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[B-219361.2]

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

A protest of the use of an oral solicitation and of deficiencies in the oral solicitation should have been filed either prior to the time protester's proposal was submitted or within 10 days of receiving inquiries on its proposal from the agency.

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

Brooks Act procedures for contracting are only to be used for architect-engineer solicitations and are not to be used to procure health support services.

Contracts—Protests—Preparation—Costs—Compensable

Recovery of the costs of filing and pursuing a protest, including attorney's fees, and proposal preparation costs is appropriate where General Accounting Office (GAO) recommends that option to extend contract not be exercised since the protester does not thereby get an opportunity to compete for the basic contract period. *Federal Properties of R.I., Inc.*, B-218192.2 May 7, 1985, 85-1 C.P.D. 508 and *The Hamilton Tool Company*, B-218260.4, Aug. 6, 1985, 85-2 C.P.D.132, distinguished.

Matter of: EHE National Health Services, Inc., October 1, 1985:

EHE National Health Services, Inc. (NHS) protests the award of contract No. GR 85-0008 to provide occupational health services at the National Science Foundation (Foundation). NHS asserts that the Foundation improperly used procedures contained in the Federal Acquisition Regulation (FAR) applicable to architect-engineer (A-E) services and improperly used an oral solicitation for this contract.

The protest is sustained.

In response to a November 16, 1984 oral solicitation for health care support services at the Foundation's headquarters for an indefinite period beginning on or about February 1, 1985, NHS submitted a proposal to the Foundation on December 28, 1984. On two subsequent occasions in January 1985, NHS responded to inquiries from the Foundation, supplying additional information on the medical director and the nursing and secretarial staff that NHS was proposing to provide.

On February 14, 1985, NHS was informed by the Foundation that a contract had been awarded to another offeror on February 1. NHS was informed at that time that the award was made on factors other than price.

NHS filed a protest on February 26 with the contracting officer, alleging that the Foundation had failed to comply with the FAR. By letter of May 23, the Foundation denied the protest and NHS protested to our Office on June 5.

NHS objects to the oral solicitation, asserting primarily that its use was improper because the Foundation knew in mid-November

1984 of its contracting needs and therefore had adequate time, 2½ months, to issue a written solicitation, conduct negotiations and make an award. NHS contends that the Foundation failed to identify the factors other than price that were major considerations in awarding the contract. Further, NHS contends that the oral solicitation was not documented as required, that NHS was not notified whether its proposal was in the competitive range, that no discussions were held with NHS and best and final offers were not requested, and that no preaward or post award notice was given to NHS. Finally, NHS disputes the Foundation's contention that certain negotiated procurement procedures in Part 15 of the FAR did not have to be followed because the Foundation had the authority to procure the health care support services under the procedures applicable to the procurement of A-E services (FAR Part 36).

Portions of this protest are untimely. Our Bid Protest Regulations require that protests of solicitation deficiencies be filed prior to the closing time for receipt of proposals, 4 C.F.R. § 21.2(a)(1) (1985), while all other protests must be filed within 10 days of when the basis for protest was known or should have been known. 4 C.F.R. § 21.2(a)(2). Here, the protester knew at the outset that an oral solicitation was being used, and we find that at least by the time it received and responded to the Foundation's inquiries in January, NHS was on notice of the fact that the oral solicitation was not resulting in an immediate award. Thus, we think NHS' objection to the use of an oral solicitation should have been filed either prior to the time it submitted its proposal or, at the latest, within 10 days of receiving the Foundation's inquiries in January. Similarly, the protester's objection to the absence of evaluation factors other than price also should have been filed prior to proposal submission.

Regarding the merits of the protest, it appears that the Foundation thought that it could contract for the health/medical support services using the procedures in Part 36 of the FAR relating to contracting for A-E services. The contracting officer stated that health services are similar to A-E services as they are professional in nature and thus should be treated similarly. The contracting officer determined that certain requirements in Part 15 of the FAR concerning procedures to be used for negotiated contracts were not to be followed. For example, the Foundation planned to rate the proposals technically and then to negotiate with the highest ranked proposer. This procedure is consistent with Part 36 of the FAR, but not Part 15 relating to negotiated contracts generally.

Part 36 of the FAR prescribes policies and procedures peculiar to contracting for construction and A-E services and implements provisions of the Brooks Act, 40 U.S.C. § 541 *et seq.* (1982), which by their express provisions are restricted to A-E firms. See *Work System Design, Inc.*, B-213451, Aug. 27, 1984, 84-2 C.P.D. ¶ 226. They do not apply to anything other than A-E services, and thus

their use in contracting for health or medical services was totally inappropriate. The fact that both A-E and medical services may be supplied by professionals provides no basis for using Brooks Act procedures when medical services are being procured.

Although admitting that it used A-E procedures to conduct this procurement, the Foundation contends that its actions may be construed as fulfilling the requirements for negotiated procurements in Part 15 of the FAR. For example, the Foundation states that NHS was always considered to be in the competitive range, that discussions were held when resumes of the proposed medical director, and nursing and clerical staff were requested, and that the resume request was, in fact, a request for best and final offers.

We do not agree that the procedures used here complied with regulatory requirements. First, it is evident that the Foundation did not consider price in evaluating proposals, even though agencies may not ignore price in evaluating proposals. FAR, § 15.610(a). Also, even assuming that the Foundation's requests for additional information constituted adequate discussions, the Foundation did not comply with FAR, § 15.611 concerning best and final offers. Agencies are required to conclude discussions by notifying offerors that discussions are concluded and calling for best and final offers, with a common cutoff date and time that allows a reasonable opportunity for the submission of written best and final offers. These requirements simply were not met here, and thus we cannot conclude that NHS had a meaningful opportunity to submit a best and final offer or that all offerors were given a common cutoff time for their final submissions. Accordingly, we sustain NHS' protest.

The Foundation informs us that the current contract covers the period through September 30, 1985, and provides for the negotiation of additional 1-year options. We are recommending that the Foundation not negotiate an additional 1-year contract with the incumbent but rather resolicit using the appropriate procedures.

NHS requests reimbursement of the costs of preparing its proposal and the costs of filing and pursuing its protest, including attorney's fees. We will allow a protester to recover its proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended is not one delineated in 4 C.F.R. §§ 21.6(a)(2-5). In light of the recommendation here, and since NHS, by the agency's own admission, was one of three firms in line for the award, we believe it had a substantial chance for receiving the award. Therefore, the recovery of proposal preparation costs is granted. 4 C.F.R. § 21.6(e).

Our Regulations limit the recovery of the costs of filing and pursuing a protest to situations where the protester unreasonably is excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). We have construed this

to mean that where the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of the costs of filing and pursuing the protest are generally inappropriate. See *Federal Properties of R.I., Inc.*, B-218192.2, May 7, 1985, 85-1 C.P.D. ¶ 508 and *The Hamilton Tool Company*, B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132.

In this case, however, the basic 1-year contract has almost expired. Therefore, although pursuant to our recommendation NHS will have an opportunity to compete for subsequent contracts, it has lost any opportunity to compete for and be awarded the contract for the basic contract period. Accordingly, the basis for our denial of the costs of filing and pursuing a protest, the opportunity to compete for essentially the same solicitation, which was present in *Federal Properties* and *The Hamilton Tool Company, supra*, is not present here. Therefore, we allow recovery of NHS' costs of filing and pursuing the protest, including attorney's fees.

[B-219161]

Appropriation—Deficiencies—Anti-Deficiency Act—Loans Guaranteed in Excess of Appropriations

The Department of Education administers a variety of entitlement programs within the Guaranteed Student Loan Program. In recording and reporting obligations, the Department should: (1) treat loan guarantees as contingent liabilities, recording obligations as default payments are required; and (2) record obligations under subsidy provisions of the program based on best estimates of payment requirements, making any adjustments as they become necessary. Since both types of obligations are authorized by law, recording such mandatory obligations, even if in excess of available funds, would not violate the Anti-Deficiency Act.

Matter of: Department of Education: Recording of obligations under the Guaranteed Student Loan Program, October 2, 1985:

This responds to a request by the Deputy Under Secretary for Planning, Budget and Evaluation, Department of Education (Department) for our opinion as to the proper method for recording and reporting obligations for certain program activities under the Guaranteed Student Loan Program. Specifically, the Department has requested that we review its traditional method of recording and reporting obligations for the "mandatory" or entitlement portions of the Guaranteed Student Loan Program, and that we determine whether current practices are consistent with the requirements of the Anti-Deficiency Act, 31 U.S.C. §1341 (1982). As discussed in further detail below, it is our view that the Department should cease its current practice of limiting the recording and reporting of actual and estimated obligations for entitlement payments to the level of available budgetary resources. The Department would not violate the Anti-Deficiency Act if the total obligations it records for these mandatory payments exceed available resources.

BACKGROUND

The Student Loan Guaranteed Program, was established by the Congress in part B of title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1071-87-2 (1982). Through the program, the Federal Government provides a variety of assistance to qualifying borrowers, lenders, and to State and nonprofit institutions, through loan guarantees, interest subsidies, payment of benefits, and allowances. Some program activities are carried out at the discretion of the Secretary of Education. See, *e.g.*, 20 U.S.C. § 1078(f) (special payments to State and nonprofit institutions for administrative costs). Others, although administered by the Secretary, constitute entitlements, for which beneficiaries qualify by meeting the criteria specified in the Act. See, *e.g.*, 20 U.S.C. § 1078 (interest subsidy); 20 U.S.C. § 1080 (default payments under loan guarantee agreements); 20 U.S.C. § 1087 (loan repayments at death, disability or bankruptcy of borrower).

The Department's submission, in describing its current practices for recording and reporting obligations under the mandatory provisions of the Guaranteed Student Loan Program, distinguishes between obligations arising from loan guarantees and those arising from subsidies:

> 1. Sections 430 and 431 [of the Higher Education Act of 1965, 20 U.S.C. §§ 1080–81] direct the Secretary to pay the lender upon the *default* of student borrowers. Section 437 directs the Secretary to repay loans in *case of the death, disability,* or *bankruptcy* of student borrowers. Obligations are recorded and reported upon the receipt and approval of claims for payment. Obligations are not made and are not recorded or reported in excess of available budgetary resources.
>
> 2. Section 428(a)(3)(A) [20 U.S.C. § 1078(a)(3)(A)] directs the Secretary to pay a portion of the *interest* due to the lender on behalf of student borrowers. Section 438(b)(1) [20 U.S.C. § 1087-1(b)(1)] directs the payment of *special allowances* to lenders. Recorded and reported obligations are estimates based on an estimate of outstanding loans at the end of each quarter. Payments occur in the following quarter, at which time adjustments are made to the amounts of previously recorded estimated obligations. Obligations in excess of resources are not reported. (Emphasis in original.)

The Department states that obligations are considered "recorded" when posted in the Department's financial accounting system, and are "reported" by inclusion in the official reports of the Department.

According to the Department, it is difficult to estimate in advance the specific amount that it will be required to pay out under the mandatory portion of the Guaranteed Student Loan Program, as costs of the program are directly affected by changes in economic conditions. The Department states that it frequently seeks—and is provided—supplemental appropriations in cases where its estimates prove to be low. Where supplemental appropriations are not provided in sufficient amounts, or are not timely enacted, the Department (1) ceases all obligational activity and payments under its discretionary programs, and (2) limits the recording and reporting of obligations for mandatory activities to the amount of available

budgetary authority. The Department's submission seeks our views as the propriety of this latter action and whether it may obligate funds for mandatory expenditures in excess of available budgetary authority without violating the Anti-Deficiency Act.

DISCUSSION

The first issue concerns the manner in which the Department has been and should be recording actual and, where appropriate, estimated mandatory obligations arising under the Guaranteed Student Loan Program. These mandatory obligations are of two types—loan guarantees and subsidies—and each will be considered in turn.

Recording Obligations Arising From Loan Guarantees. This Office has previously addressed the question of obligating funds under Federal loan guarantee programs. In a recent case involving the Farmers Home Administration's guaranteed loan programs, we stated the rule that loan guarantees are to be accounted for as contingent liabilities, with no recordable obligation arising until a default has occurred and the Government's liability established:

> * * * Our Office has taken the position that a loan guarantee is only a contingent liability that does not meet the criteria for a valid obligation under 31 U.S.C. § 200. Ordinarily, when a loan is guaranteed by the Federal Government, an obligation is only recorded if, and when, the borrower defaults—and a Federal outlay is necessarily required to honor the guarantee. This will not usually take place, if at all, in the same fiscal year in which the loan guarantee was initially approved. * * * Thus, we have held that it is not necessarily required that funds be available in the underlying revolving fund, or elsewhere, before the agency may approve a loan guarantee so long as the guarantee itself is authorized and within whatever annual monetary limits Congress has placed on it. 60 Comp. Gen. 700, 703 (1981).

See also B-214172, February 20, 1985, 64 Comp. Gen. 282; 58 Comp. Gen. 138, 147 (1978).

As we understand the Department's procedures for recording and reporting obligations arising out of its loan guarantee program, they conform in part to the principles set forth in the quoted decision. That is, the Department does not record an obligation until one of the contingencies set forth in the statute (loan default, or the death, disability, or bankruptcy of the borrower) has occurred. This is the correct procedure. However, we do not believe that the Department can legitimately refuse to record an obligation once one of the contingencies has occurred, even if the Department does not have sufficient budgetary resources to liquidate the total obligations so recorded. Under the terms of the statute (and presumably the loan guarantee agreement as well), the Department becomes legally obligated to reimburse the beneficiary of the guarantee for any loss it has suffered once it has verified that the borrower has defaulted, or that any one of the other contingencies has occurred. The nature of the Department's obligation in this respect is clearly set forth in 20 U.S.C. § 1080 as follows:

> Upon default by the student borrower on any loan covered by Federal loan insurance pursuant to this part * * *, the insurance beneficiary shall promptly notify the Secretary, and the Secretary shall if requested (at that time or after further collection efforts) by the beneficiary * * * pay to the beneficiary the amount of the loss sustained by the insured upon that loan as soon as that amount has been determined.[1]

Our holding in 39 Comp. Gen. 422 (1959), which involved a similar issue, is relevant here. In that decision we said the following:

> The general rule is that expenditures are properly chargeable to the appropriation for the fiscal year in which the liability therefore was incurred. There can be no doubt but that when administrative action is taken to grant pay increases effective on a specified date, there is imposed a legal liability upon the Government for payment of the additional compensation. Such action is sufficient to create an obligation against the appropriation current at the time the liability is incurred. The fact that the appropriation thereby obligated may be insufficient to discharge the obligation is immaterial insofar as determining when the obligation arises and the appropriation properly chargeable therewith. *See* 17 Comp. Gen. 664; 18 *id.* 363; 31 *id.* 608, 38 *id.* 81. 39 Comp. Gen. at 424-25.

The decision also stated that an agency's failure to properly record and report obligations as they occur "would violate the reporting requirements" of 31 U.S.C. § 1501(b). *Id.* at 425.

Similarly, when the borrower of a guaranted student loan defaults, the Department becomes legally liable to pay the beneficiary of its guarantee and a valid obligation is thus created. The Department does not have the authority or the discretion, for whatever reason, to alter the date on which the Government's obligation to honor its guarantee actually arises by artificially changing the manner is which the obligation is recorded.

Recording Subsidy Payments. The second category of obligations at issue here are those resulting from mandatory program payments to lenders, including interest subsidies, under 20 U.S.C. § 1078(a), and special allowances, under 20 U.S.C. § 1087-1(b)(1). Unlike loan guarantees which are contingent liabilities until loan default or some other triggering event has occurred, these subsidy payments are in the nature of firm obligations of an indeterminate amount. As is true of other entitlement programs, these obligations arise by operation of law. Because, however, the number of eligible beneficiaries will vary—depending on external factors—the exact amount of the Government's obligation cannot be determined in advance (although it may of course, be estimated). Under the statute, the Department is legally obligated to pay these amounts to the lender. *See* 20 U.S.C. §§ 1078(a)(3)(A), 1087-1(b)(3).

