carrier battle group experience may be less recent, but who nevertheless possess substantial, relevant communications, programming, training, and similar support service expertise.

While the Navy has identified differences between JOTS II and JOTS II Plus—for example, a change in operating systems, migration to a real-time design, and support of a number of interfaces to permit the computers to communicate with peripheral systems—it has not explained any of the changes in sufficient technical detail to show that the work is of a nature that would preclude competition by experienced computer personnel with access to the program code and documentation and with experience with similar, related tactical decision support systems. We are told that the changes to JOTS and JOTS II Plus have been extensive. We have been provided with little documentation of this claim. The agency says that a change in the operating system was made, but we are not told what it was. It argues that the system now includes enhanced communications capabilities, but does not describe these changes in detail or explain why only the two individuals who implemented the new system are capable of understanding it. Moreover, the Navy has offered no detailed evidence to illustrate or otherwise support its contention that recent changes in carrier group operations are so extensive that it would be impossible for someone who has not been involved in the work during the past 6 months to perform the contract.

On the other hand, the Navy concedes that the changes made between JOTS II and JOTS II Plus involved changes to warfare-specific decision aid modules (the heart of the system) only to the extent that they were restructured to permit them to interact prop-

erly with the new operating system. The protester was familiar with JOTS II. Additionally, the record shows the protester and its two proposed subcontractors (Data Systems and EDO Corporation) have extensive experience with data link/computer communications, including substantial experience with the systems the Navy cites as significant in the evaluation of JOTS II Plus. They also have had extensive experience with Naval operations, as well as with Naval warfare models, tactics and training.

In the circumstances, we find no convincing substantiation for the Navy's position that JOTS II Plus is so complex that it would be impossible for any firm except one employing the two individuals who currently work for INRI to perform the contract. Similarly, we find that the Navy has not established that the magnitude of recent changes in carrier group operations has been so extensive as to preclude satisfactory performance by otherwise qualified individuals whose experience may have been acquired more than 6 months ago, assuming those individuals are briefed on recent developments before they begin performance.

For the reasons stated, we are recommending that the Navy revised its solicitation to permit competition by eliminating the protested provisions that, as they stand, preclude consideration of proposals submitted by any firm other than INRI. Of course, nothing in our decision is intended to prevent the Navy from giving relevant experience reasonable weight in selecting an awardee under an appropriately revised solicitation.

By separate letter, we are bringing our recommendation to the attention of the Secretary of the Navy.

The protest is sustained.

[B-220665]

Contracts—Protests—Interested Party Requirement—Small Business Set-Asides

A small business concern that does not participate in the Small Business Administration's program under section 8(a) of the Small Business Act is an interested party to protest another firm's eligibility where the 8(a) subcontract was awarded on a sole-source basis and the protester will be able to compete if its protest is sustained and the reprocurement is not restricted to participants in the 8(a) program.

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

Protest issues based upon the terms of a contract are untimely where the protester received a copy of the contract more than 10 days before the protest was filed.

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Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Award Validity—Review by GAO

The General Accounting Office (GAO) does not consider protests concerning awards under section 8(a) of the Small Business Act absent a showing of possible fraud or bad faith on the part of government officials or an allegation that the Small Business Administration violated its own regulations.

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Fraud or Bad Faith Alleged—Evidence Sufficiency

Protester has not established that a subcontract awarded to a section 8(a) firm was fraudulent or made in bad faith where, more than 5 months after award, the firm was found to have been ineligible at the time of award and no evidence is presented to show that agency officials were or should have been aware of the ineligibility at that time.

Matter of: Wespercorp, Inc., Feb. 18, 1986:

Wespercorp, Inc. protests the award of letter contract No. DTFA01-85-Y-01001 by the Small Business Administration (SBA) to Amex Systems, Inc. The contract, for the design, development, production, and installation of 372 automated weather observing systems required by the Federal Aviation Administration (FAA), was awarded under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). Under this section, government agencies contract with the SBA, which in turn subcontracts for performance by socially and economically disadvantaged small businesses. Wespercorp contends that Amex was not eligible for the 8(a) program at the time of award and that there were a number of other irregularities in the procurement.

We dismiss the protest in part and deny it in part.

Background

The contract, awarded on October 15, 1984, provided for the work to be performed in three phases. The first phase is for design and development on a cost-plus-fixed-fee basis. The remaining two phases are to be definitized on a fixed-price basis through negotiations between the FAA and Amex. On October 16, 1984, Amex "graduated" from the section 8(a) program, and on November 27, Allied Bendix Corporation acquired the firm.

On April 24, 1985, the SBA Acting Associate Administrator for Minority Small Business and Capital Ownership Development reconsidered the previous eligibility of Amex to receive section 8(a) contracts in light of an August 19, 1984 Memorandum of Understanding between Amex and Allied. The agreement provided for Amex, its shareholders, and Allied to negotiate in good faith toward a merger of the firms. The SBA concluded that the Memorandum of Understanding constituted an "agreement in principle" to merge, and that subsequently Amex was not independently oper-

ated and was affiliated with Allied. As a result, on the date of the agreement, Amex exceeded the applicable size limit for its type of business, and thereafter it was not eligible for participation in the section 8(a) program. *See* 13 C.F.R. § 124.1-1(c)(1) (1985.

The Acting Associate Administrator held that all section 8(a) contract awards to Amex after August 19, 1984 were improper. SBA wrote each agency with which it had section 8(a) contracts that had been subcontracted to Amex, stating that those executed after August 19 were voidable at the agency's discretion and that any further contract actions involving Amex (such as definitizing letter contracts, executing modifications, and exercising options) would have to be made under the agency's own contracting authority.

Amex appealed the Acting Associated Administrator's finding to the SBA Office of Hearings and Appeals. The firm withdrew the appeal on October 29, 1985, pursuant to an agreement with the SBA that stated that the SBA found no evidence the Amex had acted in other than good faith. The SBA also withdrew a number of contracts, including the FAA contract at issue here, from the list of those that it considered voidable.

Wespercorp initially protested to our Office on grounds that the award to Amex was a subterfuge to avoid competition and constituted fraud or bad faith on behalf of the FAA. In support of its allegation of bad faith, Wespercorp asserted that (1) the contract was awarded less than a day before Amex "graduated" from the section 8(a) program and shortly before purchase of the company by Allied, and (2) although the SBA found that Amex had not been eligible for the contract at the time of award, FAA rather than terminating the contract, doubled the funds available for performance of the first phase. The protester also stated that it had been informed that the Federal Bureau of Investigation was investigating the award to Amex and that an FAA post-award survey had determined that Amex could not adequately perform the contract. At a bid protest conference on December 4, 1985, Wespercorp raised a number of additional issues based upon the provisions of the Amex contract, contending that the award to Amex violated procurement regulations governing the use of letter contracts, multi-year contracts, and the acquisition of major systems.

Preliminary Issues.

The FAA raises several preliminary matters. Under our Bid Protest Regulations, a party must be "interested" before we will consider its protest. 4 C.F.R. § 21.1(a) (1985). The agency contends that while Wespercorp is a small business concern, the firm does not participate in the section 8(a) program and, consequently, is not an interested party. In support of its argument, the FAA cites *Kentucky Building Maintenance, Inc.*, B-196368, Jan. 16, 1980, 80-1 CPD ¶ 49, in which we held that a large business was not an interested party

to protest the cancellation of a solicitation that had been set aside exclusively for competition among small business concerns.

An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). Wespercorp believes that it will be able to compete for the contract if we sustain its protest and if the reprocurement is either unrestricted or set aside for small business. We cannot say that Wespercorp is wrong. The SBA did not seek competition from section 8(a) concerns; it negotiated a contract exclusively with Amex. Thus, unlike the large business protester in *Kentucky Building Maintenance,* whose complaint concerned a procurement set aside for competition among small businesses, Wespercorp here is not outside a class of prospective competitors, since it is not clear that the FAA would continue to seek performance from a section 8(a) concern if we find the contract with Amex improper. Consequently, we consider Wespercorp to be an interested party for purposes of questioning whether the contract was properly awarded to Amex as a section 8(a) concern. See *ABC Management Services, Inc.,* 55 Comp. Gen. 397 (1975), 75-2 CPD ¶ 245.

The FAA also argues that the protest is untimely because the Amex contract and the SBA's April 24, 1985 size determination are public documents that were available to Westercorp when issued. Wespercorp contends that it did not learn that the SBA had found Amex to be other than a small business until a few days before its protest to our Office. We resolve doubt about the timeliness of a protest in favor of the protester. *Weardco Constr: Corp.,* B-210259, Sept. 2, 1983, 83-2 CPD ¶ 296. While the SBA finding may have been available to a requesting party, we are not aware of any notification such as publication in the Federal Register by which Wespercorp should have known of the SBA's finding. We consider the protest regarding the section 8(a) eligibility of Amex to be timely.

We agree with FAA that the protest issues that Wespercorp first raised during the bid protest conference are untimely. The procurement record contains a letter from the FAA to counsel for Wespercorp stating that, in response to a Freedom of Information Act request, a copy of the Amex contract was furnished on October 18, 1985. Wespercorp did not raise the issues based upon the terms of the contract until more than 6 weeks later, well beyond the 10 days required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). Wespercorp argues that the issues based upon the terms of the Amex contract should be considered under the significant issue provision of our timeliness rules. 4 C.F.R. § 21.2(c). However, these bases for protest concern only one contract and, in our opinion, do not warrant involving the significant issue provision. See *Professional Review of Florida, Inc., et al.,* B-215303.3 *et al.,* Apr. 5, 1985, 85-1 CPD ¶ 394. Consequently, we dismiss the additional bases of protest.

Eligibility of Amex

As noted above, section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any government agency and to arrange for the performance of the contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to contract with the SBA upon such terms and conditions as may be agreed upon. Hence, we do not review decisions to effect procurements under the 8(a) program, and we do not consider protests of 8(a) awards absent a showing of possible fraud or bad faith on the part of government officials or an allegation that regulations have been violated. *Atlantic Petroleum Corp.*, B-215472.2, Apr. 12, 1985, 85-1 CPD ¶ 417. Because Wespercorp's initial submission to this Office made a showing of possible bad faith, we considered the protest on the merits. However, we find that the firm has not substantiated its charge.

Wespercorp generally alleges that the award to Amex resulted from fraud and bad faith, but the firm cites as evidence only the SBA finding that Amex was not a small business concern after August 19, 1984. There is no evidence that the Amex agreement with Allied was known to either the SBA or the FAA before contract award. The procurement record contradicts any assertion that the decision to contract with Amex was based upon plans for an Amex merger with Allied. The SBA reported to the FAA on April 26, 1984, long before the August 19 agreement with Allied, that it had selected Amex for the FAA's requirement for automated weather observing systems. In a letter to the SBA dated August 8, again before the Amex-Allied agreement, the FAA stated that it planned to contract with Amex and inquired as to the effect of the firm's forthcoming graduation from the section 8(a) program on the proposed contract.

Further, we do not consider the FAA's failure to terminate the contract with Amex to be evidence of bad faith. The general rule is that an SBA determination that a firm was not small at the time of award has only prospective application. See *Computer Data Systems, Inc.*, 61 Comp. Gen. 79 (1981), 81-2 CPD ¶ 393. Here the SBA concluded that the Amex contract could be terminated by the FAA, but that the agency was not required to terminate. Thus, the FAA had the discretion to continue the contract, and we cannot say that its determination to do so was unreasonable.

In sum, we find no evidence in the procurement record filed in this protest to substantiate Wespercorp's allegations that the award to Amex resulted from fraud or bad faith.

We deny the protest in part and dismiss it in part.

[B-220752]

Contracts—Protests—Authority to Consider

Since General Accounting Office (GAO) decides protests that involve procurements of property or services by a federal agency, the award by a federal agency of a fran-

chise contract for cable television services is subject to GAO's bid protest jurisdiction.

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

General Accounting Office (GAO) will not consider under its bid protest jurisdiction allegations that an agency has not complied with the renewal provisions of the Cable Communications Policy Act of 1984, 47 U.S.C.A. 521, *et seq.* (West Supp. 1985), because that act expressly provides for judicial resolution of such disputes.

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

Incumbent cable television franchisee is not an interested party to contest provisions in a solicitation issued by an agency for a second franchise where the agency has determined properly that the incumbent franchisee is not eligible for award under the solicitation.

Matter of: Cable Antenna Systems, Feb. 18, 1986:

Cable Antenna Systems (CAS) protests the issuance by Vandenberg Air Force Base, California, of a request for proposals (RFP) for a nonexclusive franchise to provide cable television services to subscribers at the base. CAS contends that the RFP violates its rights as an incumbent franchisee under the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 521, *et seq.* (West Supp. 1985) (Cable Act), and complains about other alleged improprieties regarding the issuance of the solicitation.

The arguments in this case have focused almost exclusively on the jurisdiction of this Office to decide the protest. As discussed below, we conclude that although the protest is of the type that generally we will consider, the specific issues raised and the protester's peculiar status as an incumbent franchisee are such that we will not do so here. We dismiss the protest.

Background

In 1974, the agency awarded CAS an exclusive, 10-year franchise to provide cable television services to subscribers at Vandenberg. Prior to the expiration of that franchise, the agency issued a solicitation on December 11, 1984, seeking proposals from offerors wishing to provide the same services when the CAS franchise expired on August 31, 1985. CAS filed a protest with this Office (B-218212.2) contending that some of the provisions of the solicitation were inconsistent with the recently passed Cable Act, but withdrew the protest when the agency canceled the solicitation and agreed to consider renewing CAS' existing franchise under the renewal provisions of that act.

In February 1985, CAS submitted to the agency a proposal to renew its franchise. In addition, CAS and the agency discussed transferring the franchise to a third party. When CAS' negotiations with the third party were not concluded by August, however, the agency extended CAS' franchise on a nonexclusive basis

through September 30. (The agency subsequently issued another short-term extension.) By letter dated September 20, CAS notified the agency that it had terminated unsuccessfully the transfer negotiations with the third party and requested renewal of its franchise for its own account. On September 24, the agency issued the solicitation that is the subject of this protest.

Basis for Protest

The protester contends, first, that by failing either to renew its existing franchise or to initiate proper renewal proceedings, the agency has not complied with the requirements of the Cable Act, the directive the agency issued to implement the act, or the statements the agency made to this Office that led CAS to withdraw its earlier protest. The solicitation further violates the Cable Act, says the protester, because it allegedly provides for evaluating an incumbent cable operator's renewal proposal on a competitive basis. CAS contends also that the solicitation is defective because it does not contain evaluation criteria. Finally, CAS contends the agency acted improperly with respect to soliciting offers in that it did not cause a timely synopsis of the solicitation to be published in the *Commerce Business Daily*, did not allow the required 30 days for offerors to prepare their proposals, and attempted to prevent CAS from submitting a proposal.

Jurisdictional Arguments

The position of the Air Force regarding CAS' protest is that this Office has no jurisdiction to consider it. The agency takes this position basically for two reasons. First, the agency maintains that the contemplated award of a cable franchise will not involve the expenditure of appropriated funds. The Air Force explains that this solicitation is not for cable service for the government, but is merely intended to result in a second cable franchise at Vandenburg in order to introduce competition between cable franchisees. Should the agency desire to acquire cable services for an appropriated fund activity, it will procure such services through a competition between the two franchisees.

The Air Force acknowledges that, under limited circumstances, this Office in the past has considered protests of franchise awards not involving appropriated funds. Those circumstances are where the franchise provides a direct benefit to the government or services to an appropriated fund activity or where the government would receive a share of the income generated by the franchise. *See* West End Associates, B-215536, Jan. 14, 1985, 85-1 CPD ¶ 36. We have cited the government's potential liability for termination costs as another factor to be considered in deciding whether we would take jurisdiction, but have indicated that potential termination liability alone is not enough to invoke our review. *Id.* The

agency contends, however, that none of these circumstances exist in this case.

The agency's second basis for contending that this Office lacks jurisdiction is that CAS' objections to the solicitation largely involve alleged violations of the Cable Act. Such matters are not for us to consider, says the Air Force, because under 31 U.S.C.A. § 3552 (West Supp. 1985) we decide protests alleging violations of procurement statutes or regulations, and the Cable Act is not a procurement statute. Finally, the agency notes that the Cable Act provides that cable operators adversely affected by a final decision of a franchising authority regarding franchise renewal may file an action in a state court or a United States district court. 47 U.S.C.A. § 555.

The protester contends that our Office has jurisdiction over this protest pursuant to the precedent established by prior cases and that nothing in the Cable Act precludes us from exercising that jurisdiction. The protester argues that the franchise will involve services to the government under both franchise paragraph 25, which requires the franchisee to construct or modify its system to allow for a temporary emergency broadcasting capability, and paragraph 26, which requires the franchisee to reserve one cable channel for agency programming viewable only by government subscribers. Also, the protester notes that the government is liable for termination costs under franchise paragraph 38. In any event, says CAS, appropriated funds in fact are involved in this case since the agency already has decided to purchase cable services for appropriated fund activities and the operator who receives a franchise under this solicitation will be one of the two sources from whom such services may be obtained.

Analysis

Prior to January 15, 1985, the effective date of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3551, *et seq.*, our bid protest authority was based on our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers. See *Monarch Water Systems, Inc.*, B-218441, Aug. 8, 1985, 64 Comp. Gen. 756, 85-2 CPD ¶ 146. Thus, we generally would decline to consider protests concerning contracts that did not involve the expenditure of appropriated funds. *Conusstan Products, West Germany*, B-210846, Mar. 14, 1983, 83-1 CPD ¶ 253 (award of rug concession for nonapropriated fund activity). With respect to protests involving cable television franchises, our jurisdiction was based on the fact that at least a portion of the subscription fees would be paid by the government for cable services provided to appropriated fund activities. See *Teleprompter of San Bernadino, Inc.*, B-191336, July 30, 1979, 79-2 CPD ¶ 61. In some cases in which the franchising agency argued that the direct expenditure of appropriated funds was not involved, howev-

er, we cited the provision of services to the government and the government's potential liability for termination costs as factors underlying our decision to assume jurisdiction. See, e.g., *B.M.I., Inc.*, B-212286, Nov. 2, 1983, 83-2 CPD ¶ 524; *Group W. Cable, Inc.*, B-212597, Oct. 25, 1983, 83-2 CPD ¶ 496.

