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Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary used three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, NW, Washington, D.C. 20548, or by calling (202) 275-6241.

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Contents

Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States.* The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d). Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71). In addition, decisions on the validity of contract awards pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector; whether the decision modifies, clarifies, or overrules the findings of prior published decisions; and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index Digest of the Published Decisions of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974, and Civilian Personnel Law decisions whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

Table of Decision Numbers

List of Claimants, etc.

Tables of Statutes, etc.

United States Statutes

For use only as supplement to U.S. Code citations

United States Code

See also U.S. Statutes at Large

Published Decisions of the Comptrollers General

Decisions Overruled or Modified

Decisions of the Court

February 1988

B-228484, February 2, 1988

Procurement

Competitive Negotiation
■ Best/Final Offers
■■ Procedural Defects

Failure by the agency to confirm a request for best and final offers in writing violates the Federal Acquisition Regulation §§ 15.611(a) and 15.611(b)(3) (FAC 84-16). However, this violation does not in itself provide a compelling reason to disturb an award where all offerors in the competitive range are nevertheless afforded an opportunity to compete on a common basis.

Procurement

Competitive Negotiation
■ Best/Final Offers
■■ Contractors
■■■ Notification

Protester's allegation that it failed to receive an oral request for a second best and final offer (BAFO) is denied where the preponderance of the evidence in the record indicates that protester was notified of request for BAFO.

Matter of: Great Lakes Roofing Co., Inc.

Great Lakes Roofing Co., Inc. protests award to M&M Services of a firm, fixed-priced requirements contract for interior maintenance of family housing quarters at Fort Riley, Kansas, under request for proposals (RFP) No. DAKF19-87-R-0111, issued by the Army. Great Lakes alleges that procedural irregularities flawed the Army's requests for best and final offers (BAFOs), that M&M was treated more favorably by the Army, resulting in unequal competition, that there was inadequate time to prepare a second BAFO, and that the agency engaged in prohibited auction techniques.

We deny the protest.

On July 31, 1987, the Army issued the solicitation for interior maintenance and repair of housing units at Fort Riley with a September 21 closing date. The RFP provided that the government would award a contract to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price and other factors considered. The RFP contained more than 500 line items. The evaluation criteria were listed as price, performance and qualifications, with price more than twice as important as performance and qualifications which, in turn, were of equal importance.

Two offers were timely received and deemed technically acceptable (under the technical criteria of performance and qualifications) and were determined to be within the competitive price range as determined by the agency. On September 25, negotiations began with both offerors by telephone. Great Lakes was asked to review its proposal on items that were priced above the government's estimate and on line items that appeared to be extremely low. Later that same day, Great Lakes telephoned the agency to advise that its original prices were correct and no revisions would be made. The agency then advised Great Lakes to confirm this in writing as a best and final offer. Great Lakes' BAFO was received on September 28. On September 25, M&M also was requested to review its line items. M&M telephoned the agency with price changes that same day and the agency then requested M&M to furnish a BAFO. On September 28, the agency again telephoned M&M because a review of M&M's proposal revealed that the prices on doors as proposed included manufactured sealants. The agency's contract specialist pointed out that there was a line item to cover costs to seal doors and perhaps M&M should adjust its proposal accordingly. M&M was also asked to provide a second BAFO reflecting any price changes to reach the agency no later than September 30.

The agency states that Great Lakes was also contacted immediately on September 28 to verify its interpretation for the line items concerning the doors. Upon verification that the doors were priced as unfinished, the agency contends that it specifically informed Great Lakes during that same conversation that any price changes should be submitted as a second BAFO to reach the agency no later than September 30. The BAFOs of M&M and Great Lakes were received on September 30 and award was made to M&M as the offeror with a slightly lower price. This protest followed on October 9.

Great Lakes alleges that the agency failed to follow regulatory procedures in this procurement and, therefore, has compromised the integrity of the procurement process. Specifically, Great Lakes argues that the requests for BAFOs were procedurally deficient because written confirmations were not sent by the agency, established common cutoff dates for receipt of BAFOs were lacking, and insufficient time was allowed to submit a BAFO. Great Lakes also contends that it did not receive a telephone call from the agency on September 28 informing it of the opportunity to submit another BAFO by September 30 if any changes were required, but first heard of this opportunity when it telephoned the agency on the morning of September 30 to check on the progress of the award decision. This led to what Great Lakes has characterized as favorable treatment for M&M and an auction environment.

The agency concedes that it violated the FAR in not providing written confirmation of the telephone requests for BAFOs which would have confirmed a common cutoff date and time for submission of proposals.

Generally, there is no requirement that negotiations with offerors be in writing. The regulations governing the conduct of negotiations provide that either oral discussions or written communications shall be conducted with offerors to resolve uncertainties. FAR, § 15.610 (FAC 84-16). Further, even where the regula-

tions require a writing, such as requiring written confirmation of an oral request for BAFOs, the lack of written correspondence will not result in the disturbance of the award where all offerors in the competitive range are afforded an opportunity to compete on a common basis. *Technical Assistance Group, Inc.,* B-211117.2, Oct. 24, 1983, 83-2 CPD ¶ 477. Thus, the critical inquiry is not whether discussions and other communications with offerors were in writing, but, rather, whether the competition was conducted on an equal basis.

As evidence of unequal competition, Great Lakes contends that, unlike M&M, it failed to receive the September 28 telephone call from the agency which verified the doors as proposed and requested any changes to be submitted in a second BAFO by September 30. Great Lakes admits that it received a telephone call from the agency and request to submit a BAFO on September 25 after it indicated that no changes were anticipated to its proposal; however, the protester contends that the verification of the doors as proposed occurred then and not on September 28. Great Lakes contends that it first heard of the opportunity to submit a second BAFO on the morning of September 30 when it telephoned the agency regarding the award and was, therefore, prejudiced by the lack of time to properly prepare another BAFO. Great Lakes has submitted affidavits in support of its position.

