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COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

James F. Hinchman

ASSOCIATE GENERAL COUNSELS

Rollee H. Efros

Seymour Efros

Richard R. Pierson

Henry R. Wray

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[B-221356]

Contracts—Negotiation—Requests for Proposals—Defective—Ambiguous Terms

Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals.

Matter of: KISS Engineering Corporation, May 2, 1986:

KISS Engineering Corporation protests the rejection of its proposal submitted in response to request for proposals (RFP) No. DACW69-85-R-0044, issued by the United States Army Corps of Engineers. The Army found the proposal to be technically unacceptable for failing to propose a single daily rate for performing the work, which involves the preparation of appraisal reports. KISS contends that a single rate was not required, and that its proposal complied with the pricing requirements of the solicitation.

We sustain the protest.

The Army sought offers to prepare between 5 and 36 reports appraising the value of oil, gas and other subsurface properties underlying land in and around the Stonewall Jackson Lake Project in Lewis County, West Virginia. The RFP, issued on August 6, 1985, stated that separate fixed-price work orders would be negotiated with the contractor for each appraisal report ordered. The solicitation listed the following evaluation factors in descending order of importance: specialized experience in the work required; cost; qualifications and capabilities of principals, supervisors, and personnel; experience in the general geographic area; capability to complete acceptable and quality work in the required time; volume of previous Department of Defense work; and experience as an expert appraisal witness in federal court.

The description of the second factor in importance, "cost of work," stated that offerors must submit price proposals and daily fees for any required court testimony. The solicitation included a schedule for offerors to insert a "Total Daily Rate," a "Per Diem Rate," "Travel (Mileage)," and a "Fee for attending pre-trial conferences and [providing court] testimony." Each of these proposed rates was to be on a per day basis except mileage, which was to be on a per mile basis. The only other indication of what the Army desired in price proposals was the following statement, which appeared in the section concerning evaluation factors for award and which is central to the issue in this protest:

As part of the proposal, each offeror must indicate the total daily rate for all those disciplines necessary to accomplish the work described herein. Total daily rates shall include all overhead allowances authorized, profit, labor, plant, equipment, and materials to perform each work order. Travel expenses and per diem will

not exceed the amounts specified in JTRs [Joint Travel Regulations] for government employees. . . .

In its schedule, KISS noted "See Proposal" following "Total Daily Rate" and in the proposal itself included a schedule of fees listing hourly and daily rates for six categories of employees. On September 26, the Army notified KISS that its proposal had not been considered since the agency could not determine the firm's intended price from the schedule. The Army considered KISS' failure to provide a single combined rate for all employees to be a material deviation from the requirements of the solicitation. KISS initially protested to the Army and, following a denial by the agency, filed this protest. The Army awarded a contract to MSES Consultants, Inc., without conducting discussions, but performance has been suspended pending our decision.

The Army argues that to the extent the protester complains of an ambiguity in the RFP or asserts that the solicitation is unreasonable, the protest is untimely. Our Bid Protest Regulations, 4 C.F.R. §21.2(a)(1) (1985), require that protests based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals must be filed by that date. Thus, the Army argues that the ambiguity here was apparent on the face of the solicitation and should have been raised before proposals were due on September 6.

KISS' protest is not that the solicitation was ambiguous, but that the only reasonable interpretation of the solicitation is that it required offerors to propose daily rates for each discipline involved in the work, rather than one rate for the entire effort. The protester contends that the RFP language quoted above, requiring "rates" to include overhead and other costs, indicates that multiple rates were described. KISS also contends that the reference to a "Total Daily Rate" for all disciplines could refer to a separate rate for each.

The protester points out that the fixed price of the appraisal report for each tract of land will be separately negotiated, and will depend upon the size and mineral content of the tract, the number and types of necessary staff, and the estimated time required by each staff member. The RFP expressly states that "those disciplines necessary to accomplish each work order" will be considered in negotiating the price of each appraisal report. Therefore, KISS contends, it would not be reasonable to read the RFP as requiring only a single combined daily rate, since such a rate would have no meaningful relationship to the actual contract price. Conversely, daily rates for the various categories of employees required would have a direct relationship to the contract price, since the RFP provides that the skills required will be a factor in negotiating the price for each work order.

We believe that the protester presents a reasonable interpretation. Read as a whole, however, the solicitation is ambiguous, i.e.,

subject to more than one reasonable interpretation. The RFP requirement for offerors to indicate the "total daily rate for all . . . disciplines" could refer to separate rates for each discipline that represent a total of direct labor, overhead, profit and other allocable items. This view is supported by the RFP statement that "total daily rates" shall include overhead, etc. On the other hand, the Army also offers a reasonable interpretation. "Total Daily Rate" could refer to a combination of rates into single rate, and this reading is supported by the fact that space for only one rate was provided in the schedule included in the RFP.

More importantly, we find the solicitation deficient in that it did not permit an accurate assessment of probable costs. Agencies must consider cost to the government in evaluating competitive proposals. 10 U.S.C.A. § 2305(b)(4) (West Supp. 1985); 48 C.F.R. §§ 15.605(b), 15.611(d) (1984); *Aurora Associates, Inc.*, B-215565, Apr. 26, 1985, 85-1 CPD ¶ 470. The RFP, however, did not require offerors to describe how they determined their daily rate, to indicate how many days the average report might take them to prepare, or to specify any other costs except for mileage, per diem, and fees for court testimony. Thus, offerors might have estimated less intensive effort for longer periods in order to propose a lower daily rate.

It is not clear from the evaluation record in this case how the agency determined the "cost of work" factor, which was worth up to 25 percent of the available points, for each offeror. Since the highest-rated offeror for this factor only provided a single total daily rate, per diem and mileage (at the maximum allowable rates), and fees for court testimony, we conclude that the "Total Daily Rate" was the dominant, if not the sole, element of the Army's cost evaluation. We find no necessary relationship between this rate and the likely actual cost of the contract to the government. The price of each work order will not be determined by the contractor's daily rate—the price is to be separately negotiated considering "those disciplines necessary" and other individual factors related to the work or the particular tract to be appraised.

In short, for purposes of an award decision, "Total Daily Rate" would not necessarily indicate whether one offeror's proposal would be more or less costly than another's, and the KISS proposal should not have been rejected summarily for failure to provide it.

We therefore are recommending that the agency evaluate the KISS technical proposal and determine whether the firm is in the competitive range. (Two other offerors who apparently provided a single daily rate and scored slightly higher than the awardee on the cost evaluation factor do not appear to be in this range, since their scores on the technical evaluation factors were extremely low. Their overall scores were 29 and 36 points, compared with the awardee's 92 points, and we assume they would not have had a reasonable chance for award.) A fifth offeror was also rejected as "nonresponsive." We cannot determine from the record whether

this was also for reasons related to the cost evaluation factor. If so, its proposal also should be evaluated and a determination made as to whether that firm is in the competitive range.

Assuming that a competitive range of more than one will result, we recommend that the agency then conduct discussions and request best and final offers on a basis that will allow equal competition and that will obtain information the Army can use to determine the probable cost of accepting each offeror's proposal. If the outcome warrants, the awarded contract should be terminated for the convenience of the government.

We sustain the protest.

[B-221983.2]

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

General Accounting Office (GAO) will not waive regulatory requirement that protester provide contracting officer with a copy of its protest within 1 day of filing where the agency otherwise did not have specific knowledge concerning the protest's details so that it would be able to file a responsive report within the statutorily-required timeframe.

Matter of: Franklin Lumber, Inc., May 2, 1986:

Franklin Lumber, Inc., requests reconsideration of our March 4, 1986 dismissal of its protest challenging the award of a contract under invitation for bid (IFB) No. DABT56-85-B-0085. The IFB was issued by the United States Army Engineer Center, Fort Belvoir, Virginia. We affirm our dismissal.

Background

Franklin first challenged this award by filing a protest with the Army by letter of January 17, 1986. The protest consisted of a single sentence alleging that the apparent low bidder had submitted an unbalanced bid. The Army denied the protest by letter of January 29. In denying Franklin's protest, the Army stated that its review of the low bid indicated that it was not materially unbalanced.

On February 7, Franklin filed a protest with our Office, adding details to its earlier complaint to the Army, and identifying several line items on which it alleged the low bid was unbalanced. Franklin failed to provide the Army with a copy of this protest, so that, on March 4, we dismissed the matter. Our action was based on section 21.1 of our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which requires the protester to provide the contracting officer with a copy of the protest no later than 1 day after the protest is filed with our Office.

In requesting reconsideration, Franklin suggests that we waive the requirements of section 21.1, arguing that, by virtue of its Jan-

uary 17 protest, the Army had actual knowledge concerning the basis of the protest filed in our Office.

Discussion

The regulatory requirement that the contracting officer receive a copy of the protest 1 day after filing stems from the requirement imposed on the procuring activity by the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §3553(b)(2)(A) (West Supp. 1985), that the activity furnish our Office with a report within 25 days. This requirement affects, in turn, the ability of our Office to meet the 90-day deadline established in CICA for issuing our decision. Due to the importance of the statutory timeframes, waivers of section 21.1 are considered exceptional and are granted sparingly. See *Julie Research Laboratories, Inc.*, B-219866.2; B-219867.2, Sept. 18, 1985, 85-2 C.P.D. ¶302; *Sabin Metal Corp.—Reconsideration*, B-219171.2, July 24, 1985, 85-2 C.P.D. ¶79.

In requesting reconsideration of our dismissal, Franklin relies on previous decisions of this Office where we chose to waive the requirements of section 21.1. See *Colt Industries*, B-218834.2, Sept. 11, 1985, 85-2 C.P.D. ¶284; *Hewitt, Inc.*, B-219001, Aug. 20, 1985, 85-2 C.P.D. ¶200; *Florida Precision Systems, Inc.—Request for Reconsideration*, B-219448.2, Aug. 12, 1985, 85-2 C.P.D. ¶160. In those cases, however, we elected to consider the merits of the protests despite the lack of strict compliance with section 21.1 only because we found that the contracting officers had precise knowledge concerning the bases of the protests and were able to file timely reports with our Office. In each case, the contracting officer received an exact copy of the protest filed in our Office—albeit from a source other than the protester—within sufficient time to prepare and submit the agency's report to our Office within 25 days.

The report that CICA requires an agency to file must contain a detailed response to the allegations raised by the protester. *See* 31 U.S.C.A. §3553(b)(2). In a case like Franklin's, possession by the agency of a copy of the protest is essential to its ability to accomplish this task. As noted above, Franklin's protest to the Army stated only that the apparent low bid was unbalanced. In contrast, Franklin's appeal to our Office included calculations on 5 of the 99 line items purporting to prove unbalancing, and alleged that numerous other items were unbalanced as well. Thus, notwithstanding the earlier protest, the contracting officer had no knowledge of the specific charges to which he needed to respond. He also could not know whether Franklin had asserted new arguments or points of law or had raised entirely new protest issues. In sum, we cannot say that the agency could have filed a responsive report with our Office within the statutory timeframe, without having been provided a copy of Franklin's February 7 protest.

In light of Franklin's failure to comply with our Bid Protest Regulations, we will not consider its protest. The dismissal is affirmed.

[B-221717]

Contracts—Payments—Conflicting Claims—Assignee *v.* I.R.S.

Assignee bank has priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds.

Matter of: Priority to Contract Proceeds, May 5, 1986:

An Army Corps of Engineers disbursing officer asks about priority between the Internal Revenue Service (IRS) and the assignee, Security State Bank of Aitkin, Minnesota (Bank), for distribution of $7,068.55 proceeds due under a purchase order contract between the Corps of Engineers and Ray Kullhem, and the proper amount to be paid to each. For the reasons given below, assuming the Bank's factual assertions are correct, the proceeds should all be paid to the Bank.

On January 24, 1984, an assignment under the Uniform Commercial Code of all the accounts receivable of Ray Kullhem in favor of the Security State Bank of Aitkin was recorded in the Office of the County Recorder for Aitkin County, Minnesota. On August 6, 1985 an IRS tax lien was issued against Ray Kullhem in the assessed amount of $5,529.64. The dates of the assessments were March 5, 1984 and March 18, 1985.

In September 1985, Mr. Kullhem entered into a purchase order contract with the Corps of Engineers for construction of a swimming pool for $9,983. Subsequently, the contract amount was increased to $13,123. The contract permitted assignments under the Assignment of Claims Act, 31 U.S.C. §3727, and contained a no setoff clause. The clause stated: "[P]ayments to an assignee of any amounts due or to become due under this contract shall not to the extent specified in the Act, be subject to reduction or setoff."

On November 7, 1985, Mr. Kullhem executed an assignment of the described purchase order contract to the Security State Bank of Aitkin. The assignment provided that all sums payable on the contract would be payable to the Bank. The assignee informs us that the assignment was given in exchange for the Bank providing financing for the work on the purchase order contract. The assignment was not immediately served on the Corps of Engineers disbursing or contracting officers.

Subsequently, on December 12, 1985, an IRS Notice of Levy was issued and served on the Army Corps of Engineers disbursing officer for the St. Paul District. The levy was in the amount of $7,068.55, consisting of an assessed amount of $5,601.08 and statutory penalties and additions of $1,467.47. The IRS informs us that the

$71.44 difference between the assessed amount described in the lien and that in the levy was due to a $20 filing fee and a $51.44 bad check written by Mr. Kullhem. On December 19, 1985, the Bank sent two copies of the November 7 assignment to the Corps of Engineers' Office of Counsel, requesting that they be forwarded to the disbursing officer and contracting officer. (The Bank also forwarded a copy of the January 24, 1984 UCC assignment.) The Corps received the Bank's letter on December 23, 1985, and its acting disbursing officer acknowledged receipt of the assignment on December 24, 1985.

The IRS maintains that its lien and levy have priority over any existing assignment. The assignee, Security State Bank of Aitkin, contends that its UCC filing and the November 7, 1985 assignment take priority over any interest of the IRS. The assignee also maintains that the amount Mr. Kullhem still owes on the loan for financing the contract exceeds the $7,068.55 to be distributed.

The Assignment of Claims Act, 31 U.S.C. §3727, permits an assignment to a bank of money due or to become due from the United States under a contract providing for payments aggregating $1,000 or more. The Act requires that the assignment cover all amounts payable under the contract not already paid. Moreover, we have held that the assignee must have a financial interest in the contractor's operations under the contract. B-195629, Sept. 7, 1979. Generally, this means that an assignment is valid only if it secures a loan which the assignee has made to the assignor to finance the assignor's performance of the contract. *See* 62 Comp. Gen. 683, 684 (1983), *Modifying* 60 Comp. Gen. 510 (1981). Thus, blanket assignments usually do not meet the Act's requirements.

The Act also requires the assignee to file written notice of the assignment together with a copy of the instrument of assignment with the contracting officer or head of the contracting officer's agency, and the disbursing officer, if any, for the contract. 31 U.S.C. §3727(c)(3). An assignment does not become effective until this requirement is satisfied.

Under the Act the Government is precluded from asserting certain setoffs against funds payable under a Government contract containing a "no setoff" provision when the rights to those funds have been properly assigned to a bank.[1] *Id.* §3227(d). Where applicable the no setoff provision defeats operation of IRS tax liens and levies and reduces the Government's common law right of setoff to the extent the assignor is indebted to the assignee. 31 U.S.C.

[1] Although the provision in the Act authorizing limitations of setoff states that it applies only "in war or national emergency", the provision has been extended by subsequent legislation. Pub. L. No. 94-412, 90 Stat. 1255, 1258 (1976), codified at 50 U.S.C. §1651(a)(4). The legislative history of the provision shows the no setoff authorization was continued because of its importance in financing government contracts. H.R. Rep. No. 238, 94th Cong., 1st Sess. 12, 16 (1975). *See also* S. Rep. No. 1086, 95th Cong., 2d Sess. 1-2 (1978).