CICA expressly defines the bid protest authority of this Office. *Monarch Water Systems, Inc.*, 64 Comp. Gen. 756, *supra*. Under that act, our bid protest jurisdiction is based on whether the protest concerns a procurement contract for property or services by a federal agency. *T.V. Travel, Inc., et al.—Request for Reconsideration*, B-218198.6, *et al.*, Dec. 10, 1985, 65 Comp. Gen. 109, 85-2 CPD ¶ 640 (protest jurisdiction exists where agency contracts for travel management services on a no-cost, no-fee basis). In other words, it is no longer necessary to find a direct or indirect expenditure of appropriated funds in order for us to exercise bid protest jurisdiction. Rather, we will decide a protest if it involves the procurement of property or services by a federal agency. *Artisan Builders*, B-220804, Jan. 24, 1986, 65 Comp. Gen. 240, 86-1 CPD ¶ 85. Clearly the instant solicitation represents a procurement of services by a federal agency.

Although this Office has jurisdiction to consider protests involving the award of cable television franchises, we will not do so in this case. The principal complaint raised by the protester is that the agency has violated its rights under the Cable Act as an incumbent franchisee. Section 626 of the act, 47 U.S.C.A. § 546, contains detailed procedural requirements and criteria applicable to the renewal of a cable franchise. Unlike complaints concerning initial awards of cable franchises, however, the Cable Act expressly provides that a cable operator adversely affected by a failure of a franchising authority to act in accordance with the procedural requirements of section 626 may file an appeal in a United States district court or any state court of general jurisdiction having jurisdiction over the parties. The act sets forth the circumstances under which a court may grant relief. From our reading of the Cable Act and its legislative history, it appears to us that Congress has specified the forums where disputes over franchise renewals may be resolved; it did not contemplate further administrative appeals, such as review by this Office of the renewal process. To the extent this protest concerns alleged violations of the renewal provisions of the Cable Act, we will not consider it. See *Wynn Baxter/Educational Training Concepts*, B-197713, May 20, 1980, 80-1 CPD ¶ 349.

The remainder of the issues raised in this protest are not related to the renewal of CAS' existing franchise, but rather involve alleged deficiencies with respect to the issuance of the RFP. We need not reach the merits of these issues, however, since it is clear that CAS is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

The agency issued the solicitation for the purpose of selecting a second cable operator to provide services to subscribers as Vandenberg. This action was consistent with the revised policy of the Air Force to award more than one franchise at each installation in order to promote competition as a means of ensuring quality cable services at the lowest price to subscribers. Although the solicitation did not state that the incumbent franchisee, CAS, would not be permitted to compete for the second franchise, the exclusion of the incumbent was necessary in order to achieve the objective of awarding a franchise to a second cable operator. While we believe the solicitation should have advised all potential offerors, including CAS, that the incumbent would not be permitted to compete, we can find no reason to object to the exclusion.[1]

Since CAS is not eligible at this time to compete for the second cable franchise to be awarded under the protested solicitation, CAS is not the proper party to pursue whatever defects the solicitation might contain. We dismiss this aspect of the protest because CAS is not an interested party under our regulations. 4 C.F.R. § 21.0(a); *Prospect Associates, Ltd.—Reconsideration,* B-218602.2, Aug. 23, 1985, 85-2 CPD ¶ 218.

The protest is dismissed.

[B-221031; B-220409]

Appropriations—Continuing Resolutions—Authorizing Legislation Absent

Where statutory test program permitting the Defense Logistics Agency to apply a price differential of up to 2.2 percent in favor of bids submitted by labor surplus area concerns expired at the end of fiscal year 1985 and was not extended by the House Joint Resolution making continuing appropriations for fiscal year 1986, agency properly declined to apply price differential where bids were solicited and opened during fiscal year 1985 but where contract was not "made"—awarded—until after fiscal year 1985's expiration when continuing resolution was in effect.

Contracts—Labor Surplus Areas—Evaluation Preference

Agency's refusal to apply a percentage differential in evaluating price offered by labor surplus area concern was proper where statutory authority to do so had expired as of time of award, and was consistent with the provisions of the solicitation relating to evaluation of bids, which specifically warned bidders that "if no legislation is in effect at time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted."

Matter of: Lite Industries, Inc.; Magline, Inc., Feb. 18, 1986:

Lite Industries, Inc., and Magline, Inc., have filed similar protests, predicated on the same issue of statutory interpretation, concerning two separate Defense Logistics Agency (DLA) solicitations. We have combined the protests in one decision to facilitate comprehensive treatment of the issue raised.

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[1] The Air Force states that should it not renew CAS' current franchise, it will issue a new RFP to obtain a second franchisee. CAS, of course, would be eligible to compete under such an RFP.

THE LITE INDUSTRIES PROTEST

Lite Industries, Inc., protests the award to Hialeah Industries, Inc., of a firm fixed price contract for wet weather poncho liners under invitation for bids (IFB) No. DLA100-85-B-1078 issued by the DLA's Defense Personnel Support Center. The solicitation was a total small business set-aside with price differential for Labor Surplus Area (LSA) concerns. The solicitation was issued on August 8, 1985; bids were opened on September 10, 1985; and the contract was awarded to Hialeah on October 29, 1985. Lite argues that the agency erred in failing to apply the 2.2 percent price differential for LSA concerns in the evaluation of bids under the solicitation, as a result of the agency's allegedly erroneous determination that the legislation authorizing the payment of a price differential for the purpose of relieving economic dislocations had expired. We deny this protest.

Lite protested to the agency upon being advised of the award to Hialeah. Lite maintained that Hialeah ($13.45 per unit) did not qualify as an LSA concern, but that Lite ($13.48 per unit), did.[1] Since its bid was within 2.2 percent of Hialeah's, Lite argued, the application of the differential in favor of LSA concerns should have resulted in award to it. The agency advised Lite that the 2.2 percent price differential permitted under section 1254 of the Department of Defense (DOD) Authorization Act, 1985, expired at the end of fiscal year 1985 on September 30, 1985, and that the preference for LSA firms was not applicable to the contract made for this DLA procurement on October 29, 1985. Lite then protested to this Office that the continuing resolution[2] passed by Congress on September 30, 1985, extended the preference for LSA firms because the purpose of the continuing resolution was to continue government spending in the same manner and at the previous level existing at the end of the fiscal year on September 30, 1985. Therefore, according to the protester, the agency was obligated to spend money on a continuing basis for programs under the same terms and conditions as existed under the DOD Authorization Act, 1985, until the continuing resolution expired on November 14, 1985. Moreover, in Lite's view, if Congress had wanted to end the LSA preference or limit spending for the test program it would have specifically said so in the continuing resolution.

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[1] Hialeah, which in its bid claimed eligibility as an LSA concern, contends that it, also, was a fully qualifying LSA concern entitled to the 2.2 percent differential. DLA did not address this contention in its administrative report. In view of our finding that the 2.2 percent differential was not applicable to this procurement, however, we need not address Hialeah's LSA status.

[2] The term "continuing resolution" refers to legislation enacted by Congress to provide budget authority for federal agencies and specific activities to continue in operation until the regular appropriations are enacted. *See generally* 58 Comp. Gen. 530, 532 (1979).

The DLA rejects the protester's statutory interpretation, concluding instead that the test program authority found in the DOD Authorization Act, 1985, which permitted payment of price differentials to relieve economic dislocations, expired at the end of the 1985 fiscal year. DLA further contends that since the DOD Authorization Act, 1986, was enacted on November 8, 1985, without providing in any way for the test program, it evidences Congress' intent to end the test program in accordance with the statutory term of September 30, 1985, provided in the DOD Authorization Act, 1985. In DLA's view, to the extent that the continuing resolution continued programs under their current terms and conditions, the current terms and conditions for the LSA preference test program required its expiration on September 30, 1985, the end of the 1985 fiscal year. Thus DLA concludes that to require it to apply the LSA preference price differential as an evaluation factor under the protested solicitation would result in the application of public funds under a program that has not been authorized by law.

Under section 1109 of Pub. L. No. 97-252, 96 Stat. 746 (September 8, 1982), as amended by section 1205 of Pub. L. No. 98-94, 97 Stat. 683 (September 24, 1983), the Secretary of Defense was authorized to conduct a test program during fiscal years 1983 and 1984 and pay up to a 2.2 percent price differential under contracts awarded to a qualifying Labor Surplus Area concern. Section 1254 of Pub. L. No. 98-525, 98 Stat. 2611 (October 19, 1984), popularly known as the DOD Authorization Act, 1985, specifically extended the test program for one additional year through the end of fiscal year 1985. House Joint Resolution 388 (Pub. L. No. 99-103, 99 Stat. 471 (September 30, 1985))[3] making continuing appropriations for fiscal year 1986, was the funding authority in effect and applicable to this procurement on the date of the award of this contract on October 29, 1985. On November 8, 1985, Congress passed the DOD Authorization Act, 1986 (Pub. L. No. 99-145, 99 Stat. 583 (November 8, 1985)), without authorizing, funding, or otherwise addressing the LSA preference test program.

Although we recognize that a continuing resolution is a temporary appropriations act to keep existing programs functioning after the expiration of previous budget authority, the issue in this case involves the expiration of the program authorization itself as well as the expiration of funding. In similar circumstances, we have held that the specific inclusion of a program in a continuing resolution will provide both authorization and funding to continue the program despite the expiration of the appropriation authorization legislation. Similarly, if it is clear from the legislative history that

[3] Continuing resolutions are enacted as joint resolutions making continuing appropriations for a certain fiscal year. Although enacted in this form rather than as an act, once passed by both Houses of the Congress and approved by the President, a continuing resolution is a public law and has the same force and effect as any other law.

Congress intends certain programs to continue under the resolution despite the lack or expiration of authorizing legislation, the resolution will act both as authorization and appropriation. For example, in 55 Comp. Gen. 289 (1975) we found that the continuing resolution specifically stated that the program under consideration was to be continued under the resolution. This clear intent on the part of the Congress supported our determination that the program could be continued although authorization legislation for the program expired prior to or during the period the resolution was in effect. *Id.*, at 292.

In the present case, however, the test program was not specifically included in the continuing resolution, and we find no evidence to support the protester's contention that Congress intended the test program to be extended by the continuing resolution beyond the end of the 1985 fiscal year. We are unconvinced by protester's general contention that Congress intended the very specific end of fiscal year 1985 expiration for the test program—which appears under the equally specific statutory rubric "ONE-YEAR EXTENSION OF TEST PROGRAM TO AUTHORIZE PRICE DIFFERENTIALS TO RELIEVE ECONOMIC DISLOCATIONS" in the DOD Authorization Act, 1985—to be submerged in and extended by the very general provision of the continuing resolution in this case. Nor do we find any indication or direction in committee reports, floor debates and hearings, or statements in budget projections or jusifications that would support protester's contention that the agency was bound to continue operation of the test program during the period of the continuing resolution until enactment of the DOD Authorization Act, 1986.

Lite's protest was filed with this Office on November 8, 1985, at a time when the protester believed that Congress would act to further extend the test program in the DOD Authorization Act, 1986. However, Congress did not specifically extend, provide funds, or address the test program in any way. In the absence of any indication that Congress intended to extend the test program beyond its September 30, 1985 expiration date, we will not object to the DLA's determination that applying the test program evaluation factor and paying a 2.2 percent price differential under this solicitation would violate 10 U.S.C. § 2392 (1982), which prohibits the use of Department of Defense funds to pay a price differential for the purpose of relieving economic dislocations.

Lite's protest is therefore denied.

THE MAGLINE PROTEST

Magline, Inc., protests the award to Doninger Metal Products Corporation of a firm fixed price contract for expandable aluminum tent frames under DLA's Defense Personnel Support Center invitation for bids (IFB) No. DLA100-85-B-1118, another total

small business set-aside with price differential for LSA concerns. As in the case of Lite Industries, the solicitation was issued and bids were opened in fiscal year 1985; award was made in fiscal year 1986. Magline, too, protests DLA's failure to apply the 2.2 percent price differential for LSA concerns in the evaluation of bids, arguing that the agency erroneously determined that the legislation authorizing the payment of a price differential for the purpose of relieving economic dislocations had expired.

For the reasons stated above, in conjunction with the protest of Lite Industries, Magline's protest on this basis is denied.

Magline further contends that since section 1254 of the DOD Authorization Act, 1985, was in effect at the date of bid opening on September 25, 1985—prior to the Act's expiration on September 30, 1985—the solicitation was "funded" before the test program expired, and the 2.2 percent differential should apply to the evaluation of bids in this case. We disagree.

The legislation set out at 10 U.S.C. § 2392 Note, as amended, states that the Secretary of Defense may exempt from the restrictive provisions of that statute:

> any contract (other than a contract for the purchase of fuel) made by the Defense Logistics Agency during fiscal years 1983, 1984, and 1985 if the contract is to be awarded to an individual or firm located in a Labor Surplus Area. . . .

The legislation specifically refers to contracts "made" by DLA by the end of the 1985 fiscal year. Since the contract here was formed, or "made," within the meaning of the statute when the contract was awarded to Doninger on October 24, 1985, it follows that the contract was made after the DOD Authorization Act, 1985, and the test program had expired with the end of the 1985 fiscal year on September 30, 1985.

Magline further contends that, even if the test program authorization and funding had expired on September 30, 1985, it should still receive the benefit of the test program's price differential because the solicitation specifies that bids would be evaluated on the basis of price differentials for LSA concerns. Noting that the purpose of a solicitation is to apprise bidders, prior to bid opening, of the specific factors on which bids will be evaluated, and to ensure that bidders compete on the same basis, Magline contends that because the IFB contained standard LSA price differential clauses, bids must be evaluated on the basis of this differential. Here again, we disagree.

Paragraph (e) of the clause entitled, "NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE WITH PRICE DIFFERENTIAL FOR LABOR SURPLUS AREA CONCERNS (APR. 1985)" which is incorporated by reference in the solicitation in accordance with Defense Logistics Acquisition Regulation § 52.220-9000 (July 1985), states as follows:

> (e) The evaluation factor described in subparagraph (a) above is authorized by legislation in effect at the time of solicitation issuance. If the authorized percentage

factor is changed by legislation which takes effect before award, offers will be evaluated using the percentage factor so authorized. *If no legislation is in effect at the time of award which authorizes the payment of a price differential, no evaluation factor will be added to the offers submitted. Offerors are cautioned that this solicitation will not be amended solely to advise of a change in the applicable percentage to be used as an evaluation factor.* [*Italic supplied.*]

This provision adequately notifies bidders that legislative changes, such as the expiration of the test program in this case, may preclude the use of the price differential as an evaluation factor. The award to Doninger, therefore, was not inconsistent with the solicitation.

Magline also asserts that the solicitation clause quoted above is prejudicial to LSA concerns because a qualifying bidder must speculate as to whether legislation in effect at bid opening will still be in effect at the time the contract is awarded.

Calculating a bid to be submitted near the end of a fiscal year based on assumptions as to whether Congress will continue a program may well involve the perception of risk. If so, it must necessarily be a risk one assumes in doing business with the government. To hold otherwise would require the DLA to apply an evaluation factor and pay a price differential for a contract made on October 24, 1985, under program authority which expired on September 30, 1985, and is no longer authorized by law. Moreover, with the expiration of the test program authority, the remaining provisions of 10 U.S.C. § 2392 strictly prohibit the use of Department of Defense funds to relieve economic dislocations, and any action by DLA to pay a price differential in these circumstances would violate that statute. Accordingly, Magline's protest on this basis is denied.

[B-221526.2]

Contracts—Negotiations—Offers or Proposals—Evaluation—Criteria—Application of Criteria

General Accounting Office (GAO) affirms previous decision sustaining protest on basis that the awardee's proposal was not properly evaluated, since it received a maximum score, even though it proposed less than the optimum staffing preference indicated in the solicitation evaluation criteria and in the rating plan used by the agency in scoring proposals.

Matter of: T.V. Travel, Inc., et al.—Reconsideration, Feb. 18, 1986:

The General Services Administration (GSA) requests reconsideration of one aspect of our decision in *T.V. Travel, Inc., et al.—Reconsideration,* B-218198.6, *et al,* Dec. 10, 1985, 65 Comp. Gen. 109, 85-2 C.P.D. ¶640. We affirm our previous decision sustaining the protest.

In the previous decision, we considered protests against various GSA awards for the arrangement of travel services for official gov-

ernment travel.[1] We sustained protests by T.V. Travel, Inc., and World Travel Advisors, Inc., against GSA's selection of a Scheduled Airline Ticket Office (SATO) to be the travel management center for civilian agencies in the Atlanta, Georgia area. The protests were sustained because the record indicated that the SATO proposal was not properly evaluated in three areas, those being: (1) the number of travel agents proposed; (2) Diners Club Account reconciliation; and (3) electronic transmission of summary reports. We recommend that GSA reevaluate the proposals in the competitive range in these areas and determine which offeror is the highest ranked. If the SATO is not the highest ranked, then its contract should be terminated for the convenience of the government and award made to the highest rated offeror.