The agency, on the other hand, flatly states that Great Lakes was told on September 28 to submit a BAFO by September 30. The contract specialist has submitted an affidavit to the effect that she informed Great Lakes on that date "that a revised [BAFO] would be accepted if it reached this office no later than Wednesday, 30 September." Her position is supported by an agency telephone log, and, less directly, by a telephone memorandum.

The affidavit submitted by the operations manager of Great Lakes states that he has no recollection of a telephone call from the agency on either September 28 or September 29 requesting a second BAFO. The affidavit further states that had a request for second BAFOs been received, an immediate and intensive response to make proposal revisions would have been triggered. Nevertheless, the agency's report indicates that a telephone request for second BAFOs did occur on September 28. This is supported by an affidavit of the contracting officer's representative, agency telephone log, and a telephone memorandum. While the record contains conflicting affidavits from the parties, the record also contains a telephone log prepared in the ordinary course of business at the time the telephone call was made. This business entry identifies the telephone number and location of the protester and indicates that the protester was called on September 28. Therefore, we conclude that the preponderance of the evidence indicates that the telephone request for second BAFOs was made on September 28. *See Boniface Tool & Die, Inc.,* B-226550, July 15, 1987, 87-2 CPD ¶ 47. The evidence, therefore, fails to show that Great Lakes and M&M were treated unequally and denied the same opportunity to submit BAFOs by September 30. Accordingly, we deny this protest ground.

We also find Great Lakes' argument concerning prejudice due to the lack of a common cutoff time and date for receipt of proposals to be without merit. The

contracting officer states that BAFOs were required to be received no later than September 30. While there is no documentary evidence in the agency report to establish the exact time that BAFOs were due, both Great Lakes and M&M state that they were told that BAFOs were due by "12 o'clock noon or 1:00 p.m., at the latest," on September 30. The protester is apparently concerned that M&M might have gained a competitive advantage by modifying its proposal after Great Lakes had tendered its offer to the contracting officer. However, this concern is not supported by the record since M&M's proposal was received at 10:49 a.m., September 30, before receipt of Great Lakes' proposal at 11:45 a.m. Since both offerors timely submitted BAFOs, we find that they competed on an equal basis.

With respect to Great Lakes' argument that it was not allowed sufficient time to revise its proposal, this is based on the assumption that Great Lakes first received notice of the final BAFO on September 30, not September 28. However, we have already found that Great Lakes has failed to show that it did not receive the same notice and the same time to prepare its proposal that M&M received. Consequently, this protest ground must also fail.

Finally, with respect to the protester's allegation of auction techniques, we only note that Great Lakes has failed to substantiate this claim except to imply that a request for a second round of BAFOs is circumstantial evidence of auctioning. We do not agree, as negotiated procurements often have more than one round of BAFOs and the record here indicates that a second round was required to alleviate any misunderstanding about those line items concerning the doors requirement. *See Research Analysis and Management Corp.,* B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524.

The protest is denied.

B-226527, February 3, 1988

Appropriations/Financial Management

Appropriation Availability

■ **Purpose Availability**

■■ **Specific Purpose Restrictions**

■■■ **Utility Services**

■■■■ **Use Taxes**

United States Department of the Interior can pay a surcharge levied indiscriminately against the United States, commercial businesses, and private residences, pursuant to a Utah Public Service Commission lifeline telephone service program that provides discounted residential telephone rates for Utah residents eligible for various public assistance programs. Discrimination by a public utility in setting its rates is not unlawful when based upon a classification corresponding to economic differences among its consumers.

Appropriation Availability
■ Purpose Availability
■ ■ Specific Purpose Restrictions
■ ■ ■ Utility Services
■ ■ ■ ■ Use Taxes

Surcharge assessed by telephone service providers to implement Utah Public Service Commission's lifeline telephone service program by which lower income individuals receive less expensive service is not a tax, but part of an authorized rate for telephone services. The surcharge represents a partial redistribution of costs incurred by telephone service providers whereby the poorer users pay less for their services. 64 Comp. Gen. 655 (1985) distinguished.

Matter of: Surcharge of Utah Public Service Commission's Lifeline Telephone Service Program

A certifying officer with the National Park Service of the United States Department of the Interior asks whether a surcharge levied pursuant to the Utah Public Service Commission's Lifeline Telephone Service Program can be certified for payment. For the reasons given below, we find that the payment can be certified.

Background

Effective January 1, 1987, the Utah Public Service Commission established a program to provide discounted residential telephone rates for certain low income Utah residents. The program is known as the Lifeline Telephone Service Program. Utah Public Service Commission, §§ R750-341 *et seq.* Beneficiaries are residents who currently are eligible for various public assistance programs, including Aid to Families with Dependent Children, food stamps, and supplemental security income. *Id.* § R750-341-2. Eighty percent of the total costs of providing lifeline telephone services is to be funded from a surcharge imposed upon the non-lifeline customers. The other 20 percent is to be funded from a surcharge imposed upon all intrastate toll and access services in Utah. *Id.* § R750-341-6.2.

The Contel Telephone Company and other telephone service providers are to assess and collect the lifeline surcharge. Monthly bills will show an 18 cent surcharge on each access line, and a surcharge of 65 percent on long distance calls and WATS usage within Utah. The surcharge is to be assessed indiscriminately against the United States government, commercial businesses and private residences. It is estimated that the annual cost of the surcharge for one of Interior's national parks in Utah will be between $1000 and $1500. In a proceeding before it, the Utah Public Service Commission found that it had authority to establish a lower rate for lifeline services. *In re Establishment of Telephone Lifeline Rates,* Case No. 85-999-13 (Utah Pub. Serv. Comm. Jan. 3, 1986).

The Interior Department raises two legal problems that could preclude payment of the surcharge. First the Department suggests that if the surcharge is consid-

ered a vendee tax, the government cannot pay it; if a vendor tax,[1] arguably the federal government is being treated discriminatorily since it is paying for more services than another user group. Secondly, the certifying officer questions whether payment of the surcharge is consistent with section 1348 of title 31 of the United States Code, which prohibits appropriated funds from being expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone services from private residences. He argues that by paying the surcharge, indirectly the federal government would be paying for telephone service in the private residences of the eligible lifeline users.