In similar cases involving subsidy or other entitlement programs, our decisions have emphasized that the Government's "obligation" is the full amount required for payment under the applicable statute, even though that actual amount may not be finally determined until later. Thus, in B-164031(3).150, September 5, 1974, we

[1] Of course, even under this provision the Department might not be able to make the required *payment* on a defaulted loan until sufficient funds were available for it to do so. The unavailability of funds, however, should not have any impact on the agency's responsibility to record obligations as they occur.

held in essence that the obligation of the Secretary of Health, Education, and Welfare to make quarterly grant entitlement payments to States arose by operation of law, and that an erroneous estimate recorded by the Secretary did not alter this obligation. Similarly, in 63 Comp. Gen. 525 (1984) we held that when amounts are payable to recipients based on a statutory formula, the actual amount that is ultimately determined to be payable under the formula may be treated as obligated whether or not formal recordation has occurred. It has been our underlying position in these and other cases that under 31 U.S.C. § 1501(a)(5)(A),[2] the appropriate amount to be recorded initially as an obligation is the agency's best estimate of the Government's ultimate liability under the relevant entitlement legislation. *See* B-212145, September 27, 1983; 63 Comp. Gen. 525 (1984). Subsequent adjustments to the recorded estimate should be made if necessary.[3]

In accordance with the foregoing, it is our view that henceforth the Department should record obligations for mandatory subsidy payments (including special allowances) based on its best estimate of what those obligations are, even if the total of all such obligations exceeds available budgetary resources. Furthermore, if the estimate subsequently proves to be erroneous, the Department should make whatever adjustments are necessary so that the total of recorded obligations accurately reflects the actual amount of obligations incurred.

ANTI-DEFICIENCY ACT

The remaining issue is whether the Department would violate the Anti-Deficiency Act's prohibition on obligating or expending funds in excess of available appropriations if the obligations it records for either type of mandatory payment—guarantees or subsidies—exceeds available budgetary resources.[4] As indicated in the submission, the Department's past reluctance to record obligations for both types of activities in amounts exceeding available resources resulted from its desire to avoid any possible violation of

[2] This section reads as follows:

(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—

* * * * * * *

(5) a grant or subsidy payable—

(A) from appropriations made for payment of, or contributions to, amounts required to be paid inspecific amounts fixed by law or under formulas prescribed by law * * *.

[3] In an earlier case, we stated that we had no objection to the Civil Aeronautics Board's recording of obligations for mail rate subsidy payments at the time of payment rather than as obligations arose. B-126372, September 18, 1956. We stated that estimates of finalized obligations should not be recorded as obligations under the predecessor to 31 U.S.C. § 1501(a)(5). To the extent that decision is inconsistent with our opinion herein, it is overruled.

[4] Since the analysis of this issue is essentially the same whether guarantee payments or subsidy payments are involved, they are discussed together.

the Anti-Deficiency Act. The relevant portions of the Anti-Deficiency Act are set forth at 31 U.S.C. § 1341(a)(1) as follows:

> An officer or employee of the United States Government * * * may not—
> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

The prohibitions contained in the Anti-Deficiency Act are not intended to ensure compliance with the provisions of 31 U.S.C. § 1501, which govern the largely ministerial task of recording obligations as they arise. See, e.g., B-133170, January 29, 1975. In fact, if an agency incurs obligations in excess of available appropriations without authority to do so, the agency would be in violation of the Anti-Deficiency Act regardless of whether the obligations were recorded by the agency. 62 Comp. Gen. 697, 700 (1983). Nevertheless, we do not believe that the Department would violate the Anti-Deficiency Act if the obligations in question are incurred to fulfill the mandatory provisions of the Guaranteed Student Loan Program.

The prohibitions contained in the Anti-Deficiency Act are directed at discretionary obligations entered into by administrative officers. See, e.g., 42 Comp. Gen. 272, 275 (1962); 63 Comp. Gen. 308, 312 (1984). As our Office has said, the Anti-Deficiency Act specifically "provides an exception for obligations which are authorized by law to be made in excess of or in advance of appropriations." B-196132, October 11, 1974. *See also* 61 Comp. Gen. 586 (1982); B-156932, August 17, 1965.

Both types of mandatory obligations at issue here fall into the category of obligations authorized by, or perhaps even mandated by, law. Thus, when Congress authorizes the Department to extend loan guarantees in face amounts which may at any time far exceed available funding, and then requires the Department to promptly pay beneficiaries of those guarantees upon default by the borrower, it is expressly authorizing the Department to incur obligations in excess of or in advance of appropriations.[5]

In clear recognition of the possibility that default payment obligations may exceed available resources, 20 U.S.C. § 1081(b) provides that if, at any time, moneys in the Student Loan Discount Fund (from which default payments are to be made) "are insufficient to make payments in connection with the default of any loan insured

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[5] In this regard, we note that the Congress has historically provided supplemental appropriations to the Department to cover obligations in excess of amounts provided under the regular appropriation acts. *See, e.g.*, H.R. Rep. No. 402, 97th Cong., 2d Sess. 11 (1982); S. Rep. No. 224, 96th Cong., 1st Sess. 83 (1979). *See also* H.R. Rep. No. 911, 98th Cong., 2d Sess. 122 (1984), which reads as follows:

> It is possible that the amount requested will not be adequate to cover the full year cost of the program as presently authorized due to changes in program participation and interest rates. Since this is an entitlement program, a supplemental budget request will be required if program appropriation levels are inadequate.

by the Secretary [of Education]", the Secretary is authorized, to the extent provided in advance in an appropriation act, to borrow needed funds from the Secretary of the Treasury. Thus, the statutory language itself contemplates the existence of a possible deficiency situation, providing another indication that the Anti-Deficiency Act does not apply. *See* 61 Comp. Gen. 644, 650 (1982).

The situation with respect to subsidy payments is essentially the same. As stated earlier, the Department's obligation to pay interest subsidies (including special allowances) to lenders arises by operation of law and is mandated by the statute. None of the Department's administrative officers has any control over the amount the Department will be required to pay under the statutory provisions which state that the holder of a loan has a "contractual right" against the United States to receive these payments. 20 U.S.C. §§ 1078(a)(3)(A), 1087-1(b)(3). This is definitely not the type of discretionary expense the Anti-Deficiency Act was intended to restrict, and clearly falls within the "unless authorized by law" exception contained in that Act.

To summarize, it is our position that the Department should record and report both types of mandatory obligations under the Guaranteed Student Loan Program as they arise regardless of the total amount of budgetary resources that are available. In doing so, the Department should record actual obligations or, where appropriate, its best estimate of what those obligations will be, making any adjustments that are subsequently required. The recording of such obligations by the Department, even if in excess of available funding, would not violate the Anti-Deficiency Act.

[B-216753]

Subsistence—Actual Expenses—Meals

Employee was authorized actual subsistence expenses to perform temporary duty in Washington, D.C. He incurred transportation expenses to obtain meals for distances ranging from 2 to 112 miles, roundtrip. Federal Travel Regulations (FTR) allow expenses of travel to obtain actual subsistence expenses, but such expenses must be necessarily and prudently incurred and reasonable in nature. Where the expenses claimed appear largely unnecessary and unreasonable, and the employee failed to provide additional justification, the agency acted properly in denying the employee's claim.

Matter of: Eugene J. Maruschak—Transportation Expenses Incurred to Obtain Meals While on Temporary Duty, October 3, 1985:

This decision is in response to an appeal by Mr. Eugene J. Maruschak, an employee of the Internal Revenue Service (IRS), Department of the Treasury, from the settlement action by our Claims Group, dated July 1, 1982. The settlement sustained the determination by IRS that Mr. Maruschak is not entitled to reimbursement of transportation expenses incurred to obtain meals

while on temporary duty. For the reasons stated hereafter, we affirm the settlement action by our Claims Group.

BACKGROUND

Mr. Maruschak was detailed from Philadelphia, Pennsylvania, to perform official duty at the IRS National Office in Washington, D.C., during the period June 22 through December 4, 1981. Reimbursement for his expenses on temporary duty was authorized on the actual subsistence expense basis at the maximum rate of $75 per day. Mr. Maruschak was authorized to use his privately owned vehicle (POV) while performing his temporary duty assignment. Mr. Maruschak claimed reimbursement for travel in his POV, including mileage and parking expenses, to obtain lunches and dinners on 17 occasions. The roundtrip distances driven to obtain the lunches and dinners were 7, 10, 23, 16, 10, 20, 6, 29, 27, 2, 112, 28, 28, 5, 8, 9, and 23 miles. The total claim for transportation expenses to obtain meals was $76.32.

Mr. Maruschak's contention is that when reimbursement is on the actual subsistence expense basis, the expenses of transportation between places of lodging or business and places where meals are taken are allowable when claimed as part of subsistence, rather than as necessary transportation, provided the total amount claimed on the days the expenses were incurred does not exceed the applicable daily rate. He also states that only when travel to places where meals are obtained is claimed as necessary transportation, not as subsistence, is there a requirement for specific justification of expenses incurred. The claimant says that, since the total amount he spent for meals, transportation to obtain meals, and other miscellaneous expenses on a daily basis did not exceed 45 per cent of the maximum amount allowed for a high rate geographical area, such expenses should be accepted as being reasonable without further justification.

Mr. Maruschak contends, in summary, that reimbursement of the claimed expenses is allowed under the Federal Travel Regulations (FTR) and the IRS Travel Regulations and that the action by the IRS in disallowing his claim is arbitrary and capricious.

The position taken by IRS is that, taking into consideration the location where the temporary duty was performed, Washington, D.C., and the fact that Mr. Maruschak was able to obtain meals throughout the majority of the temporary duty assignment without incurring transportation expenses, the transportation expenses to obtain meals apparently were incurred as a personal choice and were not necessary to the detail. The IRS further states that Mr. Maruschak has failed to provide the agency with a statement explaining the necessity for driving to obtain meals.

OPINION

Under the provisions of section 5702(c) of Title 5, United States Code (1982), and the FTR, an agency is authorized to reimburse employees for the actual and necessary expenses of official travel where the employees perform temporary duty at a high rate geographical area. Actual subsistence expense reimbursement in FTR para. 1-8.2b covers the same type of expenses, including meals, lodging, and transportation between places of lodging or business and places where meals are taken, as are normally covered by the per diem allowance provision in FTR para. 1-7.1b.

The FTR also provides that an employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business. FTR para. 1-1.3a. Further, para. 1-1.3b of the FTR states that traveling expenses which will be reimbursed are confined to those expenses essential to transacting official business.

Paragraph 1-8.3b of the FTR outlines the responsibilities of an agency in authorizing and reimbursing actual subsistence expenses incurred by employees of the agency. In essence, those responsibilities are to establish necessary administrative arrangements for an appropriate review on the justification for travel on the actual subsistence expense basis and of the expenses claimed by a traveler. The stated purpose of the administrative arrangements is to assist the head of the agency or his designee in determining whether (1) the claimed expenses are allowable subsistence expenses, and (2) whether they were necessarily incurred in connection with the specific travel assignment. Thus, an agency determination as to the reasonableness of actual subsistence expenses is required.

Applying the above-stated law and regulations to Mr. Maruschak's claim, the employee's travel to obtain meals while performing temporary duty on the actual subsistence basis is an allowable subsistence expense. However, travel expenses to obtain meals must be necessarily and prudently incurred in connection with the temporary duty assignment and must be reasonable in nature. An employee is entitled to reimbursement only for reasonable expenses incurred incident to a temporary duty assignment since, as stated earlier, FTR para. 1-1.3a requires travelers to act prudently in incurring expenses.

Here, Mr. Maruschak's temporary duty site was Washington, D.C. While performing temporary duty in Washington, D.C., Mr. Maruschak stayed at the Oakwood Garden Apartments in Alexandria, Virginia, and at the Georgetown Mews Apartments in Washington, D.C. There are numerous restaurants and eating facilities located in close proximity (within walking distance) of the Georgetown Mews Apartments at which Mr. Maruschak could have eaten his meals. Therefore, there was no apparent necessity for him to have incurred any expenses in traveling to obtain meals while stay-

ing at the Georgetown Mews. Some travel to obtain meals during the employee's stay at the Oakwood Garden Apartments may have been necessary. However, many of the distances involved appear to be excessive for this purpose.

As stated earlier, under the provisions of FTR para. 1-8.3b, IRS is required to determine whether actual subsistence expenses, including travel to obtain meals, were necessarily incurred and were reasonable. The IRS requested Mr. Maruschak to furnish information as to the necessity for his travel to obtain meals but he has not provided the agency with this information. In order for IRS to make the required determination, it is incumbent upon Mr. Maruschak to offer an explanation as to the necessity for and reasonableness of his travel to obtain meals.

CONCLUSION

Given the questionable nature of the expenses claimed here by Mr. Maruschak and his failure to provide more detailed justification when requested, we conclude that IRS did not act arbitrarily in denying his claim in full. Therefore, based on the record before us, the settlement action by our Claims Group dated July 1, 1982, is affirmed.

[B-219573.2]

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

General Accounting Office (GAO) will not consider a new protest of solicitation improprieties prior to bid opening where an earlier, essentially identical protest was dismissed for failure to comment on the agency report.

Matter of: Pacific Lighting Energy Systems, October 4, 1985:

Pacific Lighting Energy Systems (Pacific) protests invitation for bids (IFB) No. N62474-85-B-5545 issued by the Department of the Navy (Navy) for the procurement of electrical and steam energy. Pacific objects to the use of advertised, rather than negotiated, procurement procedures as well as to several requirements of the IFB, and has incorporated, by reference, two prior protests involving the procurement of these services, one closed after withdrawal of a prior solicitation and the other dismissed after Pacific failed to comment timely on the agency report. We dismiss the protest.

Bid opening for this solicitation originally was set for July 16, 1985. Pacific first filed a protest with our Office on July 11. The protest essentially restated a prior Pacific protest concerning another solicitation for the same services (solicitation No. N62474-83-B-2934). Pacific received the agency's report on August 20; however, the firm failed to comment on the report until September 5, well after the 7 working day comment period provided in our Bid

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Protest Regulations. *See* 4 C.F.R. § 21.3(e) (1985). We therefore dismissed Pacific's protest.

During the exchange of submissions to our Office in connection with Pacific's first protest of this solicitation, the Navy extended bid opening several times, ultimately selecting September 12 as the bid opening date. On September 9, Pacific filed this protest, restating, in substantial part, the arguments it asserted in its untimely comments to the agency report. Under a separate submission, also filed on September 9, Pacific requested that we incorporate the record for the two earlier protests and invoke our express option provisions (4 C.F.R. § 21.8), and it waived an agency report.

The protest system endorsed by the Competition in Contracting Act of 1984, 41 U.S.C. 251 note (CICA), implemented by our Regulations, is designed to provide for the expeditious resolution of protests with only minimal disruption to the orderly process of government procurement. *See* 31 U.S.C. § 3554 (West Supp. 1985). To that end, CICA requires, generally, that the agency withhold contract award or, if a contract was awarded within 10 days prior to the protest, direct the contractor to cease performance while the protest is pending. The agency is required to report within 25 working days from its receipt of notice of the protest from our Office, 31 U.S.C. § 3553, and the protest must be resolved by our Office within 90 working days. 31 U.S.C. § 3554.

Our Regulations technically permit the filing of a protest against apparent solicitation improprieties before bid opening, as Pacific has done here. Neither those Regulations nor CICA, however, contemplate the pre-bid opening resubmission and reconsideration of a protest identical to one already dismissed by our Office for the protester's failure to meet the 7-day comment requirement. Accepting such as refiling would, for example, permit a protester that neglected its obligation to comment or express interest in the protest to forestall a contract award or otherwise delay a procurement simply by resubmitting its comments on the eve of bid opening as a protest. This clearly would be inconsistent with the fair, orderly and expeditious procurement of services and resolution of protests intended by Congress and set forth in CICA. A protester that fails to comment on the agency report or express interest in the protest in a timely fashion in effect has abandoned its protest for our purposes, and will not be permitted to resubmit previously untimely comments as a new protest or otherwise revive the complaint.

As stated above, Pacific has raised no new protest issues; it merely has resubmitted its previously untimely comments to the agency report and sought to include its prior protests in this complaint. Under these circumstances, we will not consider the merits of Pacific's protest.

The protest is dismissed.

[B-219455.5]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Timeliness

Protester alleges that request for reconsideration was untimely because it relied on the caption on the first page of a decision of the Comptroller General of the United States and the caption provided an insufficient address for protester's courier to effectuate delivery. Nevertheless, dismissal of request for reconsideration is affirmed because protester did not use the address prescribed in our Bid Protest Regulations, 4 C.F.R. 21.1(b).