GSA only requests reconsideration of the portion of our decision as it concerns the evaluation of the number of travel agents proposed by the SATO. GSA claims our decision is erroneous in this regard for two reasons. First, GSA disagrees with our conclusion that the evaluation criteria set forth in the solicitation indicate that offerors which proposed one travel counselor per $500,000 in anticipated travel will be rated higher than those who propose fewer travel counselors. GSA argues that any offeror, such as the SATO, which proposes a travel counselor for every $500,000 to $750,000 in anticipated travel was fully acceptable and should receive full credit in this area. Second, GSA claims that our finding that SATO proposed only 14 travel counselors is erroneous. GSA claims SATO proposed 15 travel counselors since SATO's onsite travel manager should also be counted.

GSA claims the evaluation criteria indicated that full credit would be given any travel agency offeror which proposed one travel counselor or reservation agent per $500,000 to $750,000 in annual air sales. GSA states that the solicitation indicates that "an average reservation agent can book between $500,000 to $750,000 in annual air sales." However, the subcriteria referenced by GSA that is contained in the project management evaluation criteria actually state:

> The Offeror's organization and staffing plan will be assessed to ensure that the Project Manager has adequate authority to direct the Government project, sufficient resources are committed to the project, and the firm is organized for efficient delivery of services. The Government will take into consideration that the industry standard for staffing *assumes an average reservation agent can book $500,000 in annual air sales and that few can book above $750,000 annually. . . .* [*Italic supplied.*]

In its reconsideration request, GSA does not mention the rating plan which it said it utilized in scoring the proposals, even though

[1] This decision overruled our decision in *T.V. Travel, Inc., et al.*, B-218198, *et al.*, June 25, 1985, 85-1 C.P.D. ¶720, which dismissed the protests because we believe the selections were not subject to our bid protest jurisdiction. GSA and the protesters requested reconsideration of this initial decision since they believed we had jurisdiction over these selections. Upon reconsideration, we agreed and reinstated the protests.

our previous decision relies in part on this plan. The pertinent paragraph of the rating plan states that offerors would receive a maximum three points for this subcriteria of the project management criteria if "the offeror proposed to staff to meet the industry *average of $500,000 annual sales per commercial agent.*" [*Italic supplied.*] The rating plan implementation is consistent with an objective interpretation of the above-quoted evaluation subcriteria that indicate that offerors which propose one travel counselor per $500,000 in anticipated travel will be rated higher for this subcriteria than those proposing fewer travel counselors. These subcriteria reasonably encourage offerors to offer more travel counselors to achieve a better ratio and, thus, maximize their technical score and chance for award.

GSA also states that this matter was rated under the "personnel qualifications" evaluation criteria which state "the number of reservation agents [travel counselors] will be measured against the industry standard noted in [the project management subcriteria quoted above.]" Under the rating plan, the subcriteria of the "personnel qualifications" criteria which address this matter provide for a maximum one point if "a sufficient number of reservation agents [travel counselors] will be assigned to the government so that their average sales fall between $500,000–$750,000 per year." However, this does not in any way belie the reasonable implication of the project management evaluation subcriteria that offerors proposing one travel counselor per $500,000 will be rated higher than those who propose fewer counselors.

GSA also states that we incorrectly concluded the SATO proposed 14 travel counselors rather than 15 travel counselors because SATO's onsite travel manager should also be counted. GSA references pages 15 and 22 of SATO, proposal as establishing that "in addition to his managerial duties, the onsite travel manager is available and expected to handle federal employee travel needs also with the other travel agents at the site." However, our review of SATO's proposal does not lead to this same conclusion. In regard to the onsite manager, the proposal only notes that he will assist the project manager in administering the operation of those offices and services. Therefore, we are unconvinced that our previous decision is erroneous in this regard. In any case, GSA concedes that 15 reservation agents would make the reservation agent ratio one for every $666,000 in anticipated travel rather than the one for $719,000 ratio for 14 travel counselors. Consequently, this issue does not seem particularly significant to the ultimate proposal evaluation.

GSA also references the "obvious flexibility" of the SATO because of the number of SATO offices in the close proximity to and the member airline carrier offices in the Atlanta area. GSA speculates that the SATO is inherently superior to other offerors for this

factor and "the SATO could quite conceivably have been rated much higher."

As indicated in our previous decision, GSA has not been able to find the detailed scoresheets for the proposal. Assuming GSA followed the values set forth in the rating plan as it claimed, it seems clear that the SATO received the maximum three points in the project management subcriteria and one point in the personnel qualifications criteria for its proposed number of travel agents. Therefore, we are unable to ascertain how SATO could have been rated "much higher" than the perfect score it apparently achieved in this area.

Since GSA has not established that our decision was erroneous, we affirm our previous decision.

[B-220288]

Officers and Employees—Transfers—Temporary Quarters—Entitlement

Employee of the Department of Energy was transferred incident to a permanent change of station from Colorado to Washington, D.C. Employee was authorized temporary quarters allowance for family including authorization for dependent mother to stay in Ada, Oklahoma, until she joined the family in Washington. Due to illness, dependent mother was placed in a nursing home in New Mexico until she joined the family in Washington a few months later. Since nursing home expenses incurred would not have been incurred absent the tranfer, the occupancy of such quarters may be regarded as "reasonably related and incident to the transfer" and, therefore, may be paid pursuant to FTR para. 2-5.2(d).

Matter of: Laurence R. Sanders, Feb. 19, 1986:

This action is in response to a request for an advance decision from the Department of Energy regarding whether an employee may be reimbursed for temporary quarters for his dependent mother who lived temporarily in a nursing home when he underwent a permanent change-of-station transfer.[1] For the reasons stated hereafter, we conclude that reimbursement may be allowed.

Mr. Laurence R. Sanders, an employee of the Department of Energy, was authorized travel expenses pursuant to a permanent change of station to Washington, D.C., from Grand Junction, Colorado. Mr. Sanders was authorized temporary quarters for himself and his family and he was authorized temporary quarters for his mother in Ada, Oklahoma. Mr. Sanders' mother-in-law lived in Ada, Oklahoma, and was to have given his mother the requisite care needed, until Mr. Sanders' mother could join the family in Washington.

Mr. Sanders' mother became ill while in Ada, Oklahoma, and had to be hospitalized. Mr. Sanders' mother-in-law also became ill and was therefore unable to care for Mr. Sanders' mother as originally planned. Since Mr. Sanders' mother needed care and was

[1] The request was made by V. Joseph Startari, Authorized Certifying Officer, Department of Energy, Washington, D.C.

unable to travel to join the family, Mr. Sanders arranged to have her flown to Albuquerque, New Mexico, where other relatives had her put in a nursing home until she was able to join the family in Washington.

The issue presented by the Department of Energy is whether the nursing home may be considered temporary living quarters in view of the regulations in effect at the time of Mr. Sanders' transfer. It is our view that it may.

Authority for payment of temporary quarters allowances is found at 5 U.S.C. § 5724a (1982 and Supp. I, 1983). Regulations implementing that provision are found in the Federal Travel Regulations. On the effective date of Mr. Sanders' transfer, the applicable regulations provided:

> d. *Temporary quarters located at other than official station.* As a general rule the location of the temporary quarters must be within reasonable proximity of the old and/or new official station. Payment of subsistence expenses for occupancy of temporary quarters in other locations shall not be allowed unless justified by circumstances unique to the individual employee or the employee's family that are reasonably related and incident to the transfer. * * * Occupancy of temporary quarters shall not be approved for vacation purposes or other reasons unrelated to the transfer.

Federal Travel Regulations, para. 2-5.2(d) (Supp. 10, November 14, 1983), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985).

This regulation became effective after the issuance of Mr. Sanders' travel authorization but prior to his effective date of transfer. The issue which concerns the Department of Energy is whether the reasons for the expenses under these circumstances are reasonably related to the transfer in this case, as required by the regulation. Before the addition of the above-quoted provision, the Federal Travel Regulations did not specifically address the treatment of temporary quarters located away from the old or new duty station. However, we believe that the allowability of expenses for such temporary quarters may be analogized to other provisions of the regulations and our decisions thereunder.

Paragraph 2-5.1 of the Federal Travel Regulations provides for the exercise of administrative discretion in approving temporary quarters expenses but requires generally that such expenditures be justified and made in connection with the employee's transfer. We have held that before a payment may be made there must be an administrative determination that the use of temporary quarters was incident and necessary to the transfer. See, e.g., *Eligibility for Temporary Quarters Subsistence,* B-184024, January 21, 1976.

In B-179556, May 14, 1974, we held that an employee was entitled to temporary quarters expenses for his wife and child who remained in separate lodgings at the old duty station when the employee resided at his new duty station. In that case, the employee's wife gave birth to a child and was advised by her doctor to remain in the area for further treatment. She was placed in a boarding house and the child was placed in the care of relatives. Since it ap-

peared that absent the transfer neither of those expenses would have been incurred, the expenses were related to the transfer. See also *Ronald L. Vallarian*, B-195509, January 25, 1980, in which we allowed temporary quarters for a mother and premature child because remaining in their old duty station residence would have caused a delay in selling the house and the mother and child were required to remain at the old duty station for treatment of the child.

The test in these cases is whether the temporary quarters expenses would have been incurred by the employee absent the transfer to a new duty station. If the expenses arose due to the transfer, they have been considered incident to the transfer. It is our view that the same test can be applied under the new provision in the current regulations dealing with temporary quarters away from the old or new duty station.

In the current case, it appears that temporary quarters expenses were approved for Mr. Sanders' mother. Due to the transfer, Mr. Sanders placed her in Ada, Oklahoma, and subsequently in the nursing home in New Mexico until January 18, 1984, when she joined the Sanders family in Washington. He points out that his wife had been providing in Colorado and has been providing in Washington home nursing care such that placement in a nursing home is not necessary. Mr. Sanders states that had the transfer not occurred, the expense of a nursing home would not have been necessary. We find no basis in the record to dispute this statement

In conclusion, it appears that the nursing home expenses were incurred due to the transfer of Mr. Sanders and therefore may be regarded as reasonably related and incident to the transfer, rather than as being "for vacation purposes or other reasons unrelated to the transfer." Accordingly, temporary quarters allowance may be paid to Mr. Sanders for the temporary lodging expenses of his dependent mother to the extent otherwise appropriate.

[B-220902]

Contracts—Protests—Authority to Consider

Protest concerning NASA request for carriers' rate tenders for marine transportation services is dismissed since the request was issued under authority of the Transportation Act of 1940, as amended, 49 U.S.C. 10721 (1982), and the agency did not obtain such services under the government's procurement system so that a government bill of lading will serve as the basis for payment.

Matter of: Petchem Inc., Feb. 20, 1986:

Petchem Inc. (Petchem) protests the National Aeronautics and Space Administration's (NASA) selection of Dravo Mechling Corporation (Dravo) for transportation services of an ocean tugboat for the towing of a government-owned barge.

The protest is dismissed.

On September 9, 1985, the NASA transportation office at the Marshall Space Flight Center, requested "a uniform tender of rates and/or charges" for the furnishing of an ocean towboat and equipment, as well as services and personnel not furnished by the government, necessary to tow a government-owned barge between Michoud Harbor, New Orleans, Louisiana, and the Kennedy Space Center in Florida. The barge in question is used to transport external main engine fuel tanks for the space shuttle from the place of manufacture to the Kennedy Space Center. The request for rates and/or charges advised that these uniform tenders of rates would be for the delivery of the next 10 external tanks to the Kennedy Space Center.

Only Petchem and Dravo submitted rates in response to NASA's September 9 request. Dravo's offer incorporated by reference all other terms of prior tenders of rates and/or charges which it had filed with the Interstate Commerce Commission. NASA accepted the rate tender submitted by Dravo since it determined that Dravo had proposed the lowest overall price.

NASA advises that it requested these rate tenders for the marine transportation services under authority provided in the applicable provisions of the Transportation Act of 1940. *See* 49 U.S.C. § 10721 (1982). NASA states that its request for rate quotations for the marine transportation services will be followed by issuance of a government bill of lading (Standard Form 1103) which becomes the document upon which payment is based. Accordingly, NASA argues that this protest should be dismissed because the transportation services are to be obtained under a government bill of lading pursuant to the pertinent statutory authority set forth in the Transportation Act of 1940 rather than pursuant to the procurement statutes and regulations which are subject to our bid protest authority.

A government bill of lading is the basic procurement document used by the government for acquiring freight transportation services from common carriers under section 321 of the Transportation services, at published rates, from any common carrier lawfully operating in the territory where such services are to be performed. 49 U.S.C. § 10721 (1982); see also *Department of Agriculture—Request for Advance Decision,* 62 Comp. Gen. 203 (1983), 83-1 C.P.D. ¶ 201.

Transportation obtained through the use of a government bill of lading is not subject to the procurement laws. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 47.000(a)(2) and 47.200(b)(2) (1984); see also *T.V. Travel, Inc.; et al.,* B-221526.2, Feb. 18, 1986, 65 Comp. Gen. 323 (1985) 85-2 C.P.D. ¶ 640 at 5,6. Furthermore, the rate tenders were obtained pursuant to the Transportation Act of 1940 and, therefore, the agency has not used the government's procurement procedures to obtain these transportation services. NASA has not used a solicitation which contains the ordinary clauses contained in procurement solicitations and we are advised by the

agency that payment will be based upon a government bill of lading rather than the contractual documents ordinarily used for government procurement contracts. Accordingly, we conclude that this matter falls outside the government's procurement system and thus will not be considered by our Office under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which deal with the filing of protests of alleged violations of procurement statutes and regulations. 31 U.S.C.A. § 3552 (1985).

The protest is dismissed.

[B-220988.3]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Comments on Agency's Report

Dismissal of original protest, for failure to timely comment on agency report, is affirmed despite protester's assertion that it received the report late (after the due date of the report). The protester was on notice of obligation to notify General Accounting Office (GAO) that it had not received the report by the due date, but failed to advise GAO timely that it received the report late.

Matter of: Harrell-Patterson Contracting, Inc.— Request for Reconsideration, Feb. 20, 1986:

Harrell-Patterson Contracting, Inc. (HPC), requests reconsideration of our decision, *Harrell-Patterson Contracting, Inc.—Request for Reconsideration*, B-220988.2, Jan. 24, 1986, 86-1 C.P.D. ¶87. That decision affirmed our dismissal of HPC's protest, B-220988, under invitation for bids (IFB) No. N62470-85-B-4084, issued by the Department of the Navy. We dismissed HPC's protest on December 23, 1985, because HPC failed to file its written comments on the Navy's report or a statement of continued interest in the protest within 7 working days after receipt of the agency report, as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(e) (1985).

We affirm the dismissal.

In its initial request for reconsideration, HPC's counsel asserted that it did not receive the Navy report until December 13, 1985, and filed its comments on December 24, 1985, within 7 working days of HPC's receipt of the report. However, we stated that our receipt of HPC's comments within 7 working days of HPC's actual receipt of the Navy's report did not warrant reopening of the file, since HPC was required to either file its comments or advise GAO that it had not received the report within 7 working days from the December 10, 1985, due date for delivery of the Navy report to GAO and to HPC.

HPC contends that our Bid Protest Regulations do not justify a dismissal in these circumstances and alleges that, in any event, we had HPC's comments to the agency report before we dismissed HPC's protest because it had failed to file its comments timely.

GAO's Bid Protest Regulations, 4 C.F.R. § 21.3(e), provide that the protester's failure to file comments within the 7-day period, or to

file a statement requesting that the protest be decided on the existing record, or to request an extension of the period for submitting comments, will result in the dismissal of the protest. Obviously, GAO has no means of determining the precise date that a protester received the report. At the same time, the Competition in Contracting Act of 1984 (CICA) generally requires our Office to issue a final decision within 90 working days after the protest is filed. 31 U.S.C.A. § 3554 (West Supp. 1985).

In order to meet the statutory time constraints for issuing a decision, and since we have no way of knowing when a protester receives the report, we needed to establish a date for receipt of the agency report by the protester upon which we could rely, in the absence of information to the contrary. Otherwise, the protester could idly await the report for an indefinite time to the detriment of the protest system, generally, as well as our ability to resolve protests expeditiously as required by CICA. Accordingly, our acknowledgment notice, sent to HPC shortly after the protest was filed, advised HPC of the report due date of December 10, 1985, and that HPC should promptly notify our Office if it did not receive the report on that date. It further advised that unless we heard from HPC, we would assume it received a copy of the report when we received ours. This notice made clear to the protester that the 7-day comment period commenced, at the latest, on December 10, 1985, the due date listed for the report, unless we were notified that the protester had not received the report by the stated date. *Del-Jen, Inc.—Reconsideration,* B-218136.3, June 10, 1985, 85-1 C.P.D. ¶ 659.

Thus, HPC clearly was on notice that, if we did not hear from the firm by December 19, 1985, the protest would be dismissed. HPC contends if HPC had sent a letter to our Office on December 11, a day after the due date, stating it had not received the report timely, we would not have received it until after it received the report on December 13 and it would have been "a waste of everyone's time." However, under our procedures, HPC merely was required to promptly notify us that it had not received the report. HPC could have satisfied this obligation by telephoning this Office. A letter was not required for this purpose.

Furthermore, while HPC claims that the notice was unclear as to when the protester should notify GAO of late delivery of the report, we think a reasonable reading of the language should have placed the protester on notice that, unless we were timely advised to the contrary, we would assume that the protester received a copy of the report on the date we received it and that the 7-day period for filing comments began on that date. Thus, HPC was required to notify us timely if our assumption was incorrect which meant within the 7-day period from the report due date.

Finally, HPC asserts that HPC's comments were filed before the protest was dismissed. This is incorrect. Our records show that

HPC's comments were filed (hand delivered) on December 24, although the letter is dated December 23, 1985. Our dismissal notice was dated December 23, 1985, and thus HPC's protest was closed before our receipt of HPC's comments. The last correspondence from HPC prior to our closing of the file is a letter dated November 8, which was approximately 1 month before the agency report was filed.