The Department has been certifying utility bills for payment even though the payment includes the lifeline surcharge. The Department states that if the surcharge eventually is determined to be unallowable, it would be relatively easy to offset surcharge amounts paid against future utility bills.

Legal Discussion

Generally, where rates for providing utility services are established by the legislature or a public service commission which has been delegated this power, such rates are controlling. Unless they are manifestly unjust, unreasonable or discriminatory, they should be paid by federal agency users. B-189149, Sept. 7, 1977; 27 Comp. Gen. 580, 582-83 (1948). Although public utilities as a rule cannot discriminate unjustly in their rates to consumers similarly situated or of the same class for the same service or kind of service, it is also true that rate-making authorities may decide that a substantial inequality in economic circumstances justifies a reasonable inequality of rates. Accordingly, discrimination by a public utility in setting its rates is not unlawful when based upon a classification. corresponding to economic differences among its customers or upon differences in the kind or amount of service furnished or other reasonable basis. B-189149, Sept. 7, 1977. In this regard, we have held that the General Services Administration was authorized to pay a lifeline surcharge representing lost revenues to utility companies who were providing basic utility services at reduced rates to elderly persons whose income was below a certain level. *Id.* Under this program the utility companies charged their other users for the costs of supporting the lifelines services. The users included the General Services Administration.

We think the lifeline surcharge to be imposed in this case is similar to the surcharge in B-189149, Sept. 7, 1977, and it represents a proper exercise of the Utah Public Service Commission's rate-making authority. The service is to be supplied to individuals who are eligible for public assistance, and it is to be funded from a surcharge assessed indiscriminately against customers not eligi-

[1] The Department suggests that the lifeline surcharge does not meet the requirements of a valid vendor tax since the Utah Public Service Commission does not actually assess the charge and collect the revenue from the utility companies. The Commission has merely authorized and directed the utility companies to redistribute their costs from the poor users of their services to the rich users.

ble for lifeline service, including the federal government, commercial businesses and private residences.

We do not regard the lifeline service surcharge to be a tax, either vendor or vendee, but rather a part of the authorized rate for telephone services. The surcharge represents a partial redistribution of the costs of doing business incurred by telephone service providers, and passed on to a defined class of service users. It is not a tax on the providers or their users.

We distinguish 64 Comp. Gen. 655, 656 (1985) and similar cases, in which we have held that 9-1-1 telephone fees were found to be vendee taxes, and as such could not be assessed against the United States. In those cases, the telephone service providers acted strictly as collection agents for the public authorities assessing the fees, which were used to offset the cost of a separate municipal service.

We also find that section 1348 of title 31 of the United States Code does not apply to the lifeline service program under consideration. As stated, that section prohibits appropriated funds from being expended for telephone service installed in any private residence or for tolls or other charges for telephone services from private residences. The lifeline service program does not involve these kinds of direct expenditures. A fair reading of section 1348, its legislative history and its construction does not justify such a broad interpretation of the restriction.

B-228468, February 3, 1988

Procurement

Competitive Negotiation
■ Contract Awards
■■ Administrative Discretion
■■■ Cost/Technical Tradeoffs
■■■■ Cost Savings

An agency officer may properly decide in favor of technically lower rated proposal in order to take advantage of its lower cost, notwithstanding evaluation scheme in which cost was the least important evaluation criterion but must supply a reasonable justification for such a decision.

Procurement

Competitive Negotiation
■ Contract Awards
■■ Initial-Offer Awards
■■■ Propriety

Competition in Contracting Act of 1984 prohibits contracting agencies conducting a negotiated procurement from making an award on the basis of initial proposals without discussions to other than the "lowest overall cost" offeror where there would be at least one lower-priced proposal within the competitive range.

Matter of: Meridian Corporation

Meridian Corporation (Meridian) protests the award of a contract to Reynolds, Smith and Hills (RSH) under request for proposals (RFP) No. DAAC69-87-R-0125 issued by the New Cumberland Army Depot (NCAD). The RFP sought proposals for developing and conducting energy awareness seminars at Army installations within and outside the continental United States. Meridian complains that NCAD made an award that was inconsistent with the evaluation and source selection scheme set forth in the RFP.

We sustain the protest.

On July 29, 1987, NCAD issued the instant RFP, which provided for award to the contractor receiving the highest combined ranking in four areas. Management approach, technical approach and experience received equal importance while cost had one-third the importance of the other areas for a 30-30-30-10 ratio. The solicitation also contained the Federal Acquisition Regulation (FAR), § 52.215-16 (1987), Contract Award clause, providing that award would be made to the responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, cost or price considered along with the other factors specified in the solicitation.

NCAD received 8 proposals in response to the RFP. Three offerors were determined to be within the competitive range with the following evaluation results:

Firm	Technical Score	Price
Meridian	84	$1,138,298
RSH	77.5	851,912
Hansen Assocs.	72	810,089

NCAD was uncertain how to evaluate price under these circumstances and referred the award decision to its higher command, the U.S. Army Depot System Command (DESCOM), which had retained the authority to review proposed awards exceeding $1 million dollars at depots including New Cumberland.

DESCOM advised NCAD to perform a value analysis, to identify areas of apparent superiority in Meridian's proposal and to decide whether that superiority was worth the price differential between Meridian and RSH. Accordingly, NCAD asked the requiring activity to conduct such an analysis. This analysis generated a determination that noted Meridian's excellence in its technical and management approach but concluded that the cost differential between Meridian's proposal and the other proposals could not be justified. To support this conclusion the agency noted that Meridian proposed to spend 38 hours on contract line item number (CLIN) 0002.1, 2-day visit in preparation for a seminar, and 50 hours on CLIN 0002.2, 4-day visit in preparation for a seminar. The agency believed that neither CLIN required more than 16 hours of effort. Additionally, the agency found that Meridian was paying its team leader more per hour than other offerors seemed to be paying their team leaders. The requiring

activity therefore requested that award be made to RSH inasmuch as their proposal met the "minimum needs" of the government. The record further shows that the agency did not point score cost. Rather, the agency concluded that Meridian's technically superior proposal did not justify its higher cost. Thus, the selection of RSH was based on a cost/technical tradeoff by the agency which awarded the contract to that firm. This protest followed.