§ 3727(d); 37 Comp. Gen. 318, 320, 322 (1957). A no setoff clause will protect an assignee only from an assignor's indebtedness resulting from loans for contract performance. 49 Comp. Gen. 44, 46 (1969).

In this instance, the purchase order contract between the Corps of Engineers and Mr. Kullhem did contain a no setoff clause. Moreover, the assignment complied with the requirements of the Assignment of Claims Act: as we understand it the assignment was to underwrite Mr. Kullhem's performance of the purchase order contract, and the Corps received notice of the assignment on December 23, 1985. Although the assignment did not become valid for purposes of the Assignment of Claims Act until December 23, 1985, and the tax liability and tax lien representing that liability arose prior to that date, we have consistently held that when a no setoff clause is included in an assigned contract neither the IRS nor any other Government agency can set off amounts due from the assignor against the contract proceeds owed to the assignee, even if the IRS claim matures prior to the date on which the assignment becomes effective—the date notice of the assignment is received by the contracting agency. 62 Comp. Gen. 683, 690 (1983) *modifying* 60 Comp. Gen. 510 (1981); 37 Comp. Gen. 318, 320 (1957). Accordingly, if as the assignee contends the assignor still owes the assignee bank more than the $7,068.55 contract proceeds being held by the Corps of Engineers, and the assignor's debt to the Bank resulted from a loan to finance the purchase order contract, that money should be distributed to the Bank.

Should the amount still owed the assignee by the assignor be less than the remaining $7,068.55 proceeds, the no setoff clause would only protect the assignee for the lesser amount. Any amounts above that should be paid to the IRS. Furthermore, if the loan underlying the assignment was not made to finance the purchase order contract, the no setoff clause would not protect the assignee against the IRS's claim to the proceeds.[2] That claim arose before the November 7, 1985 assignment became valid under the Assignment of Claims Act, *supra*, and thus would prevail but for the effect of the no setoff clause. For similar reasons the IRS tax claim would prevail over the January 24, 1984 UCC assignment: that assignment was received by the Corps after the tax claim arose, and was not made to finance the purchase order contract.

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[2] The Bank has told us that the assignment was made in exchange for monies to finance the contract, and that the assignor still owes the Bank more than $7,068.55 on that loan. To date, however, the Bank has not submitted documentation confirming this. Since the IRS has expressed a need for a decision quickly, we will assume these facts are correct. Nevertheless, before distributing the proceeds to the Bank, the Corps should verify these assertions.

[B-221686]

Officers and Employees—Transfers—Real Estate Expenses—Construction Costs

Transferred employee may not be reimbursed a transaction privilege tax imposed by Arizona on constructors of new houses even though the tax was passed on to the employee when he purchased a newly constructed residence at his new duty station. Although the tax qualifies as a "transfer tax" within the meaning of Federal Travel Regulations, paragraph 2-6.2d, it was a charge imposed incident to the construction of a new residence, and therefore may not be reimbursed in view of the specific prohibition contained in paragraph 2-6.2d.

Matter of: Carl Trueblood, May 8, 1986:

The question in this case is whether a transferred employee may be reimbursed for a transaction privilege tax imposed by Arizona on builders of new houses which was passed on to him when he purchased a residence at his new duty station.[1] We conclude that he may not be reimbursed since the tax was a charge incident to the construction of a new residence.

Incident to his transfer to Arizona, Mr. Carl Trueblood, an employee of the Department of the Interior, purchased a newly constructed residence. Together with his claim for real estate purchase expenses, Mr. Trueblood submitted a sales tax receipt executed by the seller's agent indicating that the purchase price of the new home included state and city sales taxes totaling $3,032.61 imposed in compliance with § 42-1310.02 (now § 42-1308) of the Arizona Revised Statutes. The taxes here in issue are in fact transaction privilege taxes imposed upon prime contractors engaged in the construction of new houses in Arizona. These taxes, although paid to Arizona by the contractors, are collected from the purchasers in the price of the new home. *City of Mesa* v. *Home Builders Assn. of Central Arizona, Inc.*, 111 Ariz. 29, 523 P.2d 57 (1974).

Paragraph 2-6.2d of the Federal Travel Regulations (FTR) (Supp. 4, Aug. 23, 1982), *incorp. by ref.* 41 C.F.R. § 101-7.003 (1983), specifies that expenses that result from construction of a residence are not reimbursable, except to the extent they are comparable to expenses that are reimbursable in connection with the purchase of an existing residence. See FTR, para. 2-6.2d(1)(j) and para. 2-6.2d(2)(f). The transaction privilege taxes included in the purchase price of Mr. Trueblood's house are assessed only on newly constructed houses. They are nearly identical to the privilege tax that was passed on to the purchaser considered in 54 Comp. Gen. 93 (1974). Although that decision was overruled on other grounds by 63 Comp. Gen. 474, *supra,* reimbursement of the New Mexico tax involved in 54 Comp. Gen. 93 was specifically disallowed on the basis that it was a charge incident to the construction of a new resi-

[1] This action is in response to a request for a decision received from Mr. Edward M. Hallenbeck, Acting Regional Director, Lower Colorado Regional Office, Bureau of Reclamation, U.S. Department of the Interior.

dence. See also *Mr. Clyde Treat*, B-181795, November 11, 1974; *James L. Starshak*, B-178943, September 17, 1974.

Therefore, although the Acting Regional Director believes that it is unfair to penalize the purchaser of a new home, we conclude that the transaction privilege taxes in this case are expenses resulting from construction which may not be allowed under the applicable regulations. Accordingly, the taxes claimed by Mr. Trueblood may not be reimbursed.

[B-219664.3]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Additional Information Supporting Timely Submission

General Accounting Office (GAO's) Bid Protest Regulations, 4 C.F.R. 21.1(c)(4) (1985), require that an initial protest set forth a detailed statement of the legal and factual protest grounds and do not contemplate a piecemeal presentation of arguments or information even where they relate to the original grounds for protest. Where, however, the initial protest called into question the accuracy of all the workload estimates in a solicitation and the agency possessed sufficient information to take comprehensive corrective action or otherwise to fully respond to the protest, then a subsequently submitted specific enumeration of defective estimates is timely.

Contracts—Protests—Allegations—Unsubstantiated

Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's needs, or result from fraud or bad faith.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Furnishing of Information on Protest—Specificity Requirement

General allegation that multiple dissimilar tasks should not have been consolidated under single work category for purposes of calculating payment deduction is untimely to the extent the protester failed to identify in its initial protest the specific work categories to which its general allegation applied, since such a determination depends on subjective criteria not defined by the protester and the contracting agency therefore could not reasonably determine which work categories, in the protester's view, were covered by the general allegation.

Matter of: Dynalectron Corporation—Request for Reconsideration, May 13, 1986:

Dynalectron Corporation (Dynalectron) requests reconsideration of our decision in *Dynalectron Corp.*, B-219664, Dec. 6, 1985, 65 Comp. Gen. 92, 85-2 CPD ¶634. In that decision, we denied Dynalectron's protest against the terms and conditions of request for proposals (RFP) No. DAVA01-85-R-0001, issued by the Defense Audiovisual Agency (DAVA) for the procurement of audiovisual services. We affirm our prior decision.

The solicitation requested proposals for supplying audiovisual services at a firm, fixed price and for undertaking audiovisual pro-

ductions on an indefinite-quantity basis, for a 9-month base period and 4 option years, in connection with DAVA's operations at Norton Air Force Base in California. The Air Force assumed the functions of DAVA after September 30, 1985.

Under the audiovisual services portion of the solicitation, offerors were provided with estimates of DAVA's requirements for a number of audiovisual services ("Required Services" or "RS") and were required to propose a total price for providing all these services during each of the base and option periods.

Accuracy of Workload Estimates

In its initial protest of August 9, 1985, Dynalectron, then the incumbent contractor, alleged that the solicitation's workload estimates for the audiovisual services were erroneous and misleading because they differed substantially from the government's actual requirements. Dynalectron identified 20 RS for which the current, actual workloads under DAVA's contract with Dynalectron exceeded the estimated workloads set forth in this solicitation by at least 100 percent. In addition, Dynalectron generally alleged that the estimates for approximately 40 other unidentified RS were overstated by at least 50 percent and that the estimates for approximately two-thirds of the RS differed significantly from the current workload.

In the administrative report responding to the protest, DAVA conceded that figures for the actual workload experienced under the current contract were not considered in deriving the estimates in the solicitation. Rather, these estimates were based upon the estimates contained in the prior solicitation which resulted in the current contract. This was done to facilitate a comparison of the advantage of accepting an offer for a new contract with the government's option of extending the current contract. Nevertheless, DAVA indicated that it would amend the solicitation to include revised workload estimates which took into account the actual workload experience under Dynalectron's current contract.

Shortly thereafter, DAVA amended the solicitation to revise not only the estimates for all except one of the 20 specific RS which Dynalectron had identified in its initial protest, but also the estimates for a number of other RS. Approximately 30 percent of all the workload estimates were revised. DAVA described the revised estimates as the "fruit of the Government's best judgment based on the most current data," indicating that both actual workload figures through July 1985 and projections of the future workload after the Department of the Air Force takes over the functions of DAVA were considered.

Dynalectron conceded in its subsequent comments of September 30 that the corrections to the workload estimates for six of the 20 RS originally identified as defective appeared to reflect actual experience. The protester contended, however, that for the other esti-

mates, the corrections were "erratic to non-existent." In addition, Dynalectron provided that it alleged to be the actual 1984 and 1985 workloads for all the RS and identified additional RS for which the workload estimates in the solicitation were allegedly defective.

DAVA thereupon amended the solicitation to revise an additional 20 percent of the workload estimates.

In our prior decision, we held the Dynalectron had failed to meet its burden of providing that the workload estimates for the 20 RS identified in Dynalectron's original protest, as revised by DAVA, were not based on the best information available as to the agency's anticipated *future* requirements, otherwise misrepresented the agency's needs, or resulted from fraud or bad faith. Cf. *D.D.S. Pac*, B-216286, Apr. 12, 1985, 85-1 CPD ¶418. In addition, we found untimely Dynalectron's allegations regarding the additional RS first identified as defective in Dynalectron's September 30 comments. Notwithstanding the general allegation in Dynalectron's initial protest that the estimates for two-thirds of the RS differed from the current workload, we concluded that Dynalectron could and should have identified all the allegedly defective estimates in the original protest.

Upon reconsideration, we now agree with Dynalectron that its protest letter adequately raised the question of the propriety of the subsequently identified, additional workload estimates. Dynalectron's initial allegations identified a general defect in the solicitation, i.e., the use of workload estimates derived from the prior solicitation which often substantially differed from the more recent historical workloads. It thereby generally called into question the basis for all the workload estimates and, in particular, called into question each workload estimate which substantially differed from the recent historical workload. Since DAVA knew the actual workload under the prior contract, it knew which workload estimates Dynalectron considered defective. The agency therefore was in a position to take comprehensive corrective action to remedy any defective workload estimate or otherwise to respond to Dynalectron's allegations in this regard. We therefore will consider on the merits Dynalectron's allegations concerning the workload estimates.

In its request for reconsideration, Dynalectron once again argues that the additional workload estimates identified in its September 30 comments are defective because they deviate from the current, actual workload under Dynalectron's contract with DAVA. Dynalectron does not explain why DAVA's estimates in the specific categories identified were improper, except for its initial general contention that actual workload data from prior years should be used. That argument is unpersuasive, however, since Dynalectron has not shown a correlation between DAVA's current and future requirements. As we stated in our original decision, workload estimates represent the best estimates of the agency's anticipated future, not current, requirements. Here, Dynalectron are presented

no evidence to show that DAVA's future requirements will be the same as its requirements under the contracts with Dynalectron for 1984 and 1985. On the contrary, it is reasonable to assume that the requirements will be different since the actual workload figures themselves show significant fluctuations in the character and quantity of work year to year; a new agency with potentially different priorities is assuming responsibility for DAVA's functions; and a contract under the RFP at issue could be extended by the exercise of options to a period of nearly 5 years.

Consistent with the requirement to formulate the workload estimates based on its future requirements, DAVA has revised the estimates twice in response to the protest. The revisions were based on both the actual workload figures through July 1985 and projections of the future workload after the Air Force takes over the functions of DAVA. Since Dynalectron has presented no evidence to show that these workload estimates were not based on the best information available as to DAVA's future requirements or otherwise result from fraud or bad faith, we find that Dynalectron has failed to show that the workload estimates are defective.

Propriety of Deductions for Defective Performance

In its original protest, Dynalectron also challenged the solicitation provisions relating to payment deductions for defective performance. Dynalectron maintained that the payment deductions set forth in the RFP had been fixed without reference to the probable actual damages that would be suffered as a result of defective performance and, therefore, that they constituted an unenforceable penalty.

In its initial protest of August 9, Dynalectron alleged that the RFP permitted deduction of an amount representing the value of several different tasks where an inspection revealed a defect in only one type of task, citing RS-48 as "an example." Although the solicitation included separate workload estimates for 10 different tasks under RS-48 (including providing presentation charts, briefing charts, blue line/black line prints, plaques, photoplates, nameplates, posters, displays, certificates and lobby displays), the RFP only provided for a single entry for these services, "[p]roduce quality Graphic Art work," a single deduction category based upon the defective percentage in the sample of any particular lot, and a single maximum payment percentage of RS value.

In response to the initial protest, DAVA issued amendment No. 6 to the RFP which in part separated RS-48 for graphic art services into 10 distinct subtasks. DAVA maintained, however, that a further breakout of tasks under other RS was inappropriate.

In our prior decision, we held that the breakout of work under RS-48 into 10 separate deduction categories as requested by Dynalectron rendered its initial protest in that regard academic. Al-

though we recognized that Dynalectron, in its September 30 comments, identified additional, specific RS which allegedly contained dissimilar tasks, we pointed out that these were apparent prior to the August 9 closing date. Since solicitation improprieties apparent prior to the closing date must be protested prior to closing, 4 C.F.R. § 21.1(a)(1) (1985), and our Bid Protest Regulations do not contemplate a piecemeal presentation or development of protest issues, we considered the allegation as to the additional RS to be untimely.

In its request for reconsideration, Dynalectron challenges our finding that its allegations concerning the additional payment deduction categories identified in its September 30 comments were untimely. The protester argues that it clearly identified the relevant problems with the payment deduction categories in its initial protest and contends that a review of the information available to the agency would have revealed all the allegedly defective categories. Dynalectron considers the additional payment deduction categories identified in its September 30 comments merely to be additional support for its previous, timely filed grounds of protest.

The crux of Dynalectron's argument is that its general allegation—that it was improper to consolidate dissimilar tasks under one RS category for purposes of calculating the payment deduction—was sufficient to identify the specific RS which Dynalectron regarded as defective. We disagree. In its initial protest, Dynalectron stated that RS-48 was defective because it combined 10 "completely separate and independent tasks" under one category. As Dynalectron framed the issue, therefore, the key determination is which categories involve "completely separate and independent" tasks.