We affirm the decision not to reopen the file.

[B-219971]

Officers and Employees—Transfers—Break in Service—Reemployed by Another Agency—Liability for Relocation Expenses

Where an employee, separated by one agency as the result of a reduction in force, is subsequently hired within the following year by another agency, both the gaining and the losing agency have discretion to pay all, any or none of the individual's relocation expenses. Since it is the Department of Defense's policy for the losing agency to pay these costs, the determination by the Defense Logistics Agency as the gaining agency not to pay these expenses was proper. Where the gaining agency has declined to pay any of such expenses, the losing agency's payment of portion of the employee's relocation expenses is not contingent upon any agreement between the heads of the two agencies involved.

Matter of: Gordon W. Kennedy, Feb. 21, 1986:

This action is in response to a request from Gordon W. Kennedy for reconsideration of our Claims Group's settlement of April 19, 1985, advising the Soil Conservation Service and the Defense Logistics Agency that each has the discretion to pay all, some or none of the employee's relocation and travel expenses.[1] We affirm that position. Thus, the Soil Conservation Service may reimburse the employee for all or any portion of his otherwise allowable relocation expenses.

BACKGROUND

Mr. Kennedy was employed as a supply clerk, GS-4, step 10, in Spokane, Washington, by the Soil Conservation Service, U.S. Department of Agriculture (hereinafter referred to as Conservation Service). Due to a reduction-in-force Mr. Kennedy's position was abolished and he was separated from Government service on June 23, 1984.

In seeking other Federal employment, Mr. Kennedy participated in the Displaced Employee Program provided by the Conservation Service and the Office of Personnel Management. See 5 C.F.R. § 330.301 (1984) *et seq.* and the Federal Personnel Manual, Chapter 330, Subchapter 3. On his application for placement assistance Mr. Kennedy indicated that in addition to the Spokane, Washington

[1] The request for reconsideration was made through the Office of the Honorable Strom Thurmond, United States Senator, by letter of June 28, 1985.

area, he would accept employment in a number of areas throughout the United States. In October 1984 Mr. Kennedy was offered and accepted a position with the Defense Logistics Agency as a supply clerk, GS–4, in Columbia, South Carolina.

At that time the Defense Logistics Agency advised Mr. Kennedy that it would not pay any of his relocation expenses. Mr. Kennedy accepted the position with this knowledge. On October 12, 1984, Mr. Kennedy had a meeting with officials of the Conservation Service in which he explained that it was his understanding that the Conservation Service was required to pay his relocation expenses. The administrative officer who participated in that meeting advised Mr. Kennedy that he would look into the matter and indicated that the Conservation Service would pay any relocation expenses it was required to pay.

During the week of October 15, 1984, Mr. Kennedy kept in contact with the Conservation Service regarding his relocation expense entitlement. The Conservation Service was apparently in the process of determining whether or not it was required to pay Mr. Kennedy's expenses, for on October 19, 1984, Mr. Kennedy went to the Conservation Service to complete several forms that would be necessary if the agency were to pay his expenses. When Mr. Kennedy visited the Conservation Service again on October 26, 1984, he was reassured that his request for relocation expenses was being processed. However, no travel authorization was ever issued.

In November 1984, after reporting for duty in Columbia, South Carolina, Mr. Kennedy learned that the State Conservationist had denied his request for relocation expenses. In response to inquiries made by Mr. Kennedy's Congressman, the Conservation Service advised that it is their policy to pay transfer expenses only when the Conservation Service is the gaining agency and the Defense Logistics Agency advised that under Department of Defense policy it is not required to pay relocation expenses when it hires an employee who has been separated by reduction in force. The Conservation Service advised the Congressman that it had offered to pay 25 percent of Mr. Kennedy's relocation costs but that the Defense Logistics Agency had not been willing to negotiate concerning payment of the remaining 75 percent.

By letters dated April 19, 1985, our Claims Group issued a settlement notifying the Defense Logistics Agency and the Soil Conservation Service that each had the discretion to pay all, some or none of Mr. Kennedy's expenses if such a decision was based upon a consistent application of that discretion and was not arbitrary or capricious. Mr. Kennedy has not been reimbursed by either agency for any of the expenses he claims in connection with his relocation to South Carolina.

ANALYSIS

The basic authority for payment of relocation expenses is found in 5 U.S.C. §§ 5724 and 5724a (1982). The entitlements of employees involved in reductions in force are specifically addressed in 5 U.S.C. § 5724(e) and § 5724a(c). The latter provides:

> (c) Under such regulations as the President may prescribe, a former employee separated by reason of reduction in force or transfer of function who within 1 year after separation is reemployed by a nontemporary appointment at a different geographical location from that were the separation occurred may be allowed and paid the expenses authorized by sections 5724, 5725, 5726(b), and 5727 of this title, and may receive the benefits authorized by subsections (a) and (b) of this section, in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated.

Section 5724(e) provides that when an employee transfers from one agency to another, the gaining agency pays the employee's expenses. It specifically provides, however, that when the transfer is due to a reduction in force, relocation expenses may be paid in whole or in part by the gaining agency or the losing agency as may be agreed upon by the heads of the agencies concerned. We have held that this latter provision applies regardless of whether the employee subject to reduction in force is transferred between agencies without a break in service or is reemployed by a different agency within 1 year following his separation 53 Comp. Gen. 99 (1973).

The regulation implementing 5 U.S.C. § 5724a(c) is found in the Federal Travel Regulations, para. 2-1.5d(2) (Supp. 10, March 13, 1984) *incorp. by ref.* 41 C.F.R 101-7.003 (1984). Under this regulation a former employee separated by reason of a reduction in force who is reemployed within 1 year of the date of separation at a different permanent duty station may be paid relocation expenses as though he had been transferred in the interest of the Government without a break in service. The allocation of such expenses when two agencies are involved is addressed by FTR, para. 2-1.6b which provides, as does 5 U.S.C. § 5724(e), that these expenses may be paid in whole or in part by the gaining or the losing agency.

Under the authorities cited above there is no question that either the Defense Logistics Agency or the Conservation Service may pay Mr. Kennedy's expenses of relocating to South Carolina. The issue presented is whether either agency is required to pay any or all of these costs.

We have held that the losing agency—the agency from which an employee was separated by reduction in force—is not required to pay any of the relocation expenses incurred incident to his reemployment within a 1-year period by a different agency. *Patricia C. Reed*, 55 Comp. Gen. 1339 (1976). In that case we sustained the policy of the Selective Service System not to approve payment of relocation expenses when its former employee is hired by a different agency. In sustaining that policy, we stated:

* * * The language of section 5724(e), as well as the Federal Travel Regulations, is permissive and vests broad discretion to the individual agencies involved in determining whether or not a reimbursement of relocation expenses may be made to an employee who is separated by a RIF and reemployed within 1 year at another geographical location.

The gaining agency—the agency that hires the former employee within 1 year of his separation by reduction in force by a different agency—has the same degree of discretion. *Russell F. Gober,* B-209085, March 22, 1983. In that case the gaining agency, the Federal Railroad Administration, refused to issue travel orders to individuals it hired who earlier had been separated through reduction in force by the National Transportation Safety Board. Its refusal was based on the implications relocation expense payments would have with respect to the agency's position in an on-going labor relations matter. In response to the National Transportation Safety Board's offer to pay up to $5,000 in relocation expenses we recognized that the losing agency has authority to pay any, all or none of the employee's relocation expenses regardless of the determination by the gaining agency to pay none of those expenses.

In Mr. Kennedy's case, the determination by the Defense Logistics Agency, the gaining agency, not to allow relocation expenses is based on the underlying Department of Defense policy set forth in Volume 2 of the Joint Travel Regulations. Under this policy, the Department of Defense component may pay relocation expenses only when it is the losing agency.

Thus, it appears that the Defense Logistics Agency's refusal to pay relocation expenses in Mr. Kennedy's case is consistent with the Department of Defense policy and in accordance with our holding in *Russell F. Gober,* B-209085, *supra.*

Consistent with our holding in *Patricia C. Reed,* 55 Comp. Gen. 1339, *supra,* the Conservation Service, as the losing agency, also has discretion to refuse to pay any or all of Mr. Kennedy's relocation expenses. Its discretion is not diminished by the Defense Logistics Agency's refusal to pay any or all of the expense in issue. While the Conservation Service has stated that is has never paid relocation expenses except when it is the gaining agency, the record reflects that in this case an offer was made by the State Conservationist to pay 25 percent of Mr. Kennedy's relocation expenses. The Conservation Service has not paid even this amount, apparently based on the erroneous assumption that it has authority to pay this amount only if the Defense Logistics Agency will bear the remaining 75 percent of Mr. Kennedy's relocation expenses.

While 5 U.S.C. § 5724(e) states that relocation expenses may be paid in whole or in part by either agency "as may be agreed upon by the heads of the agencies concerned," this provision does not limit either agency's authority to pay any or all of an employee's expenses where the other agency has declined to pay any such costs. The language concerning agreement by the heads of the

agencies concerned is intended to prevent duplicate payments, not to limit an individual agency's discretion.

Accordingly we sustain the settlement issued by our Claims Group insofar as it holds that the statute permits the gaining or losing agency to pay all, any or none of the relocation expenses in a case such as this. On the facts presented it is not clear whether the Conservation Service has finally determined that it would pay 25 percent of Mr. Kennedy's relocation expenses. In view of this decision, however, the Conservation Service should now determine whether this part of the expenses, or any greater or lesser amount, will be paid.

[B-221183]

General Accounting Office—Jurisdiction—Contracts—Walsh-Healey Act

GAO will not consider whether a bidder satisfies the requirements of the Walsh-Healey Act since such matters, by law, are for the contracting agency's determination (where a small business is involved) and the Department of Labor.

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

Post-bid opening protest that the Davis-Bacon Act, rather than the Walsh-Healey Act, should have applied to the solicitation is dismissed as untimely filed where the solicitation contained only the clauses mandated by the Federal Acquisition Regulation for referencing the requirements of the Walsh-Healey Act and made no reference to any other labor statute.

Contracts—Awards—Multiple—Propriety

Where solicitation permitted multiple awards on the line items in the bid schedule and did not prohibit bids which restricted award to combinations of line items, award properly was made to bidder submitting low total bid even though bid was conditioned on award of certain combination of line items.

Matter of: The Latta Co., Feb. 24, 1986:

The Latta Co. protests the award of a contract to Niedermeyer-Martin Co. under invitation for bids (IFB) No. DACA85-85-B-0060, issued by the Alaska District of the United States Army Corps of Engineers for the supply of six pre-engineered, prefabricated buildings and connecting corridor structures to be utilized as National Guard armories in Alaskan rural communities. We dismiss the protest in part and deny it in part.

The IFB provided for bidding on the basis of three alternates. Alternate No. 1, which contained twelve line items, called for prices on the buildings, the destination shipping costs to each of the six communities where the buildings were to be constructed, and construction work at the sites. Alternate Nos. 2 and 3 were the same with the exception that Alternate No. 2 called for pricing for destination shipping of the buildings to certain specified staging areas instead of the six communities, and Alternate No. 3 called for pric-

ing for shipping of the buildings to Seattle, Washington. The Corps of Engineers received bids from four bidders. The joint venture of Latta and The Olday Company was the apparent low total bidder on all three alternatives, but the agency eliminated the joint venture from consideration for award based on its determination that Latta was neither a regular dealer nor a manufacturer under the Walsh-Healey Act, 41 U.S.C. §§ 35–45 (1982). Award was made instead to Niedermeyer-Martin, the second low bidder, for its total bid on Alternate No. 3.

The Corps of Engineers explains that it rejected the Olday-Latta bid as provided under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 22.608–2(e) (1984), which permits rejection of bids from bidders whose Walsh-Healey Act representations indicate they are not manufacturers or regular dealers of the supplies they offer. The agency states that Olday-Latta, in its bid package, checked the portion of the IFB's Walsh-Healey Act self-certification clause that provided that the bidder was not a regular dealer of the supplies covered by the solicitation. The Corps of Engineers further states that while Olday-Latta did not indicate in the IFB's self-certification provision whether or not it was a manufacturer, the joint venture did represent that it was neither a regular dealer nor manufacturer in a bid package on a prior canceled solicitation for the same prefabricated buildings.

Latta does not dispute the Corps' determination that Latta is not a regular dealer or manufacturer. Rather Latta contends that the Walsh-Healey Act was inapplicable to the contract work to be performed; according to Latta, only 15 percent of this work involves actual manufacturing. It is Latta's view that if the act applies at all, it should cover only the portion of the contract relating to manufacturing, leaving Latta's bid to be considered for the nonmanufacturing portion of the contract. Latta finally argues that, even if the Walsh-Healey Act is deemed applicable to the entire contract, because the purpose of the act is to ensure payment of minimum wages, the act's purpose is fulfilled by a construction contractor such as Olday-Latta, which pays union scale and employee benefits in accordance with the Davis-Bacon Act, 40 U.S.C. § 276a (1982).

Latta's protest as to the applicability of the Walsh-Healey Act to this contract is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based on alleged improprieties in a solicitation which are apparent prior to the bid opening date be filed before that time. The IFB contained only the clauses, mandated by the FAR, referencing the requirements of the Walsh-Healey Act, and made no mention of the Davis-Bacon Act. The IFB also did not indicate that the Walsh-Healey Act requirements applied only to certain portions of the work under the IFB. Consequently, Latta's protest against the applicability of the Walsh-Healey Act to all or part of the procurement, filed after bid opening, will not be considered on the merits. See generally *Gunnison*

County Communication Inc., B-219748, Sept. 19, 1985, 85-2 C.P.D. ¶ 310.

Latta's argument that its compliance with the Davis-Bacon Act should be viewed as satisfying the purpose of the Walsh-Healey Act also is not for consideration here. Our Office does not consider issues as to whether a bidder meets the requirements of the Walsh-Healey Act. Such matters, by law, are for the contracting agency's determination, subject, in appropriate cases, to final review by the Small Business Administration (SBA) (if a small business is involved) and the Department of Labor. *Churchill Corp.*, B-217377, Jan. 24, 1985, 85-1 C.P.D. ¶ 96. Although Latta apparently is a small business, FAR, 48 C.F.R. § 22.608-2(e) (1984), does not require SBA review of a rejected offer where the offeror's representation indicates it is not a manufacturer or regular dealer.[1] Considering Latta's prior certification that it was not a manufacturer or regular dealer; Latta's failure to certify in its bid here that it is a manufacturer; and the fact that Latta does not now dispute the Corps' finding that it is not a manufacturer, the Corps properly did not refer the matter to SBA.

We do note that Latta states in its protest that it intended to subcontract the portion of the contract covering manufacture of the prefabricated buildings. We have stated that the clear intent of the manufacturer or regular dealer requirement in the Walsh-Healey Act is to eliminate bid brokering, the practice whereby a person who is not a legitimate dealer or manufacturer of the supplies submits a bid so low that established firms cannot successfully compete for the contract. The broker then could subcontract the work to substandard factories, thus overriding the federal government's desire to promote fair and safe labor conditions. *Stellar Industries, Inc.—Request for Reconsideration*, B-218287.2, Aug. 5, 1985, 64 Comp. Gen. 748, 85-2 C.P.D. ¶ 127. Thus, Latta's payment of benefits in accordance with the Davis-Bacon Act for the work it would perform under the contract would not satisfy the purpose of the Walsh-Healey Act with regard to insuring that the actual manufacturer or dealer of the prefabricated buildings has fair and safe labor conditions.

Latta further contends that the bid package of Niedermeyer-Martin should have been found nonresponsive because the cover letter the company submitted with its bids clearly shows that they improperly were made conditional. It is Latta's position that any conditioning of a bid is impermissible and renders the bid nonresponsive. We disagree.

Latta is correct that Niedermeyer-Martin qualified its bid; the company indicated in the cover letter accompanying its bid pack-

[1] Under FAR, 48 C.F.R. § 22.608-2(f), referral to SBA is required where the contracting officer's determination of Walsh-Healey Act ineligibility contradicts the offeror's certification.

age that it would accept the award of the line items in all three bid alternatives for shipping and site construction of the prefabricated buildings only if it also received the award for the supply of the buildings themselves. Niedermeyer-Martin also indicated that it would accept an award for the supply of the buildings even if it were not awarded the line items for the shipping and site construction. Such conditions by bidders on the acceptance of line items in a bid schedule are not unusual, however. We consistently have held that limitations in a bid to various combinations of line items are effective in the absence of a specific provision in the solicitation to the contrary. See *Walsky Construction Co.*, B-216737, Jan. 29, 1985, 85-1 C.P.D ¶ 117. In all such cases where award on a restricted combination of schedule items is provided for by the bidder, it is the low overall cost to the government that is the relevant award criterion, as is required under the procurement statutes. *See* 10 U.S.C.A. § 2305(b) (West Supp. 1985).

Here, the IFB permitted multiple awards and contained no prohibition against a bidder limiting its award to certain line item combinations. Niedermeyer-Martin thus did not render its bid nonresponsive by conditioning it in this manner. Because award based on Niedermeyer-Martin's total bid resulted in the lowest overall cost to the government, the award was proper.

The protest is dismissed in part and denied in part.

[B-221011]

Real Property—Disposition—Authority

Proposal by the Immigration and Naturalization Service (INS) to renovate Government-owned facility at Terminal Island in San Pedro, Cal., to provide space for detaining aliens by means of a long-term lease-back arrangement raises a fundamental legal problem. In order to lease the facility, which is presently wholly owned by the Government, back from the contractor performing the renovation work, INS must somehow sell or otherwise transfer the facility to the contractor. Nothing in INS's authorizing statute at 8 U.S.C. 1252(c) provides it with authority to dispose of Government-owned property.