Initially, we point out that selection officials have the discretion to make cost/technical tradeoffs and the extent of such tradeoffs is governed only by the tests of rationality and consistency with the announced evaluation criteria. *Grey Advertising Inc.,* 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. However, we have also held that where, as here, award is made to the lower priced, lower rated offeror notwithstanding an evaluation scheme placing primary importance on technical considerations, such a selection must be supported by reasonable justification. *AMG Associates, Inc.,* B-220565, Dec. 16, 1985, 85-2 CPD ¶ 673.

The agency has not presented any rational explanation to justify its selection of a lower rated technically, lower cost proposal. Specifically, the agency has not explained why Meridian's technical superiority in the major technical areas (representing 90 percent of total evaluated points) was not worth the additional cost proposed. Rather, as stated above, the agency only discusses a minor cost consideration involving two subline items which concern preparatory visits for seminars in certain locations. (These subline items are a small part of total costs which, in turn, represented under the RFP only 10 percent of total evaluated points.) The agency otherwise fails to indicate why the costs proposed by Meridian were unreasonable or excessive, considering the apparent technical superiority of Meridian's proposal. Therefore, since the Army has not provided any rational explanation of its selection decision, we conclude that the Army has not shown that its cost/technical tradeoff was reasonable.

Furthermore, the agency had no basis to make award on initial offers in these circumstances. Our previous decisions have recognized that under the Competition in Contracting Act of 1984 (CICA) agencies have limited discretion to make award on the basis of initial proposals without discussions. We have recognized an exception to the general requirement that agencies must conduct negotiations in a negotiated procurement in that the requirement need not be met "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government." CICA, 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985). By its express use of the term "lowest overall cost," CICA prohibits an agency from accepting an initial proposal, such as RSH's, where there is a lower cost technically acceptable proposal, such as Hansen's, in the competitive range. *Pan Am Support Services, Inc.—Request for Reconsideration,* B-225964.2, May 14, 1987, 66 Comp. Gen. 457, 87-1 CPD ¶ 512.

Accordingly, by separate letter of today, notwithstanding the release of this information, we are recommending to the Secretary of the Army that discussions now be conducted with all offerors whose proposals are within the competitive

range to allow for the submission of revised proposals in satisfaction of the agency's requirements. We further recommend that RSH's contract be terminated for the convenience of the government if it is not the successful offeror at the conclusion of these discussions.

B-228260.2, February 5, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ Interested Parties

Under solicitation calling for award of cost-reimbursement contract, protester whose initial proposed costs were not low nevertheless is an interested party to challenge contracting agency's method of evaluating offerors' cost proposals since, if the protest is sustained, protester could be in line for award.

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Cost Estimates

Agency's mechanical application of government estimate of staffhours to each offeror's proposed wage rates to determine evaluated costs for each offeror does not satisfy the requirement for an independent analysis of each offeror's proposed costs.

Procurement

Competitive Negotiation
■ Contract Awards
■■ Initial-Offer Awards
■■■ Propriety
■■■■ Price Reasonableness

Where government estimate of staffhours is not revealed to offerors and proposals submitted offer staffhour levels that differ substantially from government estimate, acceptance of an initial proposal based on the government's estimate and not a detailed cost analysis of each proposal is improper since the agency has not assured itself that it is actually making award at the lowest overall cost available to the government as required by law.

Matter of: Kinton, Inc.

Kinton, Inc. protests the rejection of its proposal under request for proposals (RFP) No. DABT60-87-R-0129, issued by the Army for the design and development of interactive courseware. We sustain the protest.

The RFP was for the development of courseware including lesson plans, exercises and tests in specific subject areas for entry-level service personnel. The awardee is to furnish personnel, including subject matter experts, services, fa-

cilities, and equipment to design, develop and deliver the courseware based on subject matter supplied by the Army as government furnished material (GFM). According to the Army, the primary objective of the RFP is the development of a "premaster" videotape to be shot by the agency which will be provided to a videodisc manufacturer for the production of videodiscs.[1]

The statement of work (SOW) in the RFP includes a series of contract events including delivery of GFM, contractor delivery of instructional design outlines for each subject area, delivery of courseware, government production of videotape, contractor delivery and validation of software and, at various stages, government review and approval of delivered items. After final inspection and approval, the items furnished under the contract are used to reproduce a quantity of videodiscs for actual training. The RFP called for offers on a cost-plus-fixed-fee basis and provided for award to the offeror submitting an acceptable technical proposal at the lowest evaluated cost.

The Army received 15 proposals, 8 of which, including Kinton's, were judged technically acceptable. To determine an evaluated cost for each of the technically acceptable proposals, contracting officials multiplied the government estimate of required staffhours for each staff position (totaling 23,980 staffhours) by each offeror's proposed labor rates. The agency's recalculation resulted in a substantial increase in the costs proposed by seven of the eight offerors in the competitive range. The firm which ultimately received the award, for example, had its costs increased by 50 percent; Kinton's costs, which were the fourth lowest of the proposed costs, were more than doubled; and the offeror with the lowest proposed costs had them almost tripled. The increase in Kinton's costs was due to the disparity between Kinton's proposed staffhours (9,900) and the government estimate (23,980); in evaluating Kinton's costs, the Army increased the firm's hours under each staff position to correspond roughly to the government estimate for each position.

In accordance with the RFP award provision, award was made to Creativision, Inc., the offeror with the lowest evaluated costs. Pending our decision on the protest, performance of the contract has been suspended.

Kinton argues that contracting officials should not have increased the firm's proposed staffhours because it can satisfactorily complete the project with the smaller number of staffhours it proposed. Kinton says that its proposed hours, although less than the government estimate, are comparable to the hours it proposed and used under similar Army contracts which it successfully performed. Thus, according to the protester, the government estimate of the required staffhours is inflated and bears no relation to the staffhours Kinton would need for this project.