In none of its submissions, however, including the request for reconsideration, has Dynalectron defined what in its view constitutes "completely separate and independent" tasks. Without any such indication from Dynalectron, DAVA could not reasonably determine which specific RS were allegedly defective, since such a determination depends on Dynalectron's *own* judgment as to what constitutes separate and independent tasks. Since Dynalectron's general allegation thus was based on subjective, not objective, criteria—i.e., does any particular RS involve "completely separate and independent" tasks as defined by Dynalectron?—it was incumbent on Dynalectron to identify the specific RS to which its general allegation applied.[1]

In its request for reconsideration, Dynalectron has recast and in effect broadened its initial allegation. Instead of categories involv-

[1] This is the key distinction between Dynalectron's allegation regarding the workload estimates, discussed above, and its allegation concerning the payment deductions. Unlike the payment deduction allegation, the workload estimate allegation put DAVA on notice of the objective criteria on which it was based and which could be applied to determine the specific workload estimates covered by the general allegation.

ing "completely separate and independent" tasks, Dynalectron now states that "[a]ny Required Service which was comprised of *multiple tasks* with only one payment deduction percentage falls under the category of deficiency identified in the protest." [Italic supplied.] Dynalectron concludes that simply examining each RS thus would produce a list of allegedly defective RS identical to the list furnished by Dynalectron in its comments on the agency report. We disagree. A review of the RS reveals several which are not included in Dynalectron's list even though they involve "multiple tasks" and thus fit Dynalectron's definition of allegedly defective RS in its request for reconsideration. For example:

-(1) RS-52—Design and prepare artwork for publication. Defined in sec. C-5, ¶5.2.9.2.6: "The contractor shall design and construct materials for publication and prepare camera-ready artwork for the printer."

-(2) RS-54—Provide training aids. Defined in sec. C-5, ¶5.2.9.2.8: "The contractor shall design and construct training aids, and two/three dimensional training aid display items."

-(3) RS-58—Black and white copy photography. Defined in sec. C-5, ¶5.2.9.3.4: "Black and white negatives shall be produced from art work, publications, displays, pictures, charts, etc., in a variety of sizes ranging from 35mm to 8 x 10 inch. Both continuous tone negatives and high contrast line copy negatives will be required."

Thus, even applying Dynalectron's most recent description of the RS covered by its general allegation does not yield the same list of RS as identified by Dynalectron. In our view, this confirms our conclusion that DAVA could not reasonably be expected to respond to Dynalectron's general allegation without an enumeration of specific RS regarded as defective by Dynalectron. Since Dynalectron chose not to identify the specific RS involved until its comments on the agency report,[2] we affirm our original finding that Dynalectron's protest was untimely with regard to those specific RS.

Our prior decision is affirmed.

[B-221075]

Transportation—Rates—Section 22 Quotations—Tender Revision

A provision of a tender negotiated under the Military Traffic Management Command's Guaranteed Traffic program permits otherwise applicable rates to be used. This permits lower rates in the motor carrier's existing non-negotiated rate tender which are lower than the negotiated rates to be applied in the absence of evidence that special services were requested and performed on specific shipments.

Transportation—Rates—Section 22 Quotations—Tender Revision

Rates applicable on the date that transportation services are performed are binding on the parties. In the absence of a benefit to the Government, the applicable tender

[2] In its comments on the report, Dynalectron stated that it had identified 13 RS as defective in its initial protest. This is inaccurate. As noted above, the initial protest did no more than identify one RS, RS-48, as an example of the alleged defect.

may not be retroactively modified to nullify its application to a particular point of origin which would result in higher charges being due the carrier.

Matter of: Retroactive Modification of Rate Tender, May 13, 1986:

A carrier submitted supplemental claims to the General Services Administration (GSA) for payment for certain transportation services at higher rates quoted in one of the carrier's tenders.[1] Based on the record before us, including GSA's administrative report and a report from the Military Traffic Management Command, we find that lower rates in another of the carrier's tenders apply to the service performed.

Facts

Between late November 1984 and January 1985 the Department of Defense issued Government Bills of Lading to Ryder/PIE Nationwide, Inc. (Ryder), for the transportation of eight shipments of "Freight All Kinds" from the Defense General Support Center, Richmond, Virginia (Bellbluff), to various destinations. The carrier billed and was paid charges derived from rates published in Ryder's rate Tender No. ICC-RYPI-78. Tender 78, which as effective July 5, 1983, offered rates for the transportation of "Freight All Kinds" between various points including Bellbluff. After payment the carrier presented supplemental bills in April 1985 to the GSA in the total amount of $11, 925.36, on the basis of higher rates published in Ryder's Tender No. ICC RYPI-263.[2] The higher rates in Tender 263, effective November 10, 1984, were the result of a Guaranteed Traffic program solicitation issued by the Military Traffic Management Command.

The GSA disallowed the claims pursuant to its authority to audit Government transportation bills. 31 U.S.C. § 3726 (1982). The basis for disallowance was a provision in Items 20g and 28 of Tender 263. Item 20g provides that the tender shall not apply where its charges exceed charges otherwise applicable for the same service. Item 28 provides that rates and charges in Tender 263 "alternate with rates in other tenders" when it results in lower cost to the Government. There is no dispute that the rates in Tender 78 were lower than those in Tender 263.

On September 10, 1985, Ryder again filed the claims with GSA using the same higher rates in Tender 263. To establish the inapplicability of the lower rates in Tender 78, Ryder produced Supple-

[1] A certifying officer, Michael D. Hipple, Director, Transportation Audit Division, General Services Administration, has asked for an advance decision on the question of whether he properly disallowed eight claims presented by a motor carrier for additional charges for transportation services performed for the Department of Defense.

[2] GSA reports that there are claims of approximately $250,000 affected by this issue, some of which involve RYPI-264, a tender that is similar in material respects to RYPI-263.

ment 7 to that tender. Supplement 7 was not issued until August 30, 1985, or about 9 months after the transportation services were performed, yet it purported to delete Bellbluff as an origin point retroactively to the effective date of Tender 263, November 10, 1984. The Military Traffic Management Command approved the retroactive modification.

GSA's view that Supplement 7 could not have the legal effect of nullifying the provisions allowing use of a lower rate in another tender is based on the general principle that the rate applicable at the time of movement binds the parties, and on the fact that Government officials have no authority to waive a contractual right without benefit to the Government. In support of its position GSA cites 37 Comp. Gen. 287 (1957). GSA contends that the lower rates in Tender 78 were applicable at the time of movement and, in the absence of consideration for the waiver of that contractual right, there was no authority to agree with the retroactive modification of Tender 78.

The Military Traffic Management Command contends that the modification was made to conform with the intentions of the parties under its Guaranteed Traffic program. They explain that under that program sealed rates are tendered in response to a solicitation. The tenders are publicly opened and evaluated and a carrier is selected on the basis of lowest overall cost and the ability to provide responsive, responsible service in a specific traffic lane. Ryder, as the low-cost carrier, received award of the exclusive right to handle traffic from Bellbluff to various destinations at fixed rates for a 12-month period.

The Military Traffic Management Command argues that it was necessary to modify Tender 78 because the provisions of Tender 263 allowing use of lower rates derived from other tenders were inconsistent with various other provisions of that tender which awarded exclusive traffic to Ryder. They conclude that Tender 78 was not "otherwise applicable" to shipments from Bellbluff because it does not offer the special services contemplated by Tender 263. They explain that carriers participating in the Guaranteed Traffic program are required to provide many services which carriers normally do not provide, and that they perform the services at rates that are less than those charged by other carriers. The extra services are provided at no extra charge even though they otherwise would result in extra charges. These services include providing more timely delivery, maintaining firm rates, furnishing delivery receipts, and providing heater and refrigerator service.

Star World Wide Forwarders, B-190757, July 28, 1978, is cited by the Military Traffic Management Command as support for their contention that the agency can waive a tender provision even though the waiver has the effect of increasing rates.

Discussion

Clearly, the relevant issue is which rates, those in Tender 263 or 78, are applicable. That issue turns on whether the provisions in Tender 263 permitting use of lower rates from other tenders have legal effect and whether the retroactive cancellation of Tender 78's application to Bellbluff was effective.[3]

Item 20g of Tender 263 reads:

> This tender shall not apply where charges for service provided under this tender exceed charges otherwise applicable for the same service. Receipt and acceptance of this tender by the Government shall not be considered as a guarantee to the carrier of a particular volume of traffic described in this tender.

Item 28 reads:

> *Alternation of Rates and Charges*
>
> Carrier agrees that rates and charges named in this tender will alternate with rates and charges published in carrier/Bureau tender/tariff in which carrier is a participant, effective on the issue date of this tender, which such alternation results in lower cost to the Government. *Provisions of Items 25 and 26 apply.*[4]

The Military Traffic Management Command contends that these items are inconsistent with several other tender provisions, namely, items 16, 23 (note 4), 26, 27, 29, and 40.

Item 16, entitled "Governing Publications," which states that no other tenders apply, relates to governing publications such as rules tariffs and tariffs which provide for special services. It means, simply, that if Tender 263 is applicable, there is no need to consult other tariffs for additional rules and conditions. The self-contained nature of the tender is not inconsistent with the possible application of another tender when it produces lower charges.

Note 4 of item 23 provides that the rates published in the tender are firm and cannot be increased for 12 months. Clearly this does not preclude application of lower charges.

Item 26 provides that the rates and charges "are firm for the term of this tender and may not be increased," and that this rule "supersedes that part of item 20 referring to tender amendments." Item 20e provides that the tender may be "canceled" by the carrier on written notice of not less than 30 days, and cancellations or amendments may be made upon shorter notice by mutual agreement with the Government. Item 20g provides that there is no guarantee of tonnage. Reading items 26 and 20 together, it seems

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[3] Since rate applicability is the relevant issue and the carrier has not alleged that it did not receive the traffic under the Guaranteed Traffic solicitation, we will not address a collateral question raised by GSA concerning the applicability of the Federal Acquisition Regulations. Where the Government Bill of Lading is the basic procurement document, the Federal Acquisition Regulations do not apply. See B-188513, April 10, 1978, and 49 U.S.C. § 10721 (1982). Ordinarily, a tender is a continuing offer and not a continuing contract obligating the carrier to provide the service. 39 Comp. Gen. 352 (1959).

[4] Item 25 provides for application of lowest total charges; it states that the rates apply on shipments subject to transit time, and that the Government reserves the right to use another carrier where the primary carrier cannot provide expedited service. Item 26 states that the rates cannot be increased.

that, except to increase rates, the parties can amend or cancel the tender with specified notice. In any event we do not view these provisions as being inconsistent with the provisions which permit lower rates derived from other existing tenders to be applied.

Item 27 provides for negotiation of charges on services not specifically named in the tender. It contemplates negotiation before services are performed, and not later. This presumes that the tender is applicable, and does not exclude applying an alternate lower cost tender.

Item 29 reflects the carrier's agreement to meet certain truckload transit times. This provision and various other provisions, which indicate that the carrier will perform certain services not normally provided by motor carriers, do not present inconsistencies with the provisions permitting use of lower rates from other tenders. However, as discussed later, they raise the question of whether Tender 78 applies to a specific shipment if that tender and its governing publications did not offer certain services which were actually requested and performed.

Item 40 simply states that the tonnages shown in the tender are estimates and that certain shipments moving by other transportation modes have been excluded from the estimates. There appears to be no question that the carrier received the available tonnage, thus that is not at issue.

The Military Traffic Management Command argues that the provisions of Tender 263 are not similar to the provisions of Tender 78 to the extent that Tender 78 should not be considered "otherwise applicable." They point out that the Government may contract to pay higher rates than those assessed to the public generally if necessary to obtain services not available to the public. See *Hilldrup Transfer & Storage Co.*, 58 Comp. Gen. 375 (1979). The argument seems to be that Tender 263 should be considered as offering services so different from those authorized by Tender 78 that Tender 78 should not be considered otherwise applicable. Tender 263 offers a single rate for transportation even though certain extra cost services may be provided and it binds the carrier to certain terms not usually applicable. Nevertheless, Tender 263 does not specifically supersede other tenders; in fact, it specifically permits the use of other tenders offering lower rates. We cannot conclude, therefore, that Tender 78 may not be used for shipments otherwise covered by its terms. Further, GSA reports that there is nothing on the Government Bills of Lading or elsewhere in the record showing that the special services offered at no extra charge in Tender 263 were requested or performed on the shipments involved here. Further, if special services were actually requested and performed, they may be covered by tariffs governing Tender 78 at lower overall cost than Tender 263 provides. Whether Tender 78 and its governing publications offered lower rates for the same services as Tender 263 is a determination for GSA to make in the first in-

stance. The carrier has the burden of showing that any special services billed for were requested and performed. *Ultra Special Express*, 54 Comp. Gen. 308 (1974); *Trans Country Van Lines, Inc.*, 53 Comp. Gen. 603 (1974).

Since the clause in item 28 of Tender 263 was included in addition to the standard tender provision contained in item 20g, both of which provide for the use of lower rates, it seems clear that the parties intended to permit the use of lower rates in tenders other than Tender 263. Thus, we cannot find that the attempted retroactive modification of Tender 78 was to carry out the original intent of the parties under Tender 263.

Contrary to Military Traffic Management Command's contention, in *Star World Wide Forwarders, supra*, we did not hold that a Government agency may waive a contractual right. That decision held that since there was evidence that a new rate tender was intended to be an increase in rates, a former tender could not thereafter be used to apply lower rates. There, the increase in rates was accepted before the transportation services were performed and the only deviation authorized was from an agency procedure dealing with the method of filing tenders. Since in the present case it has not been shown that the Government received any benefit for the modification, and no officer or employee of the Government can waive, modify, or otherwise change contractual obligations without a compensatory benefit, that modification is not retroactively effective. See 40 Comp. Gen. 309, 311 (1960); and 37 Comp. Gen. 287, *supra*.

Accordingly, we find that the Military Traffic Management Command did not have authority to accept the retroactive modification of Tender 78 as a means of nullifying its use as an alternative to Tender 263 which would have the effect of retroactively allowing Ryder the higher charges. On the basis of this record, the GSA properly disallowed the carrier's claims.

Guaranteed Traffic agreements with carriers may preclude the use of lower rates published in existing tenders, but the new agreement must provide that lower rates in other tenders will not be applicable. *Cf.* B-154967, December 21, 1964; and *Puerto Rico Marine Management*, 57 Comp. Gen. 584 (1978).

[B-222045]

General Accounting Office—Recommendations—Contracts—Termination—Erroneous Awards—Award to Protester If Otherwise Eligible

Agency which terminated contract after discovering that solicitation understated its requirements and that awardee's product would not meet its needs should reinstate the solicitation and make award to the protester since protester's offer will meet the agency's actual needs and was the lowest technically acceptable offer under the original solicitation.

Matter of: W.H. Smith Hardware Co., May 13, 1986:

W.H. Smith Hardware Company protests the actions of the Defense Construction Supply Center (DCSC) under solicitation No. DLA700-86-R-0285 for lavatory faucets. Smith originally protested the rejection of its offer as unacceptable and the award of a contract to State Plumbing and Heating Systems, Inc. Before the resolution of the protest, DCSC terminated the contract with State on the ground that the solicitation did not set forth all of the agency's needs. It proposes to resolicit the requirement. Smith now contends that DCSC should reinstate the original solicitation and award it a contract because its original offer meets all the agency's needs.

We sustain the protest.

The solicitation, as amended, contained a National Stock Number and a short description of the item. It also listed three manufacturers and their approved part numbers. DCSC received nine offers in response to the solicitation, including two from State. Both the low (submitted by State) and the second low offer (submitted by Sunbury Supply Company) were rejected as technically unacceptable because the faucets offered contained a knob style control rather than the specified lever control. The third low offer (submitted by Smith) was also rejected as technically unacceptable because the item offered was thought to contain a plastic valve body, leaving State's alternate offer as the lowest acceptable offer. A contract was awarded to State on January 27, 1986.

After receiving Smith's protest, DCSC reevaluated the protester's offer and found it to be technically acceptable. The agency also discovered that the item description in the solicitation had omitted any reference to male adapters that were required by the agency. DCSC also found that two of the three approved manufacturers' part numbers listed in the solicitation as acceptable were in fact unacceptable because they did not include the male adapters. DCSC terminated State's contract because the item which State offered did not include the male adapters. The agency proposes to resolicit the requirement with a revised item description.