Matter of: NJCT Corporation—Request for Reconsideration, October 7, 1985:

NJCT Corporation (NJCT) requests reconsideration of our decision in *NJCT Corporation—Request for Reconsideration*, B-219455.3, Aug. 21, 1985, 85-2 C.P.D. ¶ 206, in which we held that NJCT's request for reconsideration of *NJCT Corporation*, B-219455, July 22, 1985, 85-2 C.P.D. ¶ 70, was untimely filed. We deny the request for reconsideration.

NJCT states that its request for reconsideration was untimely because it used the caption, "Comptroller General of the United States, Washington, D.C. 20548," which is printed on the first page of our decisions, as our address for its request for reconsideration. NJCT states that the address was insufficient for the private mail courier which NJCT employed to effectuate delivery. Accordingly, NJCT had to send its request for reconsideration again and that was untimely filed. The address NJCT used the second time was "Office of Gen Acct, US Gen Acct Office, Room 1029, 441 G Street, N.W., Washington, D.C. 20548." NJCT states that its reconsideration request should be considered since it relied on the above-quoted caption to address its request for reconsideration.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(b) (1985), state that protests must be addressed as follows: "General Counsel, General Accounting Office, Washington, D.C. 20548, Attention: Procurement Law Control Group." This address is specified in our regulations in order to assure protesters that mail will be correctly received and routed to the office within the General Accounting Office which is responsible for handling these matters. *Gary's Disposal, Inc.*, B-207864, July 23, 1982, 82-2 C.P.D. ¶ 72. It is our experience that protests so addressed are properly delivered.

NJCT did not use the address specified in our regulations. We have found that protests which are not addressed to the address contained in our Regulations and not received within the prescribed 10 working days are untimely. *Gary's Disposal, Inc.*, B-207864, *supra*. *Maryland T Corporation*, B-192247, July 19, 1978, 78-2 C.P.D. ¶ 52. This rule also applies to requests for reconsideration. 4 C.F.R. § 21.12(b).

The prior decision is affirmed.

[B-218672]

Meals—Furnishing—Airplane Travel

Absent specific statutory authority, a Federal agency may not provide meals at Government expense to its officers, employees, or others. This general prohibition extends to in-flight meals served on Government aircraft, although it does not apply to government personnel in travel status, for whom there is specific statutory authority to provide meals. Hence, the National Oceanic and Atmospheric Administration may not provide cost-free meals to those aboard its aircraft on extended flights engaged in weather research, except for Government personnel in travel status.

Matter of: Provision of Meals on Government Aircraft, October 17, 1985:

A certifying officer of the National Oceanic and Atmospheric Administration (NOAA) requests a decision concerning whether NOAA may provide meals at Government expense to persons on Government aircraft during extended flights while engaged in severe weather research.[1] We conclude that NOAA may not provide cost-free meals to persons aboard these flights except for Government personnel in travel status.

Background

The National Oceanic and Atmospheric Administration maintains and operates a fleet of aircraft for the purpose of severe weather research and forecasting. During severe weather situations, such as hurricane warnings, NOAA aircraft participate in extended flights, sometimes 8 hours or longer. Persons on these flights include civilian NOAA employees, NOAA Commissioned Corps personnel, and other individuals who are not employed by the Government, such as media and research people. The National Oceanic and Atmospheric Administration has requested a decision concerning the propriety of serving free meals to those aboard these aircraft.

Analysis and Conclusion

We have consistently held that, absent specific statutory authority, an agency may not provide free meals, beverages, or other refreshments to Government personnel because this is not a necessary expense of the agency.[2] Similarly, we have disallowed the provision of free food and drink, absent specific statutory authority, to individuals who are not Government personnel. 57 Comp. Gen. 806 (1978).

The appropriation statute applicable to NOAA provides for "necessary expenses of activities authorized by law for the National Oceanic and Atmospheric Administration, including acquisition,

[1] This decision is issued in response to a request from Auke Hart, Certifying Officer of the Department of Commerce, for a decision concerning the providing of free meals, beverages or other refreshments on NOAA's weather research aircraft.

[2] See 47 Comp. Gen. 657 (1968), and B-188078, May 5, 1978.

maintenance, operation and hire of aircraft." Public Law 98-411, approved August 30, 1984, 98 Stat. 1547. This appropriation does not provide for the serving of free in-flight meals to NOAA personnel or others. Furthermore, we can find no authority to classify the serving of free meals as a necessary expense of the agency.

Specific statutory authority does exist, however, for the Government to pay for the meals of Government personnel in travel status.[3] Thus, we have permitted a contracting officer to procure lodgings and meals for civilian personnel on temporary duty (in travel status) and furnish them to the personnel at no charge, provided that the total cost does not exceed the maximum per diem allowance. 60 Comp. Gen. 181 (1981). We applied the same rule to the uniformed services, in a case involving the NOAA Corps. *Lieutenant Commander William J. Harrigan,* 62 Comp. Gen. 308 (1981). Thus, we conclude that NOAA may provide meals to Government personnel aboard its aircraft who are in travel status.[4] The agency may not provide cost-free meals to Government personnel not in travel status or to other individuals, however.

The certifying officer inquired as to the effect of providing cost-free meals on the claims for travel expenses of NOAA personnel. Where meals are furnished without charge by a Federal Government agency (at a temporary duty station), an appropriate deduction shall be made from the authorized per diem rate.[5]

The issues presented are addressed accordingly.

[B-220293.2]

Contracts—Protests—General Accounting Office Procedures—Constructive Notice

Protester's assertion that it was unaware of the requirement to file protest with General Accounting Office (GAO) within 10 working days after protester learned of adverse agency action on its protest initially filed with procuring agency is not a basis for consideration of the protest since the protester is charged with constructive notice of GAO's Bid Protest Regulations through their publication in the Federal Register.

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[3] Civilian personnel, traveling on official business away from their designated post of duty, are entitled to a per diem allowance for travel. 5 U.S.C. § 5702. Similarly, members of the uniformed services are entitled to travel allowances for travel performed under orders. 37 U.S.C. § 404.

[4] The determination of which employees are in travel status and entitled to travel allowances, and hence eligible for free in-flight meals, is a matter of agency discretion within applicable regulations. Thus, no per diem shall be allowed for travel periods of less than 10 hours, unless the travel period is 6 hours or more and begins before 6 a.m. or ends after 8 p.m. Federal Travel Regulations, paragraph 1-7.6d(1), *incorp. by ref.,* 41 C.F.R. § 101-7.003. The uniformed services have a similar 10-hour rule. Joint Travel Regulations, Vol. 1 (1 JTR), paragraph M4201-17. Agencies have discretion not to pay per diem allowances at all for travel of less than 24 hours. *Baker and Sandusky,* B-185195, May 28, 1976. Thus, for example, on NOAA flights of 10 hours or less which depart from and return to Miami, NOAA personnel whose permanent duty station is Miami would not be eligible for per diem—or free meals—but personnel stationed elsewhere may be.

[5] FTR, para. 1-7.6f; 1 JTR para. M4205-4.

Matter of: Milwaukee Industrial Clinics, S.C.—Reconsideration, October 18, 1985:

Milwaukee Industrial Clinics, S.C. (Milwaukee) requests reconsideration of our notice of September 19, 1985, which dismissed its protest that a provision in invitation for bids No. RO-V-86-0001, issued by the Department of Health and Human Services (HHS), was restrictive.

We dismissed the protest as untimely because it was not filed with our Office within 10 working days following initial adverse agency action on a protest filed with HHS. Our action was in accordance with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985), which provide that, when a protest has first been filed with the contracting agency, any subsequent protest to this Office must be filed within 10 working days after the protester knew or should have known of initial adverse agency action on its protest to the agency.

We affirm the dismissal.

The record shows that Milwaukee initially filed a protest against the solicitation specification with the contracting agency on August 19, 1985, and that the contracting officer denied the protest by letter of August 21. Milwaukee then requested that the contracting officer reconsider its protest, and, on September 18, it filed its protest with this Office. Since Milwaukee's protest to our Office was not filed until September 18, almost 1 month after the intitial adverse agency action on its protest to HHS, we dismissed it as untimely under section 21.2(a)(3), *supra*.

In its request for reconsideration, Milwaukee asks that we waive our timeliness rules here because it was not familiar with our procedures and it consequently followed the advice of its congressman in pursuing its protests to the agency and our Office. Our regulations do provide for consideration of protests that are not timely filed when a significant issue is raised or "for good cause." *See* 4 C.F.R. § 21.2(c). This protest does not, in our judgment, raise a significant issue, and the good cause exception is reserved for circumstances where some compelling reason beyond the protester's control prevented the filing of a timely protest. *Vycor Corp. et al.*, B-212687 *et al.*, Feb. 15, 1984, 84-1 C.P.D. ¶ 205. That is not the situation here. The protester simply did not meet its responsibility to assure that the timeliness requirements were met. In this connection, we point out that, since our regulations are published in the Federal Register (*see* 49 Fed. Reg. 49,417 (1984)), protesters are charged with constructive notice of their contents, and, therefore, a protester's professed unawareness of these published regulations is not a proper basis for waiving their requirements. *Agha Construction—Reconsideration*, B-218741.3, June 10, 1985, 85-1 C.P.D. ¶ 662.

[B-217996]

Telephone—Long Distance Calls—Government Business Necessity—Certification Requirement—Statistical Sampling Use.

Administrative certification by head of agency or designee that long distance telephone calls are necessary in the interest of the Government may be made on an estimate of the precentage of similar toll calls in the past that have been official calls provided the verification process provides reasonable assurance of accuracy and freedom from abuse.

Vouchers and Invoices—Sampling Procedures—Use of Statistical Sampling

Administrative certification of long distance telephone calls under 31 U.S.C. 1348(b) does not carry with it financial responsibilities attendant to the certification of a voucher for payment, but may be relied on by certifying official who does certify voucher for payment. 63 Comp. Gen. 241 (1984); 57 Comp. Gen. 321 (1978) explained.

Matter of: U.S. Nuclear Regulatory Commission—Certification of long distance telephone tolls, October 21, 1985:

An authorized certifying officer for the United States Nuclear Regulatory Commission (NRC) has requested an advance decision on whether a percentage of a bill for a large number of long distance telephone calls may be certified based on an estimate of the number of official calls that are derived from past agency experience. For the reasons given below, we think such a certification may be used if steps are taken to reasonably assure that the calls paid for meet the statutory requirements.

FACTS

Under the Prompt Payment Act, 31 U.S.C. § 3901 *et seq.*, Federal agencies must pay interest on late payments for services. The NRC incurs such expenses regularly with regard to its long distance telephone calls. Under 31 U.S.C. § 1348(b) (1982), before appropriated funds become available for payment for long distance telephone calls, the calls must be certified as "necessary in the interest of the Government." 31 U.S.C. § 1318(b). In his letter the certifying officer explains how the NRC's certification/collection procedures cannot be completed within sixteen days of the required payment date, as prescribed by the Prompt Payment Act, 31 U.S.C. § 3902(b)(3) (1982). As pointed out, in the past we have allowed agencies to certify official calls based on a statistical sample. *See* 63 Comp. Gen. 241 (1984) and 57 Comp. Gen. 321 (1978). The certifying officer contends that the NRC, although it makes many long distance toll calls, does not place enough toll calls to make statistical sampling feasible. Therefore, the NRC would like to certify a percentage of its long distance tolls as "official" based on the historical experience of "official" toll calls made and verified in the past year.

The NRC currently produces a printout of all long distance telephone calls covering a billing period and distributes a copy to its various organizational units. NRC asks employees from whose telephones the calls were made to state whether they were official or personal calls. During the 12-month period official calls amounted to 94.26 percent of the calls on one telephone number and 98.55 percent of the calls on the second number covered by the bill. Significantly less that 1 percent of all the calls were uncertified as either official or personal. NRC proposes to pay 95 percent of the toll charges based on this historical record pending completion of the internal verification process. The formal verification process, once completed, will be the basis for a final adjustment of payment in subsequent months. The NRC also proposes that it will review its payments at least once a year to determine its most recent experience as to the level of unofficial toll calls. According to the NRC, since the adjustments that affect the unpaid portion of the telephone charges relate primarily to charges for personal calls collected by the agency but for which it is not liable, it does not anticipate that the telephone company will charge NRC interest for these late payments.

DISCUSSION

In reviewing this proposal, we agree with the conclusion that the proposal does not satisfy the statistical sampling standards we have approved for certification of telephone toll calls in the past. Rather, the proposal appears to be partial payment under a service contract where the services have been received but the amount due cannot be immediately determined. We see no practical reason why the NRC cannot implement its proposed plan. However, we think it may be useful to clarify our view of the certifications involved.

While it may have been assumed in our decisions that each long distance call must be separately certified as being necessary and in the Government interest, we do not believe that 31 U.S.C. § 1348(b) requires this when one bill is submitted for a large number of calls. In approving the statistical sampling device as a means of certifying each call without actually reviewing the purpose of each call, we have already recognized this principle. We think an agency head or his or her designee, based on the agency's experience, may reasonably certify that a certain percentage of a total number of long distance calls meets the requirements of 31 U.S.C. § 1348(b). However, in order to so certify, we think he must be confident that the system in place for verifying that calls are in the Government interest has a high degree of accuracy.

We think it is appropriate to allow the NRC proposal because it appears to us to achieve a practical result. Not only is it more economical, but it may better carry out the purposes of 31 U.S.C. § 1348(b). Since erroneous certifications are possible, we think it is

important to note that a certification made under 31 U.S.C. § 1348(b) does not carry with it financial responsibility for errors as do certifications under 31 U.S.C. § 3528. Section 3528 creates financial responsibility for erroneous payments on the part of an official designated to certify the corrections of vouchers upon which moneys are to be paid by disbursing officers in discharge of debts or obligations of the Government. Even where the section 1348(b) certification appears on the face of a payment voucher, it is not certified for payment. 56 Comp. Gen. 29 (1976). The certifying official who certifies a long distance telephone voucher for payment can rely on an administrative certification that the calls in question were for Government business without incurring financial responsibility for errors in the administrative certification. *Id.*

[B-218705]

Retirement—Civilian—Reemployed Annuitant—Annuity Deduction Mandatory

A Civil Service annuitant claims entitlement to full compensation, in addition to his annuity, for temporary full-time duties allegedly performed following his retirement. Under the provisions of 5 U.S.C. 8344(a), the salary of a retired Civil Service annuitant must be reduced by the amount of his annuity during any period of actual employment. However, since the claimant states that he was not appointed to a position following retirement, which statement has been confirmed by the agency's personnel office, he is not entitled to any compensation, reduced or otherwise, for the period in question.

Appointments—Absence of Formal Appointment—Reimbursement for Services Performed—Denied

A Civil Service annuitant claims entitlement to compensation in addition to his annuity for temporary full-time duties allegedly performed following his retirement. He states that he was never appointed to a position following his retirement, but contends that his supervisor accepted his offer to continue working after retirement, and said that he would find a way to pay him. The claim is denied. Under 31 U.S.C. 1342, an officer or employee of the government is prohibited from accepting the voluntary services of an individual. Further, the government is not bound by the unauthorized acts of its agents, even where the agent may be unaware of the limitations on his authority.

Matter of: Nathaniel C. Elie—Reemployed Annuitant—Compensation—Lack of Appointment, October 21, 1985:

This decision is in response to a letter from Mr. Nathaniel C. Elie, in which he requests further consideration of his claim for compensation as a Federal employee during the period of September 2, 1980, through October 10, 1980. We conclude he is not entitled to compensation for the following reasons.

BACKGROUND

Mr. Elie's claims was the subject of a settlement by our Claims Group, Z-169652, February 20, 1985, which disallowed his claim. The basis for the disallowance was a finding that there was no evi-

dence to show that he worked as a Federal employee during the period claimed.

The basis for his request for further consideration is his contention that there were various persons who could confirm that he was promised that, if he worked, efforts would be made to pay him. Further, he contends that there were others who could confirm the number of hours he worked through informal records they kept.

The facts in the case are brief. Mr. Elie was employed as a Supervisory Supply Technician with the 193rd Infantry Brigade, United States Army, Fort Clayton, Republic of Panama. On August 29, 1980, he was retired from the Civil Service with more than 40 years of Federal service. Information received from the Civilian Personnel Office (CPO), Headquarters Command, 193rd Infantry Brigade, indicates that they have no record that he was reappointed to a position following his retirement, or that he performed any duties during the period claimed.