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[1] In addition to the RFP at issue here, Kinton filed protests involving four other RFPs issued by the Army for the same type of work (RFP Nos. DABT60-87-R-0081, 0087, 0139 and 0179). Those protests were considered in a separate decision by our Office because the Army's reasons for rejecting Kinton's proposals under those RFPs were different than those under the RFP here. *Kinton, Inc.*, B-228233, *et al.*, Jan. 28, 1988, 88-1 CPD ¶ ———.

As a preliminary matter, the Army argues that Kinton is not an interested party to protest the award because the firm would not be in line for award even if its protest is upheld. In this regard, the agency points out that three offerors proposed lower total costs than Kinton and seven offerors were lower on evaluated costs.

Under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1987), a party must be "interested" in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of the party's status in relation to the procurement. *Automated Services, Inc.*, B-221906, May 19, 1986, 86-1 CPD ¶ 470.

Here, Kinton's protest essentially concerns the propriety of the Army's method of evaluating the offerors' proposed costs. Kinton argues that its own personnel are particularly skilled and efficient, as reflected in Kinton's higher proposed labor rates, so that it could satisfactorily complete the work with fewer hours than estimated by the Army. As a result, in Kinton's view, it was improper for the Army to calculate its evaluated costs by simply adjusting its proposed staffhours to the agency's estimate. If, as Kinton argues, the Army's cost evaluation was flawed, Kinton's proposal, if properly evaluated, could have the lowest evaluated cost. Since under those circumstances Kinton could be in line for award, the firm is an interested party to challenge the Army's cost evaluation method. *See Hughes Aircraft Co.*, B-222152, June 19, 1986, 86-1 CPD ¶ 564.

With respect to the merits of the protest, the Army argues that its adjustment of the offerors' proposed staffhours to conform to the government estimate was appropriate since in a cost-type contract an offeror's proposed hours and costs may not accurately reflect the actual hours the contractor will use and the actual costs the government will be required to pay. The agency also argues that Kinton has not shown that the government estimate of staffhours was incorrect.

As explained in detail below, we find that the agency did not properly evaluate the cost proposals of the competitive range offerors and should not have made award on the basis of initial proposals without holding discussions with all technically acceptable offerors.

Under a cost-reimbursement type contract, offerors' proposed costs of performance should not be considered as controlling since, regardless of the costs proposed by the offeror, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) § 15.605(d). Accordingly, where, as here, the RFP contemplates the award of a cost-type contract, the agency is required to analyze each offeror's proposed costs for realism. *GP Taurio, Inc.*, B-222564, July 22, 1986, 86-2 CPD ¶ 90.

In this case, the Army formulated its estimate of the required staffhours and used that estimate to adjust each offeror's proposed costs. The agency made no effort to independently analyze the realism of the offerors' proposed costs based on each offeror's proposed personnel, staffhours and wage rates; rather, contracting officials simply applied each offeror's proposed wage rates to the agen-

cy's predetermined staffhour estimate, without regard to the offeror's proposed staffhours. The agency's recalculation here resulted in a substantial increase in the costs proposed by seven of the eight competitive range offerors. Under these circumstances, we think that it is clearly inconsistent for an agency to use a cost-reimbursement method of contracting on the one hand while maintaining on the other hand that estimated costs or hours are capable of being determined to such a degree of certainty that any estimated costs or hours other than those of the government are unrealistic and must be significantly adjusted. *See* FAR § 16.301-2; 47 Comp. Gen. 336, 347 (1967). More importantly, the mechanical approach taken here does not satisfy the requirement for an independent analysis of each offeror's cost proposal, particularly where award is made on the basis of initial proposals without discussions. In fact, we have recognized that where, as here, the government estimate is not revealed to offerors and proposals substantially deviate from that estimate, the contracting agency should consider the possibility that the proposals may, nevertheless, be advantageous to the government and conduct discussions with the offerors concerning the discrepancy. *See Teledyne Lewisburg; Oklahoma Aerotronics, Inc.,* B-183704, Oct. 10, 1975, 75-2 CPD ¶ 228.

Thus, we think that it was improper for the agency to make award without a more detailed cost analysis of proposals or without holding discussions regarding offerors' proposed staffhours and costs. In this respect, the Competition in Contracting Act of 1984 (CICA) allows an agency to award a contract on the basis of initial proposals where the solicitation advises offerors of that possibility and the existence of full and open competition or accurate prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985); FAR § 15.610(a)(3). This provision of CICA prohibits an agency from accepting an initial proposal that may not represent the lowest overall cost to the government. When an agency is faced with circumstances where an initial proposal may not reflect the lowest overall cost, the agency should conduct discussions to enable it to obtain the actual lowest overall cost or to otherwise determine the proposal most advantageous to the government under the evaluation factors listed in the solicitation. *Hartridge Equipment Corp.,* B-228303, Jan. 15, 1988, 88-1 CPD ¶ ———; *JGB Enterprises, Inc.,* B-225058, Mar. 13, 1987, 87-1 CPD ¶ 283.

Here, rather than negotiate with offerors over the discrepancy between the government estimate of staffhours and the offerors' proposed staffhours, the agency merely adjusted the cost proposals of all offerors to conform to its own estimate. There is nothing in the record to indicate why the Army believed only its estimates could be valid or why the protester's position, that considerably fewer hours are possible through high efficiency levels and higher wage rates, is without merit in this case. Therefore, given the range of proposals submitted and the Army's absolute reliance in making the award decision on a government estimate which was not disclosed to the offerors, we find that the Army could not reasonably conclude that award based on initial proposals would result in the lowest overall cost to the government, as required by CICA. Accordingly, we are

recommending that the Army open negotiations relating to staffhours, labor rates and costs with all offerors in the competitive range and then determine the realism of the proposed costs after discussions are concluded. If the agency, after so doing, concludes that an offeror other than Creativision should receive the award under the solicitation's evaluation criteria, Creativision's contract should be terminated and the award made to the proper firm.