Real Property—Disposition—Authority

Property owned by the Government which was once used as a detention facility but is currently being used by INS as its Western Regional Office and which INS admittedly needs for use once again as a detention facility does not qualify as property which is "excess" to the needs of the INS or "surplus" to the needs of the INS or "surplus" to the needs of the United States so as to warrant its disposal under the Federal Property and Administrative Services Act of 1949, as amended, either by the General Services Administration or by INS upon a delegation of authority from GSA. There is no other authority of which we are aware which would enable INS to divest itself of a building it now owns under these circumstances.

Leases—Propriety

INS needs to find a way to pay for renovating a facility it now owns over a long period of time because it does not have or expect to have sufficient appropriations to support a contract for the full cost of the repairs, in a single fiscal year. It is no solution for INS to lease its facility to the contractor on a long-term basis in return for repairs and improvements or management of the detention services. In the ab-

sence of specific statutory authority, rentals paid to the Government must be in the form of money consideration only. 40 U.S.C. 303b (1982).

Matter of: Immigration and Naturalization Service—Lease-back arrangement to pay for renovations to detention facility, Feb. 25, 1986:

This decision is in response to an inquiry from James A. Kennedy, Assistant Commissioner, Office of Administration, Immigration and Naturalization Service (INS), U.S. Department of Justice, asking whether it may enter into what it has termed a lease-back agreement in order to have a facility already owned by the Government remodeled to serve as a detention center for aliens awaiting deportation.

The inquiry discloses that the INS Western Regional Office (WRO) is currently located at Terminal Island in San Pedro, California, and is scheduled to be relocated by approximately April 1, 1986. Mr. Kennedy states that the facility is "wholly owned by INS and is situated in a U.S. Coast Guard compound, and some years ago was in fact a detention facility." INS would like to again utilize this facility as a detention facility but it will require some extensive remodeling, for which it intends to contract in accordance with the Federal Acquisition Regulation (FAR). The problem, as explained to us during an informal conference with the Assistant Commissioner, is that INS does not have available appropriated funds to support a contract for the remodeling project this year, although the need for suitable space is very urgent. Thus, the Assistant Commissioner proposes a lease-back arrangement, which he feels will enable INS to pay for the work "over a multi-year period even though the work will have been completed in the first year of the arrangement." INS indicates that it is working with the General Services Administration (GSA) to ensure that it may proceed with such a lease-back arrangement. However, it directs our attention to the Attorney General's broad powers under 8 U.S.C. § 1252(c) and suggests that perhaps INS has sufficient authority to enter into a lease-back contract without the need for a GSA delegation.

We have studied the Attorney General's authority under 8 U.S.C. § 1252(c) and agree with the INS characterization that it provides "broad independent authority to acquire detention space." If, as the statute provides, "no Federal buildings are available" or no suitable non-Federal facilities are available for rental, the Attorney General may utilize his lump sum appropriation for the "administration and enforcement of the immigration laws to acquire land and a suitable building on the land."

As mentioned earlier, the INS's proposed solution is a lease-back arrangement. A "lease-back" is generally defined as a transaction whereby a transferor sells his own property and later leases it back

from the buyer. As we understand it,[1] INS would sell or otherwise transfer its building at Terminal Island to the contractor selected to perform the renovation work. He would then enter into a long-term arrangement which, he says, is "essentially no different, in a procedural sense, from any other lease-purchase arrangement for real property." We agree that once the INS no longer owns the property, the arrangement to buy it back in the manner proposed amounts to a lease-purchase contract. Our problem is with the first step of the INS proposal—the sale or transfer of its wholly owned Government facility to the contractor in order to buy it back for the price of the renovations, with payments spread out over a long period of time.

DISPOSAL OF GOVERNMENT-OWNED PROPERTY

It has uniformly been held in the decisions of the courts and in the opinions of the Comptroller General and the Attorney General that Article IV, section 3, clause 2 of the Constitution of the United States confers on the Congress executive jurisdiction to dispose of real or other property of the United States. Therefore, without express or reasonably implied statutory authorization, the head of a department or agency of the Government is powerless to dispose of the property of the United States.[2]

INS does not itself have express statutory authorization to dispose of property owned by the United States, either by sale or by lease. Even the broad authority of 8 U.S.C. § 1252(c), discussed earlier, is concerned only with the *acquisition* of space used for detention of aliens, but not with the *disposal* of such space.

There is statutory authorization for the Administrator of General Services (and by delegation of authority from the Administrator, the head of the a department or agency) to dispose of *surplus* property of the United States. Under the provisions of the Federal Property and Administrative Services Act of 1949, as amended, the head of a Federal agency may declare property under the control of that agency which is not needed for the discharge of agency responsiblities to be "excess property." 40 U.S.C. § 472(e). Such property thereby becomes available for transfer to and use by another Federal agency. *See* 42 C.F.R. § 101-47.201 through 101-47.203. If the Administrator of General Services determines that excess property is not required for the needs of any Federal agency, he may

[1] The Assistant Administrator did not really state that the INS plans to divest the Government of ownership of the Terminal Island facility. However, unless it does so, we do not see how it can lease the facility back.

[2] See *e.g.*, *United States* v. *Nicoll*, 27 Fed. Cas. 149 No. 15,879 (C.C.D. N.Y., 1826); *Irvine* v. *Marshall*, 61 U.S. (20 How.) 558 (1857); *Wisconsin R. Co.* v. *Price County*, 133 U.S. 496 (1890); *Light* v. *United States*, 220 U.S. 523 (1911); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289 (1941); 34 Op. Atty. Gen. 320 (1924) and opinions cited therein; and B-191943, October 16, 1978; 50 Comp. Gen. 63 (1970); 44 *id.* 824 (1965); 38 *id.* 36 (1958); 25 *id.* 909 (1946); 22 *id.* 563 (1942); 15 *id.* 96 (1935); and 14 *id.* 169 (1934).

declare it "surplus property." 40 U.S.C. § 472(g). The Administrator of General Services is the designated agency to supervise and direct the disposition of all Government-owned surplus real property. The Administrator may designate or authorized any executive agency to dispose or surplus property by sale, exchange, lease, permit or transfer, for cash, credit, or other property. 40 U.S.C. § 484(c). However, these disposals whether made directly or by delegation, must conform to statutory and regulatory requirements.

Based upon the facts as presented in the INS submission, neither the GSA nor the INS (pursuant to a delegation of authority from GSA) would be authorized under the authority of the Federal Property and Administrative Services Act of 1949 as amended (discussed above) to dispose of the facility located at Terminal Island on the grounds that it was excess to INS's needs and surplus to the needs of the Government as a whole. On the contrary, INS is suggesting the lease-back method of renovation primarily because of its great need to obtain space for detention purposes. Thus the facility could not be characterized as either surplus or excess, and we know of no other authority to transfer title to the property in order to lease it back.

CONCLUSION

We do not think that a lease-back arrangement involving INS's own property at Terminal Island is a feasible solution to its funding dilemma. Before the property can be "leased-back" from the contractor performing renovation work, it must first transfer title to the facility to the contractor. There is no authority to make such a disposal of Government property since it is neither excess to INS's needs or surplus to the needs of the Government as a whole.

Our only suggestion is that INS secure legislative approval to enter into a lease-purchase contract for some other suitable property, or otherwise secure supplemental funding on an emergency basis to support a contract for the entire cost of renovations.

[B-215408]

Officers and Employees—Transfers—Temporary Quarters—Entitlement

A transferred employee's immediate family joined him at his new duty station several months after he reported for duty, remained there for 26 days, and then returned to their residence at the old duty station. The employee's claim for family travel and temporary quarters subsistence expense is denied since the record does not provide any objective evidence that the family intended to vacate the residence at the old station so as to entitle the employee to be reimbursed.

Officers and Employees—Transfers—Temporary Quarters—Entitlement

A transferred employee may be deemed to have disestablished his residence at his old duty station effective the date he reported to his new duty station, even though

his family did not disestablish their residence at the old station. Thus, under para. 2-5.2a of the Federal Travel Regulations (May 1973 ed.), he is entitled to TQSE for himself, not to exceed 30 days.

Officers and Employees—Transfers—Transportation for House Hunting—Authorization

A transferred employee who was authorized a househunting trip, which he had not performed before he reported to duty, may be reimbursed for travel expenses and 6 days per diem for his wife's subsequent househunting trip where the record indicates that she performed such duties prior to her return to the old duty station.

Matter of: George L. Daves—Temporary Quarters Subsistence Expenses—Househunting Expenses, Feb. 26, 1986:

This decision is in response to a request from the Director, Office of Comptroller, United States Merit Systems Protection Board (MSPB). It concerns the entitlement of one of its employees to be reimbursed certain relocation expenses incurred incident to a permanent change of station in April 1980.

BACKGROUND

Mr. George L. Daves, who had been an employee with the United States Department of Housing and Urban Development, stationed in Washington, D.C., became employed by the MSPB on April 6, 1980, in the position of Supervisory Attorney Examiner in its Atlanta Field Office. By Travel Authorization dated April 11, 1980, the MSPB authorized his permanent change of station from Washington, D.C., to Atlanta, Georgia. He was also authorized reimbursement for the transportation of his immediate family (spouse and two children), the use of a privately owned vehicle (POV) as their approved mode of travel; transportation and storage of household goods; the expense of sale and purchase of residences; an advance househunting trip; temporary quarters subsistence expenses (TQSE); and miscellaneous expenses.

On April 12, 1980, Mr. Daves traveled by POV from Washington, D.C., to Atlanta, Georgia, and arrived there the following day. While not specifically stated in the submission, we presume that he reported for duty at the Atlanta Field Office on April 14, 1980.

Mr. Daves' wife and two children did not accompany him at that time. However, on June 30, 1980, they traveled by POV from Washington, D.C., to Atlanta, and arrived there on July 1, 1980. They remained there until July 26, 1980. At that time, Mrs. Daves and the two children returned to their Washington, D.C., residence, where they continue to reside.

In 1981, Mr. Daves filed a travel voucher for his transfer, claiming expenses totaling $1,009.18. Having already received a travel advance of $800, he requested reimbursement of an additional $209.18. His expense voucher contained the following claim items:

1. Employee travel & subsistence (4/12-13/80)	$73.04
2. Family travel & subsistence (6/30-7/1/80)	183.20
3. TQSE for employee and family (7/1-26/80)	752.94
Total	1,008.18

Mr. Daves was allowed $81.79 for his personal travel and travel subsistence. However, his family's travel and the total TQSE claim were disallowed. Thus, the MSPB established that Mr. Daves owed $718.21, against the $800 travel advance.

The basis for the disallowance by MSPB was that the travel by the family could not be deemed relocation travel, incident to his permanent change of station, since they remained in Atlanta only 26 days, and then returned to their Washington residence. Further, TQSE payments were not authorized since they resumed occupancy of their fully furnished Washington residence, and there was no other demonstrable evidence that they had vacated the residence.

Mr. Daves states in support of his claim that during the period immediately following his transfer and before his family's move to Atlanta, they had been informed by a Washington real estate agent that because of a soft housing market in the Washington area they should not attempt to sell that residence at that time. It was suggested by the real estate agency that they rent the Washington house and wait for the market to improve. Based on that information, they decided to locate a residence in Atlanta, return to Washington to arrange to move their furniture, and then lease the Washington house or sell it if the market had improved by that time. Mr. Daves contends that his family's travel to Atlanta on June 30-July 1, 1980, represents their decision to completely vacate the Washington residence and to permanently relocate in Atlanta. He also contends that his wife brought personal items, their childrens' school transcripts, and all medical records, when she traveled to Atlanta on June 30, 1980.

Mr. Daves also contends that the fact that his family returned to Washington on July 26 and remained there was occasioned by circumstances totally unrelated to their actual move to Atlanta and arose after they had arrived. Mr. Daves states that on July 3, 1980, several days after his family arrived, the MSPB issued a vacancy announcement for Chief Appeals Officers at the SES level for seven offices, including the Atlanta Field Office. He considered the announcement as creating uncertainty regarding his future in Atlanta. As a result, he was reluctant to finalize the purchase of a home in the Atlanta area until his position in that office was clarified, which he attempted to do through a series of memoranda. Mr. Daves goes on to state that he was eventually selected for the position of Chief Appeals Officer in the Atlanta Field Office (January 11, 1981), but by that time mortgage interest rates had escalated to

nearly 18 percent and he could no longer afford to purchase or rent a home in the Atlanta area.

DECISION

Section 5724a of Title 5, United States Code, authorizes the reimbursement of certain expenses, under regulations, incurred by an employee for whom the government pays travel and transportation expenses incident to a permanent change of station (5 U.S.C. § 5724(a)). Among those expenses authorized are temporary quarters subsistence expenses for the employee and his immediate family, and a househunting trip. The regulations governing these matters, which were in effect at the time of Mr. Daves' permanent change of station, are contained in chapter 2, Part 5 of the Federal Travel Regulations, FPMR 101-7 (May 1973) (FTR).

Paragraph 2-5.2c of the FTR provides:

> c. *What constitutes temporary quarters.* The term "temporary quarters" refers to any lodging obtained from private or commercial sources to be occupied temporarily by the employee or members of his immediate family who have vacated the residence quarters in which they were residing at the time the transfer was authorized.

In our decisions, we have generally considered a residence to have been vacated when an employee's family ceases to occupy it for the purposes intended. See *Charles C. Werner,* B-185696, May 28, 1976; *Erle B. Odekirk,* B-187519, January 26, 1977; and *Luther S. Clemmer,* B-199347, February 18, 1981. In determining whether the family has ceased to occupy a residence at his former duty station, we examine the action taken by an employee and his family before and after departure from that residence. The focus of our inquiry, generally, has been whether the employee, in light of all the facts and circumstances, has manifested by objective evidence the intent to vacate the former residence.

Conversely, when evidence to support the employee's intent to cease occupancy of the residence at a particular time is not present, we have not authorized payment. In decision *John M. Mankat,* B-195866, April 2, 1980, we denied reimbursement of TQSE for an employee's family where they returned to the old duty station after 1 week at the new duty station in order to prevent vandalism at the residence at the former station. In that case, the family returned to a residence which was left fully furnished, unsure of when it would be sold, or when they could move into a residence at the new duty station. In decision *John O. Randall,* B-206169, June 16, 1982, a similar factual situation was presented. In that case, an employee's family joined him at his new duty station several months after he transferred, remained approximately 1 month and returned to their fully furnished residence at the former station. Some months later, the family actually moved to the new station. We allowed TQSE following their actual move based on a finding that they vacated the former residence at that later time. However, we ruled that his family could not be consid-

ered as having vacated the residence during the earlier period since there was no objective evidence of that fact.

The focus of these decisions is that reimbursement for TQSE is based on whether the residence at the former station has been disestablished. In the present case, Mr. Daves contends that his family's travel on June 30, 1980, was to effect their relocation. We cannot so conclude. The facts are that when his wife and children traveled to Atlanta their residence in Washington remained fully furnished, ready for occupancy, and had not been put up for sale or rent. Further, the family actually returned to their old residence after 26 days absence and have continued to reside there.

Accordingly, it is our view that the decisions in *Mankat* and *Randall* are controlling. Therefore, Mr. Daves is not entitled to TQSE for his family incident to his transfer to Atlanta.

This conclusion, however, does not entirely defeat Mr. Daves' entitlement to be reimbursed for other expenses in addition to those already approved. Even though we have concluded that his family is not entitled to relocation travel and TQSE due to lack of evidence that they disestablished their residence in Washington, D.C., Mr. Daves, himself, may be deemed to have disestablished his residence in Washington, effective the date he reported for duty at his new station in Atlanta. Since it appears that he was in temporary quarters at least until July 1, 1980, when his family arrived in Atlanta, he would be entitled to TQSE for himself for part of that time. In this regard, it is noted that his Travel Authorization provided for TQSE not to exceed 54 days. Such authorization was erroneous. Under the provisions of paragraph 2-5.2a of the May 1973 edition of the FTR, TQSE entitlements are limited to a 30-day period. Therefore, since Mr. Daves' period in temporary quarters exceeded that limit, he may receive TQSE in his own right for the full 30 days. This would be in addition to his cost of change of station travel and travel per diem.

Also, it is our view that under the circumstances of this case Mr. Daves may be reimbursed for his wife's househunting trip. Under the FTR, an employee's roundtrip househunting travel must be fully accomplished before he reports for duty in order to be reimbursed. However, a similar requirement is not imposed on an employee's spouse. Paragraph 2-4.1a of the FTR provides, in part:

> a. * * * Such a round trip by the spouse * * * may be accomplished at any time before relocation of the family to the new official station but not beyond the maximum time for beginning allowable travel and transportation.

The record shows that one of Mrs. Daves activities in Atlanta was househunting. Although the permissible period for househunting was not specifically designated in Mr. Daves' travel authorization, FTR, paragraph 2-4.2 authorized a maximum of 6 days, including traveltime (47 Comp. Gen. 189 (1967)), and that period may be deemed appropriate here. Therefore, Mr. Daves may also be re-

imbursed the cost of his spouse's roundtrip travel by POV, and her househunting per diem for 6 days.

[B-221306]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Adverse Agency Action Effect

Protest filed with General Accounting Office (GAO) within 10 working days after adverse agency action on protest at that level (contracting agency proceeded to accept best and final offers) is timely and, thus, will be considered.