Smith argues that DCSC should reopen the solicitation and award it the contract based on its original offer because that offer was the lowest which proposed a product which contained the required male adapters.

While the procurement regulations provide no specific direction or guidance regarding how procuring agencies should proceed after a contract termination such as the one involved here, we think that the agency's determination either to resolicit the requirement or, if practicable, to make award under the prior solicitation must be reasonably supported. See *Koehring Co., Speedstar Division*, B-219667.2, Feb. 6, 1986, 65 Comp. Gen. 268, 86-1 CPD ¶ 135.

Here, the record shows that the item offered by Smith does include the required male adapters and that Smith has indeed sub-

mitted the low offer which meets the agency's actual needs. Smith's offer is also lower than the State alternate offer which resulted in the initial award. The lower offers submitted by Sunbury and State were rejected for reasons unrelated to the defect in the solicitation concerning the male adapters and therefore would presumably be unacceptable under the proposed resolicitation.

The agency proposes to resolicit the requirement because the solicitation's item description was defective in that it did not specify that the faucets to be supplied must include a male adapter. We note, however, that Smith's low offer appears to meet the agency's needs. Further, since the solicitation understated rather than overstated the agency's needs, the other offerors would not be prejudiced by an award to Smith based on its low offer. Consequently, we do not believe that any useful purpose would be served by resoliciting the requirement rather than awarding a contract to Smith based on its offer under the original solicitation, assuming, of course, that the offer is otherwise acceptable and that Smith is responsible. *See Hemford Co.*, B-216811, Feb. 8, 1985, 85-1 CPD ¶ 167. We are by letter of today making such a recommendation to the contracting agency.

The protest is sustained.

[B-220699]

Miscellaneous Receipts—Special Account *v.* Miscellaneous Receipts

When the high bidder for a mineral lease offered by the Bureau of Land Management does not execute a lease, the one-fifth bonus submitted with the bid is forfeited. Section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 191), provides that all money received from sales, bonuses, royalties, and rentals are to be distributed under that section. Therefore, the forfeited bonuses are to be distributed in the same manner as other lease proceeds to which section 35 is applicable.

Matter of: Bureau of Land Management, Department of the Interior—Disposition of Forfeited Bonus Bids Received At Competitive Mineral Lease Sales, May 14, 1986:

The Bureau of Land Management of the Department of the Interior (BLM) requests a decision on the disposition of forfeited bonus bid receipts it holds as deposits against the completion of certain competitive mineral leases. We conclude that these forfeited receipts should be distributed in the same manner as other lease proceeds.

In conducting the competition for these leases, BLM receives one-fifth of the bonus bid from the winning bidder as a deposit pending completion of the lease. The lease is executed only if the bidder pays the remaining four-fifths of the bonus bid and the first year rental within 30 days of notice of bid acceptance. It the bidder does not complete payment within this time period, the bonus bid deposit is forfeited to BLM.

We are asked if these amounts should be transferred to Interior's Minerals Management Service for distribution under section 35 of the Mineral Lands Leasing Act in the same way as other lease proceeds subject to section 35, or instead should be deposited as miscellaneous receipts in the General Fund of the U.S. Treasury. The Interior Solicitor's Office has advised BLM that the moneys should be considered "money received from sales" or "money received from * * * bonuses" under the Mineral Lands Leasing Act, both of which are subject to section 35 distribution. We are told that the Solicitor's Office cites *Watt* v. *Alaska*, 451 U.S. 259 (1981) in support of this view.

Unless otherwise authorized by law, all receipts are to be deposited in the general fund of the Treasury as miscellaneous receipts, under 31 U.S.C. § 3302, Section 35 of the Mineral Lands Leasing Act of 1920, as amended, is codified at 30 U.S.C. § 191. Under the provision—

> All money received from sales, bonuses, royalties * * * and rentals of the public lands under the provisions of this chapter [Leases and Prospecting Permits] * * * shall be paid into the Treasury of the United States * * *.

Fifty percent of this amount is then required to be paid to the State where the leased land or deposits are located (ninety percent to Alaska); forty percent to the Reclamation Fund established under the Reclamation Act of 1902; and the remaining 10 percent is to be credited to miscellaneous receipts.

Under 43 C.F.R. § 3120.5 (1985), the successful bidder at a mineral lease sale conducted by BLM is required within 30 days of notice to execute lease forms, pay the balance of the bonus bid as well as the first year's rental and the publication costs. If this is not done or the bidder otherwise fails to comply with applicable regulations, the one-fifth bonus accompanying the bid is forfeited. 43 C.F.R. § 3120.6.

Our review of the legislative history of section 35 does not indicate that any special consideration was given for receipts which are retained because of the high bidder's failure to execute a lease, as contrasted to the retention of the amounts received subsequent to the signing of a lease. Since under section 35, forfeited amounts are not distinguished from other moneys properly retained by BLM, and not returned to the payor, they should be considered as "money received" under that provision.

Morever, under 43 C.F.R. § 3120.7 Interior has the right to offer a lease to the next highest bidder if the high bid is rejected. This may be done if the difference between the two bids is no greater than the one-fifth of the rejected bid. The effect of this provision is to assure that the receipts from the sale to the next highest bidder, including the forfeited one-fifth bonus bid, shall not be less than the bid originally offered. In this circumstance, the failure to include the forfeited one-fifth bonus bid in the section 35 distribution would reduce the amounts received by the affected states and by

the reclamation fund (other than for Alaska) even though the total amount received for the lease equals or exceeds the total original bid, which would be distributed under section 35. We do not believe that this result was intended. As moneys properly received and retained by the United States, the amounts forfeited should be distributed under section 35.

According to the request for our decision, the Interior Solicitor's Office considers *Watt* v. *Alaska*, cited above, as supporting the disposition of forfeited bonus bids under section 35, notwithstanding the later enactment of the Wildlife Refuge Revenue Sharing Act of 1964 which contained a different sharing formula. In that case, the Supreme Court of the United States held that revenues from oil and gas leases on federal wildlife refuges consisting of reserved public lands must be distributed under section 35. The Court concluded that the term "minerals" in section 401(a) of the Wildlife Refuge Revenue Sharing Act, 49 Stat. 383, as amended in 1964 by Pub. L. No. 88-523, 78 Stat. 701, applies only to minerals on *acquired* refuge lands. We considered the same issue in 55 Comp. Gen. 117 (1975) but concluded that all revenues from oil and gas found on wildlife refuge lands, whether the lands were acquired or reserved, were subject to the Wildlife Refuge Revenue Sharing Act rather than the Mineral Lands Leasing Act. The question at hand does not really concern which leases are subject to section 35, but only how forfeited bids on lands which are subject to section 35 are to be treated. Accordingly, we do not think that *Watt* v. *Alaska* is relevant in determining the question presented to us. For future reference in appropriate cases, however, we would consider our holding in 55 Comp. Gen. 117 modified to the extent necessary to conform to the Supreme Court's decision.

Accordingly, for the reason indicated, we conclude that the one-fifth bonus paid by a high bidder for a mineral lease and forfeited to the United States upon failure to execute a lease, is to be distributed in the same manner as lease proceeds otherwise subject to section 35 of the Mineral Lands Leasing Act of 1920, as amended.

[B-221374, et al.]

Contracts—Negotiation—Offers or Proposals—Evaluation—Life-Cycle Costing

Where a cost ceiling is included in a solicitation for the purpose of comparing life cycle costs for government construction of military family housing with the same costs for contractor construction, and the government's cost is expressed in terms of present value, the cost for contractor construction also must be converted to present value. A proposal that, before discounting, exceeds the cost ceiling should not, therefore, be rejected.

Contracts—Protests—Allegations—Not Prejudicial

Protester was not prejudiced by the failure of the solicitation to state whether an annual cost ceiling represented anticipated actual expenditures where the protester did not rely on the cost ceiling in formulating its price proposal.

Contracts—Negotiation—Offers or Proposals—Evaluation—Life-Cycle Costing

Where a solicitation does not specify the inflation rates to be used to evaluate cost proposals for a 19.5 year lease, but merely states that during the term of the lease, maintenance costs will be allowed to escalate according to "Economic Indicators" prepared by the Council of Economic Advisors, the agency is not required to use an average of past indicators for evaluation purposes, but rather is free to use any reasonable index of future inflation.

Contracts—Protests—Moot, Academic, etc. Questions—Corrective Action Proposed, Taken, etc. by Agency

Whether an agency improperly excluded an initial proposal from the competitive range because of its inclusion of an interest rate contingency is academic when the agency in fact evaluates an unsolicited best and final offer from which the contingency has been deleted.

Contracts—Negotiation—Awards—To Other Than Low Offeror

Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point.

Matter of: Fort Wainwright Developers, Inc.; Sadco Enterprises; Fairbanks Associates, May 14, 1986:

I. Introduction

Fort Wainwright Developers, Inc., Fairbanks Associates, and Sadco Enterprises protest the award of a contract to North Star Alaska Housing Corporation under request for proposals (RFP) No. DACA85-85-R-0019, issued by the U.S. Army Corps of Engineers. The procurement is for the construction, leaseback to the government, and operation and maintenance of military family housing at Fort Wainwright, Fairbanks, Alaska. The agency made award to North Star on December 31, 1985, but suspended performance between January 22 and March 25, 1986, when, in accord with the Competition in Contracting Act of 1984 (CICA), it determined that urgent and compelling circumstances justified performance notwithstanding the protests.[1]

The protesters principally complain that the award to North Star was improper because the "average annual cost" of the firm's initial proposal exceeded the RFP's cost ceiling. Fairbanks Associates also complains that rejection of its initial proposal as nonresponsive because of an interest rate contingency was improper. Additionally, the protesters complain that the award to an offeror whose price was more than their own was not in the best interest of the government.

[1] Only the initially-filed Fort Wainwright Developers protest effected suspension of performance, since only it was filed and the agency notified within 10 calendar days of award. *See* the Federal Acquisition Regulation (FAR), § 33.104(c)(5) (FAC-84-9), implementing CICA 31 U.S.C.A. § 3553(d)(1) (West Supp. 1985).

In supplemental protests, Fort Wainwright Developers and Fairbanks Associates complain that North Star's proposed development plan does not comply with (1) building setback and road construction requirements of the City of Fairbanks, which are incorporated into the RFP, (2) numerous design criteria of the RFP, and (3) the development boundary limits. Because the supplemental protests have later dead-lines for agency reports and protester and party comments, *see* 4 C.F.R. § 21.3 (1985), we will resolve them in a separate decision.

We deny the protests considered in this decision in part and dismiss them in part.

II. Background

The Corps conducted this procurement pursuant to section 801 of the Military Construction Authorization Act of 1984, 10 U.S.C.A. § 2828(g) (West Supp. 1985), as amended by the Military Construction Authorization Act of 1986, Pub. L. No. 99-167, § 801, 99 Stat. 961, 985-86. The statute provides that the Secretary of a military department may enter into a contract for the lease of family housing units to be constructed on or near a military installation where there is a validated deficit in family housing. 10 U.S.C.A. § 2822(g)(1). No contract may be entered into, however, until the Secretary of Defense submits to the appropriate committees of Congress, in writing, "an economic analysis (based upon accepted life cycle costing procedures) which demonstrates that the proposed contract is cost effective in comparison with the alternative means of furnishing the same facilities," i.e., government construction. 10 U.S.C.A. § 2828(g)(6)(A).

Here, in anticipation of the arrival of the 6th Light Infantry Division at Fort Wainwright in the summer of 1987, the RFP contemplated construction of 400 family housing units that the contractor will lease back to the government and operate and maintain for 19.5 years. The RFP provided for technical proposals to be evaluated on the basis of site design and engineering, dwelling unit design and engineering, and maintenance plans, with a maximum of 1,300 points available for these factors.

The RFP indicated that life cycle costs also would be a basis for evaluation. Offerors were to submit separate first-year prices for two cost elements, designated "shelter rent" (the contractor's "return on and return of his investment") and "maintenance rent" (the contractor's charge for keeping the development in adequate repair). According to the RFP, shelter rent will remain fixed for each year of the contract, but maintenance rent will be allowed to escalate "at a rate pegged to the 'Economic Indicators' prepared for the Joint Economic Committee of Congress by the Council of Economic Advisors . . . ."

The RFP further provided that the relative value of proposals would be established by means of a cost/quality ratio. This was to

be calculated by dividing the combined shelter and maintenance rent for each proposal, protected over 19.5 years, by the quality (technical) points that the proposal received during the technical evaluation. However, the RFP warned that the final selection would be made by the selection board to ensure an award in the best interest of the government and in compliance with applicable statutory limitations.

Since the underlying objective of the procurement was to determine whether contractor construction and leaseback of the housing units under section 801 would be more cost effective than government construction, the RFP also advised offerors that an economic analysis, based on life cycle costs, would be prepared and submitted for congressional review. In this regard, the RFP specified that the "average annual cost" of shelter and maintenance was not to exceed $8,140,000. Although not stated in the solicitation, this figure represents the uniform annual equivalent of the cost of government construction, expressed in present value terms, less 5 percent. Whether the awardee's initial price exceeded this amount is a protest issue.

Six offerors submitted proposals by the July 5, 1985 closing date. The Corps describes the actual evaluation of these proposals as comprising the following steps:

1. Initial review to ensure that proposals included required submittals and met minimum design criteria;

2. Evaluation consisting of two steps:

a) Technical review by a 10-member multi-disciplinary team to whom the identity of offerors was not known;

b) Ranking of proposals according to projected cost per quality point (the highest-ranked proposal was the one having the lowest cost per point); and

3. Economic analysis, comparing the life cycle cost of the highest-ranked proposal with that of government construction, as required by the enabling legislation.

The Corps ranked the initial proposals at issue here as follows: [2]

[2] Of the remaining initial proposals, the Corps ranked that of Ben Lomond and Company second and Green Builders Construction Company sixth. The agency determined, however, that the Lomon proposal was unacceptable because, like that of Fairbanks Associates, it included an interest rate contingency. The Corps did not ask Lomond to submit a best and final offer, and it did not do so. Green's best and final offer was ranked last. Neither of these offerors has protested or commented on the subject protests.

Offeror	Technical Points	First-year Shelter and Maintenance Rent	Projected 19.5 Year Cost [3]	Cost per Quality Point
North Star	984	$8,139,800	$166,460,887	$169,168
Fairbanks	862	7,306,871	151,469,409	175,719
Fort Wainwright	806	7,363,680	146,735,797	182,054
Sadco	856	7,800,000	164,722,946	192,433

[3] To project proposed costs over the lease period, the Corps first multiplied the first year shelter rent by 19.5. To this, it added total maintenance rent, adjusted for inflation for each year after the first. Then, to calculate the cost per quality point in accord with the formula in the RFP, it divided total projected costs by the quality points for each proposal. The agency used inflation rates stipulated by the Office of Management and Budget through the Office of the Secretary of Defense (OMB/OSD) to escalate maintenance rent. In projecting proposed costs, the agency did not discount them as it did in the subsequent economic analysis.