The protest is sustained.

B-228803, February 5, 1988

Military Personnel

Relocation
■ Household Goods
■■ Vessels
■■■ Shipment

The definition of the term "household goods" contained in the Joint Federal Travel Regulations, promulgated under the authority in 37 U.S.C. § 406(b), may be revised to include small boats and canoes so such articles may be moved at government expense as part of uniformed service members' household goods shipments. Upon such revision 53 Comp. Gen. 159 (1973) would be superseded.

Matter of: Uniformed Service Members' Household Goods—Small Boats and Canoes Included

The question in this case is whether the Joint Federal Travel Regulations may be amended so that "small boats and canoes" may be shipped at public expense under the authority of 37 U.S.C. § 406(b), which provides for the transportation of the "baggage and household effects" of uniformed service members who are ordered to make a permanent change-of-station move.[1] We conclude that the regulations may be amended to include small boats and canoes in the definition of articles that may be shipped at public expense under this statute.

Background

A member of a uniformed service who is ordered to make a permanent change of station ". . . is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned . . ." 37 U.S.C. § 406(b)(1)(A) (Supp. III, 1985). Implementing regulations define the term "household goods" as generally including all personal property associated with the home and personal effects belonging to service members and their dependents, on the effective date of the permanent-change-of-station orders, which can be accepted and transported as household goods by

[1] This responds to a request for a decision received from the Chairman, Per Diem, Travel and Transportation Allowance Committee, Dept. of Defense, (PDTATAC Control Number 87-10).

an authorized commercial carrier. Volume 1 of the Joint Federal Travel Regulations (1 JFTR), Appendix A. It is clear from chapter 5, Part D, of 1 JFTR and from the definition of "household goods" in Appendix A that that term encompasses all items referred to in 37 U.S.C. § 406(b) as "baggage and household effects." The definition contains a list of items specifically excluded from coverage under the term, and among the enumerated exclusions are:

2. Automobiles, trucks, vans and similar motor vehicles; boats; airplanes; mobile homes; camper trailers; and farming vehicles . . .

Hence, under current regulations, since "boats" are specifically excluded from the definition of "household goods," boats of any type are now considered not to be "baggage and household effects" which may be transported at public expense when service members are ordered to make a permanent change-of-station move.

The uniformed services have recommended that the definition of "household goods" in 1 JFTR, Appendix A, be revised ". . . to permit the shipment of small boats and canoes as part of a uniformed member's household goods because many members have a small boat or canoe that they use for recreational purposes or in pursuit of their hobbies." The services argue that such change would be consistent with a previous change to the definition of "household goods" in which snowmobiles, which at one time were specifically excluded, were taken off the exclusion list and specifically included in the definition.[2] They also point out that such change would be consistent with the recommendations of an ad hoc committee composed of a representative from the Per Diem Committee Staff, General Services Administration, Department of State, and the General Accounting Office formed in 1979 to explore the possibility of arriving at a standard definition of household goods which would be applicable to the uniformed and civilian members/employees of the United States government.

The services point out that the commercial household goods carriers' tariffs have special provisions concerning boats, canoes, skiffs, light rowboats, kayaks, sailboats and boat trailers that contain certain weight additives. It is stated that when a shipment includes a boat 14 feet or more in length, the transportation charges for the shipment are based upon the net scale weight of the shipment plus a weight additive calculated as follows:

a. Canoes, skiffs, light rowboats, and kayaks 14 feet and over in length 40 lbs per linear foot of the total length.

b. Boats, 14 feet and over in length 115 lbs per linear foot of total length.

It is stated that if the proposal to change the regulations is approved, it is contemplated that when a uniformed service member's household goods shipment includes an article for which a weight additive is assessed, the amount of the weight additive should be added to the net weight of the shipment and count against the member's authorized weight allowance. In addition, if an article to

[2] See Volume 1, Joint Travel Regulations, Appendix J (Change 360, Feb. 1, 1983, and Change 363, May 1, 1983).

be shipped requires special packing and crating, and/or handling, the member should be required to pay for such additional accessorial service.

The issue thus presented is whether 1 JFTR, Appendix A, may be revised to authorize the transportation of "small boats and canoes" as "household goods" under the authority of 37 U.S.C. § 406(b)(1)(A).

Analysis and Conclusion

We have repeatedly observed that "baggage," "household effects" and "household goods" are general terms not limiting themselves to precise definition, but varying in scope depending upon the context in which they are used. *Transportation—Household Goods— Live Animals,* 65 Comp. Gen. 122, 124 (1985); 53 Comp. Gen. 159, 160 (1973); 52 Comp. Gen. 479, 481 (1973); 44 Comp. Gen. 65, 66 (1964). Although the terms have always been considered to include personal property generally associated with the home and person, over the years, due in part to the changing circumstances, our view of what was generally associated with the home and person has changed. For example, in the early 1970's Volume 1 of the Joint Travel Regulations did not specifically exclude a snowmobile from the definition of "household goods." We held, however, that a snowmobile could not be included in "household goods," and we defined a class of sports or hobby equipment (which included boats, trailers, and airplanes) which we did not consider to be "household goods." B-179580, Mar. 18, 1974. During that same time, however, we recognized that ". . . findings in a study [of the definitions of household goods] may present the basis in support of modifications to the existing definitions . . .," and we suggested a detailed review of the matter. 52 Comp. Gen. 479 (1973). The ad hoc committee, referred to by the Per Diem Committee in its request for decision, resulted from this suggestion and did recommend a considerably broader definition of "household goods" than was then in effect. The General Services Administration, in paragraph 2-1.4h of the Federal Travel Regulations, FPMR 101-7 (Supp. 4, Aug. 23, 1982), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1983), and then the uniformed services in Volume 1, Joint Travel Regulations, Appendix J (Change 363, May 1, 1983), revised the definitions of "household goods" to adopt the central recommendation of the ad hoc committee that all personal property associated with the person or home that can be legally accepted and transported as household goods by an authorized commercial carrier should be defined as "household goods." Both the General Services Administration and the uniformed services adopted virtually the same definition of "household goods," which included a sentence that stated that snowmobiles and vehicles such as motorcycles, mopeds and golf carts, may be shipped as household goods.[3] We have not objected to these revisions in the regulations, which superseded our decision on snowmobiles, and we no longer view items of personal property that may be classified as "sports or hobby equipment" as being ex-

[3] Although the revised definitions of "household goods" did reflect the ad hoc committee's central recommendation and expand the items included in the term, they were not as expansive as the committee recommended, and retained a significant list of excluded items from the term, including "boats."

cluded from the term "household goods" solely on that basis. To the extent that B-179580, Mar. 18, 1974, *supra,* suggested otherwise it has been superseded.