Contracts—Awards—Procedures Leading to Award—General Accounting Office Review

Where the contracting agency did not transmit any written notice of award to offeror, and informed the offeror that a contract would not be signed until a date when the contracting officer would be available, it should have been clear to the offeror that award had not been made; meetings between the offeror and agency and ancillary unsigned contract documents prepared by the agency indicated only that the agency planned to make an award to the offeror, and were not substitutes for a proper award by the contracting officer.

Contracts—Default—Reprocurement—Government Procurement Statutes—Applicability

A reprocurement for the account of a defaulted contractor is not subject to the strict terms of the regulations that govern regular federal procurement and will not be disturbed where the agency's actions are reasonable; reopening negotiations to permit an additional offeror to submit a proposal, thereby avoiding a sole-source award, is not unreasonable, since it promotes competition and helps assure that the government will receive the most reasonable price.

Contracts—Protests—Allegations—Unsubstantiated

Protest that the contracting agency disclosed the protester's offered price to another offeror, resulting in that offeror submitting the lowest cost proposal, is denied where the allegation is unsupported in the record, and where the record discloses other reasons for the competitor's low offer.

Contracts—Protests—Preparation—Costs—Noncompensable

Protester's procurement costs, including reasonable attorneys' fees for pursuit of protest, will not be awarded where the contracting agency did not act improperly and the protest is denied.

Matter of: TSCO, Inc., Feb. 26, 1986:

TSCO, Inc. (TSCO), protests the award of a contract to Bill McCann, Inc., under the reprocurement to replace the defaulted contractor under invitation for bids (IFB) No. DACA27-85-B-0050, issued by the United States Army Corps of Engineers. We deny the protest.

The IFB, originally issued June 14, 1985, called for construction to install air conditioning at dependent schools at Forth Knox, Kentucky. Two bids—those of TSCO and Webb Mechanical Enterprises, Inc.—were received by the bid opening date. One bid, McCann's, was received 4 minutes after the time specified for bid opening and thus was rejected and returned to McCann unopened. Award was made to Webb on September 26 based on its low bid

price of $6,925,538. Webb experienced difficulties obtaining required payment and performance bonds, however, and, on November 4, the Corps terminated Webb's contract for default.

Following the termination, the Corps undertook to reprocure the work against Webb's account by initiating negotiations with TSCO, the only other timely bidder. At a November 18 meeting, the Corps advised TSCO that its goal was to minimize Webb's liability. In response, TSCO proposed a lump-sum price of $6,988,956 which, although lower than its original bid price, still was higher than the defaulted contract price. By letter dated November 19, TSCO furnished the Corps a breakdown of its prices for each of seven schools. The next day, the Corps gave TSCO a contract number the firm had requested for securing bonds. The Corps advised TSCO that the dates on the bonds should be left blank, and would be completed when the Corps signed the contract. The signing would not take place until November 22, the Corps further advised, since the contracting officer would be unavailable before then. On November 20-21, TSCO met with Corps construction representatives and Fort Knox school officials to discuss, and ultimately agree to, a construction schedule.

By letter to the Corps dated November 19, McCann insisted on being afforded an opportunity to compete for the procurement, and stated that it would offer a price below the defaulted contract price. The Corps determined it would be in the government's interest to include McCann in a competition and, by telegrams received November 26, requested that TSCO and McCann submit best and final offers by noon on November 27. Both firms submitted timely offers. TSCO submitted its offer at 10 a.m., along with a separate letter complaining that opening the procurement to McCann was improper since TSCO already had an oral contract with the Corps; the Corps should not have disclosed the scheduling plan TSCO developed with the Corps; and McCann unfairly had access to TSCO's original bid price. The Corps awarded McCann the contract on December 2, based on its low price of $6,620,000.

TSCO contends that the award to McCann was improper since it already had been awarded a contract; the Corps violated procurement regulations in conducting the procurement; and the Corps engaged in auction techniques.

Timeliness

Preliminarily, the Corps argues that TSCO's protest is untimely and thus should not be considered because TSCO did not file it with our Office within 10 days after becoming aware that the Corps intended to reopen the competition. We find that TSCO's protest is timely.

The Corps' position fails to take into account the fact that TSCO filed a protest with the Corps shortly before the deadline for sub-

mitting final offers. Under our Bid Protest Regulations, a protest based on alleged solicitation improprieties must be filed with the contracting agency or our Office before the next closing date for receipt of proposals after the impropriety arises. 4 C.F.R. § 21.2(a)(1) (1985). The record shows that TSCO became aware on November 22 or November 26 that the Corps intended to reopen the solicitation to another firm, and filed a protest with the Corps challenging this action at 10 a.m., on November 27, 2 hours prior to the deadline for submission of best and final offers. This protest was timely.

Where a timely protest has been filed initially with the contracting agency, any subsequent protest to our Office will be considered if filed within 10 working days after the protester receives notice of adverse agency action. 4 C.F.R. § 21.2(a)(3). The Corps' continued receipt of best and final offers on November 27 constituted initial adverse agency action, *i.e.*, notice that the Corps planned to proceed with the reopening of the solicitation. December 12 was the tenth working day after November 27 (accounting for the November 28 Thanksgiving holiday), so TSCO's protest filed in our Office on December 11 was timely and, thus, will be considered on the merits.

Oral Award

TSCO takes the position that it was awarded a contract orally on November 20 when the CORPS gave TSCO a contract number. As additional evidence of the award, TSCO points to the Corps' request for funds for the contract, preconstruction meetings between TSCO and the Corps, and the Corps' preparation of documents including an unsigned notice to proceed.

The Competition in Contracting Act of 1984, 10 U.S.C.A. § 2305(b) (West Supp. 1985), and Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.1002 (1984), provide that the contracting officer shall award a contract by transmitting written notice of award to the offeror. There was no such written notice here. See *Kunert Electric*, B-204439, June 8, 1982, 82-1 C.P.D. ¶ 551. In any case, acceptance of a prospective contactor's offer by the government must be clear and unconditional, and a contract does not come into existence when the purported acceptance is conditioned on future actions by the offeror or the procuring agency. *Sevcik-Thomas Builders and Engineers Corp.*, B-215678, July 30, 1984, 84-2 C.P.D. ¶ 128. As discussed, although TSCO was given a contract number to use in securing its bonds, the Corps specifically advised TSCO that the contracting officer—the government official with authority to bind the Crops contractually—would not sign and date the contract until November 22. While TSCO apparently views the signing as a formality, we think the Corps' advice in this regard clearly indicated that the Corps did not intend to award a contract earlier than November 22.

The Corps' issuance of a contract number for bonding purposes; conducting construction planning meetings; and preparation of contract documents, indicated only that the Corps anticipated an award to TSCO, not that an award had been made. We have specifically held that informing an offeror of the contract number assigned to the solicitation falls short of indicating the contracting agency's clear, unconditional acceptance of the offer. *Mil-Base Industries,* B-218015, Apr. 12, 1985, 85-1 C.P.D. ¶ 421.

We note, finally, that the government can be stopped from denying a contract only to the extent that the offeror was injured by its reliance on the government's actions. *Family Service of Burlington County,* B-215956, Sept. 4, 1984, 84-2 C.P.D. ¶ 250. TSCO has not asserted, and the record contains no evidence, that it has suffered any specific financial or other harm as a result of reliance on the Corps' actions. In any case, remedies with respect to an estoppel argument, such as a claim for expenses incurred in anticipation of contract performance, must be pursued under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* See *Lunn Industries, Inc.,* B-210747, Oct. 25, 1983, 83-2 C.P.D. ¶ 491.

Violation of Regulations

TSCO alleges that the Corps violated several procurement regulations in conducting this procurement, and that the award to McCann thus should be overturned. TSCO principally argues that the Corps' reopening of discussions and requesting a best and final offer from McCann, when McCann had not submitted an initial proposal, violated FAR, 48 C.F.R. § 15.611, which sets forth general principles governing negotiated procurements.

The FAR provisions cited by TSCO are not controlling here. We long have held that where, as here, a reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. *Douglas County Aviation, Inc.,* B-208311, June 8, 1983, 83-1 C.P.D. ¶ 623. Under FAR, 48 C.F.R. § 49.402-6, entitled "Repurchase against contractor's account," the contracting officer may use any terms and acquisition method he deems appropriate for repurchase of the same requirement (as the standard default clause similarly provides), but must repurchase at as reasonable a price as practicable and obtain competition to the maximum extent practicable.[1] We will review a reprocurement to determine whether the contracting agency proceeded reasonably under the circumstances. *Id.* We find the Corps' actions were reasonable.

[1] TSCO asserts that FAR, 48 C.F.R. § 49.402-6, requires the contracting officer to comply with generally applicable procurement regulations in conducting reprocurements. The cited provisions, in fact, contains no such requirement and TSCO's position is untenable in light of our prior decisions.

The record shows that the Corps' primary concern in the reprocurement was obtaining the lowest price possible, in accordance with the repurchase regulations. Although the Corps initially planned to contract with TSCO without competition, the agency decided that a competition, in fact, would be preferable once McCann informed the Corps that it was interested in competing and that it would offer a price below the defaulted contract price. We believe it was reasonable for the Corps, at this juncture, to request a final offer from TSCO and McCann by a common deadline: such action allowed for competition among the two firms that expressed interest in the original procurement, and presented the Corps with the opportunity to make award at less than the defaulted contract price. Permitting McCann to compete also was consistent with the FAR requirement that competition be maximized

We also point out that, as it is the objective of our bid protest function to promote full and free competition for government contracts, we generally do not look favorably upon protests that a contracting agency should procure supplies or services from a particular firm on a sole-source basis. *Ingersoll-Rand,* B-206066, Feb. 3, 1982, 82-1 C.P.D. ¶ 83.

Auction

TSCO maintains that, in the course of including McCann in the reprocurement, the Corps engaged in prohibited auction techniques. Specifically, TSCO argues that the Corps must have disclosed TSCO's offered price when advising McCann that it would be permitted to compete. TSCO urges that we sustain its argument based on the Corps' failure to deny in its report that it revealed TSCO's price.

The record contains no evidence that TSCO's price was revealed to McCann, and a protester's unsubstantiated statements are not sufficient to establish otherwise. *Andrews Tool Co.,* B-214344, July 24, 1984, 84-2 C.P.D. ¶ 101. It is relevant that the record shows McCann's late bid on the original procurement was lower than either TSCO's or Webb's bid. We thus do not consider it surprising that McCann's offered price on the reprocurement, although somewhat above its original bid (due, McCann explains, to a mistake in its original calculations), remained below Webb's defaulted contract price. That is, we find no reason to assume, as TSCO argues, that McCann's low price must have resulted from a disclosure of TSCO's price.

We believe the apparent absence of an express denial by the Corps can be traced to the manner in which TSCO raised this allegation. TSCO's original protest letter asserts that the Corps "engag[ed] in auction techniques," without specifying the actions to which the allegation referred. The Corps did specifically reply to the allegation in its report, under the heading "Allegation of 'Auc-

tion Technique,' " but apparently read the allegation as an objection to the fact that TSCO's bid on the original procurement had been disclosed to McCann at the public bid opening, a complaint TSCO raised in its agency-level protest. The Corps' response, therefore, was along the lines that such a disclosure does not constitute auctioning just because a reprocurement is conducted. The Corps' response was a reasonable attempt to answer TSCO's allegation and will not be deemed an admission by the Corps that it acted improperly.

TSCO also claims it was improper for the Corps to disclose to McCann the construction schedule TSCO developed during meetings with Corps personnel and Fort Knox school officials; the Corps advised McCann of the schedule when informing McCann that it would be permitted to submit an offer. Disclosure of the schedule is unobjectionable. TSCO has no apparent proprietary rights in the construction schedule, and the Corps properly determined that both TSCO's and McCann's offers should be based on the same schedule to assure that competition would be on an equal basis.

TSCO has requested reimbursement of its procurement and protest costs, including reasonable attorneys' fees. There is no basis for awarding such costs where, as here, the contracting agency did not act improperly, and we deny the protest. *Polaris, Inc.*, B-218008, Apr. 8, 1985, 85-1 C.P.D. ¶ 401.

The protest and request for costs are denied.

[B-200923]

Courts—Judges—Compensation—Increases—Comparability Pay Adjustment—Precluded Under Pub. L. 97-92

Federal judge requests reexamination of prior decisions concerning effect of section 140 of Public Law 97-92, and amendment which bars pay increases for federal judges except as specifically authorized by Congress. Although the sponsor of section 140 now says that the amendment was not intended to be permanent legislation but was to expire with the appropriation act to which it was attached, we hold that section 140 is permanent legislation in view of congressional intent expressed at the time of passage of section 140 and subsequently. Prior decisions are affirmed.

Matter of: Federal Judges IV—Reexamination of Appropriations Rider Limitation on Pay Increases, Feb. 27, 1986:

ISSUE

The issue presented is whether section 140 of Public Law 97-92, December 15, 1981, 95 Stat. 1183, 1200, which precludes pay increases for federal judges unless specifically authorized by Congress, shall continue to be construed as permanent legislation. We hold that, despite newly presented evidence of intent by the sponsor of section 140 that the amendment was not intended to be permanent legislation, section 140 is permanent legislation and federal

judges are not entitled to retroactive pay increases unless specifically authorized by an Act of Congress.

BACKGROUND

This decision is in response to a request from the Honorable Frank M. Coffin, United States Circuit Judge, United States Court of Appeals for the First Circuit,[1] seeking our reexamination of prior decisions concerning pay increases for federal judges.

Pay adjustments for federal judges

The salaries of federal judges are subject to adjustment by two mechanisms: (1) the Federal Salary Act of 1967 provides for a quadrennial review of executive, legislative, and judicial salaries (2 U.S.C. §§ 351-361 (1982)); and (2) the Executive Salary Cost-of-Living Adjustment Act provides that salaries covered by the Federal Salary Act of 1967 will receive the same comparability adjustment as is made to the General Schedule under the provisions of 5 U.S.C. § 5305. See 5 U.S.C. § 5318 and 28 U.S.C. § 461 (1982).

Section 140 and prior decisions

In prior decisions we considered the effect of section 140 of Public Law 97-92 on the laws providing pay increases for federal judges. Section 140 was added to a continuing resolution appropriations act and it provides, in essence, that the salaries of federal judges may not be increased except as specifically authorized by an Act of Congress. We held in the *Federal Judges I,* 62 Comp. Gen. 54 (1982), that section 140 was permanent legislation and that federal judges were not entitled to a comparability increase on October 1, 1982, in the absence of specific congressional authorization.[2]

Subsequently, we ruled in *Federal Judges II,* 62 Comp. Gen. 358 (1983), that federal judges were entitled to the December 1982 comparability pay increase in view of a specific congressional authorization for such a pay increase. Finally, we held in *Federal Judges III,* 63 Comp. Gen. 141 (1983), that federal judges were not entitled to the January 1984 comparability pay increase, again in the absence of specific congressional authorization for a pay increase.

We note that federal judges later received the 1984 comparability pay increase of 4 percent pursuant to section 2207 of the Deficit Reduction Act of 1984, Public Law 98-369, July 18, 1984, 98 Stat. 494, 1060. In addition, federal judges have received the 3.5 percent comparability increase effective January 1985. See Public Law 99-88, August 15, 1985, 99 Stat. 293, 310.

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[1] Judge Coffin has written in his capacity as the Chairman of the Judicial Conference Committee on the Judicial Branch.

[2] See also B-200923, October 1, 1982, interpreting section 140 as permanent legislation.

Arguments of the judges

In requesting reexamination of our decisions, Judge Coffin refers to newly obtained information revealing the legislative intent as to the meaning and duration of section 140 of Public Law 97-92. Specifically, he points to a letter from the Honorable Bob Dole, Majority Leader of the United States Senate, clarifying his intent with respect to section 140, which he introduced as an amendment to the continuing appropriations resolution.

Senator Dole, in his letter of March 18, 1985, to our Office, notes that the amendment was offered as an accommodation to another Senator and that it was prepared by that Senator's staff. He states further that the intent was to limit the application of this amendment to the fiscal year in which it was enacted, and he points out that the Senate rule and practice is not to attach permanent legislation to continuing resolutions.

Judge Coffin also points out that in a discussion during a hearing in 1982,[3] Senator Dole stated that the amendment (section 140) would be in effect for only 1 year. Thus, Judge Coffin argues that these clarifying remarks help identify the legislative intent behind section 140.

Finally, Judge Coffin concedes that the effect of section 140 was discussed during the debate on the Deficit Reduction Act of 1984 when the Congress granted federal judges the 4 percent comparability increase for 1984. However, he contends that the debate centered on how our Office had ruled on section 140, not on what was the intent of Congress in enacting section 140 several years earlier.[4]

Opinion

The key question in this decision is whether section 140 of Public Law 97-92 shall be construed to be permanent legislation or whether it expired at the end of fiscal year 1982 with the continuing resolution appropriations act. In our analysis in *Federal Judges I*, we stated that a provision contained in an annual appropriations act may *not* be construed to be permanent legislation unless the language or the nature of the provision makes it clear that such was the intent of the Congress. 62 Comp. Gen. at 56. However, in that decision we held that both the language (words indicating futurity) and the nature of the provision (no direct relation to the object of the appropriations act) indicated intent by the Congress to make this provision permanent legislation, and that such intent was supported by the legislative history before us at that time.

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[3] Hearing on S. 1847 before the Subcomms. on Courts and Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 104 (1982).

[4] Cong. Rec. S5027-30, S5102-04 (daily eds. April 30, 1984, and May 1, 1984) (statements of Senators Mitchell, Thurmond, Domenici, and Bentsen).

We note that at the time Senator Dole introduced the amendment, the stated purpose was "to put an end to the automatic, backdoor pay raises for federal judges." He continued by explaining that about 2 months earlier, Congress has failed to enact a pay cap on or before October 1, and that, although it was not the intent of Congress, federal judges had received a pay increase on October 1, 1981, which could not subsequently be altered or repealed. Senator Dole then concluded that his amendment "would remedy this situation by prohibiting judicial pay increases unless they were specifically authorized by Congress." Cong. Rec. S13890 (daily ed. November 19, 1981).