Mr. Elie states that shortly before he retired, he and his supervisor discussed the possible temporary continuation of his employment following retirement because there was apparently no one to replace him. Arrangements supposedly were made by his supervisor through the CPO to rehire him as a reemployed annuitant on a temporary basis. Mr. Elie states that on September 2, 1980, a CPO representative explained the compensation structure of that type of employment to him. He states further that, after receiving this information, he informed his supervisor that he would not accept reemployment on that basis since he would not receive his full pay for any period he worked. In spite of that, he stated that he offered to continue working until a replacement could be found. He contends that his offer was accepted and that it was agreed by his supervisor that every attempt would be made to find a way to pay him the full pay for the work he did. He does admit, however, that he was never appointed to any position following his retirement.

DECISION

The employment of an individual by an agency of the Federal government and the entitlement to receive compensation for the position to which he is appointed and serving are matters strictly governed by statute.

As noted, Mr. Elie retired from the Civil Service on August 29, 1980. Section 3323(b) of Title 5, United States Code, provides that retired annuitants under the Civil Service Retirement Act may be reemployed to serve in an appointive position. If he was so employed, the only basis upon which Mr. Elie could have been compensated would be under the provisions of 5 U.S.C. § 8344. That section authorizes reemployment of Civil Service annuitants. However, subsection (a) provides, in part, that during the period of such employment an amount equal to the annuity which an individual

could otherwise receive during the period of actual employment "shall be deducted from his pay."

In other words, the maximum amount of compensation Mr. Elie could have received, if he had been actually reemployed following his retirement, would be the difference between the annuity he was receiving and the salary authorized for the position to which he was appointed. See 28 Comp. Gen. 693 (1949); and *Adrian D. Nelson*, B-188520, April 21, 1977. We are not aware of any basis upon which Mr. Elie could have been reemployed on a temporary fulltime basis by the Federal government and receive full compensation in addition to his Civil Service annuity.

With regard to Mr. Elie's assertion that his supervisor agreed to accept his offer to continue working without appointment and would find a way to pay him, 31 U.S.C. § 1342 (1982)—formerly 31 U.S.C. § 665(b)—prohibits an officer or an employee of the United States from accepting the voluntary services of an individual. This would include permitting Mr. Elie to perform the duties of a position without being properly appointed to that position. As for the alleged agreement between Mr. Elie and his supervisor, it is a well settled rule that the government is not bound by the acts of its agents which go beyond the actual authority conferred by statute and regulations. This is so even though the agent may have been unaware of the limitations on his authority. Further, the government is not prevented from repudiating any such unauthorized acts. See *Dr. Frank A. Peak*, 60 Comp. Gen. 71, 74 (1980) and cases cited. See also *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); and *Federal Crop Insurance Corp* v. *Merrill*, 332 U.S. 380 (1947).

Since the record shows that Mr. Elie rejected the only basis upon which he could have been reemployed and no attempt was ever made to initiate the necessary paperwork to reemploy him in any capacity during the period in question, it is our view that he never achieved any employment status following his retirement. Therefore, he is not entitled to any compensation for the period involved.

Accordingly, the action taken by our Claims Group, is sustained.

[B-220578]

Bids—Responsiveness—Pricing Response—Minor Deviations From IFB Requirements

Where prices were provided for all items and subitems on a bidding schedule, the fact that the contracting officer had to add the individual item prices and fill in the totals the bidder had left blank does not mean the bid was nonresponsive, as the bidder showed his intent to be bound by the pricing of all items and subitems. Failure to add the prices of the items was only a mere clerical error, and the mere mechanical exercise of addition shows the total bid amount intended.

Bids—Mistakes—Waiver, etc. of Error

Failure to provide a duplicate copy of the bid is a minor informality or irregularity.

Bids—Correction—Initialing Requirement

A bidder's failure to initial changes in a bid is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the intended price.

Matter of: TCI, Limited, October 21, 1985:

TCI, Limited (TCI), protests the award of a contract under invitation for bids (IFB) No. DACA85-85-B-0059, issued to the Steenmeyer Corporation (Steenmeyer) by the United States Army Engineer District, Alaska, for the renovation of Buildings 1001 and 1004, Fort Wainwright, Alaska. TCI argues that since Steenmeyer failed to fill in the blanks provided for the total of additive items and the total of base and additive items, the intent of the bid cannot be discerned, and the bid therefore should have been rejected as nonresponsive.

We dismiss the protest.

The bidding schedule called for prices on items 1 and 2, the latter of which was subdivided into numerous sub-items, and on 13 additive items, Steenmeyer's bidding schedule shows that it inserted prices on item 1, on all of the subitems in item 2, and on all of the additive items, both as to the unit prices and their extended total amounts. TCI, however, failed to insert grand totals for all of the extended total amounts it had bid; the contracting officer himself calculated those totals in order to evaluate the bid.

Generally, where any substantial doubt exists as to whether a bidder upon award could be required to perform all the work called for if he chose not to, the integrity of the competitive bid system requires rejection of the bid unless the bid otherwise affirmatively indicates that the bidder contemplated performance of the work. 51 Comp. Gen. 543, 547 (1972). This rule, however does not prohibit the correction of a price omission in a bid when the figure intended is established by the bid itself. 52 Comp. Gen. 604, 609 (1973). Where the bid itself establishes both the existence of the error and the bid actually intended, to hold that bid nonresponsive would convert an obvious clerical error of omission to a matter of responsiveness. *Ebonex, Inc.*, B-211557, Aug. 9, 1983, 83-2 C.P.D. ¶ 192.

Here, Steenmeyer bid on all items and subitems merely omitting the mathematical totals of these items. We do not agree with the protester that there really is any reasonable doubt as to Steenmeyer's intention to be bound to all items if the bid were accepted, and we therefore see no basis to object to the contracting officer's evaluation of the bid by totaling Steenmeyer's item and subitem bids.

TCI also complains that Steenmeyer failed to provide a duplicate copy of its bid documents at the time of bid opening as required by the solicitation. The Federal Acquisition Regulation (FAR), however, specifically provides that the failure to return the number of copies of signed bids required by an IFB is a minor informality or irregularity which may be cured by the bidder or waived by the

contracting officer, whichever is advantageous to the government. FAR, 48 C.F.R. § 14.405(a) (1984).

Finally, TCI protests that Steenmeyer failed to initial erasures on its bidding schedule.

We have held that a bidder's failure to initial changes is a matter of form that may be considered an informality and waived if the bid leaves no doubt as to the price intended. *R.R.Gregory Corporation,* B-217251, Apr. 19, 1985, 85-1 C.P.D. ¶ 449. The record shows that Steenmeyer made several changes to its bid and, with the exception of one extended price, all of the changes were initialed. We note that although the one changed extended price was not initialed, the unit price for that item, also changed, was initialed. Since the required quantity for that item is one, and the extended price is the same as the unit price, $6,658.00, it is clear that Steenmeyer intended to bid one unit of that item at $6,658 for the total item price of $6,658.

The protest is dismissed.

[B-219136]

Appropriation—What Constitutes Appropriated Funds—User Fees

Where Congress authorizes the collection or receipt of certain funds by an agency and has specified or limited their use or purpose, the authorization constitutes an appropriation, and protests arising from procurements involving those funds are subject to GAO bid protest jurisdiction.

Contracts—Modifications—Beyond Scope of Contract—Subject to GAO Review

Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactively extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and General Accounting Office (GAO) recommends that a competitive procurement for the requirement be conducted.

Contracts—Protests—Preparation—Costs—Compensable

Protester is entitled to recover the costs of pursuing its protest, including attorneys' fees, where agency, in effect, made an improper sole-source award; GAO considers the incentive of recovering the costs of protesting an improper sole-source award to be consistent with the Competition in Contracting Act's broad purpose of increasing and enhancing competition on federal procurements.

Matter of: Washington National Arena Limited Partnership, October 22, 1985:

Washington National Arena Limited Partnership (TicketCenter) protests the issuance by the National Park Service (NPS), Department of the Interior, of amendment 3 to contract No. CX-0001-3-0046 with Ticketron Corporation (Ticketron), which added the sale of performance tickets for the Carter Barron Amphitheatre in Washington, D.C., to the contract requirement for campsite reser-

vation services. Ticket Center argues that NPS was required to conduct a competition for the added services. We sustain the protest.

On November 10, 1982, NPS issued a request for proposals (negotiation authority being based on visitor reservation contracting authority in 16 U.S.C. § 460L-6a(f) (1982)) to develop and operate a reservation system to permit the public to make advance reservations for the use of various campground facilities. The solicitation contemplated award of a 1-year contract with four 1-year options for exercise by the government. Award was made to Ticketron on January 28, 1983. NPS extended the original contract to January 25, 1985, by amendment 2, but never exercised an option prior to that new expiration date to further extend the contract. Instead, NPS allowed the contract to expire. NPS thereafter issued a request for proposals for Carter Barron ticket sales, but canceled it on May 20. On June 10, 1985, NPS issued amendment 3 purporting to extend Ticketron's expired contract to January 25, 1986, and adding the Carter Barron ticket sales to the contract.

TicketCenter protests the extension of Ticketron's contract on two grounds. First, it argues that the Carter Barron ticket sales were outside the scope of the original contract, which covered campsite reservation services. TicketCenter believes the two types of reservation services are sufficiently different to warrant a separate competitive procurement of the Carter Barron services. Second, TicketCenter maintains that since Ticketron's original contract expired in January 1985, NPS could not retroactively extend the term of that contract and add other services by an amendment issued more than 4 months later. It is TicketCenter's position that NPS instead was required to conduct a competitive procurement for the award of a new contract covering all of the required ticket reservation services, and that NPS's failure to do so contravened the competition requirements of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253, *et seq.* (West Supp. 1985).

NPS responds only to TicketCenter's first argument, arguing that the Carter Barron ticket sales were within the scope of Ticketron's contract since that contract contained a provision allowing NPS to add further reservation services to the contract as they would be identified by NPS during the contract term. NPS does not comment on TicketCenter's position that, once Ticketron's contract expired, it could not be extended and services could not be added. NPS does argue, however, that this protest is not subject to the Federal Acquisition Regulation (FAR) or to review by our Office since the contract does not involve the expenditure of appropriated funds (contractor payment is through commissions deducted from the ticket sale proceeds before the proceeds are turned over to the government), and because we have held in our prior decisions that contract modifications and amendments are matters of contract administration outside the purview of the General Accounting Office.

We do not agree that the funds received in connection with visitor reservation services are not appropriated funds. We have held that where Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization constitutes an appropriation, and protests arising from procurements involving such funds are subject to our review in accordance with the provisions of the FAR. *See Fortec Constructors—Reconsideration,* 57 Comp. Gen. 311 (1978), 78-1 C.P.D. ¶ 153; *Monarch Water Systems, Inc.,* B-218441, Aug. 8, 1985, 64 Comp. Gen. 756 85-2 C.P.D. ¶ 146.

Here, section 4601-6a(b) of Title 16 authorizes federal agencies to "provide for the collection of daily recreation use fees" in furnishing outdoor recreation facilities and services. Section 4601-6a(f) provides that fees collected by agencies are to be "covered into" a special account in the United States Treasury and administered in conjunction with, but separate from, revenues in the Land and Water Conservation fund. In view of NPS' authority to collect the funds and the limitation on the use of the funds, the funds received by NPS for visitor reservations constitute appropriated funds, and procurements for visitor reservation services therefore fall within the scope of the FAR and GAO's bid protest jurisdiction. See *Monarch Water Systems, Inc.,* B-218441, *supra.*

Contrary to NPS's belief that the propriety of modifying Ticketron's contract is a matter of contract administration not for review by GAO, we will review allegations such as TicketCenter's that a modification constituted a cardinal change outside the scope of the original contract. *Wayne H. Coloney Co., Inc.,* B-215535, May 15, 1985, 85-1 C.P.D. ¶ 545. The fact that we will review such matters is inapposite here, however, since we agree with TicketCenter's second argument that Ticketron's expired contract could not be extended or otherwise modified.

The record shows, as TicketCenter alleges, that the original contract term was extended to January 25, 1985, by issuance of amendment 2 to the contract. While there remained options under the contract which could be exercised by NPS to extend the contract term further, neither NPS nor the record indicates that NPS ever exercised another option before the contract ended on the amended January 25, 1985, expiration date. NPS states in its report that it did extend the contract term to January 25, 1986, and that it added the Carter Barron ticket sales by the same modification. NPS neglects to state in its report, however, that this modification, in the form of amendment 3 showing a January 25, 1985, effective date, was not executed by NPS and Ticketron until June 10, 1985, more than 4 months after Ticketron's contract had expired. In other words, amendment 3 appears to have been an attempt by NPS to revive Ticketron's expired contract by retroactively extending and modifying it.

We agree with TicketCenter that this attempt was improper. Upon expiration of Ticketron's contract, neither the government nor Ticketron was obligated by any of the contract terms; Ticketron no longer was bound to provide visitor reservation services, and the government no longer was bound to pay Ticketron commissions for such services. The unexercised option provisions were part of the contract and, thus, necessarily expired when the contractual relationship was terminated. Thus, the attempted retroactive extension of Ticketron's contract was not an extension at all—there was no contract to extend—but the noncompetitive creation of a new contractual relationship with Ticketron.

Under CICA, agencies are required to "obtain full and open competition through the use of competitive procedures" in procuring property or services. 41 U.S.C. § 253. Certain exemptions from the competition requirement are listed, but it does not appear from the record, and NPS does not argue, that any of these exemptions would apply to justify a noncompetitive award to Ticketron under the circumstances here. Consequently, we sustain the protest on the ground that NPS should have conducted a competitive procurement for these visitor reservation services.

Interior notes in its report that the 1983 contract was awarded to Ticketron pursuant to section 460L–6(f) of Title 16, which provides that the agency may "contract with any public or private entity to provide visitor reservation services" under terms and conditions it deems appropriate. As for the applicability of this provision to the extension of the contract, the legislative history of the section indicates that it was intended to clarify the authority to contract for reservation services by permitting the contractor to deduct a commission from the proceeds of sales to the public. S. Rep. No. 93–745, 93d Cong., 2d Sess. 8 (1974). Although the section authorizes Interior to enter into this type of contract with any public or private entity under the terms and conditions it deems appropriate, we do not interpret the section as permitting the agency to enter into these contracts without obtaining competition. Indeed, Interior has not argued that the section exempts these contracts from the requirement for competition.

By separate letter to the Secretary of the Interior, we are recommending that Ticketron's contract be terminated for convenience and that NPS's requirement for these services be satisfied through a competitive procurement.

In addition, we are advising the Secretary that we find TicketCenter is entitled to recover the costs of filing and pursuing its protest, including attorney's fees. Our Bid Protest Regulations, implementing CICA, provide for the recovery of these costs by a protester where the agency unreasonably has excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester, and the protester ultimately receives the award. 4 C.F.R. § 21.6(d)–(e) (1985). We have not recom-

mended an award to TicketCenter, and NPS' improper extension of Ticketron's expired contract, a *de facto* sole-source award, clearly had the effect of precluding TicketCenter from competing for or receiving the contract awarded to Ticketron in June.

We previously have denied recovery of protest costs where we recommend recompetition of a procurement under which the protester's proposal improperly was rejected. In our decision, *The Hamilton Tool Co.*, B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132, for example, we concluded that while other potential contractors benefitted from resolicitation, the protester's interest was sufficiently protected so that there was no need to allow protest costs. Here, however, the protest does not involve the rejection of a proposal but, rather, the improper award of a sole-source contract. It was the broad purpose of CICA to increase and enhance competition on federal procurements, and we consider the incentive of recovering the costs of protesting an improper sole-source award to be consistent with this purpose.

The protest is sustained.

[B-219463]

Contracts—Payments—Conflicting Claims—Surety *v.* Internal Revenue Service

The order of priority for the payment of remaining contract balances held by a contracting Federal agency are first, the surety on its performance bond, including taxes required to be paid under the bond, minus any liquidated damages owed the Government as provided in the contract; second, the IRS for the tax debt owed by the contractor; and, last, the surety on its payment bond.

Contracts—Payments—Conflicting Claims—Assignee/Surety *v.* Government

As there was no formal takeover agreement between the performing surety and the contracting Federal agency providing therefore, the surety's priority over the Government to unexpended contract balances for satisfying its performance bond obligations would not include unpaid earnings due the contractor that accrued prior to the surety taking over performance of the defaulted contract.