We acknowledge that "small boats and canoes" that are used for recreational purposes appear to be analogous to snowmobiles, motorcycles, mopeds, and golf carts which are also used for recreational purposes. Accordingly, we now would not object to an amendment to the regulations to include these within the definition of "household goods" that may be transported at government expense. Upon such redefinition, our prior decision in 53 Comp. Gen. 159 (1973), which precluded components and accessories of such boats from being considered as "household goods," would be superseded.

We also note that generally a carrier's authority to transport household goods includes the authority to transport a boat so long as it is a part of the personal effects of the householder, and we are aware of no specific limitations on the size of boats such a carrier may accept. *See Philip T. Woodfin Extension—Boats,* 67 M.C.C. 419 (1956). Therefore, if the services contemplate placing any restrictions on the size of the boats they wish to allow to be transported with a member's household goods, as they appeared to indicate in the submission, such restrictions should be included in the amendment to the Travel Regulations.[4] In addition, it should be made clear in the regulations and informational material provided to members that the extra constructive weight differential applied to some boats by the carriers will be counted against the member's weight allowance and the member will be charged for any special handling or packing required.

Also, since the last major revision of the definition of household goods in 1983 for the uniformed services in the Joint Travel Regulations resulted in a definition nearly identical to that contained in the Federal Travel Regulations, it may be helpful for the Per Diem Committee to coordinate with the General Services Administration in the revision process so that uniformity is retained in the "household goods" that may be shipped at public expense for civilians and service members.

[4] Note also that certain boats used as residences may be transported at government expense as mobile home dwellings under the authority of 37 U.S.C. § 409. *See Lieutenant Christopher J. Donovan,* 62 Comp. Gen. 292 (1983). Transportation allowances for a mobile home dwelling and for shipment of household goods incident to the same change of station generally are mutually exclusive. *See* 37 U.S.C. § 409(a)(2).

B-228597, February 9, 1988

Procurement

Sealed Bidding
■ Bid Guarantees
■ ■ Sureties
■ ■ ■ Acceptability

Solicitation provision which, in accordance with a deviation from the Federal Acquisition Regulation (FAR), precludes the use of individuals as security for bid, payment and performance bonds unless they deposit adequate tangible assets with the government is not objectionable where the deviation properly was authorized under the FAR, and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

Matter of: Coliseum Construction, Inc.

Coliseum Construction, Inc., protests the provision in invitation for bids (IFB) No. N62471-87-B-2338, issued by the Department of the Navy, that bonds executed by individual sureties without the deposit of tangible securities would not be acceptable. The solicitation is for the repair and interior painting of a building at the Naval Shipyard in Pearl Harbor, Hawaii. Coliseum contends that the prohibition on individual sureties unduly restricts competition.

We deny the protest.

The IFB required the successful bidder to furnish performance and payment bonds within 10 days of contract award. The IFB provided that an individual surety would be acceptable only if it deposited with the contracting officer cash, bonds, or notes of the United States, or such other security as the contracting officer deemed necessary, for the required amount of the guaranty; the collateral so deposited would remain in the possession and control of the government for at least 1 year after completion of the contract. The IFB further stated that the acceptability of an individual surety could not be based on an "Affidavit of Individual Surety." Such affidavit is a document, separate from the bond itself, in which the individual pledges assets, such as real estate, that serves as an aid in determining the responsibility of an individual surety. *See River Equipment Co., Inc.,* B-227066, July 24, 1987, 87-2 CPD ¶ 84. By supplying information required by the affidavit, the individual surety must show a net worth not less than the penal amount of the bond. Federal Acquisition Regulation (FAR) § 28.202(a) (FAC 84-8).

Coliseum protests that the IFB makes it almost impossible for bidders to use individuals as sureties. The protester points out that FAR § 28.201(b) states that solicitations shall not preclude offerors from using the types of surety or security permitted by FAR subpart 28.2, which includes individual sureties, unless prohibited by law or regulation. Coliseum argues that the Navy improperly has deviated from that provision.

The Navy responds that, in accordance with his authority to authorize class deviations from the FAR, the Under Secretary of Defense for Research and Engineering (Acquisition Management) established a pilot contracting activity pro-

gram to enable contracting personnel to acquire supplies and services more quickly and easily, and delegated the authority to grant class deviations to the Assistant Secretary of the Navy (Shipbuilding and Logistics). The Navy also states that the Assistant Secretary then approved the request of the Commander, Pacific Naval Facilities Engineering Command, for a class deviation to permit the exclusion of individual sureties as security for payment, performance and bid bonds.

The Navy further responds that the protested class deviation was requested because the procedure to determine the acceptability of individuals proposed as sureties was time-consuming, cumbersome and unreliable. The justification for the request states the view that contracting officers have no practical means of validating: (a) the net worth of individual sureties; (b) the number and amounts of other existing bonds utilizing the same individuals as security; (c) the status of other contracts for which the individuals have furnished bonds; (d) the continuing acceptability of the individual sureties; or (e) the continuing availability and value of the sureties' assets in the event of claims.[1] The Commander concluded that individual sureties do not provide an acceptable level of security, and argued that a contracting officer should have the authority to exclude the use of individual sureties where appropriate. The deviation was granted on September 24, 1987, for the period ending on September 30, 1988.