Although it may be argued that section 140 was not intended to be permanent legislation, such an interpretation would strip the section of any legal effect. As we pointed out in *Federal Judges I*, the next applicable pay increase under existing law for federal judges would have been effective October 1, 1982, and if section 140 were not permanent legislation, the section would expire with the continuing resolution on September 30, 1982. Thus, under this interpretation section 140 would have no legal effect since it would have been enacted to prevent pay increases during a period when no increases were authorized to be made. As we stated in *Federal Judges I*, there is a presumption against interpreting a statute in a way which renders it ineffective.

In our opinion, there is a conflict in interpreting Senator Dole's remarks at the time of passage of section 140 and his remarks after passage of section 140. We note that under principles of statutory construction, statements of the sponsor of a bill during deliberations on the bill are given consideration by the courts since other legislators look to the sponsor to be particularly well informed about the bill's purpose, meaning, and intended effect.[5] However, post-passage remarks by legislators, even explicit remarks, cannot change the legislative intent expressed prior to passage of the act.[6] We believe that despite the post-passage expressions of intent by Senator Dole, it was the intent of the Congress that section 140 be permanent legislation.

Although the post-passage remarks of legislators are of little assistance in interpreting congressional intent, subsequent actions by the Congress with regard to the same legislation are very useful in such interpretation. We note that our interpretation of congressional intent with respect to section 140 is clearly supported by the subsequent legislative actions by the Congress. For example, as we noted in *Federal Judges II*, Congress enacted a pay increase for "senior executive, judicial, and legislative positions" in December

[5] Sutherland Stat. Const. § 48.15 (4th Ed.); and *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, 640 (1967).

[6] Sutherland Stat. Const. § 48.15 (4th Ed.); and *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

1982.[7] The conference report to that legislation specifically referred to section 140 of Public Law 97-92 and stated that section 140 would not prevent this pay increase for federal judges since the conference agreement provided a specific congressional authorization for such an increase. Conference Report quoted in part in *Federal Judges II*, 62 Comp. Gen. 358, 360.

Furthermore, we note that a bill was introduced by the Honorable George J. Mitchell in 1984 to specifically repeal section 140 and to provide federal judges with the 1984 comparability pay increase. S. 2224, 98th Cong., 2d Sess. (1984). No action was taken on that bill. Senator Mitchell later introduced an amendment during consideration of another bill to authorize the 1984 comparability pay increase for federal judges, without repealing section 140, Cong. Rec. S5027-28 (daily ed. April 30, 1984). This section bill was incorporated into the Deficit Reduction Act of 1984, and federal judges received the 1984 comparability increase without any further attempt to repeal section 140.

Judge Coffin argues that in enacting the 1984 pay increase the Congress was not reflecting upon the original intent of section 140, but rather upon the way our Office had interpreted the effect of section 140. We disagree, although we are cognizant of the principles that Congress is not required to act each time a statute is interpreted erroneously, and that legislation inaction following such an interpretation is not strong evidence of legislative intent.[8] On the other hand, where it can be shown that a consistent administrative interpretation has been clearly brought to the attention of Congress and it has not been changed, that is "almost conclusive evidence that the interpretation has congressional approval." *Kay*, at 646-47.

Therefore, we conclude that, despite the newly presented evidence of intent to the contrary, section 140 of Public Law 97-92 is permanent legislation and federal judges are not entitled to pay increases except as specifically authorized by Congress. Our prior decisions are affirmed.

Finally, we note that the principal concern of the Congress in enacting section 140 appears to have been to bar the so-called "backdoor" pay increases which judges received by operation of law but which were delayed or denied to other high-level federal officials. However, the effect of section 140 as enacted by the Congress is that federal judges do not receive the same comparability increases provided to other federal employees by operation of law except upon specific congressional authorization. We are constrained to follow the language of section 140 even though it extends beyond the problem Congress was trying to cure.

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[7] Section 129(b) of Public Law 97-377, December 21, 1977, 96 Stat. 1830, 1914.

[8] *Kay* v. *Federal Communications Commission*, 443 F.2d 638 (D.C. Cir. 1970); and Sutherland Stat. Const. § 49.10 (4th ed.).

We also note that it is doubtful Congress intended to deny federal judges the same comparability increases provided to other federal employees. As noted above, Congress has enacted legislation in both 1984 and 1985 to grant federal judges the comparability increases retroactively. Therefore, we strongly urge that the Congress clarify this situation by amending the statutues governing pay for federal judges and repeal section 140 to permit federal judges to receive the same increases provided to other high-level executive and legislative officials. The so-called backdoor increases could be prevented by delaying increases for federal judges until 30 days following the effective date of pay increases for other high-level officials, but making the judges' pay increases retroactive to that effective date. To assist the Congress in consideration of such an amendment, we are submitting proposed language to the Chairmen of the Appropriations and Judiciary Committees of the Senate and House of Representatives.

[B-217578]

Saint Lawrence Seaway Development Corporation—Employees—Work Schedules

The Saint Lawrence Seaway Development Corporation proposes an 8-hour shift for its maintenance and marine employees including a 15-minute rest break at 9 a.m. and a paid 20-minute combination rest/meal period at 1 p.m. A noncompensable lunch period may not be extended or shortened by a paid rest period because there exists a legal distinction in both origin and effect between a rest and a meal period. Time for a meal period is not compensable if the employees are not required to perform substantial duties. On the other hand, time for brief rest periods may be authorized without decrease in compensation.

Saint Lawrence Seaway Development Corporation—Employees—Work Schedule

A proposal to establish an 8-hour shift with a paid 20-minute combination rest/meal period may not be implemented. It is clear that the purpose of this period is to provide the employees with a duty-free period for the purpose of eating, and there is no indication of any need for a change from the current situation in which the employees are not required to perform substantial duties during the meal period. Accordingly, the employees may not be compensated for the rest/meal period.

Matter of: Saint Lawrence Seaway Development Corporation—Paid Lunch Period, Feb. 27, 1986:

The Saint Lawrence Seaway Development Corporation (Seaway Corporation) asks whether it may agree to provide its wage maintenance and marine employees with an 8-hour workday which includes a paid 15-minute rest break at 9 a.m. and a paid 20-minute combination rest/meal break at 1 p.m. We conclude that the Seaway Corporation may provide a brief paid rest break, but may not provide a paid lunch period.[1]

[1] This is a request for a decision concerning the legality of an expenditure of appropriated funds on a matter of mutual concern to an agency and to a labor organization. Jurisdiction arises under 4 C.F.R. Part 22 (1985). The American Federation

Background

The issues involved in this case arose our of labor contract negotiations between the employees' exclusive bargaining representative, the American Federation of Government Employees, Local 1968, and the Seaway Corporation. During these negotiations, Local 1968 proposed that wage grade maintenance and marine personnel work an 8-hour day with a paid 15-minute rest break at 9 a.m. and a paid 20-minute rest/meal period at 1 p.m. The parties agreed to submit the matter to us for a decision concerning the legality of the proposal. See Article 13b of the "Memorandum of Agreement, Saint Lawrence Seaway Development Corporation and Local No. 1968, American Federation of Government Employees," approved by the parties on September 7, 1984.

Currently, the maintenance and marine employees' basic workweek is Monday through Friday, 7:30 a.m. to 4 p.m. Included is a 10-minute rest break in the morning, an unpaid 30-minute meal break from 12 to 12:30 p.m., and a 10-minute rest break in the afternoon. The Seaway Corporation states that due to the nature of the work done by these employees, rest and meal periods can be scheduled. The proposal would establish an 8-hour workday from 7:30 a.m. to 3:30 p.m. Employees would be provided a 15-minute rest break between 9 and 9:30 a.m. and a 20-minute combination rest/meal period between 1 and 1:30 p.m. Both of these periods would be included as hours of work.

The Seaway Corporation asks whether such periods would be compensable, thus enabling the maintenance and marine personnel to work an 8-hour shift. If the answer to this question is in the affirmative, the Seaway Corporation asks whether this same arrangement may be extended to General Schedule personnel.

Analysis

Although the authority of the head of an agency to schedule a basic 40-hour workweek and to establish lunch breaks and rest periods is well established,[2] that authority is not unlimited, and such schedules may be reviewed by this Office where the expenditure of public funds is involved. B-190011, December 30, 1977. Also, see Federal Personnel Manual, chapter 610, paragraph 1-1c.

There is a clear distinction between lunch breaks and rest periods. A lunch break is a period of time set aside for the purpose of eating. Unless required by the work performed an employee is off

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of Government Employees, Local 1968 was furnished a copy of the request for a Comptroller General decision on February 6, 1985, as required by 4 C.F.R. § 22.4 (1985) and has not objected to the submission of this matter to this Office. Although the Seaway Corporation pays all its expenses, including employee salaries, out of the tolls it collects, these funds are considered appropriated funds. *See* B-193573, January 8, 1978.

[2] *National Broiler Council, Inc.* v. *Federal Labor Relations Council,* 382 F. Supp. 322 (E.D.Va. 1974); B-166304, April 7, 1969.

duty and in a nonpay status during an authorized lunch period. Generally he is free to depart his place of work and use such time as he or she desires. A lunch period may be compensable work time only if the employee is required to perform substantial official duties during that period. 42 Comp. Gen. 195 (1969); B-190011, *supra;* see also B-166304, April 7, 1969, and the cases cited therein. Under 5 U.S.C. § 6101(a)(3), such breaks in working hours in excess of 1 hour may be scheduled only if the agency head determines that a longer break is necessary for the limited reasons specified therein.

On the other hand, an employee may be compensated for authorized rest periods. The purpose of a rest period is to provide a brief period of time for a respite from the work routine, perhaps in order for the employees to recharge themselves before continuing with their duties. It has been recognized that rest breaks promote the efficiency of the employee. See 29 C.F.R. § 785.18 (1985). An agency head may grant brief rest periods when he or she determines that this would be beneficial or essential to the efficiency of the Federal service. B-166304, April 7, 1969. Hence, such rest periods are considered to be part of the employee's day and are compensated.

The general authority of heads of agencies to regulate the conduct of employees, as contained in 5 U.S.C. § 301, has been cited as the basic authority for the allowance of brief lunch periods. A primary test for establishing a *bona fide* meal period is whether the employees are required to perform substantial duties and thus are not completely relieved from duty for the purpose of eating. 25 Comp. Gen. 315 (1945); B-190011, December 30, 1977; and B-56940, May 1, 1946. This rule holds true for employees covered by the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982), and is applied even though the break is shorter than 30 minutes. *Blain* v. *General Electric Co.,* 371 F. Supp. 857 (W.D.Ky. 1971).

It appears to us that the proposal presented by the Seaway Corporation attempts to avoid the prohibition against compensating employees for lunch breaks by shortening the lunch break, attaching the afternoon rest period to it, and renaming the result a "combination rest/meal period." It is clear that since this period is scheduled near the normal lunch period and is described as a "combination rest/meal period," its primary purpose is to provide time for employees to eat. To permit employees to be compensated for this time would be to ignore not only the legal distinction between lunch and rest periods, but also the purpose underlying each.

Conclusion

Since the purpose of the 20-minute rest/meal break is to permit employees to take their noonday meal and since it is stated that the employees are not required to work during work breaks, the rule applicable to meal periods rather than rest breaks must be ap-

plied. That is, any period set aside for the purpose of permitting employees to eat where the employees are not required to do substantial duties is not compensable, regardless of the name used to describe it. As indicated above, the fact that the employee is free from job requirements to take a meal, not the length of time involved, governs the treatment of such a period. *Blain* v. *General Electric Co., supra.*

Accordingly, since there is no requirement that work be performed during the meal/rest break proposed there is no authority to include that break as compensable time. This conclusion applies equally to General Schedule employees and wage grade employees.

[B-220113]

Appropriations—Defense Department—Research and Development Projects—Merger of Accounts

Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company, Despite House Armed Services Committee denial of reprogramming within RDT&E appropriation account from another program element to the Armament/Ordnance program element. Instead, funding was obtained from other projects with the Armament Ordnance program element. DOD reprogramming procedures were not violated since neither DOD Directive 7250.5, nor DOD Instruction 7250.10 cover this type of transaction.

Appropriations—Defense Department—Research and Development Projects—Merger of Accounts

Air Force awarded contract for prototype strategic weapons loaders (munitions lift trailers) to Pacific Car and Foundry Company. Conference Committee on DOD Authorization Act, 1986, Pub. L. No. 99-145, deleted provision in Senate bill which specifically authorized use of prior year funds for this purpose. The Act made no reference to the contract. Failure to specifically authorize funds did not constitute denial of funding which might otherwise be available.

To: The Honorable Roy Dyson, House of Representatives, Feb. 28, 1986:

In a letter dated August 22, 1985, you were joined by Representative Helen Delich Bentley and Representative Marjorie S. Holt in requesting that this Office investigate the Department of the Air Force's award of a $3.8 million contract to Pacific Car and Foundry (PACCAR) on August 16, 1985. The contract is for the design, fabrication, and testing of three prototype strategic weapons leaders (SWL), also called munitions lift trailers (MLT), to support B-1B aircraft.

You indicate that the Air Force reprogrammed funds for this project in direct defiance of the Congress' repeated refusal to authorize such a reprogramming. You refer to the Joint Senate-House Conference Committee on the 1986 Defense Authorization bill which you say expressly denied the Air Force permission to proceed with the new SWL development. In view of the foregoing, you are of the opinion that the Air Force ignored the intent of the Congress and violated the mutual trust which is vital to the passage of

defense-related legislation. Also, you view the Air Force's contract award as raising serious constitutuional questions regarding the separation of powers between the Congress and the Executive branches of the Federal Government.

In addition to investigating this matter, you asked that we request the Secretary of Defense to cease all activity relating to the development and production of a new lift trailer.

For the reasons stated below, we do not agree that the Air Force's award of a contract to PACCAR for the development, design, and testing of prototype strategic weapons loaders violated any appropriation act or other law or the Department of Defense reprogramming procedures. Although the Air Force's actions were certainly not consistent with the wishes of the House Committee on Armed Services, the Committee's views were never enacted into law. Moreover, the Air Force did not reprogram in order to fund the contract. Instead, it used funds available within the same program element. Absent an unauthorized expenditure, we see no indication of any violation of the separation of powers between the Congress and the Department of the Air Force.

The Air Force entered into a contract with PACCAR on August 16, 1985. The company's duties include the design of a strategic weapons loader and the fabrication and testing of three prototype units. The total amount to be paid to PACCAR is $3,826,138.04. The contract provides that $1,300,000 is presently available for payment and allotted to the contract. It further states that it is anticipated that from time to time additional funds will be allotted to the contract until the total price allotted.

On August 28, 1985, we wrote to the Secretary of the Air Force, explaining that we had a congressional request for a legal opinion on the propriety of the contract award to PACCAR and noting that the requestor asked that he halt all research, development, and testing under the contract until our opinion was rendered. Also, in accordance with our usual practice, we requested the Air Force's views on the contract award. In reply, we received a letter dated September 30, 1985, from the cognizant Assistant General Counsel of the Air Force. He indicated that performance of the recently awarded contract would continue. The Air Force letter explained that the contract was funded by reprioritization with the Armament/Ordnance program element and not be reprogramming funds from the Air Launched Cruise Missile program element, which had been objected to by the House Committee on Armed Services.

We have provided a chronological summary of the key congressional elements pertaining to this request as an appendix to this letter.

Discussion

At least since 1983, the issue of which model is the best loader for the newest strategic bombers has been before both houses of the Congress. The FY 1985 and 1986 Air Force budget submissions referred to the development of a "simplified" loader. In brief, the Senate Committee on Armed Services generally has favored a new loader while the House Committee on Armed Services has supported the use of the modified MHU-173 lift trailer. The House Committee believed that development of a new trailer was unwarranted and not cost effective. After the Senate Committee requested the Air Force to explain its plans for the sole-source acquisition of a modified MHU-173, the Air Force undertook a competition for a new simplified loader. Despite opposition to this competition from the House Committee on Armed Services, section 112 of the DOD Authorization Act for FY 1985 provided that no funds could be used for procurement of a new loader until a contractor had been determined by competition. Subsequently, PACCAR was selected as the winner of such competition.

The Air Force's request for the reprogramming of $3.8 million for the PACCAR contract was rejected by the House Committee on Armed Services. Under the proposed reprogramming, the necessary funds would have been shifted within the FY 1985 RDT&E account from the Air Launched Cruise Missile program element to the Armament/Ordnance program element, but, in accordance with DOD Directive 7250.5, the planned reprogramming was dropped in view of the disapproval of the House Committee on Armed Services. Subsequently, the Air Force provided $1.3 million in FY 1985 funds for the PACCAR contract by shifting priorities and funds within the Armament/Ordnance program element itself. The balance needed to complete the project was expected to be paid from FY 1986 funds.

While certain increases in RDT&E program elements totals are considered "reprogramming" under DOD Instruction 7250.10, funding changes *within* program elements are not regarded as "reprogramming." Funding changes within program elements are often necessitated by delays in contract performance, or increases due to changed priorities. These changes usually are considered to be minor and uncontroversial although this was not true in this case.

When funding was denied by means of reprogramming from another program element to Armament/Ordnance, an alternate way of using funds within the Armament/Ordnance program element was found. The applicable DOD Directive and Instruction do not require approval or notice concerning this kind of action.