Matter of: Priority of payment of unexpended contract balances on contract between United States Fish and Wildlife Service and Yu Corporation, October 22, 1985:

A contracting officer with the United States Fish and Wildlife Service, Department of the Interior, has asked us to determine the order of priority of payment of approximately $155,000 of remaining proceeds of a contract between the Service and Yu Corporation (Contract No. 14-16-00005-82-025). The parties are the Internal Revenue Service and the surety, the Fidelity and Deposit Company of Maryland, on its performance and payment bonds. For the reasons given below, we find the order of priority to be the surety on its performance bond, the IRS, and the surety on its payment bond.

BACKGROUND

The record shows that the contract in question was awarded to the Yu Corporation on May 12, 1982 for $570,485. The contract was to be completed by September 18, 1982. Subsequently, the contract was modified to increase the contract price to $600,041.65, and to extend performance time to November 11, 1982. Consistent with the Miller Act, 40 U.S.C. §§ 270a-270d, performance and payment bonds were issued by the Fidelity and Deposit Company of Maryland. The bonds were executed on May 21, 1982. On November 19, 1982, Yu Corporation assigned monies due under the contract to Guaranty-First Trust Company of Waltham, Massachusetts. By trust agreement of December 23, 1982, the assignee bank agreed to the surety's priority for payments the surety made on its bond obligations.

Apparently work did not progress well on the contract and problems arose regarding nonpayment of subcontractors and suppliers. To further complicate matters, on February 9, 1983 the contracting officer was served with an IRS Notice of Levy stating that Yu Corporation owed the IRS $52,263.88. The tax liabilities arose in 1980, 1981 and 1982. Several months later, the United States Department of Labor requested withholding of $2,971.24 from contract monies for violation of the Davis-Bacon Act, 40 U.S.C. § 276a. Subsequently, the surety instituted an interpleader action in the United States District Court for the District of Massachusetts, *Fidelity and Deposit Co.* v. *A.J. Concrete Service,* Civ. Action No. 83-1822-K (D.C. Mass. June 23, 1983), listing claims from subcontractors and suppliers. As a result of satisfying its payment bond obligations, by Order of November 30, 1984, the surety was discharged from liability for making further payments under the payment bond.

On March 30, 1983, the contract with Yu was terminated for default. (In this regard, the contract provided for liquidated damages to the Government at $400 per day for each calendar day of inexcusable delay.) Several weeks later the Fidelity and Deposit Company agreed to complete the project. The contracting officer informs us that in view of the diverse claims to remaining contract funds no formal takeover agreement was executed with the surety. The contracting officer subsequently informed us that the surety has completed the project.

As of December 20, 1984, Fidelity and Deposit Company claimed it had made payments of $400,229.82 on its performance and payment bonds, but did not provide specific totals for its payments on each of the bonds. It is estimated that as of May 13, 1985, the remaining contract proceeds totalled $155,000.

Based on the facts described, the Fish and Wildlife Service asked us to render an advance decision about the appropriate distribution of remaining contract funds. Several weeks later the service informed us that we should limit our consideration to the priorities

between the IRS and the surety on its performance and payment bonds.

LEGAL DISCUSSION

It is established that when a surety completes performance of a contract, the surety is not only a subrogee of the contractor but also a subrogee of the Government and entitled to any rights the Government has to the retained funds. *Trinity Universal Ins. Co.* v. *United States,* 382 F.2d 317, 320 (5th Cir. 1967), *cert. denied* 390 U.S. 906 (1968); *Security Ins. Co. of Hartford* v. *United States,* 428 F.2d 838, 841-43 (Ct. Cl. 1970), *overruling in pertinent part, Standard Accident Ins. Co. of United States,* 97 F. Supp. 829 (Ct. Cl. 1951); B-217167, Aug. 13, 1985, 64 Comp. Gen. 763. Thus, a surety completing a defaulted contract under a performance bond has a right to reimbursement from the unexpended contract balance for the expenses it incurs, free from setoff by the Government of the contractor's debts to the Government (*Security Ins.,* 428 F.2d at 842-43), less any liquidated damages to which the Government is entitled under the contract. B-192237, Jan. 15, 1979. We have held that the surety's expenses, for which it is entitled to be reimbursed, include payments of withholding taxes required to be paid under a performance bond.[1] B-189679, Sept. 7, 1977; See *United States* v. *United States Fidelity and Guaranty Co.,* 328 F. Supp. 69 (E.D. Wash. 1971), *aff'd,* 477 F.2d 567 (9th Cir. 1973). The surety's priority avoids the anomalous result whereby if setoff were permitted the surety frequently would be worse off for having undertaken to complete performance. *Security Ins.,* 428 F.2d at 844; B-217167, Aug. 3, 1985, 64 Comp. Gen. 763, *supra.*

When there is a takeover agreement between the Government and the surety, the money available to the surety generally would include all funds remaining in the hands of the Government under the contract, including withheld percentages and progress payments, whether earned prior to or subsequent to the original contractor's default, less any liquidated damages to which the Government is entitled under the contract. *See* B-192237, Jan. 15, 1979.[2] Absent a formal takeover agreement providing therefore, however, a performing surety is not entitled to recover free from setoff, amounts earned by, but not paid to, the contractor before the date

[1] Section 1 of the Miller Act, as amended, 40 U.S.C. § 270a(d), requires every performance bond to "specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished."

[2] In situations where there is a formal takeover agreement the Federal Acquisition Regulation provides that "unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, shall be subject to debts due the Government by the contractor, except to the extent that such unpaid earnings may be required to permit payment to the completing surety of its actual costs and expenses incurred in the completion of the work * * *." FAR § 49.404(e)(1) (Apr. 1, 1985).

the surety took over performance of the contract. In this situation a surety is limited to payment from all other retained contract balances. *Security Ins.*, 428 F.2d at 844.

Consistent with these principles, after the Fish and Wildlife Service deducts the liquidated damages owed it, we think Fidelity and Deposit Company, as a performing surety, would have first priority to the unexpended contract proceeds up to the amount it expended for satisfying its performance bond obligations, including payment of the withholding taxes it was required to pay under its performance bond. The priority over the IRS for the unexpended contract proceeds would include priority to all retained percentages and progress payments except those earned by Yu prior to Fidelity and Deposit taking over performance of the contract. The IRS has priority to the unpaid earnings due the Yu Corporation because there is no formal takeover agreement providing that these proceeds also would be paid to Fidelity and Deposit.

Unlike the priority on its performance bond, Fidelity and Deposit does not have priority over the IRS for expenditures made under its payment bond. It is well-settled that the Government has the same right belonging to every creditor to apply undisbursed moneys owed to a debtor to fully or partially extinguish debts owed the Government.[3] *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1841); B-214905.2, July 10, 1984. Thus, absent a "no setoff" clause in a contract, the Government may satisfy by setoff any tax claim it has against a contractor, notwithstanding that all or part of the tax claim does not pertain to the contract under which the parties are contesting payment. The Government's right to setoff has been held to be superior to that of a payment bond surety who has paid the claims of laborers and materialmen, *United States* v. *Munsey Trust Co.*, 332 U.S. at 239-44. Thus, a payment bond surety is subrogated to the rights of a contractor, rather than to the rights of the Government, and, as subrogee of the contractor cannot claim rights the contractor did not have. *Security Ins.*, 428 F.2d at 841. Accordingly, the IRS has priority over Fidelity and Deposit, for payments the surety made to laborers and materialmen on its payment bond, to the unexpended contract proceeds in the amount of the $52,264 tax debt owed by Yu Corporation to the United States.

In sum, we conclude that after deducting liquidated damages owed the government, the remaining unexpended contract balance should be distributed first to Fidelity and Deposit for its performance bond payments, then to the IRS to satisfy Yu Corporation's $52,204 tax debt and, if anything remains, to Fidelity and Deposit for its payment bond disbursements. As the record only provides a total sum for the monies spent by the surety on both its bonds, and

[3] Of course, the Government also has a right to enforce its tax lien. 26 U.S.C. §§ 6321, 6322.

that as of December 20, 1984, the Fish and Wildlife Service will have to determine the precise amounts paid out on each of the bonds so that it can make the proper distributions consistent with the described priorities.

[B-220705]

Bids—Responsiveness—Failure to Furnish Something Required—Small Business Representation

Bid under small business set-aside which fails to indicate that supplies to be furnished will be manufactured or produced by a small business concern is nonresponsive. Moreover, information obtained after bid opening may not be used to make bid responsive.

Matter of: Teco, Inc., October 22, 1985:

Teco, Inc., protests the rejection of its bid as nonresponsive under solicitation No. DAAE07-85-B-J446, a total small business set-aside issued by the United States Army Tank-Automotive Command for the procurement of 38 aerial lift devices. The bid was rejected because, although Teco represented in its bid that it was a small business concern, the firm failed to indicate that the supplies to be furnished would be manufactured or produced by a small business.

We dismiss the protest.

The bidding certification concerning the bidder's obligation to furnish products manufactured by a small business concern is a matter of bid responsiveness because it involves a performance commitment, *i.e.*, to furnish small business products. Thus, a bidder's intention to furnish such products must be established at the time of bid opening. See *J-MAR Metal Fabricating Co.*, B-217224, Mar. 21, 1985, 85-1 C.P.D. ¶ 329. Otherwise, if the bid were accepted as submitted, the small business contractor would be free to provide the supplies from either small or large business manufacturers as its private business interests might dictate, thus defeating the intent of the set-aside program. See *Hauser Products Incorporated*, B-218140, Feb. 22, 1985, 85-1 C.P.D. ¶ 227.

Teco's failure to indicate in its bid that the products to be furnished would be manufactured by a small business thus constituted a failure on Teco's part to submit a binding promise to meet the small business set-aside requirement. Therefore, its bid properly was found nonresponsive. See *Hanson Industrial Products*, B-218723, *et al.*, May 9, 1985, 85-1 C.P.D. ¶ 521.

Teco contends that the contracting officer nevertheless was aware of its alleged intention to furnish small business products because (1) subsequent to bid opening a preaward survey was conducted at which time production and delivery, among other things, were discussed, and (2) Teco is currently working on two other contracts for the same item.

Postopening explanations, however, cannot be used to make a nonresponsive bid responsive even if, as here, the government could obtain a lower price by accepting the bid. See *Basic Marine, Inc.*, B-215236, June 5, 1984, 84-1 C.P.D. ¶ 603. Further, regardless of Teco's status under its other two contracts, the fact remains that its failure to certify that it would supply items manufactured by a small business under the present contract would, if the bid were accepted as submitted, leave the firm free to supply an item from a source other than a small business if it chose to do so. See *Automatic Limited*, B-214997, Nov. 15, 1984, 84-2 C.P.D. ¶ 535.

The protest is dismissed.

[B-218335.2; .3; .4]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Eligible Party Requirement

A contract awardee adversely affected by a prior General Accounting Office (GAO) decision is not eligible to request reconsideration of that decision where the firm was notified of the original protest but chose not to exercise its right to comment on the issues raised in the protest.

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of fact or law—Not established

Prior decision, which held that the agency's source selection improperly deviated from the solicitation's established evaluation scheme absent a compelling justification in the record to support the selection, is affirmed where the agency's request for reconsideration fails to establish convincingly that the prior decision contains errors of law or of fact which warrant its reversal or modification.

Contracts—Negotiation—Offers or Proposals—Evaluation—Cost Realism Analysis—Reasonableness

An offerors' proposed cost as adjusted for cost realism cannot be said to be unreasonable where it is virtually identical to the government's original estimate and apparently would be in line with other offerors' proposed costs if those costs were also to be adjusted for cost realism.

Matter of: DLI Engineering Corporation—Reconsideration, October 28, 1985:

The Department of the Navy requests reconsideration of our decision in *DLI Engineering Corp.*, B-218335, June 28, 1985, 85-1 CPD ¶ 742. In that decision, we sustained DLI's protest asserting that the Navy had improperly awarded a cost-plus-fixed-fee contract to Integrated Systems Analysts, Inc. (ISA) for engineering and analytical services to support the Navy's resolution of shipboard machinery vibration problems under request for proposals (RFP) No. N00140-84-R-0191. We concluded that the Navy's source selection deviated from the solicitation's established evaluation criteria, which placed primary importance on technical capability over cost, where ISA's proposal, although significantly lower in cost, was also markedly inferior to DLI's in terms of technical merit. Accordingly,

we recommended that if DLI's proposed costs were determined to be reasonable, the Navy should consider the feasibility of terminating ISA's contract for the convenience of the government and awarding the balance of the requirement to DLI.

The Navy requests reconsideration on the grounds that our prior decision failed to apply established precedent of this Office and was based upon an erroneous factual assumption. Furthermore, the Navy indicates that DLI's proposed cost, as now adjusted for cost realism in response to our recommendation, is unreasonable. We affirm our prior decision.

Preliminary Matters

At the outset, we note that ISA, the awardee, and ROH and Ocean Environmental Systems (OES), two disappointed offerors, have joined in the Navy's request for reconsideration. We will not consider the arguments raised by those firms during our reconsideration.

Our Bid Protest Regulations, 4 C.F.R. § 21.12 (1985), provide that this Office will entertain a timely request for reconsideration of a previous decision filed by the protester, any interested party which participated in the protest, and any federal agency involved in the protest. We have held that where an interested party was on notice of the protest, but did not choose to file any comments with regard to the issues raised therein, that party is not eligible to request reconsideration. *Jervis B. Webb Co., et al.—Reconsideration,* B-218110.2, Feb. 11, 1985, 85-1 CPD ¶ 181. Here, the Navy confirms that ISA was properly notified of DLI's protest and was furnished a copy. Since ISA did not exercise its right to file comments on the protest during our original resolution of the matter, we will not entertain its present request for reconsideration.

The Navy informs us that it did not notify ROH and OES of the protest. Although the firms, therefore, technically may be entitled to request reconsideration, see *R.A. Schemel & Associates, Inc.—Reconsideration,* B-209707.2, Sept. 2, 1983, 83-2 CPD ¶ 291, we believe that the arguments raised by the firms are untimely or otherwise properly not for consideration.

ROH challenges our recommendation that the balance of the requirement be awarded to DLI on the ground that ROH might have been the successful offeror but for the Navy's improper evaluation of proposals, and suggests that its proposal should now be reevaluated. However, it is clear that any basis for protest in this regard arose no later than ROH's April 10, 1985 debriefing. Since our regulations require that protests be filed within 10 working days after the basis of protest is known or should have been known, 4 C.F.R. § 21.2(a)(2), ROH may not raise the issue some 4 months after that debriefing took place. See *Professional Review of Florida, Inc., et al.,* B-215303.3, *et al.,* Apr. 5, 1985, 85-1 CPD ¶ 394.

OES also challenges our recommended corrective action and urges that we should instead recommend that the procurement be recompeted. OES contends that because more than a year has passed between the time proposals were initially submitted under the RFP and issuance of our decision, changed technical and financial circumstances dictate that the original offerors in the competitive range be given the opportunity to submit revised proposals. The firm also complains that the RFP's requirements were unduly vague and that the Navy failed to apply the evaluation criteria properly with respect to its proposal, thus resulting in an improper award. Furthermore, OES asserts that our decision should be reconsidered because the firm, by not being notified of the protest, was unfairly deprived of an opportunity to be heard in the matter.

There is no indication that the Navy's requirements as set forth in the RFP have changed, and the Navy in fact has determined that acquisition of the contemplated services is urgent. Therefore, we fail to see how the passage of time in this instance has any bearing upon the propriety of our recommendation, and a recompetition at this point clearly would not be in the government's best interest. To the extent OES alleges that the RFP was defective, the basis for this allegation was apparent to OES from the face of the document itself, and, therefore, should have been protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); see also *CBM Electronic Systems, Inc.*, B-215679, Jan. 2, 1985, 85-1 CPD ¶ 7.

Although the Navy did not inform OES of DLI's protest, the agency did notify the firm by letter of February 25, 1985, that an award had been made to ISA. Accordingly, if OES believed that it had grounds for protest regarding the propriety of that award, it should have raised the matter well before this time. Even though OES asserts that it only now has learned through our decision of its relative standing among the other offerors, a firm which is challenging an award must diligently pursue information which may provide additional support for its challenge. See *General Electric Co.*, B-217149, Jan. 18, 1985, 85-1 CPD ¶ 60. Since OES, upon learning of the award, could have requested a debriefing from the Navy (the record is unclear whether one was actually afforded the firm due to its low relative standing among the offerors), or could have initiated a Freedom of Information Act request, the necessary information concerning the evaluation of its proposal would have been available to the firm much earlier. *Id.* Therefore, we will not consider the matter now as part of our present reconsideration.