The Corps' subsequent economic analysis resulted in an evaluated life cycle cost of $56,169,071, or a uniform annual equivalent of $7,427,807 for North Star's proposal. The agency considered this cost effective compared with the corresponding figure for government construction, $8,140,000, and submitted the economic analysis to the appropriate committees of Congress.[4]

In December 1985, however, the staff of the Subcommittee on Military Construction, House Committee on Appropriations, advised that all proposals were too high. The agency advised offerors of this fact and requested best and final offers by December 16, 1985. Specifically, the Corps requested offerors to adjust shelter and/or maintenance rent, but stated that no changes should be made in technical proposals. North Star provided a best and final offer in the amount of $7,730,920, approximately 5 percent less than its initial offer of $8,139,800. Although the agency had determined that Fairbanks Associates' offer was "nonresponsive" because of an interest rate contingency,[5] the firm learned of the re-

[4] The Corps calculated life cycle costs for the government construction option over a 21-year period (1986-2006), allowing 1.5 years for construction and 19.5 years for operation and maintenance. It then applied a discount factor of 12 percent to projected costs, year by year, to obtain a net present value of $64,458,170. The Corps converted this figure to a uniform annual equivalent, $8,523,954, in order to reflect the fact that money would be spent at different times during the period of construction and operation of the housing units. Finally the Corps reduced the uniform annual equivalent by 5 percent to allow for possible errors, leading to the $8,140,000 identified in the RFP as the "average annual cost." Life cycle costs and the uniform-annual equivalent for North Star's proposal were calculated in the same way.

[5] The firm had stated that if interest rates rose to more than 14 percent before contract award, it would require a feasibility analysis and possible adjustment of the proposal.

quest for best and finals and submitted one in which it reduced its price and deleted the contingency.

The agency ranked the best and final offers at issue here as follows:

Offeror	Technical Points	First-year Shelter and Maintenance Rent	Projected 19.5 Year Cost	Cost per Quality Point
North Star	984	$7,730,920	$158,094,253	$160,665
Fairbanks	862	6,806,871	141,104,417	163,694
Fort Wainwright	806	6,838,480	136,494,393	169,348
Sadco	856	7,314,019	155,184,943	181,291

Because the Corps had found North Star's initial proposal to be cost effective, it states that it did not perform an economic analysis of best and final offers. The Corps awarded the contract to North Star on December 31, 1985.

III. Protests Regarding Evaluation and Award

A. *Average Annual Cost*

All three protesters maintain that North Star's initial proposed price, as evaluated, exceeds the RFP's $8,140,000 cost ceiling, and that the firm's initial proposal therefore should have been summarily rejected as "nonresponsive." They base their protests on paragraph J of the RFP, as amended, which states:

> J. Annual Cost. Congress established this program as a test to determine if leasing is more cost effective than alternative means of furnishing the same housing. Economic analyses will be prepared and submitted to the Congress for their review. Proposals in excess of that amount will be considered nonconforming and will not be further evaluated. The average annual cost based on shelter rent and maintenance rent cost from exhibit "B" of section VI is expected to be between $5,000,000 and $7,000,000 but shall not exceed $8,140,000.

Fort Wainwright Developers argues, based upon information provided to it in a debriefing and in portions of the agency report, that the Corps improperly used only North Star's first-year shelter and maintenance rent in determining that its average annual cost was less than $8,140,000. Fort Wainwright argues that the Corps considered, but rejected, an amendment to the RFP that would have applied the ceiling to first-year costs only.

Both Fort Wainwright Developers and Fairbanks Associates argue that the Corps should have calculated the average annual cost referred to in paragraph J simply by averaging each offeror's projected 19.5 year costs. Both protesters have submitted calcula-

tions showing that, evaluated this way, the average annual cost of North Star's initial proposal is more than $8,536,000.

Fort Wainwright acknowledges that responsiveness does not generally apply to a negotiated procurement, but argues that certain requirements may be so material that a proposal which fails to meet them is technically unacceptable. The protester argues that the cost ceiling was such a requirement, because the RFP stated that average annual cost "shall not" exceed $8,140,000 and that proposals in excess of that amount would not be further evaluated.

Fairbanks Associates, citing *Corbetta Construction Co. of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD ¶ 144; *aff'd* 55 Comp. Gen. 972 (1976), 76-1 CPD ¶ 240, argues that "shall" and "will" signify mandatory requirements, and that where an initial proposal fails to comply with a mandatory requirement, it must be summarily rejected.

In the alternative, Fairbanks Associates argues that the term "average annual cost" was ambiguous, and that it was prejudiced as a result of the ambiguity. Fairbanks Associates contends that without the cost ceiling as it interpreted it, the firm could have designed and proposed a more elaborate project and would have been awarded more quality points.

B. *Inflation Rates*

Fairbanks Associates further maintains that the evaluation was flawed because the inflation rates used by the Corps to project maintenance rent differed from those in the RFP. The protester states that because the solicitation indicated that maintenance rent would be allowed to escalate according to the "Economic Indicators" prepared by the Council of Economic Advisors, it based its proposal on an average of these indicators for the years 1982 to 1984, which was 4.7 percent. Fairbanks Associates argues that using this rate, it calculated that its first-year proposed price could not exceed $7,440,000.

The protester argues that the Corps improperly used rates supplied by the Office of Management and Budget through the Office of the Secretary of Defense (OMB/OSD), which are less than the average of past "Economic Indicators." [6] Fairbanks Associates concludes that the Corps' use of the lower OMB/OSD inflation rates also prejudiced it competitively in the sense that it could have prepared a higher priced, more elaborate proposal and earned more quality points.

C. *Exclusion of Fairbanks Associates from the Competitive Range*

Fairbanks Associates also protests the Corps' determination that its initial proposal was "nonresponsive" because, as noted above, the firm included an interest rate contingency. The protester al-

[6] The OMB/OSD rates used by the Corps were 4 percent for fiscal year 1984 and 4.4 percent for fiscal year 1985. The rates gradually decrease to 3.4 percent for fiscal year 1989 and each year thereafter to 2006.

leges that it was orally advised that the contingency was acceptable, and argues that the Corps is estopped from rejecting the proposal on this ground. The Corps, however, denies giving such advice and states that the contingency rendered the proposal too indefinite to evaluate, so that it was eliminated from the competitive range before the request for best and finals.

D. *Award to a Higher-Priced Offeror*

The protesters also allege that award to North Star was improper because the cost of North Star's proposal exceeded the cost of each of their respective proposals. Fort Wainwright Developers points to the final award factor—whether selection is in the best interest of the government—and maintains that award to North Star is not in the best interest of the government due to the cost discrepancy between the awardee's proposal and its own.

IV. GAO Analysis

We have carefully considered all submissions by each of the parties. However, we do not consider it necessary to review each and every argument here. We believe that the following discussion is adequate for purposes of resolving the protests.

We find first that Sadco's protest is academic, since its proposal was ranked fourth among those at issue here. Sadco has argued only that the awardee's proposal should have been summarily rejected, and has not protested concerning either of the other offerors, whose proposals cost less per quality point than its own. We dismiss the protest, since the firm would not be in line for award even if we found that its allegations had legal merit. See *Claude E. Atkins Enterprises, Inc.*, B-205129, June 8, 1982, 82-1 CPD ¶553. We note, however, that the issues raised by Sadco generally duplicate those raised by the other two protesters, so that our discussion should resolve Sadco's concerns.

A. *Average Annual Cost*

With regard to average annual cost, we believe that the protesters misunderstood the derivation of the $8,140,000 ceiling in the RFP, leading to a misunderstanding of how and when the Corps would determine whether offers exceeded it. While the RFP could have been more clearly drafted, as discussed below, we do not find the protesters were prejudiced by the deficiency.

The record—particularly the economic analyses prepared for the Congress and at the request of our Office following a conference—makes it clear that the $8,140,000 figure is the result of a present value analysis of the life cycle cost of construction and maintenance of the housing units if performed by the government.

A present value analysis is required by the applicable Office of Management and Budget Circular, No. A-104, which covers decisions on lease or purchase of real property. As North Star points out in its comments to our Office, the circular specifically states

that "undiscounted cash flow analysis will not be the basis for identifying the most economic of lease-or-purchase alternatives."

The protesters' suggested method of determining average annual cost, i.e., merely averaging total projected costs (by dividing total projected shelter and maintenance rents by 19.5), does not permit a meaningful comparison of the cost of government construction with the cost of contractor construction under section 801. The protesters' method takes inflation into account. However, because the projected costs for 19.5 years are not discounted, the total of these costs does not reflect the fact that inflated dollars (paid by the government to the contractor in the year 2000, for example) will be worth less than current dollars. In short, since the $8,140,000 ceiling in the RFP was based on discounted costs, the Corps also had to discount projected shelter and maintenance rent before it could determine which alternative was most cost effective.

The RFP does not clearly state that the cost ceiling is equal to the uniform annual equivalent of the cost of government construction, expressed in present value terms. Nevertheless, paragraph J concerns the economic analysis and, in our opinion, indicates that the ceiling would be applied at this stage of the evaluation process. We do not agree with the protesters that the Corps should have summarily rejected North Star's initial proposal because the average of its total projected costs, undiscounted, exceeded $8,140,000.

Nor do we agree that Fairbanks Associates was prejudiced by the Corps' failure to state more explicitly how proposals would be measured against the cost ceiling. The firm in effect contends that it would have offered a higher price had it realized that it would be discounted before comparison with the ceiling. It is clear from the procurement record that neither Fairbanks Associates nor Fort Wainwright Developers used the cost ceiling to establish its price.

As evaluated by the Corps, Fairbanks Associates' undiscounted average annual cost, $7,767,662, was $372,338 (4.6 percent) less than the cost ceiling as the protester understood it. After the Corps told offerors that all prices were considered to be too high, the cost ceiling was no longer relevant to Fairbanks Associates' offer, since it was already below the ceiling, whether calculated as the Corps intended or as Fairbanks Associates believes reasonable. Fairbanks Associates then lowered its price significantly. Fort Wainwright's initial price was similarly less than the cost ceiling (7.6 percent), as determined without discounting, and it too submitted further reductions in its best and final offer. Thus, the protesters' contention that, but for their understanding of the cost ceiling, they would have offered a higher price, is not persuasive.

We also question whether, by its increasing price, either Fairbanks Associates or Fort Wainwright Developers could have displaced North Star. Increased prices would in themselves make the firms' offers less competitive by increasing their cost per quality point ratios. An increased price would have to result in an increase

in technical score that not only outweighed the detriment from the higher price but also made up the substantial difference in technical scores between North Star and the other two offerors.

Here, there was a difference of 122 quality points (12.4 percent) between Fairbanks Associates and North Star, and of 178 quality points (18.1 percent) between Fort Wainwright Developers and North Star. Using best and final offers, this translates into a difference of $3,029 per quality point for Fairbanks Associates and $8,683 for Fort Wainwright Developers. In their debriefings, each offeror was shown the number of technical points that it received, according to category, versus the points assigned to North Star. The protesters have not suggested how they could have improved their technical proposals—for example, by adding additional tot lots, by upgrading appliances or carpeting, and so on—that would have resulted in a substantial increase in quality for an unspecified additional price. Fairbanks Associates' bare statement that it would have submitted a more elaborate proposal if it had known the actual nature of the cost ceiling is not, in itself, sufficient to show that the firm would have had a reasonable chance of receiving the award. See *WHY R&D, Inc.*, B-221817, Apr. 16, 1986, 86-1 CPD ¶ 375; *Digital Radio Corp.*, B-216441, May 10, 1985, 85-1 CPD ¶ 526.

In considering the protests that North Star's initial proposal should have been summarily rejected as nonresponsive, we also note that the term responsiveness, as used by the protesters, is generally inapposite in a negotiated procurement. As Fort Wainwright contends, it can be used in an RFP to mean requirements that are so material that a proposal failing to conform to them would be considered unacceptable. *Computer Machinery Corp.*, 55 Comp. Gen. 1151, 1154 (1976), 76-1 CPD ¶ 358. Even then, however, an agency should not automatically reject a nonconforming initial proposal in the same manner that it would reject a nonresponsive bid. *Scan-Optics, Inc.*, B-211048, Apr. 24, 1984, 84-1 CPD ¶ 464. Rather, the agency must determine whether the proposal is reasonably susceptible to being made acceptable through discussions. *Id.; see also* Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1984) (requiring that competitive range determinations include all proposals that have a reasonable chance of being selected for award).

Here, the solicitation did not specifically use the term responsive. However, it did warn that proposals in excess of "that amount," which the protesters interpreted as an average annual cost of $8,140,000, would be considered nonconforming and would not be further evaluated. Regardless of the derivation of this figure, we do not believe it would have been reasonable to apply the cost ceiling to initial proposals.

The *Corbetta* cases, cited by the protesters, also involved a procurement for the design and construction of military family housing units; all but one initial proposal exceeded a statutory limitation on the average cost per housing unit. We interpreted the applicable

procurement regulation,[7] providing that a proposal containing prices that exceed statutory cost limitations should be rejected, as not requiring rejection of an initial proposal, even if the price exceeds the statutory limitation. We found that during discussions offerors might reduce prices so as to come within the statutory limitation. *See* 55 Comp. Gen. *supra* at 982; 55 Comp. Gen. *supra* at 219; *Corbetta Construction Co. of Illinois, Inc.*, B-182979, Mar. 10, 1978, 78-1 CPD ¶ 191 at 4.[8]

Even if, for the sake of argument, we view North Star's initial proposal as having an average annual cost of more than $8,140,000, it was reasonably susceptible to being made acceptable through discussions. In North Star's best and final offer, proposed first-year prices for shelter and maintenance rent; the annual average of these costs, projected over the 19.5 year term of the lease; and the uniform annual equivalent were all less than the amount specified in the RFP.

Accordingly, we deny the protests that North Star's initial proposal should have been summarily rejected.

B. *Inflation Rates*

With regard to the inflation rates used to escalate offerors' proposed first-year maintenance rents, the RFP did not specify any rate for evaluation purposes. The RFP indicated only that during the term of the lease, maintenance rent would be allowed to escalate at a rate pegged to the "Economic Indicators" (identified in the sample lease included in the RFP as the Housing, Shelter, Maintenance, and Repair Index for the 12 months preceding payment) prepared for Joint Economic Committee of Congress by the Council of Economic Advisors. In its economic analysis, the Corps states that it assumed that the OMB/OSD inflation indexes that it used for evaluation purposes would equate to future changes in the Economic Indicators. We believe this assumption, and use of the lower OMB/OSD rates, was reasonable.

The Housing, Shelter, Maintenance, and Repair Index is one of the component indexes of the Consumer Price Index (CPI). The CPI is a statistical measure of change over time in the prices of goods and services in major expenditure groups (for example, food, housing, apparel, transportation, health and recreation). It compares the prices of the same goods and services in a current month with those in the previous month or year.[9] The CPI is frequently used

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[7] Armed Services Procurement Regulation, § 18-110(c) (1974). The comparable current section is the Federal Acquistion Regulation, 48 C.F.R. § 36.205 (1984).

[8] Unlike *Corbetta* here, there is no statutory limitation on cost. The legislative history of section 801 specifically states that the intent of Congress was not to impose a ceiling on the maximum annual lease, so long as it was cost effective when compared with the alternative of government construction. H.R. Rep. No. 359, 98th Cong., 1st Sess. 45 (1983).

[9] Joint Economic Comm., 96th Cong., 2d Sess., *1980 Supplement to Economic Indicators: Historical and Descriptive Background* 85 (Comm. Print 1980); Bureau of Labor Statistics, Dept. of Labor, Rep. No. 517, *The Consumer Price Index: Concepts and Content Over the Years* (1977).

as an index of inflation. However, it is relevant solely for measurement of past price changes. It does not project future inflation rates.

Although the RFP referred to the "Economic Indicators," it did not state that indicators for past years would be used for evaluation purposes. When the solicitation is read as a whole, it indicates only that the pegging of the maintenance rent to the increase or decrease in the referenced CPI will be for the purpose of adjusting payments during the term of the lease. Since the Corps did not specify the inflation rate or rates that it would use for evaluation purposes, as opposed to payment purposes, we believe it was free to use any reasonable index, including the OMB/OSD rates that are specifically intended to predict future inflation. Although Fairbanks Associates' method of estimating future inflation, using an average of "Economic Indicators" for past years, may have been reasonable, the protester has not met its burden of showing that the agency's method was unreasonable. See *Centurial Products*, B-216517, Sept. 19, 1985, 64 Comp. Gen. 858, 85-2 CPD ¶ 305; *Western Filament, Inc.*, B-181558, Dec. 10, 1974, 74-2 CPD ¶ 320.