The Air Force action, while not subject to reprogramming controls and not legally impermissible, was nevertheless taken in spite of the reprogramming denial by the House Committee on Armed Services. However, we cannot say that the Air Force award of a

contract to PACCAR was contrary to the will of the Congress, as expressed in prior legislation. (See earlier discussion of section 112 of the DOD Authorization Act for FY 1985.) It is true that the Conference Committee on the FY 1986 DOD Authorization Act, on July 29, 1985, deleted a provision authorizing the release of prior year funds for the competition winner's development of an MLT. A similar action was taken earlier in the month, on July 2, by the Conference Committee on the supplemental appropriations bill for FY 1985. However, the reason given for deletion of the funds was not disapproval of the MLT program. The conferees explained that the proposed language was unneeded since adequate funds already were available for this program. In any event, no prohibition was placed in either Act to restrict funding of the PACCAR contract. Absent a statutory restriction, there is no legal bar to funding the contract from available RDT&E funds. Further, the use of previously designated funds from the Armament/Ordnance program element was not in violation of DOD procedures.

Conclusion

In our opinion the Air Force's award of a contract to Pacific Car & Foundry Company for the development, design, and testing of prototype strategic weapons loaders did not violate any appropriation act or other law nor was it contrary to Department of Defense reprogramming procedures. Absent an unauthorized expenditure, we see no indication of any violation of the separation of powers between the Congress and the Department of the Air Force.

With the approval of your staff, a copy of this opinion is being sent to the Chairman of the House Armed Services Committee, the Chairman of the Committee's Subcommittee on Research and Development, the Chairman of the Senate Armed Services Committee, and to the Air Force.

APPENDIX

Chronological Summary of Congressional Events

On *July 5, 1983,* the Senate Committee on Armed Services in its report on S. 675, The Omnibus Defense Authorization Act, 1984 (S. Rep. No. 174, 98th Cong., 1st Sess. 96), referred to Air Force plans to convert the loader used for B-52 aircraft to use for the B-1B bomber. It requested a report explaining the reason for a sole-source acquisition for this purpose, as compared to the operational, maintenance and cost factors of a competitive design and procurement.

On *January 30, 1984,* the Director of Legislative Liaison for the Air Force wrote to the Chairman of the House Committee on Armed Services about the planned release of a Request for Proposal for the development and testing of a new simplified MLT for

B-1B aircraft. He indicated that this was being done because of less than satisfactory field experience with the MHU-173 trailer currently deployed with B-52G aircraft. About $4 million of Fiscal Year 1984 Research, Development, Test and Evaluation (RDT&E) funds would be internally reprogrammed to the Armament/Ordnance Development Program for the development of an alternative lift trailer. It was anticipated that a modified MHU-173 MLT or a design derivative would figure prominently in the competition and evaluation.

On *February 7, 1984,* the Chairman and the Ranking Minority Member of the House Committee on Armed Services responded by requesting a deferral of the obligation or expenditure of any funds for this purpose, pending the completion of the Committee's evaluation of the MHU-173 system. It was explained that it was not the Committee's policy to initiate new programs through reprogramming actions, absent an urgent requirement.

On *April 19, 1984,* the House Committee on Armed Services reported on H.R. 5167 the Department of Defense (DOD) Authorization Act, 1985. The Report (H.R. Rep. No. 691, 98th Cong., 2d Sess. 167-8) stated that a competitive program to develop a new trailer was unwarranted and not cost effective, and directed that no funds authorized for appropriation by this bill be used for the design, development or procurement of a new lift trailer. Nevertheless, section 112 of H.R. 5167 as finally enacted, Pub. L. No. 98-525, 98 Stat. 2492, 2507, October 19, 1984, did not put that prohibition into the law. Instead, it provided that:

> None of the funds appropriated to the Department of Defense may be obligated or expended for procurement of a new strategic weapons loader to meet the performance requirements for the B-1B bomber aircraft or the Advanced Technology Bomber aircraft *until* a contractor for such weapons has been determined after a competition. [Italic supplied.]

In the Conference Report on Pub. L. No. 98-525, H.R. Rep. No. 1080, 98th Cong., 2d Sess. 246 (1984), the conferees stated their understanding that the winning design for the new SWL would be evaluated against the modified MHU-173 design to determine which would be best. According to the report, "The results of this evaluation, and the rationale for the selected approach, will be reported to the Senate and House Armed Services Committees prior to the initiation of MLT procurements."

On *December 7, 1984,* the Air Force's Director of Legislative Liaison wrote to the Chairman of the Committee on Armed Services of the House of Representatives. He stated:

> The Air Force has completed its competition for the new MLT, and Pacific Car & Foundry Company of Seattle, Washington was selected as the winner. The Air Force has also completed its evaluation of the winning design for the MLT against the modified MHU-173 design, with the result that the design for the new MLT was determined to best accommodate the long term needs of the strategic bomber force.

The letter explained the rationale for selecting the new MLT over the modified MHU-173 design. It also stated that the Air

Force was reprogramming $3.8 million as indicated in its letter to the House Armed Services Committee of January 30, 1984, and that the Air Force intended to award a contract to PACCAR by December 14, 1984.

On *December 10, 1984,* the Chairman of the House Armed Services Committee responded by advising that the Committee did not concur with the planned reprogramming of $3.8 million to initiate the new program because its concerns had not been fully addressed in the December 7 letter.

On *May 13, 1985,* the Deputy Secretary of Defense again submitted reprogramming action FY 85-67PA for the Air Force's Research, Development, Test and Evaluation Appropriation Account for Fiscal Year 1985. Under the proposed action, $3.8 million was to be deducted from Air Launched Cruise Missile funds, and added to Armament/Ordnance Development for the new MLT. It was explained that the reprogramming action was submitted for prior approval because it affected an item that had been designated as a matter of special interest to one or more congressional committees.

On *May 23, 1985,* the Chairman of the House Committee on Armed Services notified the Deputy Secretary of Defense that the Committee had disapproved the reprogramming request.

The Conference Report on H.R. 2577, making supplemental appropriations for FY 1985, H.R. Rep. No. 236, 99th Cong., 1st Sess. 30 (July 2, 1985) deleted a Senate provision which would have made $3.8 million available for the simplified MLT program. The report stated:

> The conferees agree the proposed language is not required since adequate funding is available for this program for which competitive selection was mandated by section 112 of the Department of Defense Authorization Act, 1985* * *

Consequently, the Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 293, enacted on August 15, 1985, contained no reference to the simplified MLT program.

The Conference Report on S. 1160, the DOD Authorization Act, 1986, H.R. Rep. No. 235, 99th Cong., 1st Sess. 402 (July 29, 1985), deleted a provision in the Senate bill that authorized the release of prior year funds still available for obligation, for the development of the MLT by the winner of the competition mandated by section 112 of the FY 1985 DOD Authorization Act. The House amendment of the bill did not contain this provision. As enacted, the authorization bill, Pub. L. No. 99-145, 99 Stat. 583, November 8, 1985, contains no reference to the use of prior year unobligated balances for the development of a simplified MLT.

[B-221421]

Environmental Protection and Improvement—Clean Air Act—Environmental Protection Agency Authority—State Implementation Plans—Revisions—Failure to Revise

General Accounting Office (GAO) disagrees with Environmental Protection Agency (EPA) tentative legal conclusion that the highway fund sanction in Part D of the Clean Air Act (42 U.S.C. 7506(a)) can be invoked to penalize either: 1) nonattainment areas that refuse to comply with EPA's call for additional SIP revisions requested per 42 U.S.C. 7410(a)(2)(H) and EPA's Nov. 1983 policy statement; or 2) areas with approved July 1, 1982, SIP revisions (42 U.S.C. 7502(a)(2) and (b)(11) that revoke statutorily required elements of those SIP revisions. The highway fund sanction applies only when EPA finds that the Governor of a nonattainment state has not submitted or at least is not making reasonable efforts to submit a Part D SIP revision containing transportation controls. B-208593, Dec. 30, 1982, Apr. 21, 1983, and Jan. 7, 1986, *affirmed*.

To: The Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, Feb. 28, 1986:

Your letter of December 2, 1985, requested our views on the Environmental Protection Agency's (EPA) tentative legal conclusions supporting liberal use of the highway funding sanction in section 176 of the Clean Air Act to promote cooperation with EPA's post Part D enforcement efforts. Our view is that, at this time, use of the sanction is confined to continuing major deficiencies in the July 1, 1982, extension state Implementation Plan (SIP) revisions.

BACKGROUND

When Congress amended the Clean Air Act in 1977, it backed up extended attainment deadlines with explicit requirements to revise SIPs and new sanctions for failure to comply with the Act's requirements. Pub. L. No. 95-95, 91 Stat. 685, 746-51 (*adding new* §§ 171-78 to the Act of July 14, 1955, ch. 360, 69 Stat. 322). Sections 171-78 (codified at 42 U.S.C. §§ 7501-08) are also known as Part D of the Act.

Specifically, the 1977 Amendments required preparation of additional SIP revisions as a condition of extending attainment dates for the national primary ambient air quality standards (NAAQSs) until December 31, 1982. In the case of carbon monoxide and ozone an extra extension to December 31, 1987, was allowed if a state showed earlier attainment was not possible and it submitted an additional SIP revision. Due July 1, 1982, this additional SIP revision was required by law to contain (1) an analysis of alternatives to construction at major emitting facilities; (2) a specific schedule for implementing a vehicle inspection and maintenance program; and (3) "other measures" needed for attainment by December 31, 1987. Moreover, the above requirements of the July 1, 1982, SIP revisions were to be adopted in the form of "enforceable measures." Section 172, 42-U.S.C. § 7502 (1982).

In addition to introducing stiff new planning requirements, Part D also added new penalties intended to promote planning, implementation and ultimate attainment. Of particular concern to EPA at present is section 176(a), the highway fund sanction. This section reads as follows:

> The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under title 23, other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—
>
> (1) in which any national primary ambient air quality standard has not been attained,
>
> (2) where transportation control measures are necessary for the attainment of such standard, and
>
> (3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982). 42 U.S.C. § 7506(a).

This penalty is probably the most potent sanction in the Act. For this reason it is a very useful tool to motivate the full performance of the Act's requirements. However, as discussed in detail below, it is strictly limited in its application.

GAO has already issued opinions concerning the requirements of the extension SIPs, due July 1, 1982, on the appropriate use of penalties contained in the Act, and on EPA's enforcement posture. (B-208593, Dec. 30, 1982; Apr. 21, 1983; and Jan. 7, 1986.) We stand by the analysis in these opinions. They are pertinent to the questions at hand.

EPA MEMORANDUM

The draft memorandum you asked us to review takes the position that the highway fund sanction is currently available to induce compliance with the additional round of SIP revisions EPA requested in lieu of enforcing sanctions against nonattainment areas after December 31, 1982, and also that the sanction can be used to punish states that revoke a part of their July 1, 1982 SIP revisions after EPA approved them. The memorandum makes three arguments in favor of its conclusions, which we will comment on in turn.

(1) *Using the sanction is not inconsistent with EPA's current policy*

The memorandum recognizes a possible conflict between the EPA November 1983 statement which announced EPA's policy to forego application of sanctions and a decision to invoke the highway fund penalty for failure to cooperate in submitting a post Part D SIP revision. However, it dismisses the conflict as minor and/or curable.

We disagree generally with the November 1983 policy (B-208593, Jan. 7, 1986), but when EPA found that the highway fund sanction was inappropriate to enforce the post Part D SIP revisions, it made the right decision. 48 Fed. Reg. 50691. The policy statement identified the SIP revisions being called for as revisions under section 110(a)(2)(H) of the statute. In that case, section 110(c)(10)(C) dictates the proper agency response to a failure to comply with a requested SIP revision. The statute prescribes prompt Federal issuance of regulations promulgating the SIP material the state has failed to revise on its own as requested.

Moreover, section 176(a) itself specifies the circumstances in which it is to be used. The sanction is triggered by the Administrator's finding that the state has not submitted a SIP revision that considers all the elements of section 172. It follows from this language that the sanction only applies to Part D SIP revisions, not to revisions under section 110. It is true as the memorandum suggests, that the highway fund sanction was only a secondary consideration in the November 1983 policy and also that the agency can change that policy if it wishes, but the statute seems to contradict such action.

(2) *Extra SIP revisions are under Part D*

The memorandum explains that because section 110(a)(2)(H) allowed the Administrator to request SIP revisions for the purpose of compliance with requirements of the 1977 Amendments to the Clean Air Act (which Amendments added Part D), the post Part D SIP revisions are actually revisions "under Part D." It goes on to conclude that the highway fund penalty is available to promote all Part D planning, including the post Part D SIP revisions.

We do not agree with that analysis for two reasons. First, the Administrator did not call for SIP revisions to comply with the 1977 Amendments. Rather, the reason stated in the November 1983 policy was that existing plans were "substantially inadequate to achieve attainment." Secondly, we note that the post Part D SIP revisions were only available to promote the section 172 (a)(1) and (2) SIP revisions which are referenced both by section number and by due date. We do not think the penalty applies to any other SIP revisions, even if they are revisions "under Part D."

The memorandum argues that Part D created a "renewable planning obligation," and therefore, the post Part D SIP revisions relate back to the original section 172 submission, and fall under the highway fund penalty in that way. Whatever renewable obligations Part D imposes, section 176(a) is triggered only by the failure to submit a complete plan on the proper dates, and submission is clearly a one-time, not a "renewable" event.

(3) *Congress would have allowed the highway fund sanction to be used*

The memorandum argues that Congress did not anticipate continued nonattainment or the necessity to call for more SIP revi-

sions. If it had, it would have allowed the highway fund penalty to be used to sanction noncooperation with a call for post Part D SIP revisions under section 110(a)(2)(H).

Several of our past opinions to you on this matter have stated our view that the post-deadline action required by the Act is enforcement of the construction ban in section 110(a)(2)(I). Since the Act specifically provides a post-deadline response to nonattainment, we do not agree that the Congress would have done something else if it had anticipated the need to apply sanctions for failure to submit adequate post Part D SIP revisions.

EPA is also considering using the highway fund sanction against regions that submitted Part D SIP revisions, but revoked some part of the SIP after EPA approved it. Unpopular inspection and maintenance (I&M) programs that had required state legislative action to create would be prime targets for repeal or indefinite postponement.

In B-208593, Dec. 30, 1982, we said that enforceable vehicle I&M was a statutory requirement of the July 1, 1982, SIP revisions. A state legislature's repeal of vehicle I&M authority therefore could not form the basis for a SIP revision, because a state may not revoke statutory elements of its SIP. (Section 110(a)(3)(A).) Such a case is obviously an implementation failure, not a SIP revision or approval problem. Part D contains a specific penalty for nonimplementation: cut-off of all Clean Air grants.

Section 176(b) provides for the halting of all Clean Air Act grants as a penalty for nonimplementation of a SIP. But because these funds arguably have a less immediate and less visible impact on the public, their cut off may be perceived as a less serious threat than is the highway funds sanction for failure to submit a plan. As a matter of policy, we think nonimplementation is just as serious as nonsubmission. Nonetheless, Congress specified different penalties for the two types of failures and EPA must abide by the statutory plan.

Furthermore, the legislative history of the 1977 Amendments makes it clear that the highway funds sanction was not to be used to penalize nonimplementation. Senator Gravel, who authored the sanction, confirmed this interpretation of his amendment in a colloquy with Senator Stevens:

> Mr. STEVENS. [I]f you have an implementation plan, whether you implement it or not, there will be no loss of highway funds.
> Mr. GRAVEL. That is right. * * * 123 Cong. Rec. 18476 (1977).

We discussed the meaning of EPA approval of Part D SIP revisions as related to section 176(a) in B-208593, Apr. 21, 1983. Addressing the question of whether EPA approval of a Part D SIP would constitute an estoppel against the imposition of the highway funding sanction in the future, we said:

> * * * As we indicated in our December 30, 1982, letter (B-208593), EPA approval may not mean that the SIP revision absolutely complies with all the statutory re-

quirements, including transportation controls. Moreover, if challenged, the Administrator's approval of SIPs is subject to judicial review. Act, section 307; see *Connecticut Fund for the Environment v. EPA*, 612 F.2d 998 (2d Cir. 1982). Therefore, EPA approval does not absolutely guarantee immunity from highway fund restrictions. We are satisfied, however, that EPA approval or conditional approval must mean at least that the Administrator has determined that reasonable efforts were made to submit an acceptable SIP revision. Thus, EPA approval or conditional approval would, absent either a finding of changed circumstances [where EPA approval was based not on an actual submission but on reasonable efforts to submit which were subsequently abandoned] or subsequent judicial action, preclude the later application of this sanction.

Moreover, we note that the minimum requirement to stay the sanction is reasonable effort to submit an approvable Part D SIP revision. Approval itself has never been required to stay the sanction.

PROPER USE OF THE HIGHWAY FUND SANCTION

Having ruled out use of the highway fund sanction to induce states to submit post Part D SIP revisions and for punishment of states that revoke parts of their Part D SIPs, the question arises whether there is any remaining use for this sanction. A finding of no reasonable efforts to submit could still trigger the sanction if it followed either a disapproved initial submission or nonsubmission. However, the passage of time and the approaching expiration of even the extended attainment deadline makes it less and less likely that the sanction can be used in a way that helps achieve healthful air.

CONCLUSION

In our view, EPA's proposal to invoke the highway fund sanction to promote cooperation with its post Part D SIP revisions and to penalize nonimplementation is not authorized by the statute. EPA should instead use the construction moratorium, Federal promulgation of SIPs, and section 176(b) Clean Air grants sanctions to achieve the goal of expeditious post-deadline attainment. If in EPA's judgment these methods are too economically or administratively burdensome, it should seek either legislative relief from enforcement responsibility or new statutory penalties as warranted.

We hope the foregoing is helpful to you. Under our usual agreement, this opinion will be available to the public 30 days from its date, unless you release it sooner.

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