With respect to OES' last point, the Federal Acquisition Regulation, 48 C.F.R. § 33.104(a)(3) (as added by Federal Acquisition Circular 84-6, 50 Fed. Reg. 2268, 2271 (Jan. 15, 1985)), specifically provides that the agency shall give immediate notice of a protest filed with this Office to the contractor, if the award has been made or, if no award has been made, to all parties who appear to have a rea-

sonable prospect of receiving an award if the protest is denied. Since DLI's protest was not filed until after the award had been made, the Navy was only required to notify ISA, the contract awardee. And, even if the protest had been filed prior to award, there was no requirement to notify OES because the firm, with the lowest technical rating and the highest offered cost, had no reasonable chance of being awarded the contract if DLI's protest were denied. Therefore, OES cannot legally complain that it was not notified of the protest. Moreover, since our prior decision did not question the Navy's overall evaluation of proposals, but rather the propriety of the agency's specific selection of ISA over DLI, we cannot conclude that OES was prejudiced by the lack of notice to the extent that we must now address the arguments raised in its reconsideration request.

Analysis

In order to prevail in a request for reconsideration, the requesting party must convincingly show either errors of law or of fact in our prior decision which warrant its reversal or modification. *Department of Labor—Reconsideration*, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

The Navy contends that our prior decision failed to apply established precedent of this Office concerning the broad discretion afforded to contracting officers in selecting among competing proposals for the contract award. The Navy states that the contracting officer here fully recognized that the solicitation had placed primary importance on technical considerations over cost, but that he was well within his discretion in determining that the superior technical merit of DLI's proposal did not warrant an award to the firm at a much higher cost. The Navy notes that DLI's offered cost, unadjusted for cost realism, was 59 percent higher than ISA's offered cost as adjusted for cost realism, but DLI's technical ranking was only 26 percent higher (96 versus 76 points out of a possible 100). Therefore, the Navy urges that our decision improperly disregarded the cost/technical tradeoff made by the contracting officer in selecting the offer most advantageous to the government. We do not agree with the Navy's position.

Our prior decision did not fail to acknowledge the broad degree of discretion afforded to source selection officials in determining the manner and extent to which they can make use of the technical and cost evaluation results, see *Stewart & Stevenson Services, Inc.*, B-213949, Sept. 10, 1984, 84-2 CPD ¶ 268, nor did it ignore the general rule that selection officials are not necessarily bound either by technical point scores or by the recommendations of technical evaluators in selecting the most advantageous offer. See *RCA Service Co.*, B-208871, Aug. 22, 1983, 83-2 CPD § 221. It simply reflected the well-settled principle that a cost/technical tradeoff for source selection purposes is ultimately governed by the tests of rationality

and consistency with the solicitation's established evaluation scheme. See *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

The RFP provided that cost, although important, ranked fifth among five stated evaluation factors, the other factors being technical considerations: corporate past experience; personnel; management plan/approach; and contractor facilities. Under the established evaluation scheme, each of the four technical factors, by itself, was more important than cost. Our decision that the award to ISA was inconsistent with the evaluation scheme was in large part based upon the narrative comments of the Navy's evaluators who concluded that DLI's proposal was techincally far superior to the other proposals received. In this regard, the evaluators found that DLI's proposed analytical methodology for the resolution of vibration problems was so unique that it would fully satisfy the agency's requirements with a minimum degree of risk. As noted by the evaluators, the great risk associated with performance by a contractor using diagnostic techniques less sophisticated than DLI's was that erroneous machinery repair recommendations could lead to unnecessary costs far exceeding the total amount of the contract. Therefore, since DLI's proposal, although acceptable and ranked third among the six competitive range offerors, also contained numerous technical weaknesses as noted by the evaluators, it was our view that the selection of ISA had to be supported by a compelling justification. See *EPSCO, Inc.*, B-183816, Nov. 21, 1975, 75-2 CPD ¶ 338.

We did not find such a justification in the record. The contracting officer's cost/technical tradeoff determination was that DLI's marked technical superiority would have been worth a cost premium of up to 40 percent over ISA's evaluated cost, but was not worth a cost premium of 59 percent. However, the Navy never provided any underlying rationale for that determination, such as a finding that the low cost of ISA's offer would more than offset the monetary risk of erroneous repair recommendations associated with ISA's performance of the contract.

Instead, the Navy placed an undue importance on cost. In its request for reconsideration, it states that the contracting officer "was fully prepared to pay hundreds of thousands of dollars more for the technical superiority of the DLI proposal." In our view, the impropriety of the Navy's source selection lies in the fact that the agency has never established why that superiority was worth "hundreds of thousands of dollars more" but not worth the 59 percent cost premium originally at issue here. It is also misleading for the Navy to argue that the 59 percent cost premium negates DLI's 26 percent technical superiority because, as already noted, technical considerations were paramount. Accordingly, since the technical percentage differential is of much greater weight, the two differentials should not be compared on an equivalent basis. In short, since the Navy

invited competition on the basis that technical capability to meet its urgent needs was of primary importance over offered cost, we continue to believe that it was an abuse of the agency's discretion not to select DLI for the award for the sole apparent reason that the firm's technical superiority involved a substantial cost premium.[1]

The Navy also asserts that our prior decision is based on the erroneous assumption that ISA had proposed a diminished level of effort from that estimated in the RFP. In our decision, we stated that the cost differential between the two offers could reflect ISA's underestimation of the effort needed to perform the work rather than any excessive premium for DLI's technical superiority. The Navy points out that the RFP had provided that an estimated 44,000 man-hours by various labor categories would be required to perform the contract. Accordingly, since both ISA and DLI prepared their cost proposals in accordance with the RFP's level of effort, the Navy asserts that we erred in assuming that ISA may have proposed a lesser level of effort than that necessary to meet the Navy's requirements.

We think the Navy has misconstrued our use of the word "effort" in our decision. We fully recognized that both offerors had proposed in accordance with the 44,000 man-hours estimate in the RFP. However, as DLI correctly notes, the Navy was not acquiring a set number of man-hours, since those provided in the RFP were only estimates, but rather was acquiring particular engineering and analytical services to meet its needs. Therefore, our use of the word "effort" was meant in the broader sense, to indicate that ISA may have underestimated the nature and scope of the contract's engineering and analytical requirements.

Furthermore, in this regard, we questioned the validity of the Navy's cost/technical trade-off analysis which had hypothesized that ISA could perform on a qualitatively equal basis to DLI with the use of additional contractor and government man-hours and still be lower in ultimate cost than DLI. We did not, as the Navy now asserts, believe that the contracting officer had automatically concluded that ISA would in fact be able to accomplish the same results as DLI if afforded more man-hours, or that performance of the contract by ISA would require a level of effort beyond the 44,000 man-hours estimated in the RFP. Rather, we were concerned that the cost/technical tradeoff analysis purported to estab-

[1] The Navy states for the first time in its request for reconsideration that its technical evaluators concurred in the award to ISA. The Navy has furnished no documentation in support of this statement, and, in any event, we generally will not consider newly presented arguments by an agency where the agency failed to present such arguments in its administrative report on the original protest, and the information which forms the basis for the arguments was available at that time. See *Griffin-Space Services Co.—Reconsideration*, 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 528; *Swan Industries—Request for Reconsideration*, B-218484.2, *et al.*, May 17, 1985, 85-1 CPD ¶ 569.

lish that performance by ISA, all things considered, would still result in a lower final cost to the government.

We believe that tradeoff analysis to be flawed because it failed to recognize that only DLI had been found as offering a unique technical approach (as opposed to one that was only more efficient) that would satisfy the contract's requirements with a minimized risk of erroneous repair recommendations. Accordingly, because the tradeoff analysis only addressed perceived levels of efficiency, we concluded that it did not serve to establish that acceptance of ISA's offer would prove to be most advantageous to the government.

As a final issue, the Navy indicates that we should withdraw our recommendation for corrective action because DLI's proposed cost, as now adjusted for cost realism, is unreasonable. The Navy relates that it performed a cost realism analysis with respect to DLI's proposal in response to our recommendation, and, as a result, has calculated that DLI's best and final offer should be upwardly adjusted from $1,467,175 to $1,662,055 due to DLI's apparent understatement of certain cost elements, versus ISA's evaluated cost of $923,175. The Navy asserts that the technical superiority of DLI's proposal does not warrant such a cost premium.

We have reviewed the Navy's cost realism determination, and we cannot conclude that it is erroneous. See *Dynamic Science, Inc.*, B-214111, Oct. 12, 1984, 84-2 CPD ¶ 402. However, although we are concerned that performance by DLI may now entail a greater cost expenditure than that which was in issue during our original resolution of the matter, we do not believe that the Navy has established that DLI's evaluated cost [2] is now unreasonable *per se*.

The issue of cost unreasonableness generally relates to a finding that a firm's proposed cost is so high (in relation to the government's estimate or to the proposed costs of the other offerors) that the firm almost certainly has no chance of being awarded the contract. See, *e.g., Informatics General Corp.*, B-210709, June 30, 1983, 83-2 CPD ¶ 47.

In this matter, the Navy has informed us that the government's original estimate for the work, based upon the costs incurred by OES in performing similar services, was $1.6 million. Clearly, since DLI's proposed cost as now adjusted for cost realism is virtually identical to the government's estimate, it cannot be said to be unreasonable in that respect. Moreover, the cost realism analyses performed for ISA and DLI caused upwards adjustments of 18 and 13 percent, respectively, in their proposed costs, and we are therefore of the impression that the proposed costs of the remaining competitive range offerors would be adjusted to a similar degree if the

[2] We note that the 80 percent differential between DLI's and ISA's evaluated costs is largely based on the Navy's adjustment of DLI's overhead rate from 125 to 140 percent for cost realism purposes. However, DLI has offered to cap its overhead rate at 130 percent, which should mean a $56,069 reduction in its evaluated cost so as to decrease the present 80 percent differential.

Navy performed additional analyses. Since DLI's unadjusted cost was in line with the proposed costs of those other offerors, and in fact was not the highest, the result of the cost realism analysis has not demonstrated that DLI's evaluated cost is now unreasonable in relation to the other offers received, or the kind of effort proposed.

Accordingly, since the Navy has not shown that our prior decision contains errors of law or of fact, that decision, with its recommendation that corrective action be taken, is affirmed.

[B-219430]

Contracts—Protests—What Constitutes Protest

Protest challenging agency's decision not to award a contract under a solicitation issued in accordance with the procedures set out in OMB Circular A-76 falls within the definition of protest in the Competition in Contracting Act since the act does not require that an award be proposed at the time a protest is filed and a proposed award within the statutory definition is contemplated when a solicitation is issued for cost comparison purposes. Review of such a protest is consistent with congressional intent to strengthen existing General Accounting Office (GAO) bid protest function.

Contracts—Protests—Allegations—Unsubstantiated

The fact that historical data contained in an IFB may have been inaccurate and thus not suitable alone as a basis for estimating performance costs is not a sustainable protest where it is not shown that data provided was not the best objective data available at that time.

Neither government nor bidders are required to base their costs on historical data alone since both may rely on the experience and expertise of their employees and managers to determine the least costly method of performing the statement of work.

Contracts—In-House Performance *v.* Contracting out—Cost Comparison—Adequate Documentation Requirement

Government is not bound to utilize historical cost data for materials where estimate of additional savings generated by switch to new procurement method is not found unreasonable.

Matter of: Contract Services Company, Inc., October 28, 1985:

Contract Services Company, Inc. (CSC), protests the Department of the Navy's determination to retain in-house the Transportation, Special and Heavy Equipment Operations and Maintenance function at the Public Works Center, San Francisco Bay, Oakland, California. This determination, made in accordance with Office of Management and Budget (OMB) Circular A-76 procedures, was based on a comparison of CSC's bid submitted in response to invitation for bids (IFB) No. N62474-85-B-1655, with the Navy's cost estimate. The cost comparison showed that continuing in-house performance would cost the government approximately $124,000 less than contracting with CSC. CSC argues that the Navy's computation of its in-house estimate contains several errors which warrant the reversal of this determination. We disagree, and deny the protest.

Jurisdiction

Initially, we note that the Navy has not submitted a substantive report addressing the issues raised by CSC. Rather, the Naval Facilities Engineering Command (NAVFAC) responded to our request for an agency report by asserting that our Office lacks jurisdiction to consider this matter. NAVFAC argues that a protest concerning an agency's failure to award a contract does not fall within the statutory definition of "protest" contained in the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1187 (1984). The Navy contends that any objection to the cancellation of a solicitation, including those issued in connection with an OMB Circular A-76 cost comparison, is no longer within our jurisdiction, therefore, and should not be considered.

CICA defines protest as:

> * * * a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract. 31 U.S.C. § 3551(1), as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199.

NAVFAC, in effect, is arguing that by canceling a solicitation or deciding to retain a function in-house, there is no longer a "proposed award" and, therefore, there is no statutory basis to consider the protest. However, we do not interpret CICA so narrowly as to require that an award be proposed at the time a protest is filed in order to be considered by our Office. In issuing a solicitation, an agency proposes to award a contract under the terms and conditions set forth in the solicitation and bids are submitted on that basis. In our view, a "proposed award" within the statutory definition is contemplated under these circumstances and, therefore, a timely protest of an agency's action concerning the solicitation, including its cancellation, will be considered.*

Furthermore, we believe that in enacting the bid protest provisions of the Competition in Contracting Act, Congress intended that our Office continue to decide protests involving the cancellation of solicitations in general as well as those involving A-76 cost

*NAVFAC also asserts that it is precluded from implementing any corrective action recommendation issued by our Office because, by regulation based on the Supplement to OMB Circular A-76, part I, ch. 2, para. I, the A-76 appeal decision is not subject to negotiation, arbitration or agreement. We have previously concluded that this provision does not preclude our Office from considering a protest from a bidder alleging that its bid has been arbitrarily rejected. *Alliance Properties, Inc.*, B-219407, Sept. 18, 1985, 64 Comp. Gen. 854, 85-1 CPD ¶ 299. Moreover, the Navy decision to follow our recommendation is irrelevant in defining our authority to hear the matter. Furthermore, we do not believe that the regulation can be applied to prevent agencies from acting in accordance with our recommendation. Under CICA, agencies are required to consider our recommendation and file a report with our Office within 60 days if they are not followed. 31 U.S.C. § 3554(e)(1) as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, 1202. In our view, this provision obligates agencies to consider our recommendation in good faith and a regulation cannot be construed to relieve agencies of this responsibility.

comparisons. We note that CICA defines an interested party as a bidder or offeror whose economic interest is not only affected by an award, but also by the failure to award a contract. *See* 31 U.S.C. § 3551(2) as added by CICA. Before the enactment of CICA, our Office routinely reviewed bid protests involving cancellations and faulty cost comparisons and one of the express purposes of the act was to strengthen our existing bid protest function. See e.g. *Crown Laundry and Dry Cleaners, Inc.*, B-194505, July 18, 1979, 79-2 CPD ¶ 38; H.R. Rept. No. 861, 98th Cong., 2d Sess. 1435 (1984). In view of the continuing potential for adverse impact on the competitive system if, after an agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the award decision, we will continue to review such matters. Cf. *Alliance Properties, Inc.*, B-219407, Sept. 18, 1985, 85-2 CPD ¶ 299.

Cost Comparison

CSC first questions the Navy's estimate for personnel staffing and overtime. CSC states that its cost estimate was based on the historical data provided by the Navy in the IFB. CSC asserts that the data showed that in fiscal year (FY) 1983 the Navy had 28 full-time employees (FTEs) in the Crane Rigging Branch (CRB), 13 FTEs in the Construction Equipment Branch (CEB) and needed 17.25 percent in additional overtime hours to meet the requirements in the CRB. CSC states that the Navy's estimate included only 20 FTEs in the CRB, 5 FTEs in the CEB and estimated 6.58 percent for overtime in the CRB. CSC argues that as a result, the Navy's estimate was not based on the same statement of work (SOW) that bidders utilized to calculate their costs.

CSC also contends that the 12-percent discount used by the Navy in calculating its material costs for FY 1985 was excessive. CSC argues that the value of this discount is approximately $200,000, that it was based on only one vendor's estimate and that there is not sufficient evidence to show that the required material can actually be purchased at that cost. In addition, CSC argues that the Navy improperly deducted the residual value of assets from asset acquisition costs, that the Navy did not include an estimate for the repair and maintenance of certain vehicles and that the Navy unreasonably attributed no general and administrative (G&A) overhead to the cost of in-house performance. CSC asserts that a recalculation will clearly demonstrate that it was the low bidder and that it should be awarded the contract.