Fairbanks Associates' also argues that it was competitively prejudiced by the use of lower inflation rates to project maintenance rent. As discussed above in the context of the cost ceiling, even if the firm had been aware that the Corps would use the lower OMB/OSD inflation rates to evaluate its proposed first-year maintenance rent, we do not believe that there was a reasonable possibility that the firm could have increased its technical score by an amount sufficient to displace the awardee by increasing the portion of its proposed price representing maintenance rent. Maintenance represents less than 16 percent of Fairbanks Associates' proposed first-year price, and it is not reasonable to assume, based upon the protester's bare assertion, that a small increase in this small portion of its offered price would have increased the firm's cost/quality ratio.

We deny the protest that the cost evaluation was flawed because the Corps used OMB/OSD rates to project maintenance rent.

C. *Exclusion of Fairbanks Associates from the Competitive Range*

With regard to Fairbanks Associates' protest that the Corps improperly eliminated its initial proposal from the competitive range because of the inclusion of an interest rate contingency, we find the matter academic.

Although the Corps did not request a best and final offer from Fairbanks Associates, the firm, as noted above, in fact submitted a revised offer, lowering its price and deleting the interest rate contingency to which the Corps objected. We find nothing improper in this, since despite the Corps' request that offerors not change their technical proposals, as long as negotiations are still open, offerors within the competitive range have a right to change or modify their proposals in any manner. See *PRC Information Science Co.*,

56 Comp. Gen. 768 (1977), 77-2 CPD ¶ 11; *The FMI-Hammer Joint Venture*, B-206665, Aug. 20, 1982, 82-2 CPD ¶ 160.

Moreover, even if the Corps improperly found the firm's initial proposal to be unacceptable, it actually evaluated and ranked Fairbanks Associates' best and final according to cost per quality point. For all practical purposes, the firm was included in the competitive range, and we will not consider this basis of protest further.

D. Award to a Higher-Priced Offeror

The Corps clearly took the protesters' lower prices into account by virtue of its use of the cost per quality point evaluation formula specified in the RFP. We have recognized the propriety of using such a formula to determine which proposal is most advantageous to the government, see *Shapell Government Housing Inc., et al.*, 55 Comp. Gen. 839 (1976), 76-1 CPD ¶ 161; *Claude & Atkins Enterprises, Inc., supra*, and we note that mathematically, the formula results in giving equal weight to cost and technical factors. In a negotiated procurement, there is no requirement that award be made on the basis of lowest price or cost to the government unless the solicitation so specifies. See *Washington Health Services, Ltd.*, B-220295.2, Feb. 13, 1986, 86-1 CPD ¶ 157.

Here, North Star's final cost per quality point was $3,029 less than that of Fairbanks Associates and $8,683 less than that of Fort Wainwright Developers. We find that the award to North Star was reasonable and in accord with the evaluation scheme set forth in the solicitation. We therefore deny the protests with regard to the award to higher-priced offeror.

The protests are dismissed in part and denied in part.

[B-222549]

General Accounting Office—Jurisdiction—Contracts—Postal Service, United States

The United States Postal Service is not subject to the General Accounting Office's bid protest jurisdiction under the Competition in Contracting Act of 1984 as a result of the statutory provision (39 U.S.C. 410) exempting the Postal Service from any federal procurement law not specifically made applicable to it.

Matter of: Falcon Systems, Inc., May 14, 1986:

Falcon Systems, Inc. protests the award of a contract to Grid Systems Corporation under solicitation No. 104230-86-B-0025 issued by the United States Postal Service. Falcon contends that the Postal Service improperly found that the product offered by Falcon was not in current production or commercially available. Because the Postal Service is not subject to our bid protest jurisdiction, we dismiss the protest.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551 *et seq.*, (West Supp. 1985), our bid protest jurisdiction extends to alleged violations of procurement statutes or regulations in connection with procurements by federal agencies. See

Monarch Water Systems, Inc., 65 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. Under 39 U.S.C. § 410(a) (1982) the Postal Service is specifically exempted from any "Federal law dealing with public or Federal contracts," except for those laws enumerated in 39 U.S.C. § 410(b); CICA is not included in the list of statutes made applicable to the Postal Service by 39 U.S.C. § 410(b). Accordingly, due to the general exemption from federal procurement laws in 39 U.S.C. § 410(a), the Postal Service is not subject to CICA. *See* Bid Protest Regulations, 4 C.F.R. § 21.3(f)(8) (1985).

In support of its position, Falcon cites *Monarch Water Systems, Inc., supra*, in which we held that the Tennessee Valley Authority (TVA) is subject to our bid protest jurisdiction under CICA. The holding in *Monarch* is inapposite, however, since TVA's enabling legislation has no provision equivalent to the exemption from federal procurement laws in 39 U.S.C. § 410 pertaining to the Postal Service.

The protest is dismissed.

[B-221851]

Contracts—Protests—Subcontractor Protests—Awards "for" Government

Subcontractor selection is not made for the government within the meaning of the exception allowing General Accounting Office review because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor.

Matter of: Ocean Enterprises, Ltd., May 22, 1986:

Ocean Enterprises, Ltd. (OEL), protests the award of a subcontract to Buccaneer Marine, Ltd. (Buccaneer), under request for quotations (RFQ) No. 34-468-00 issued by Science Applications International Corporation (ASIC), a prime contractor performing services for the United States Department of the Navy. The RFQ called for the bare boat charter of a vessel at the Santa Cruz Acoustic Range Facility (SCARF) on Santa Cruz Island, California. OEL argues that SAIC gave the awardee unfair competitive advantages and improperly analyzed the proposed costs. We dismiss the protest.

SCARF is an ocean laboratory and measurement facility which is used for experiments and tests requiring an open ocean environment. In particular, nearly all high speed acoustical trials of Navy ships and submarines are performed there. The facility entails little more than one acre of land, which is leased by SAIC from a private owner, on the Santa Cruz Island and an offshore area which apparently is owned by the federal government.

On October 1, 1984, the Navy awarded SAIC a cost-plus-fixed-fee contract under which SAIC was to provide all necessary support services required to conduct Navy operations involving SCARF and/or SCARF support vessels. The contract requires SAIC to pro-

vide a support vessel to assist the Navy in its testing operations at the facility, and SAIC initially met this requirement when it awarded a charter to OEL for a vessel for the period of February 5, 1985, to September 30, 1985.

On July 19, 1985, SAIC issued RFQ No. 34-468-00 to provide a continuation of the vessel services. The solicitation included 23 lease vessel specifications that had to be met in order to accomplish the work performed by the charter vessel. Since these specifications require hull modifications to the craft, the RFQ provided that the vessel specifications would "be aboard, in place and operating when the vessel goes on charter," instead of requiring the specifications to be met at the time of the offer. The solicitation further provided that the performance period will be October 1, 1985, through September 30, 1986, with an option for the 2-year period of October 1, 1986, through September 30, 1988. The solicitation set August 9 as the closing date for the receipt of quotations.

As an initial matter, the Navy argues that the protest should be dismissed because it involves a subcontract award over which our Office lacks jurisdiction. Our office does not review subcontract awards by government prime contractors except where the award is by or for the government. GAO Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1985). This limitation on our review is derived from the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3551, *et seq.* (West Supp. 1985), which limits our bid protest jurisdiction to protests concerning solicitations issued by federal contracting agencies. In the context of subcontractor selections, we interpret the act to authorize our Office to review protests only where, as a result of the contractual relationship between the prime contractor and the government, the subcontract in effect is awarded on behalf of the government. For example, we will consider protests regarding subcontractor selections where they concern subcontracts awarded by prime contractors operating and managing Department of Energy facilities; purchases of equipment for government-owned, contractor-operated (GOCO plants; and procurements by construction management prime contractors. *Information Consultants, Inc.*, B-213682, Apr. 2, 1984, 84-1 C.P.D. ¶ 373. In each of those cases, the prime contractor principally provides large-scale management services to the government and, as a result, generally has an ongoing purchasing responsibility. In effect, the prime contractor acts as a middleman or conduit between the government and the subcontractor and, as a result, the subcontract is said to be "for" the government. *Rohde & Schwarz-Polarad, Inc.—Reconsideration*, B-219108.2, July 8, 1985, 85-2 C.P.D. ¶ 33.

OEL does not assert that this case involves a purchase of equipment for a GOCO plant or a procurement by a construction management prime contractor. Rather, it appears to argue that the situation here is similar to a subcontract awarded by a prime contractor operating and managing a Department of Energy facility. It

contends that SCARF is a government-owned facility for which SAIC provides large-scale management services and has ongoing purchasing responsibility. The Navy contends that none of the circumstances in which our Office has found jurisdiction over subcontract awards are present here and, therefore, this subcontract is not "for" the government. We agree with the Navy.

As evidence of its position, OEL initially points to several documents and brochures prepared prior to this protest being filed in which the Navy and SAIC both characterized SCARF as a GOCO which is operated by SAIC. These documents, however, do not serve as a determination of the legal status of these parties. In particular, the Navy documents were prepared by technical personnel who were not familiar with the legal or contractual meaning of the term GOCO. Further, the Navy has established procedures for the establishment and maintenance of GOCO's and there has not been any determination under these procedures that SCARF is a GOCO. *See* SECNAV Instruction 4862.8A, Dec. 18, 1981; Department of Defense Directive 4275.5, Oct. 6, 1980.

In order for a facility to be a GOCO, the government must own the facility and that facility must be operated by the contractor. The Navy, however, does not own the land on which SCARF is based—the prime contractor leases the land from a private owner. The site primarily consists of equipment housed in relocatable buildings and trailers; there is no permanent facility or plant.

Further, the contract between the Navy and SAIC indicates that SAIC does not operate SCARF, that is, it does not provide large-scale management services. A review of the contract between the Navy and SAIC establishes that this is a support services contract under which the contractor provides maintenance and operational assistance to the Navy, while the Navy manages the project operations at the site. In particular, the statement of work set forth in the contract shows that the primary duties under the contract are to provide technical and logistical services in support of testing operations and to maintain government-furnished and contractor-owned or leased equipment. For example, SAIC is to inspect, operate, maintain, and repair all of the government-furnished equipment (GFE) located at SCARF and on board the various support vessels and, here, it is to provide a vessel to accomplish specified services necessary to support Navy testing operations. We note that the task assignments issued pursuant to the contract merely reiterate tasks set forth in the contract and serve only to obligate funds under the contract.

Further, the contract provision estimating the number of man-hours per year necessary to perform the contract demonstrates that this contract is for support services. The contract estimates that 20,000 man-hours a year will be required to perform the contract, but less than 2,000 hours of that total are for mangerial/operation functions. Thus, SAIC is providing some management serv-

ices, but they constitute less than 10 percent of services under the contract and, therefore, the prime contractor is not principally providing management services.

Since SAIC is not providing large-scale management services to the government, it follows that it does not have an ongoing purchasing responsibility. SAIC's purchasing responsibilities are incidental to performance of its support and maintenance tasks. For example, its duty is to repair GFE and it is to make any purchases necessary in order to meet that duty. Similarly, here, SAIC is to operate a vessel to support Navy testing operations and it is responsible for meeting that obligation, whether it is necessary for the firm to lease the vessel or not. The subcontract for Buccaneer's vessel binds SAIC, not the Navy. Moreover, there is no indication in the Navy's contract with SAIC that SAIC is to purchase "for" the government.

We therefore conclude that SAIC is not acting as a middleman or conduit between the government and the subcontractor. Thus, SAIC is not acting for the government in awarding subcontracts and we therefore will not review this procurement. See *American Medical Supply & Service Corp.—Request for Reconsideration*, B-219266.2, July 24, 1985, 85-2 C.P.D. ¶ 80; *Rohde & Schwarz-Polarad, Inc.—Reconsideration*, B-219108.2, *supra*.

[B-222097]

Statutory Construction—Permanency

Section 8097 of the Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1219 (1986), does not constitute permanent legislation. A provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of the Congress. Here, the provision in question includes no words of futurity and the provision is not unrelated to the purposes of the Act. Further, the provision is not rendered ineffectual by a finding that it is not permanent.

Matter of: Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, May 22, 1986:

This decision is in response to a request from Representatives Les AuCoin, George E. Brown, Jr., Norman D. Dicks, and Lawrence Coughlin, for the opinion of this Office as to whether section 8097 of the Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1219 (1986), constitutes permanent legislation. Section 8097 prohibits the use of appropriated funds to carry out a test of an anti-satellite weapon against an object in space until the President makes certain certifications to Congress. As set forth below, we conclude that section 8097 does not constitute permanent legislation, but rather is applicable only to funds made available by the DOD Appropriations Act, 1986, or other legislation

providing funding for anti-satellite weapon testing during fiscal year 1986.

Funding is provided for the testing of anti-satellite weapons in the Department of Defense Appropriations Act, 1986, in Title IV, "Research, Development, Test, and Evaluation, Air Force." The funds provided are 2-year funds, "to remain available for obligation until September 30, 1987." 99 Stat. 1200. However, section 8097 of that Act reads as follows:

> Sec. 8097. None of the funds appropriated by this Act or any other Act may be obligated or expended to carry out a test of the Space Defense System (anti-satellite weapon) against an object in space until the President certifies to Congress that the Soviet Union has conducted, after October 3, 1985, a test against an object in space of a dedicated anti-satellite weapon.

There is a presumption that any provision in an annual appropriation act is effective only for the covered fiscal year. 31 U.S.C. § 1301(c); 20 Comp. Gen. 322, 325 (1940). *See also* Pub. L. No. 99-190, 90 Stat. 1185, 1204 (1985) (Section 8008 of DOD Appropriations Act, 1986). This is because appropriation acts are by their nature non-permanent legislation. Thus, unless otherwise specified, the provisions of an appropriation act for a given fiscal year expire at the end of that fiscal year. Accordingly, it has been the longstanding position of this Office that a provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of the Congress. 62 Comp. Gen. 54, 56 (1982); 10 Comp. Gen. 120, 121 (1930).

Permanency is indicated most clearly when the provision in question includes "words of futurity" such as "hereafter" or "after the date of approval of this act." *See, e.g.*, 36 Comp. Gen. 434 (1956). Here, section 8097 includes no such words of futurity. In our view, the phrase, "this Act or any other Act," does not constitute words of futurity. In interpreting similar language in the past, we held that the words "or any other act" do not indicate futurity, but merely extend the effect of the provision to other appropriations available in that fiscal year. B-145492, September 21, 1976. *See also* B-208705, September 14, 1982. Accordingly, in the case at hand, the inclusion in section 8097 of the phrase "this Act or any other Act" does not make the anti-satellite weapon testing restriction permanent, but rather merely extends the applicability of the restriction to any other funds available during fiscal year 1986, in addition to funds made available by the Department of Defense Appropriations Act, 1986, for anti-satellite weapon testing. These funds would include carry-over funds which were available from prior fiscal years, as well as funds transferred from other appropriation accounts under existing authority or additional funds made available during fiscal year 1986. Of course, since the funds for anti-satellite weapon testing provided by the fiscal year 1986 appropriation act are available until September 30, 1987, the restriction on use of those particular funds would continue to apply until their expiration.

The use of words of futurity is not essential for an appropriation act provision to constitute permanent legislation "if the permanent character of the legislation is otherwise clearly indicated." 9 Comp. Gen. 248, 249 (1929). One indication of permanence is when the provision is of a general nature, bearing no relation to the objects of the appropriation act. 62 Comp. Gen. 54, 56 (1982); 26 Comp. Gen. 354, 357 (1946). However, in the instant case, section 8097 is clearly related to the objects of the Department of Defense Appropriations Act, 1986. It restricts funding for testing of the Space Defense System, for which funds are provided in the Act. *See* Title IV, "Research, Development, Test and Evaluation, Air Force," 99 Stat. 1200; H.R. Rep. No. 332, 99th Cong., 1st Sess. 333 (1985).