Due to NAVFAC's failure to submit a report addressing the issues raised by CSC, our review is confined to the record established by the protester, which consists of CSC's agency appeal, the Navy's response and limited additional documentation. However, the protester still bears the burden of proof and must demonstrate not only that the agency failed to follow mandated procedures, but

that the failure materially affected the cost comparison's outcome. *JL Associates, Inc.*, B-218137, May 6, 1985, 85-1 CPD ¶ 501; *Serv-Air, Inc.; AVCO*, 60 Comp. Gen. 44 (1980), 80-2 CPD ¶ 317. Although under these circumstances the protester may meet its burden by presenting sufficient evidence to raise a reasonable doubt as to the validity of the cost comparison's result, see e.g. *MAR, Inc.*, B-205635, Sept. 27, 1982, 82-2 CPD ¶ 278, we find that CSC has not met this burden and are unable to conclude that the Navy's cost comparison deviated materially from applicable cost comparison procedures.

The record shows that the Navy's personnel estimates were based on the most efficient organization (MEO) necessary to accomplish the requirements of the SOW. Also, the decreased overtime percentage was based on FY 1984 data derived from MEO tracking reports. Although the Navy's estimate for both categories differed from the historical estimates provided in the IFB, neither CSC nor the Navy was required to base its cost on historical information alone. *Pacific Architects and Engineers, Inc.*, B-212257, July 6, 1984, 84-2 CPD ¶ 20. The Navy is not prohibited from using available techniques to calculate the most efficient, least costly organization for performing the SOW and the record indicates that this was the approach utilized by the Navy. Concerning the 1983 overtime percentage which was provided CSC, although it may have been inaccurate, there is no evidence that it was not the best estimate available. The SOW, not historical data, is the principal tool for use in calculating contract costs and CSC has not shown that the in-house estimate in these areas does not accurately reflect the in-house costs which will be incurred by the Navy to perform the SOW. See *E.C. Services Co.*, B-218202, May 23, 1985, 85-1 CPD 594; *Joule Maintenance Corp.*, B-208684, Sept. 16, 1983, 83-2 CPD ¶ 333.

With respect to the 12-percent discount for material costs, the Navy states that the savings were generated by a switch to a more efficient method of procurement. The record shows that the Navy intends to use an indefinite-delivery-type contract and that two major vendors were surveyed and responded by providing signed writtten quotes as to the discounts which would be applicable. Based on an analysis of the information obtained, the Navy determined that the 12-percent discount for materials was justified. Although CSC argues that the Navy should be required to utilize historical data, the Navy need no use such data where it would not accurately reflect the costs which would be incurred. *E.C. Services Co.*, B-218202, *supra*. CSC has submitted no evidence which disputes the Navy's determination and, based on the record, we cannot conclude that the estimate of the savings generated by the new procuring method is inaccurate.

We also find the remaining issues raised by CSC to be without merit. The Cost Comparison Handbook, Page IV-20, para. F.2.c., only states that the residual value of assets may be carried at zero,

but does not prohibit its calculation. The Navy states that the assets in question are normally sold by auction and the Useful Life and Disposal Value Table, appendix "C" of the Cost Comparison Handbook, was used to calculate residual value. That table indicates the disposal value as a percent of acquisition cost for a variety of assets, and we find nothing improper in the Navy's estimating the residual value of its assets or in using appendix "C" as a basis for its calculations.

Concerning CSC's contention that the in-house estimate did not include certain maintenance and repair costs, the Navy states that these costs were included in the estimate for personnel and material costs. In addition, the Navy may properly attribute no G&A to the cost of in-house performance unless it is determined that contracting out would eliminate a whole man-year of work from the outside supporting offices. *Samsel Services Co.*, B-213828, Sept. 5, 1984, 84-2 CPD ¶ 257. Absent such an impact, the government's cost essentially is viewed as the same whether or not a contract was awarded. The Navy states that all affected departments that would provide support were surveyed and in every case there was not one position which could be eliminated. While CSC argues that this determination is unreasonable, we have no basis to take legal objection to the Navy's computation of its G&A as zero. *Samsel Services Co.*, B-213828, *supra.; Facilities Engineering & Maintenance Corp.*, B-210376, Sept. 27, 1983, 83-2 CPD ¶ 381.

Finally, we note that we have also reviewed the other areas of disagreement between CSC and the Navy as evidenced by CSC's appeal and the Navy's appeal decision. However, in no case are we able to conclude that the Navy deviated materially from the applicable cost comparison procedures.

The protest is denied.

[B-218695]

Transportation—Overcharges—Set-Off

A motor carrier that delivered a Government shipment and billed for the services contends that since another carrier picked up and transported the shipment before transferring it for further transportation and delivery, the transportation constituted a joint-line movement requiring the application of joint-line rates. The General Services Administration's audit determination, that the delivering carrier's lower single-line rates were applicable, is sustained because the record shows that the delivering carrier, having the necessary operating authority, agreed to transport the shipment from origin to destination at single-line rates. The fact that the billing carrier elected to allow another carrier to pick up the shipment is irrelevant.

Matter of: ABF Freight System, Inc. (East Texas Motor Freight), October 30, 1985:

ABF Freight System, Inc. (ABF), asks the Comptroller General to review deduction action taken by the General Services Administration against ABF to recover an overcharge collected by East Texas

Motor Freight Lines for transportation of a Government shipment. We sustain the General Services Administration's action.

Facts

The record contains a copy of Government Bill of Lading S-4081164, issued July 20, 1982, by the transportation officer, Anniston Army Depot, Alabama, to procure the transportation of two pallets of machinery parts, weighing 815 pounds, from Anniston to Fort Ord, California. The name of the transportation company shown on the Government Bill of Lading is "East Texas Motor Freight Lines." It shows the shipment was routed "via ETMF" and the notation "per ETMF" appears with a signature indicating receipt by that carrier.

East Texas Motor Freight Lines billed and collected freight charges for transporting the shipment from origin to destination. The charges apparently were based on joint-line rates (more than one carrier) on the assumption that another carrier picked up the shipment and provided line-haul transportation before transferring it to East Texas for further transportation and delivery. The General Services Administration stated an overcharge against East Texas using lower single-line rates offered in their Tender No. 668 on the theory that if another carrier was involved it acted merely as an agent of East Texas rather than as a joint interline carrier. The General Services Administration represents that East Texas had the necessary operating authority to transport the shipment from origin to destination.

Collection action was taken against ABF Freight System which, apparently, accepts responsibility for claims against East Texas [1] but contests the validity of the overcharge. ABF disputes the General Services Administration's premise that the other carrier, which ABF identifies as AAA Cooper, was East Texas' agent. ABF represents that AAA Cooper advised that it was acting as a principal when it picked up the shipment and transported it to Birmingham, Alabama, where it was transferred to East Texas, apparently on interline account.

Discussion

The relevant inquiry in this case is whether East Texas agreed with the Government to transport the shipment from origin to destination at single-line rates offered in Tender No. 668.

The bill of lading operates as the contract of carriage between the shipper and the initial carrier. See *Navajo Freight Lines, Inc.*, B-189382, January 6, 1978. The carrier is responsible for transpor-

[1] The General Services Administration advises that ABF Freight System has formally adopted East Texas' operations and has the responsibility for settling all of East Texas' claims.

tation at the agreed rates. The Government Bill of Lading shows that it was issued to East Texas; that the shipment was intentionally routed via East Texas and that it was received "per ETMF." These facts present compelling evidence that East Texas was the initial carrier under the Government Bill of Lading contract as well as the delivering carrier. East Texas apparently had the requisite operating authority to transport the shipment from Anniston to Fort Ord. This record thus establishes that East Texas agreed to transport the shipment from origin to destination, and its Tender No. 668 represented a continuous offer to perform such transportation at the single-line rates published therein.

The operational details East Texas selected to perform the transportation, including the use of another carrier, have no legal effect on the mutual obligations of East Texas and the Government under the contract of carriage. Thus, regardless of the number of carriers East Texas engaged for the actual transportation, the record shows convincingly that East Texas agreed to transport the shipment from origin to destination at single-line rates. B-144154, April 2, 1962.

Accordingly, the single-line rates used by the General Services Administration in its audit were applicable and the overcharge notices were valid; thus, the General Services Administration's action is sustained.

[B-218819]

Travel Expenses—Constructive Travel Costs—Actual Expenses Less

A transferred employee secured a one-way airfare ticket for his dependent daughter to travel from her college location to his new permanent duty station to effect her change of station. He exchanged that ticket for a roundtrip excursion airfare ticket for her at a lesser cost than the initial one-way ticket, thus, permitting her to return to college at no additional expense. Since the record shows that no one-way airfare ticket between the two points could be issued at a cost less than the roundtrip excursion airfare ticket the expense claimed may be paid in its entirety under authority of the Federal Travel Regulations pertaining to indirect travel, which limits reimbursement to the constructive cost by the usually traveled route.

Matter of: John P. Butt—Dependent Relocation Travel, October 30, 1985:

This decision is in response to a request from an Authorized Certifying Officer, National Finance Center, United States Department of Agriculture. It concerns the entitlement of one of its employees to be reimbursed the expenses of his dependent's travel incident to a permanent change-of-station transfer in October 1984. We conclude that the employee may be reimbursed for the following reasons.

BACKGROUND

The claimant, Mr. John P. Butt, an employee of the Forest Service, was stationed in Warren, Pennsylvania. By Travel Authorization, dated July 20, 1984, he was transferred to Ogden, Utah, effective October 28, 1984. Such transfer included travel and transportation rights of his immediate family, who were identified in the authorization as his spouse and 20 year old daughter, who at that time was a student at Pennsylvania State University.

Pursuant to that authorization, an airfare ticket was issued for Mr. Butt's daughter on August 22, 1984, to travel one-way from State College, Pennsylvania, to Salt Lake City, Utah, on December 20, 1984, to effect her change of station. The cost of that one-way ticket was $463. On August 23, 1984, the one-way ticket was exchanged by Mr. Butt for a roundtrip excursion airfare ticket, thus, permitting his daughter to travel from State College, Pennsylvania, to Salt Lake City, Utah, on December 20, 1984, and return to State College, Pennsylvania, on January 13, 1985. The cost of the roundtrip excursion ticket was $461.

The certifying officer points out that since the Federal Travel Regulations only authorize a one-way relocation trip, the payment of the full amount of the roundtrip ticket is in doubt.

DECISION

The laws governing reimbursement for employee expenses incident to a transfer of official duty station are contained in 5 U.S.C. §§ 5724 and 5724a (1982). Among the various expenses authorized are the costs of transporting an employee's immediate family to his new duty station

Part 2 of Chapter 2, Federal Travel Regulations, (FTR), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984), provides the rules governing basic entitlement to per diem, travel and transportation allowances for employees performing permanent change-of-station transfers. More specifically, FTR para. 2-2.2a provides that travel of the immediate family may begin at the employee's old official station or some other point selected by the employee. However, the cost to the Government for transportation of the immediate family cannot exceed the allowable cost by the usually traveled route between the employee's old and new official stations.

Further, FTR para. 1-2.5b provides in part:

> b. *Indirect-route or interrupted travel.* When a person for his/her own convenience travels by an indirect route or interrupts travel by direct route, the extra expense shall be borne by him/her. Reimbursement for expenses shall be based only on such charges as would have been incurred by a usually traveled route. * * *

We have consistently applied the above rule, that absent official justification for the need for circuitous travel, when an employee travels by an indirect route, he is entitled to reimbursement for such travel, but not to exceed the cost by the usually traveled

route. B-178535, June 21, 1973; *John F. Brady*, B-182927, July 2, 1975. We also stated in B-178535, above, that when personal and official travel is combined, we would not require cost proration of any transportation savings that may accrue which result solely from the fact that the employee performed some personal travel in addition to the required official travel.

In order to preclude the possibility that the expense associated with the issuance of the initial ticket was in error, we sought additional information to confirm the correctness of the charges made. We have been advised that the charge for the one-way airfare ticket as issued was correct; that the charge for the excursion airfare ticket was correct; and that no one-way airfare ticket for travel between the two points was issuable at a cost less than the roundtrip excursion airfare ticket actually issued.

We realize that there is no authority to reimburse the employee for his dependent's return travel, and in effect the travel was not indirect. Compare *Willenburg and Ham*, B-211775, October 5, 1983. However, in the present case, the fact that the special fare package included a return trip by which the dependent was able to return to college, does not negate the employee's reimbursement right for dependent relocation travel. The fact remains that the dependent did travel to the employee's new permanent duty station and residence, and at a lesser cost than it would otherwise have been on a one-way airfare ticket. The record also indicates, as stated above, that at the time the ticket was purchased, it was lowest fare available. See *Marlene Boberick*, B-210374, July 8, 1983. Thus, we believe that under the circumstances of this case, the rules following indirect travel should be followed, and reimbursement limited to the lower or constructive cost.

Accordingly, Mr. Butt may be reimbursed for the full fare paid.

[B-217502]

Compensation—Overtime—Irregular, Unscheduled—"Call-Back" Overtime

The minimum 2-hour credit for unscheduled overtime work performed by Federal employees under the "call-back" overtime provisions of 5 U.S.C. 5542(b)(1) is for the purpose of assuring adequate compensation to recalled employees for the particular inconveniences involved in their having to prepare for work and travel back to their work stations. Hence, the minimum 2-hour credit is not available on every occasion an employee performs unscheduled overtime work, notwithstanding that generally all unscheduled work inherently involves a certain amount of personal inconvenience, and employees who are called upon to perform unscheduled overtime work entirely within their homes are therefore ineligible for the statutory 2-hour minimum work credit.

Compensation—Overtime—Work at Home

Federal employees may be allowed overtime compensation based on the actual time involved for unscheduled overtime work they are called upon to perform at their places of residence, provided the work is of a substantial nature, and procedures are established for verifying the time and performance of the work. Federal Aviation Administration employees may be paid overtime compensation on that basis on oc-

casions when they are called upon to use automated data processing equipment in their homes to adjust malfunctioning navigation instruments located elsewhere.

Matter of: Overtime Compensation—Work Performed At Home, October 31, 1985:

The question presented in this matter is whether employees of the Federal Aviation Administration who use automated data processing equipment in their homes to adjust malfunctioning navigation instruments located elsewhere may be credited on each occasion with the performance of a minimum of 2 hours' overtime work under the "call-back" overtime provisions of 5 U.S.C. § 5542(b)(1).[1] We conclude that the provisions of statute in question cannot properly be construed to permit the crediting of overtime in that manner.

Background

The Federal Aviation Administration is in the process of adapting its navigational aids to a new technology that will enable agency employees to monitor and adjust navigation instruments remotely, over telephone lines through the use of automated data processing equipment. This will allow employees to make the necessary adjustments from their homes in many instances, and will thus reduce the need when malfunctions occur during their off-duty hours for the employees to leave their homes and travel to airports and other places where the navigation devices are located.

On the occasions when agency employees are called upon to adjust the navigation instruments from their homes, it is anticipated that the work required of them will normally take less than 2 hours to complete. Since these employees are not required to remain at their homes or duty stations when on call they are not eligible for standby premium pay as authorized under 5 U.S.C. § 5545(c)(1). However, the agency suggests that this work may be inconvenient especially if sleep or personal plans are interrupted, and that overtime pay based solely on the amount of time the work is actually performed may prove to be inadequate compensation in light of this inconvenience. The agency therefore questions whether the employees may be credited with the performance of at least 2 hours' work on those occasions, as generally authorized under the "call-back" overtime provisions of 5 U.S.C. § 5542(b)(1) for Federal employees who are recalled to perform unscheduled overtime work.

[1] This action is in response to a request for a decision received from the Director of Personnel and Training of the Federal Aviation Administration. The request was submitted by the agency under 4 C.F.R. Part 22 as a matter of mutual concern to it and a labor organization, the Professional Airways Systems Specialists. The agency served the labor organization with a copy of the request for a decision, and the labor organization has agreed to be bound by this decision, subject to applicable appeal rights. See 4 C.F.R §§ 22.4 and 22.7(b). Although decisions of the Comptroller General are not subject to administrative appeal or review, the Federal courts are under no requirement to follow or uphold them.