Permanency of an appropriation act provision may also be indicated when the provision would be rendered futile or meaningless were it not interpreted to be permanent legislation. 62 Comp. Gen. 54, 56 (1982). This is a corollary of the rule of statutory construction that a statute should not be construed in a way which renders it wholly ineffective. *See* B-214058, February 1, 1985. However, this principle is not applicable in the case at hand. Even though not construed to be permanent, section 8097 is effective as a moratorium on testing at least during fiscal year 1986.

Therefore, based on the language and nature of section 8097, we conclude that it does not constitute permanent legislation. We conclude that the anti-satellite weapon testing restriction is applicable only to funds made available by the DOD Appropriations Act, 1986, or other legislation providing funding for anti-satellite weapon testing during fiscal year 1986. The restriction, accordingly, would not be applicable to new funds appropriated by the Congress for fiscal year 1987.

We have usually looked to legislative history to confirm our interpretation of an appropriation act provision. We have not relied on legislative history alone to overcome the statutory presumption that provisions in appropriation acts do not constitute permanent legislation unless expressly provided otherwise. 31 U.S.C. § 1301(c). *See* B-214058, February 1, 1984; 62 Comp. Gen. 54, 56 (1982). In this instance, the legislative history of section 8097 is ambiguous and includes conflicting statements regarding the permanence of the anti-satellite testing restriction.

The restriction in section 8097 was included in H.R. 3629 when the bill was reported from the House Appropriations Committee. The provision at the point referred only to "funds appropriated by this Act," with no reference to funds appropriated by "any other Act." While the bill language clearly limits the restriction to the FY 1986 appropriation, the House Appropriations Committee report included the following statement, which could be read as an understanding that the restriction would be permanent:

> The Air Force requested $149,934,000 for Space Defense Systems to continue development of an anti-satellite capability. The Committee recommends the budgeted

amount. The Committee concurs in the concerns expressed over continued testing against objects in space, absent such testing by the Soviet Union. The Committee has therefore included in the bill a General Provision which prohibits obligating or expending funds for such testing until the President has certified that the Soviet Union conducted a test after October 3, 1985.

H.R. Rep. No. 332, 99th Cong., 1st Sess. 333 (1985). Nonetheless, statements on the floor of the House when H.R. 3629 was considered seem to indicate a prevailing understanding that the restriction, as framed at the time, was temporary. *See, e.g.*, 131 Cong. Rec. H 9401-9402 (daily ed. October 30, 1985).

When H.R. 3629 was considered in the Senate, the restriction regarding funding of anti-satellite weapon testing had been eliminated by the Committee on Appropriations. S. Rep. No. 176, 99th Cong., 1st Sess. 353 (1985).

H.R. 3629 was subsequently considered by the Congress as part of H.J. Res. 465, which was ultimately enacted as Pub. L. No. 99-190, the fiscal year 1986 continuing resolution. When the House-Senate Conference Committee considered the matter, the conferees agreed to include the anti-satellite testing restriction in the resolution. Additionally, they added new language restricting funds appropriated by "any other Act." The Conference Committee explained as follows:

The conferees agree to the House position that *no fiscal year 1986 funds* are to be used for testing on anti-satellite weapons against objects in space. Bill language has been provided which *further prohibits* obligation or expenditure of funds provided by this or any other Act for such testing until the President certifies to Congress that the Soviet Union has conducted after October 3, 1985, a test against an object in space of a dedicated anti-satellite weapon.

H.R. Rep. No. 450, 99th Cong., 1st Sess. 259 (1985) [Italic supplied.] *See also* H.R. Rep. No. 443, 99th Cong., 1st Sess. 258 (1985).

The language used by the conferees to explain their action with regard to funding of anti-satellite testing is ambiguous. The first sentence of the explanatory statement refers to fiscal year 1986 funds. However, the explanatory statement goes on to note that "language has been provided which further prohibits obligation or expenditure of funds provided by this or any other Act." It is unclear what the conferees intended the new language, "or any other Act," to add to section 8097. The conferees may have intended to extend the restriction on the use of appropriated funds for anti-satellite testing to any other funds properly available in fiscal year 1986 for such testing (*e.g.*, funds carried over from fiscal year 1985). *See* 131 Cong. Rec. S18153 (daily ed. December 19, 1985) (remarks of Senator Wallop). This interpretation would be consistent with the position of this Office regarding interpretation of the phrase "this or any other act." Alternatively, it may have been the intent of the conferees to extend the testing restriction to funds available under future appropriation acts, effectively making the restriction permanent.

When the continuing resolution was debated on the floor of both the House and Senate, conflicting statements were made regarding

permanency of the anti-satellite testing restriction. In general, statements made in the House appeared to indicate that the restriction would be permanent. For example, Representative AuCoin had the following comments:

We can stop Asat testing on both sides. That's what this resolution does. No "ifs" "ands," or "buts." No hokey escape clauses that let the President test if he certifies he's thinking about attempting to consider negotiating about when to have the next arms control talks.

Just clear, cold turkey no testing. We block not just two tests, *but all tests of this weapon in any fiscal year.* • • •

131 Cong. Rec. H12977 (daily ed. December 19, 1985) [Italic supplied.] Similarly, Representative Weiss had the following comment:

On the other hand, if we act to ensure that the stiff new prohibition on Asat tests contained in the continuing resolution is preserved, it is likely that such an arms race can be successfully avoided. The conference committee language denies appropriations for Asat testing under 'this or any act,' meaning that *Asat testing will not be allowed to resume unless specific language repealing the ban is enacted in the future.*

131 Cong. Rec. H13034 (daily ed. December 19, 1985) [Italic supplied.] *See generally* 131 Cong. Rec. H12160, 12162 (daily ed. December 16, 1985) (remarks of Representative Conte); *id.* at H12189 (remarks of Representative Chappell); *id.* at H12191 (remarks of Representative AuCoin); *id.* at H12194 (remarks of Representative Kemp); 131 Cong. Rec. H12985 (daily ed. December 19, 1985) (remarks of Representative Fascell); *id.* at 13031 (remarks of Representative Brown).

However, statements made in the Senate suggest that section 8097 was not intended to have permanent effect. For example, Senator Wallop commented as follows:

The U.S. Asat Program, ready for tests No. 2 and No. 3 is effectively put on ice *for the remainder of this fiscal year.*

• • • • • • •

Testing is necessary. Only one test has been completed, on September 13, 1985. It demonstrated that certain problems with the motors had been solved. Under the Defense authorization bill, three tests were authorized for fiscal year 1986 including the September 1985 test. Following the testing plan, on December 13, 1985, the Air Force launched two targets for use in the remaining two tests for this year. Launching these two targets cost approximately $20 million.

Because these targets have a limited useful lifetime, a *moratorium for fiscal year 1986* would result in the loss of $20 million. Very efficient my colleagues. Very efficient.

131 Cong. Rec. S18153-18154 (daily ed. December 19, 1985) [Italic supplied.]

Senator Stevens, a Senate conferee, had the following comment which seems to indicate that he too believed the provision would be temporary, although his position is not absolutely clear.

The downside of this good news is the concession to the House position against space testing of the anti-satellite weapons system, commonly called Asat. We fought hard on this issue, Mr. President, to preserve the Senate position allowing limited testing under specific conditions, but the House was adamant. In the end Asat testing became a key link in the overall agreement and, in effect, the price for the successful conclusion of other high priority issues. So the agreement is on a testing moratorium, but the Senate position is that this issue can be reopened at any time

in future appropriation acts. We will watch the progress of arms control negotiations in Geneva, and we will watch the activities of the Soviets in Asat development to ensure that this *temporary halt in testing* does not jeopardize our defense posture.

131 Cong. Rec. S18137 (daily ed. December 19, 1985) [Italic supplied.] *See generally* 131 Cong. Rec. S17662-17663 (daily ed. December 16, 1985) (remarks of Senator Proxmire); *id.* at S17711-17712 (remarks of Senator Kerry).

Representatives AuCoin, Brown, Dicks, and Coughlin, in support of their position that section 8097 "was to apply to all appropriations on a permanent basis," cite a prepared answer submitted by the Air Force, concerning an earlier certification requirement, in response to a written question posed by the House Armed Services Committee during the fiscal year 1985 Department of Defense authorization and oversight hearings. That question, and the Air Force answer, were as follows:

Question. It has been interpreted by some within the Senate that the Tsongas certification requirement will remain in effect until it is fulfilled, regardless of whether the first test against the ITV occurs in FY84. Is this your interpretation of the legal constraints imposed on the Air Force by the Tsongas Amendment?

Answer. The text of the Tsongas Amendment states that "Notwithstanding any other provision of law, none of the funds appropriated pursuant to our [sic] authorization contained in this or any other Act may be obligated or expended to test any explosive or inert anti-satellite warheads in space unless * * *". This would seem to indicate that the amendment is not limited to the 1984 DOD Authorization Act.

Hearings on Department of Defense Authorization of Appropriations for Fiscal Year 1985 Before the House Committee on Armed Services, 98th Cong., 2nd Sess. Part 4, 169 (1984).

In our view, this hearing excerpt cannot be given great weight in determining congressional intent with regard to the permanency of section 8097. Initially, we note that the Tsongas Amendment, although somewhat similar to section 8097 in effect, is an entirely distinct legislative provision. *See* Pub. L. No. 98-94, § 1235, 97 Stat. 614, 695-96 (1983), *as amended by* Pub. L. No. 98-525, § 205, 98 Stat. 2492, 2509-10 (1984). More significantly, it was included in an authorization act, not in an appropriation act. Because authorization acts are not by definition time limited, the presumption against permanency does not automatically apply to them. Finally, with rspect to the certification requirement of section 8097, we note that the Air Force Office of General Counsel informally has taken the position that the provision is not permanent.

Because of the ambiquities and conflicting statements in the legislative history of section 8097, the legislative history is not conclusive in determining the intent of Congress with regard to the permanence of the anti-satellite testing restriction. Therefore, it does not contradict our determination that section 8097 is not permanent.

In summary, none of the circumstances which could support a finding that section 8097 constitutes permanent legislation is present in the case at hand. Accordingly, we conclude that section 8097 of the Department of Defense Appropriation Act, 1986, does

not constitute permanent legislation but rather is applicable only to funds made available by the DOD Appropriations Act, 1986, or other legislation providing funding for anti-satellite weapon testing during fiscal year 1986.

[B-216918]

Courts—District of Columbia—Superior Court

The Superior Court of the District of Columbia, although established by Congress under Article I of the Constitution, is more analogous to a state court than to a Federal court for purposes of Title VII of the Civil Rights Act of 1964. Accordingly, and since its employees are not in the competitive service, it is subject to the jurisdiction of the Equal Employment Opportunity Commission under section 706 of the Civil Rights Act, which generally covers state and local governments, rather than section 717 which applies to Federal entities.

Matter of: Investigative Jurisdiction of Equal Employment Opportunity Commission over the Superior Court of the District of Columbia, May 27, 1986:

The late Chief Judge of the Superior Court of the District of Columbia requested our opinion on whether the Equal Employment Opportunity Commission (EEOC) has jurisdiction over employment discrimination complaints against the court under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Specifically, the question is whether the court is subject to the EEOC's enforcement authority found in section 706 of the Act. Before preparing our response, we solicited the views of the EEOC on this issue. We have fully considered the Commission's comments in preparing this decision. For the reasons stated below, we conclude that the court is subject to section 706.

Background

Generally, Title VII of the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000e–2000e–17 (1982)) provides protections against discrimination in employment and appropriate remedies. As originally enacted, Title VII did not cover Government employees. The Equal Employment Opportunity Act of 1972 amended the Civil Rights Act to extend the protections of Title VII to most Federal, state and local government employees. As a result of the 1972 amendment, section 717 [1] sets forth the administrative procedures for the enforcement of Title VII protections which are applicable to Federal employees, and section 706 [2] provides procedures applicable to state and local government employees.

Under the procedures set forth in section 706 and the EEOC's implementing regulations, employees bringing a charge against an employer to whom section 706 applies are, with exceptions not rele-

[1] 42 U.S.C. § 2000e–16.
[2] 42 U.S.C. § 2000e–5.

vant here, required to begin the administrative complaint process by filing their charge with the Commission. 42 U.S.C. § 2000e-5(b). The Commission, after serving the respondent with a copy of the charge, conducts a full investigation of the matter. 29 C.F.R. §§ 1601.14, 1601.15. The EEOC is authorized to subpoena witnesses and documents and to hold public hearings to carry out its investigation. 29 C.F.R. § 1601.16, 1601.17.

Once it has taken jurisdiction of a charge under section 706, the Commission may dispose of it in a number of ways. It may dismiss a charge which was not timely filed or which fails to state a claim under Title VII. 29 C.F.R. § 1601.19. It may encourage a negotiated settlement of the matter. 29 C.F.R. § 1601.20. If the charge is not settled or dismissed, the Commission may make a determination that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring and then endeavor to eliminate the practice informally. 29 C.F.R. § 1601.24. Finally, if the matter remains unresolved, the EEOC may issue a notice of right to sue, thereby enabling the aggrieved party to bring a civil action. 29 C.F.R. § 1601.28.

By contrast, Title VII complaints covered by section 717 are not subject to the Commission's complaint process. Under the applicable regulations, the employing agency, not the EEOC, is responsible for carrying out the administrative process for discrimination complaints against "section 717 employers." 29 C.F.R. 1613.211-1613.283. The process is somewhat analogous to the section 706 procedure, concluding with the head of the agency or his designee making a final decision on the complaint. The Commission's role in section 717 cases is generally limited to hearing the appeals of complaints which have been adversely decided by agency heads. 29 C.F.R. §§ 1613.231-1613.234.

Issue

Section 717 specifies that it covers employees "in those units of the Government of the District of Columbia having positions in the competitive service * * *." 42 U.S.C. § 2000e-16(a). Section 706 does not apply to employees of "any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5) * * *" 42 U.S.C. § 2000e(b). The legislative history of the Equal Employment Opportunity Act of 1972 indicates that the term "competitive service" as used above was intended to mean the Federal competitive service. A section-by-section analysis inserted into the Congressional Record at the time the Senate considered approval of the Conference Report on the later enacted bill, in explaining the Act's definition of "employer" upon which Title VII coverage is based, stated:

This subsection defines the terms "employer" as used in Title VII. This subsection would now include, within the meaning of term "employer" all state and local governments, governmental agencies, and political subdivisions, and the District of Co-

lumbia departments or agencies (except those subject by statute to the procedures of the Federal competitive service as defined in 5 U.S.C. § 2102, who along with all other Federal employees would now be covered by section 717 of the Act). 120 Cong. Rec. S3460 (daily ed. March 6, 1972) (following remarks of Sen. Williams).

Interpreting these provisions and their legislative history, the courts have held that Title VII complaints against District of Columbia governmental units are covered by the procedures of either section 706 or section 717, depending upon whether the unit has positions in the competitive service. *Bethel* v. *Jefferson*, 589 F.2d 631 (D.C. Cir. 1978); *Torre* v. *Barry*, 661 F.2d 1371 (D.C. Cir. 1981).

Employees of the Superior Court of the District of Columbia are not in the competitive service. Under 5 U.S.C. § 2102(a)(3), the competitive service includes "positions in the government of the District of Columbia which are specifically included in the competitive service by statute." The court's employees are not included in the competitive service by statute. On the contrary, the statutory provisions pertaining to court personnel indicate clearly that court employees are not subject to competitive service procedures. Section 11-1725 of the District of Columbia Code provides that the Court's Executive Officer shall appoint and remove non-judicial court personnel subject to the approval of the Joint Committee on Judicial Administration of the District of Columbia.