Overtime Compensation under 5 U.S.C. § 5542(b)(1)

Subsection 5542(b)(1) of title 5, United States Code, provides that:

> (1) unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration; * * *

This is derived from a law enacted by the Congress in 1954.[2] The congressional reports relating to the enactment of that law state that this was designed to cover an "employee called back to perform unscheduled overtime work after he has gone home." [3] The provision was sponsored before the Congress by the Civil Service Commission, in furtherance of findings and recommendations resulting from a study conducted jointly by the Commission and the Bureau of the Budget. The findings and recommendations as presented to the Congress stated that the minimum credit was warranted because "call-back overtime assignments are usually inconvenient." Aside from the interruption of an employee's normal pursuits, this inconvenience was described primarily as the burden imposed on an employee recalled on unscheduled occasions "to spend considerable time in preparing for work and traveling to his place of duty.[4]

Consistent with the legislative history of 5 U.S.C. § 5542(b)(1), we have adopted the view that the primary purpose of the 2-hour minimum work credit is to assure adequate compensation for employees for the inconvenience of having to prepare for work, leave their homes, and travel to their work stations to perform unscheduled overtime work.[5] Thus, we have held that under the statute employees who are called away from their homes to perform unscheduled overtime work are entitled to the 2-hours' minimum work credit, even though they may not actually perform any work and may instead be sent home from the worksite immediately after their arrival.[6] Also, we have held that employees who do perform unscheduled periods of overtime work that merge with their regularly scheduled tours of duty for the day are not entitled to the minimum 2-hour credit, essentially since that situation involves no travel to a worksite induced solely by a recall for unscheduled overtime work.[7]

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[2] Section 205 of Public Law 763, 83d Cong., September 1, 1954, ch. 1208, 68 Stat. 1105, 1110.

[3] See S. REP. NO. 1992, 83d Cong., 2d Sess. 8, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3816, 3823. See also H.R. REP. NO. 2665 (CONF.), 83d Cong., 2d Sess., *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3861, 3869.

[4] See *Compensation for Overtime and Holiday Employment: Hearings on S. 354 before the Subcomm. on Civil Service of the Senate Comm. on Post Office and Civil Service*, 82d Cong., 1st Sess. 4, 20–21 (1951) (statement of Robert Ramspect, Chairman, Civil Service Commission). See also S. REP. NO. 1992, *supra*, at 17, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS at 3832; and 35 Comp. Gen. 448, 449 (1956).

[5] See 40 Comp. Gen. 379, 381–382 (1960).

[6] 40 Comp. Gen. 379, *supra*.

[7] See 45 Comp. Gen. 53 (1965).

Concerning overtime compensation for work performed at home, we have interposed no objection to Federal employees being paid for work undertaken at their places of residence in certain circumstances, provided the work is of a substantial nature and the employing agency is able to verify that the work has in fact been performed.[8] Thus, for example in a case involving Passport Office employees required to receive and make lengthy telephone calls at their homes outside their regular office hours to resolve problems associated with emergency passport requests, we concluded that the employees could be credited with the performance of compensable overtime work. The conclusion was, however, that the credit was limited to the actual time worked during the telephone calls, as shown in the official logbooks and other records, and that the 2-hour minimum overtime credit provisions of 5 U.S.C. § 5542(b)(1) did not apply to the work performed over the telephone from their homes.[9] Although not specifically stated in the text of that decision, the employees' eligibility for the minimum 2-hour credit for "call-back" overtime work was consequently determined to be limited to the occasions when a problem could not be resolved by telephone, and the employees were instead required to travel from their homes back to their offices to take care of the emergency.

Conclusion

Whenever an employee is called upon to perform unscheduled overtime work, there is inherently involved a certain amount of inconvenience to the employee resulting from the interruption of personal plans or pursuits. As indicated, however, the provisions of 5 U.S.C. § 5542(b)(1) do not authorize a 2-hour minimum work credit on every occasion unscheduled overtime work is performed. Rather, we have repeatedly and consistently expressed the view that personal travel outside the home to a worksite located elsewhere for the sole purpose of performing unscheduled overtime work is a necessary prerequisite to eligibility for the minimum 2-hour work credit authorized under the statute. Moreover, we have specifically held that compensation for unscheduled overtime work performed by employees inside their homes is to be based on and limited to the length of time they are actually engaged in that work.

In the present matter, therefore, our view is that the employees called upon to perform unscheduled overtime work in their homes in the circumstances described may be allowed overtime compensation for the work actually done, provided procedures are estab-

[8] See, generally, B-214453, December 6, 1984; B-182851, February 11, 1975; and B-131094, April 17, 1957.

[9] See B-169113, March 24, 1970. Compare also *Charles F. Callis*, B-205118, March 8, 1982, concerning the application of the *de minimis* doctrine to claims for overtime compensation for unscheduled official telephone conversations made at home which are not long enough in duration to meet the minimum accrual standards established for overtime compensation.

lished for recording and verifying the performance and the duration of the work. It is also our view that they cannot properly be allowed the 2-hours' minimum work credit authorized under 5 U.S.C. § 5542(b)(1) in the absence of a recall to work requiring them to travel from their homes to worksites located elsewhere.

The question presented is answered accordingly.

[B-217644]

Contracts—Discounts—Prompt Payment—Computation Basis—Saturday, Sunday, and Holidays

When Federal government offices are closed because of a legal holiday and government business is not expected to be conducted, payments falling due on the legal holiday may be made the following day, including payments that are decreased by prompt payment discounts. Where government offices are open, on Inauguration Day or local holidays, payments must be made on the holiday if due.

Matter of: Prompt Payment Discount When Payment is due on Local Holidays, October 31, 1985:

The Government Printing Office (GPO) asks whether it is legally entitled to prompt payment discount if the last day of the payment period falls on a local public holiday and payment is made on the following day. Specifically the GPO mentions Inauguration Day, which in 1985 was observed on Monday, January 21, but only in the District of Columbia and surrounding jurisdictions. For the reasons given below, we conclude that, except as otherwise provided by contract, when a local holiday is authorized by law, government agencies which are closed for that holiday are entitled to prompt payment discounts if they pay on the next business day following the holiday.

It is a well-established rule of Federal contract law that when an act is to be performed within a certain number of days and the last day falls on a Sunday or a legal holiday, performance on the following day is proper. *Street* v. *United States,* 133 U.S. 299, 306 (1889); 20 Comp. Gen. 310, 311 (1940); 18 Comp. Gen. 812, 814 (1939). The rule is based primarily on the ground of impossibility, either practical or legal, Sundays and legal holidays being days on which business generally is not conducted. A-98462, Apr. 26, 1943. More particularly, we have held that when a government contract provides a discount for payment within a certain number of days and the last day of the discount period falls on Sunday, the Government is entitled to the discount if payment is made on the following business day. 20 Comp. Gen. 310, 311 (1940). Consistent with the general rule, we think the same conclusion would apply to legal holidays. *See* 18 Comp. Gen. 812, 814 (1939).

Whether these principles apply to Inauguration Day and other local holidays that are authorized by law depends on whether it is expected that the usual government functions will be performed. When Federal government offices are closed and government busi-

ness is not expected to be conducted, payments falling due on such days may be made on the following day; however, when the contrary is true, payments must be made on the day of the holiday.

Although Federal law designates Inauguration Day as a legal holiday only for limited purposes, 5 U.S.C. § 6103,[1] the District of Columbia describes it as a holiday for all purposes. *D.C. Code Ann.* § 28-2701 (Supp. 1984). Moreover, both Federal and District laws provide that when Inauguration Day falls on Sunday, it will be observed on the succeeding Monday. What this means in practical terms is that in the District of Columbia and some adjacent suburbs, Federal government offices are closed on Inauguration Day. Accordingly, except as otherwise provided by contract, contractual payments that were to be made by Federal government offices that were closed on Inauguration Day could have been made on the next business day. As the GPO has told us that its payments normally are made from offices in the District of Columbia and its offices were closed on Inauguration Day, contractual payments which included the benefit of prompt payment discounts could have been made on the succeeding day. In those parts of the country where Federal government business was expected to proceed as usual, contractual payments that fell due on Inauguration Day should have been made on that day.

As far as we know, the problem raised by the GPO has not been recurring. Nevertheless, if it persists, to avoid ambiguity we would suggest that agencies include a provision in their contracts consistent with our views herein.

[B-220084]

Bonds—Bid—Form Variances

The use of a commercial form bid bond instead of Standard Form 24 is not *per se* objectionable; rather, the question is whether the commercial form represents a significant departure from the rights and obligations of the parties set forth in the standard form.

Bonds—Bid—Deficiencies—Bid Rejection

A commercial form bid bond which limited the surety's obligation to only the difference between the protester's bid and the lowest amount at which the government might be able to award the contract was properly determined to be inadequate, thus requiring rejection of the protester's bid as nonresponsive, since Standard Form 24 is reasonably read as allowing the government to recover "any cost" of procuring the work from another source, including the additional costs associated with a reprocurement.

Matter of: Kiewit Western Co., October 31, 1985:

Kiewit Western Co. protests the rejection of its apparent low bid as nonresponsive under invitation for bids (IFB) No. CO-MVNP 1-B(4), issued by the Department of Transportation, Federal Highway

[1] Section 6103 describes it as a holiday only "for the purpose of statutes relating to pay and leave of employees. * * *"

Administration (FHWA) for the construction of a retaining wall at the Colorado-Mesa Verde National Park. FHWA rejected the bid because it determined that Kiewit's bid bond was inadequate. Kiewit asserts that its bond is in fact sufficient to protect the government's interest, and accordingly urges that it is entitled to the award as the low, responsive bidder. We deny the protest.

At the outset, we note that we have granted Kiewit's request that the express option provision of our Bid Protest Regulations be invoked in this instance. Because of the nature of the issue involved, the case appeared suitable for our resolution within 45 calendar days, and FHWA also concurred in the request due to the extreme urgency of the project which is to prevent further landslides at the park. *See* 4 C.F.R. § 21.8 (1985).

Background

The IFB required the submission of a bid guarantee of not less than 20 percent of the amount of the bid in the form of a bid bond or other suitable instrument,[1] and bidders were cautioned that failure to furnish the bid guarantee with the bid might be cause for rejection.

Bids were opened on September 12, 1985, and Kiewit was the apparent low bidder with a bid of $704,182.50. Nielson's Inc. was the apparent second low bidder with a bid of $720,825.00. However, an examination of Kiewit's bid documents revealed that the firm had not submitted its bid bond on Standard Form 24 (SF-24), which had been included with all solicitation packages, but rather on a commercial form drafted by its surety. FHWA determined that the bond was unacceptable because it did not afford the government the same protection as that afforded by SF-24, and accordingly rejected Kiewit's bid as nonresponsive.

Kiewit urges to the contrary that its bond is sufficient to protect the government's interest. Although the bond was not on SF-24, Kiewit asserts that even if there is any greater limitation on its surety's obligation under the bond furnished, this is of no consequence because the stated penal sum far exceeds the difference between the firm's bid and Nielson's. In this regard, Kiewit refers to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.101-4 (1984), which provides that noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid, except that the noncompliance shall be waived in certain stated situations, such as where the amount of the bid guarantee is less than that required but is equal to or greater than the difference between the bid price and the next higher acceptable bid. FAR, 48 C.F.R. § 28.101-4(b). Kiewit asserts that this situation is present here, and

[1] *See* the Federal Acquisition Regulation, 48 C.F.R. § 52.228-1 (1984), which provides that a bid guarantee is a firm commitment such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, under Treasury Department regulations, certain bonds or notes of the United States.

that FHWA, therefore, is required to waive the defect and accept the firm's bid. We do not agree with Kiewit's protest position.

Analysis

A bid bond (or other suitable type of bid guarantee) assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. The purpose of the bid bond is to secure the liability of a surety to the government if the bidder fails to fulfill these obligations. *O.V. Campbell and Sons Industries, Inc.*, B-216699, Dec. 27, 1984, 85-1 CPD ¶ 1.

It has been our view that a bidder's use of a commercial form bid bond instead of SF-24 is not *per se* objectionable; rather, the question is whether use of the commercial form represents a significant departure from the rights and obligations of the parties set forth in SF-24. *Perkin-Elmer*, B-214040, Aug. 8, 1984, 63 Comp. Gen. 529 84-2 CPD ¶ 158.

As we see it, the sole matter for resolution is whether Kiewit's surety bound itself to reimburse the government in the event of Kiewit's default [2] to the same extent that it would have been bound if the bond had been submitted on SF-24. SF-24 is reasonably read as providing that the surety is obligated to pay "any cost" of procuring the work from another source,[3] whereas Kiewit's bond specifically stated:

> The Surety shall in no event be liable for a greater amount hereunder than the difference between the amount of the Principal's bid or proposal, and the lowest amount in excess of said bid, or proposal, for which said Obligee may be able to award said contract within a reasonable time.

Since this clause in Kiewit's bond limits the surety's liability only to the difference Kiewit's bid and the amount of the contract which is ultimately awarded, and not to any other costs that might be incurred in making that award, we view this as a "significant departure" from the rights and obligations of the parties under SF-24. *Perkin-Elmer*, B-214040, *supra*.

As FHWA informs us, its experience has been that the majority of defaults occur after award when the successful bidder is unable to secure performance and payment bonds, and the other bids have usually expired. FHWA states that a total reprocurement is thus often necessary with the attendant costs of printing, mailing, publication, and the salaries of those personnel who prepare the repro-

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[2] "Default" as used here means the successful bidder's failure to execute any post-award contractual documents and furnish performance and payment bonds. *Trans-Alaska Mechanical Contractors*, B-204737, Sept. 29, 1981, 81-2 CPD ¶ 268.

[3] SF-24, FAR, 48 C.F.R. § 53.301-24, states that the surety's obligation becomes void when either the principal, upon acceptance of its bid within the specified period, executes further contractual documents and gives the required performance and payment bonds within the specified period after receipt of the bond forms, or, in the event of the principal's failure to fulfill these obligations, the principal pays the government for "any cost" of procuring the work which exceeds the amount of the bid.

curement solicitations. In this regard, FHWA refers to the FAR, 48 C.F.R. § 52.228-1, *supra* n.1, as incorporated into the IFB, which provides that in the event the contract is terminated for default, the bidder is liable for "any cost" of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference. Thus, FHWA believes that Kiewit's bond was materially defective because it did not afford the government the right to recover all reprocurement costs as would have been afforded if SF-24, had been used. We concur in that view.

We do not agree with Kiewit's assertion that the greater limitation on its surety's obligation is rendered immaterial by the fact that the penal sum of the bond exceeds the difference between Kiewit's bid and Nielson's bid. It is true that the FAR, 48 C.F.R. § 28.101-4(b), *supra*, provides for the acceptance of a bid guarantee which is deficient in amount but which nonetheless equals or exceeds the difference between the bid and the next higher acceptable bid. See *AVS Inc.*, B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328. The rationale for this provision is that the government is protected from excess costs if award to the next bidder becomes necessary. *Young Patrol Service, Inc.*, B-210177, Feb. 3, 1983, 83-1 CPD ¶ 125. However, this provision is only an objective administrative standard for determining the sufficiency of a bid bond since it presumes that the government will not be faced with the necessity for a reprocurement action.

However, the sufficiency of Kiewit's bond in terms of any necessary award to the next bidder was never in question, since the penal sum amount is clearly adequate to protect the government in that situation. Rather it is the limitation on its surety's obligation to reimburse the government for all costs in the event of the firm's default after the expiration of bids that is in question. Under Kiewit's bond the government would not be able to recover additional costs associated with any subsequent reprocurement because the surety's obligation was limited to only the difference between Kiewit's bid and the amount of the ultimate award. Therefore, we do not believe that the exception allowing for waiver under the FAR, 48 C.F.R. § 28.101-4(b), is applicable here because that provision only defines the sufficiency of a bid bond under the presumption that the award can be made to the next bidder, and not the full measure of damages otherwise available to the government.

We conclude that FHWA properly rejected Kiewit's bid as nonresponsive because of the inadequacy of the firm's commercial form bid bond. See *Perkin-Elmer,* B-214040, *supra.* Although this works an unfortunate result, the possibility of a monetary savings to the government does not outweigh the importance of maintaining the integrity of the sealed bidding system by rejecting a nonresponsive bid. *Id.* Moreover, the situation could easily have been avoided if Kiewit had used the SF-24 bid bond provided with the IFB.

The protest is denied.

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