The "non-competitive service" status of such District of Columbia Superior Court employees coincides with the status of District of Columbia employees generally. Although a number of District of Columbia employees were in the Federal competitive service at the time of the enactment of Title VII, they no longer are. Under the authority of the District of Columbia Self-Government Act, Public Law No. 93-198 (December 24, 1973), § 422(3), 87 Stat. 774 at 791, the District of Columbia has enacted its own merit personnel system (See D.C. Law 2-139, § 3202, D.C. Code § 1-633.2(a)(2)) thereby making District of Columbia employees generally not subject to the Federal competitive system. See also B-217270, October 28, 1985, regarding "non-competitive service" status of employees of the Superior Court of the District of Columbia.

Since court employees do not hold competitive service positions, the court would appear to be subject to the EEOC's complaint process under section 706, unless there is some reason to distinguish the court from other departments or agencies of the Government of the District of Columbia. Clearly the Superior Court is an element of the Government of the District of Columbia. The complication arises in that the court is also an "Article I court," *i.e.*, it was established by Congress under Article I of the Constitution. D.C. Code § 11-101. In this sense, it differs from other state and local courts, which are subject to section 706. The late Chief Judge noted that section 717(a) (42 U.S.C. § 2000e-16(a)) appears to exclude courts established by Congress under Articles I and III of the Constitution from EEOC's section 706 complaint process. He further noted that

"the Congress has retained authority over the Court despite the enactment of the District of Columbia Self-Government and Governmental Reorganization Act." For these reasons he asked whether, for purposes of Title VII, it is correct to treat the court as a state or local court, in which event section 706 applies, or whether it is more correct to consider the court as analogous to a Federal court, in which event it is subject presumably only to section 717.

Discussion

In our opinion, the Superior Court is subject to section 706 because it is analogous to a state or local court, and the fact that it was established under Article I does not affect its status as a local governmental unit.

We note initially that Title VII does not mention Article I or Article III courts specifically. Rather, for purposes of determining the applicability of section 706 or section 717, Title VII speaks, in effect, in terms of whether an employer is one of certain specified Federal departments or agencies, a state or local agency, or a unit of the Government of the District of Columbia. The late Chief Judge's question suggested the view that Article I courts, because they are federally created, should be considered Federal employers for Title VII purposes.

A court need not, in our view, be considered a Federal employer merely because it is established by Congress under Article I. The Congress established the Superior Court of the District of Columbia pursuant to power granted to it in clause 17 of section 8 of Article I, which authorizes the Congress to exercise exclusive jurisdiction over the District of Columbia. As our following discussion indicates, the Congress, although acting under Article I, intended the Superior Court to be strictly local in character and analogous to a state court.

We base our opinion on several United States Supreme Court decisions in which the Court has viewed the Superior Court as tantamount to a state or local court by interpreting the legislative intent of the Court Reform Act. For example, in *Palmore* v. *United States*, 411 U.S. 389 (1973), the Court stated that the Court Reform Act was intended to establish a strictly local court system to relieve the formerly burdened Article III "federal" courts of the responsibility for trying local criminal matters in order to support its holding that a felon need not constitutionally be tried by an Article III judge. In discussing the Court Reform Act, the Court stated:

> * * * Here Congress has expressly created two systems of courts in the District. One of them, made up the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, are constitutional courts manned by Art III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern * * *. The other system is made up of strictly local courts, the Superior Court and the District of Columbia Court of Appeals. These courts were expressly created pursuant to the plenary Art I power to legislate for the District of

Columbia, DC Code Ann § 11-101(2) (Supp. V, 1972), * * *. Here, Congress reorganized the court system in the District of Columbia and established one set of courts in the District with Art III characteristics and devoted to matters of national concern. It also created a wholly separate court system designed primarily to concern itself with local law and to serve as a local court system for a large metropolitan area.

. . . . . .

[This separate court system has] functions essentially similar to those of the local courts found in the 50 States of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction. 411 U.S. at 406-409.

Following *Palmore*, the Supreme Court has taken the view that it is proper to consider the Superior Court of the District of Columbia as a local court in other contexts as well. See for example, *Key* v. *Doyle*, 434 U.S. 59, 64 (1977); and *Swain* v. *Pressley*, 430 U.S. 372, 375 (1977).

Conclusion

In light of these Supreme Court decisions, we believe that, for purposes of Title VII, the Superior Court is more appropriately viewed as a state or local, rather than a Federal, government entity. As such, and since its employees are not in the competitive service, the Court would be subject to the investigative jurisdiction of the EEOC as provided in section 706.

[B-219841]

Contracts—Payments—Assignment

The Defense Logistics Agency (DLA), which erroneously paid certain contract proceeds to the contractor-assignor rather than to the assignee, should now pay the claim of the assignee. The assignee complied with all requirements of the Assignment of Claims Act, 31 U.S.C. 3727. DLA could not discharge its payment obligation under the contract by paying the contractor. A letter from the assignee to the contractor, after the erroneous payment, releasing the assignee's interest in the contract does not revoke the assignment or otherwise extinguish the assignee's right to payment in these circumstances.

Interest—Payment Delay—Contracts

The Defense Logistics Agency may not pay interest on a delayed contract payment to the assignee of a Government contract. Interest is not recoverable against the United States unless it is expressly authorized in the relevant statute or contract.

Matter of: Claim of First Interstate Bank of California as Assignee of Defense Logistics Agency Contract, May 28, 1986:

This decision is in response to a request from Mr. Peter H. Tovar, Chief of the Accounting and Finance Division of the Defense Logistics Agency (DLA). Mr. Tovar asks us to decide whether a claim of the First Interstate Bank of California for $26,655, plus interest, as assignee of certain contract proceeds may be paid. For the reasons set forth below, we conclude that the claim for $26,655

should be paid, but that no claim for interest may be allowed in these circumstances.

At some point prior to 1983, DLA and The Sign Company, Inc., entered into contract number DLA400-82-C-4764 for reflective tape. In December of 1983, proceeds under the contract were assigned by The Sign Company to First Interstate, apparently in accordance with the terms of a loan of $26,655 by First Interstate to The Sign Company. Proper notice of the assignment was sent to the DLA contracting officer and disbursing officer as required by the Assignment of Claims Act. 31 U.S.C. § 3727 (1982). Notification of the assignment was acknowledged by the appropriate DLA officials.

Notwithstanding the assignment, the first and final payment on contract number DLA400-82-C-4764 in the amount of $34,659 was made to The Sign Company on February 18, 1983. A stop payment order was issued against the check on March 29, 1983, but the check had already been paid. DLA unsuccessfully demanded repayment from The Sign Company.

First Interstate Bank subsequently demanded $26,655 from DLA. DLA, however, has refused payment on two grounds. First, DLA contends that First Interstate has not shown that its loan to The Sign Company was made to finance performance under contract number DLA400-82-C-4764, thereby making the assignment proper under the Assignment of Claims Act. See *Coleman* v. *United States*, 158 Ct. Cl. 490 (1962).

We do not concur in DLA's position and conclude that the assignment must be deemed to be proper. First Interstate is clearly a financing institution and contends in its submission that the $26,655 was advanced to The Sign Company "against the contract." DLA has pointed to no circumstances or evidence casting doubt on that assertion or on the validity of the assignment in general. Further, DLA received and acknowledged notice of the assignment well before the incorrect payment was made. DLA does not dispute that The Sign Company was paid the contract proceeds erroneously and attempted to prevent the negotiation of the erroneously issued check and to recover the erroneously paid funds. In *Produce Factors Corporation* v. *United States*, 467 F.2d 1343, 1349 (Ct. Cl. 1972), the Court of Claims held:

> When the Government receives notice that an assignment of proceeds under a Government contract has been made, it can no longer discharge its payment obligation under the contract by paying the contractor. The Government has only a reasonable time to determine the validity of the assignment; thereafter the assignee is entitled to all amounts earned by the contractor's performance.

DLA further contends that a "release" executed by First Interstate subsequent to the erroneous payment relieves it of responsibility to pay First Interstate. DLA refers to a May 20, 1983 letter from an Assistant Vice President of First Interstate to The Sign Company. The May 20 letter purported to "release the interest of First Interstate Bank" in several contracts, including contract

number DLA400-82-C-4764. The letter was supplied by The Sign Company to DLA. DLA interprets this release as a "release of the assignment and money due thereunder." First Interstate contends, however, that the May 20 document did not release the Government, but only released The Sign Company from its obligations under the loan contract, thereby converting "a recourse assignment into an assignment without recourse."

The intended legal effect of the May 20 letter is unclear. It appears, at most, to have been effective to release The Sign Company from its obligation under the loan agreement between The Sign Company and First Interstate to assign the proceeds of contract number DLA400-82-C-4764 to First Interstate. In any event, we conclude that the May 20 letter, whatever its intended effect, should not operate to extinguish First Interstate's right to payment from the Government. The May 20 letter was addressed to The Sign Company, not to DLA. The Federal Acquisition Regulations provide that an assignment may be released upon filing by the contractor of "a written notice of release together with a true copy of the release assignment instrument" with the contracting officer, any surety, and the disbursing officer. 48 C.F.R. § 32.805(e) (1984). No such procedure was followed in this case. Further, there is no indication that DLA relied on the May 20 letter, so that First Interstate should now be estopped to enforce the assignment. The erroneous payment took place months before DLA received a copy of the May 20 letter.

Finally, First Interstate has also claimed interest in the amount of $3,829.80. It is firmly established principle that interest is not recoverable against the United States unless it is expressly authorized in the relevant statute or contract. 45 Comp. Gen. 169 (1965). We know of no statute which is pertinent in this case and no relevant contract provision has been brought to our attention. Therefore, the claim of First Interstate for interest must be disallowed.

Accordingly, the claim of First Interstate Bank may be paid in the amount of $26,655.

[B-217913]

Appropriations—Refund of Expenditures—Disposition

Rebates from Travel Management Centers redistributed to paying Federal agency may be retained by agency for credit to its own appropriation and does not need to be deposited into the Treasury as miscellaneous receipts. This does not constitute an illegal augmentation of appropriations in that these rebates are adjustments of previous amounts disbursed and therefore qualify as "refunds" under regulations permitting such refunds to be retained by the agency.

Matter of: Rebates from Travel Management Center Contractors, May 30, 1986:

This decision is in response to a request from the General Counsel of the General Services Administration (GSA) asking whether

Federal agencies whose employee travel arrangements are handled by Travel Management Centers (TMC) (travel agents operating under so-called no cost contracts with GSA) might in the future retain rebate payments proposed to be received from TMCs. The agency would either deposit these payments to the credit of appropriations against which employee travel is charged or have amounts representing a portion of the commission received by TMCs from third parties whose services are used by TMCs when making employee travel arrangements credited against future billings.

As explained in further detail below, payments or credits may be credited to the appropriation against which the cost of employee travel is charged or applied against future billings for employee travel because they would constitute refunds which do not have to be deposited to the general fund of the Treasury as miscellaneous receipts.

Background

GSA currently has nearly 100 contracts with TMCs and is considering further expansion of the program. GSA proposes to request rebates or credits from TMCs in selected future solicitations. TMCs do not charge the Government directly for the services they provide, but instead receive commissions from transportation or lodging establishments with whom they book reservations. Three methods are used to effect payment to TMCs for Federal employee travel:

1. The TMC is paid by a contractor (Diners Club) which has issued a credit card to a Government employee pursuant to a contract with GSA;
2. The TMC is paid by a contractor (Diners Club) on behalf of GSA under GSA's Government Travel Systems accounts (GTS); or
3. The TMC is paid directly pursuant to Government Transportation Requests (GTR).

GSA proposes to recapture part of the TMC commissions in the form of a rebate collected periodically and remitted by the TMCs to GSA or to the particular agency making payment on a GTS or reimbursing the employee who travels on a charge card. When GTRs are used, a credit would be made by the TMC toward the particular agency account involved. GSA views the rebate as a discount but is concerned that where a GTS or credit card is used any rebate recovered might have to be deposited to the credit of miscellaneous receipts of the Treasury pursuant to 31 U.S.C. § 3302.

DISCUSSION

As a general proposition, absent specific statutory authority, all funds received for the use of the United States must be deposited in the general fund of the Treasury as miscellaneous receipts. 31

U.S.C. § 3302. Violation of this statute constitutes an illegal "augmentation" of the agency's appropriation and funds must be returned to the Treasury so they can be appropriated as the Congress sees fit.

One of the exceptions to the general rule is that an agency may retain receipts which qualify as "refunds to appropriations." Refunds are defined as "repayments for excess payments and are to be credited to the appropriation or fund accounts from which the excess payments were made. Refunds must be directly related to previously recorded expenditures and are reductions of such expenditures."[1] Refunds also have been defined as representing "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed." [2] Since there is no statutory authority which would in this instance permit agency retention of rebates, the question is whether the rebate may be deemed a "refund" within the scope of the regulations.

In determining whether the rebate or credit can be properly characterized as a refund under these regulations we rely upon our line of cases which permit the crediting of refunds to the appropriations charged. It has been suggested that agency retention of the rebate in this case follows from two of our decisions involving contracts which contained clauses providing for some type of adjustment in the contract price. In 34 Comp. Gen. 145 (1954) we held that the refund required under a guarantee-warranty clause was properly creditable to the agency appropriation because it could be considered an adjustment in the contract price. Similarly in 33 Comp. Gen. 176 we held that a contractor's refund made under a price redetermination clause may be credited to the agency account in that the refund was the return of an admitted overpayment.

A similar conclusion is reached in the situation where a breaching contractor is required to pay the excess costs of reprocurement. In 62 Comp. Gen. 678 (1983) we determined that such funds need not be deposited into the general fund of the Treasury. In this case and in the prior cases cited the amounts received are not illegal augmentations of agency appropriations because they are adjustments in previous amounts disbursed which serve to provide the agency involved with that which it bargained for under the original contract. Similarly, amounts received from an insurer for damage to an employee's personal property where the agency has paid a claim by the employee under 31 U.S.C. § 3721 may be credited to the appropriation of the agency. *See* 61 Comp. Gen. 5377 (1982). We concluded that the recovery is analogous to the recovery of an overpayment or the return of an unused advance and quali-

[1] GAO Policy and Procedures Manual for the Guidance of Federal Agencies, Title VII, section 12.2.

[2] Treasury Department-GAO Joint Regulation No. 1, reprinted as Appendix B to Title VII of the Policy and Procedures Manual.

fies as a refund under the regulations. *See also* 62 Comp. Gen. 70 (1982).

In each of these three situations described by GSA in its submission, the proposed payment or credit can similarly be characterized as a refund within the scope of the decisions authorizing deposit to the credit of the appropriation against which the employee travel was initially charged. It is most clear in the third example since there the billing is made by, and paid to, the TMC. However, the nature of the payment or credit does not change simply because in the first example the Government pays the employee for his authorized expenses and in the second example it pays the Diners Club. This is because in both of these situations the commission charged by the TMC is ultimately paid by the Government.

Consequently, if the TMC agrees to discount its services to the Government, we see no reason why the agency should not be authorized to deposit this saving to the credit of the appropriation against which the initial cost of the employee travel is charged. The fact that the party making the payment of credit may not be the same one the Government paid does not alter this conclusion. Thus, such payments or credits representing a discount on commissions otherwise collected by TMCs in connection with handling travel arrangements for Government employees on official business, the cost of which is ultimately paid for by the Government, may be refunded to the credit of the appropriation initially charged the cost of employee travel.[3]

[3] *See* 31 U.S.C. § 1552(b).

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