In our recent decision in *Altex Enterprises, Inc.,* B-228200, Jan. 6, 1988, 67 Comp. Gen. 184, 88-1 CPD ¶ 7, we sustained a protest of a finding that the bidder was nonresponsible because its sureties would not grant the agency a security interest in real property listed on the Affidavit of Individual Surety, as required by the invitation. We agreed that the requirement, which was generated by the local contracting activity, unduly restricted competition and discriminated against the use of individual versus corporate sureties and against companies that had to use individual sureties, primarily small businesses. We rejected the contracting officer's position that he had the discretion, even absent any unusual circumstances, to apply requirements that effectively made the use of individual sureties impossible on a routine, across-the-board basis, regardless of the particular bidder's individual sureties; we pointed out that this position was inconsistent with FAR § 28.202-2, which expressly permits the use of individual sureties.

As indicated in that decision, we are concerned with the effect on competition of a solicitation provision that effectively prohibits the use of individual sureties absent a demonstrated need to do so in a particular procurement. We nevertheless will not object to the present solicitation on that basis. In *Altex,* the prohibition was generated locally, and the contracting officer's inclusion of it was directly inconsistent with the FAR. Here, in contrast, the prohibition was authorized through the Department of Defense's authority in FAR § 1.404 to grant deviations from the FAR, and the record shows that the Navy properly processed the deviation in accordance with applicable guidelines and regulations. Further,

[1] FAR § 28.202-2 requires verification of the individual sureties' acceptability.

the deviation was granted as part of a pilot program developed by the Navy to improve its contracting efforts, and will expire at the end of September 1988. We think the implementation of the deviation should not be subject to our objection during the period in which the Navy is gathering information on its effect and effectiveness.

The protest therefore is denied. We point out, however, that should the Navy desire to extend the deviation past September, it should propose an appropriate FAR revision to cover the matter, pursuant to FAR § 1.404.

B-229695, B-229695.2, February 10, 1988

Procurement

Competitive Negotiation

■ **Discussion**

■■ **Adequacy**

■■■ **Criteria**

Where agency did not consider protester's proposed costs unreasonable and those costs did not exceed the government's estimate, it was not necessary for the agency to notify protester during discussions that its proposed costs were too high.

Procurement

Bid Protests

■ **GAO Procedures**

■■ **Interested Parties**

■■■ **Direct Interest Standards**

Protester, the fourth ranked offeror, is not an interested party to protest the award to the highest ranked offeror where the second and third ranked offerors are in line for award if the protest is sustained.

Procurement

Competitive Negotiation

■ **Offers**

■■ **Cost Realism**

■■■ **Evaluation**

■■■■ **Administrative Discretion**

Agency need not perform a cost realism analysis where solicitation is competitive and results in the award of a fixed-price contract.

Matter of: State Technical Institute at Memphis

State Technical Institute at Memphis (STIM) protests the award of a contract to San Diego Community College District (San Diego) under request for proposals (RFP) No. N00612-87-R-9012, issued by the Department of the Navy to procure

contractor instructor services for the Navy Air Technical Training Center at Millington, Tennessee.

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

The RFP provided that award would be based on price and other factors. Offerors were required to submit a price proposal and an "other factors" proposal, and were advised that in the proposal evaluation "other factors" would be worth 60 percent and price would be worth 40 percent. The RFP provided for the award of a fixed-price contract for a 9-month base period and four 1-year option periods to the responsive offeror whose total offer on all line items was most advantageous to the government.

The Navy received five proposals, evaluated them, and requested each offeror to submit a best and final offer (BAFO). San Diego's BAFO was ranked first with 94.12 points: 40 points for its $31,549,637 low price proposal and 54.12 points for its "other factors" proposal. STIM was ranked fourth with 80.96 points: 20.96 points for its $60,251,200 price proposal and 60 points for its "other factors" proposal. The second and third ranked offerors received total scores of 93.24 and 85.88 points, respectively, and each offered to perform the contract at a price lower than STIM's. The Navy determined that the offer presented by San Diego would be most advantageous to the government and awarded a contract to that firm.

On November 25, 1987, STIM protested to our Office that the Navy failed to hold meaningful discussions with the offerors; that San Diego's offer violated the solicitation's anti-wage busting provisions; and that San Diego had submitted an unbalanced bid.[1] Following a December 1 debriefing with the Navy, STIM supplemented its initial protest grounds by asserting that the Navy had failed to consider whether the prices proposed by San Diego were reasonable and realistic.

STIM first protests that the Navy violated its obligation to hold meaningful discussions with all offerors in the competitive range by failing to notify STIM that its proposed costs were significantly higher than the costs proposed by the other offerors. STIM also asserts that the agency was required to hold discussions because none of the other offerors complied with all the requirements of the RFP and the Navy thus needed additional information to evaluate the proposals submitted by these offerors. The only specific matter on which STIM focuses is the firm's belief that none of the other offerors submitted resumes of all necessary contract personnel as required by the RFP.

The Navy argues that it was not required to notify STIM that its costs were high because the agency did not consider the high costs a deficiency. The Navy further notes that Federal Acquisition Regulation (FAR) § 15.610(d)(3)(ii) (FAC

[1] The Navy responded to this issue in a report to our Office and specifically argued that San Diego did not submit an unbalanced bid. In its comments on the Navy's report, STIM did not rebut the Navy's answer. We therefore consider this issue abandoned. *See Action Industrial Supply,* B-224819, Jan. 6, 1987, 87-1 CPD ¶ 11.

84-16) prohibits advising an offeror of its price standing relative to other offerors.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(b)(4)(B) (Supp. III 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, which means that an agency must point out deficiencies, weaknesses and excesses in the proposal unless doing so would result in disclosure of one offeror's approach to another or technical leveling. Once discussions are opened with an offeror—and a request for BAFOs constitutes discussions—the agency must point out all deficiencies in the offeror's proposal. *Price Waterhouse,* 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54.

Here, while the price proposed by STIM is higher than the prices proposed by other offerors, the Navy did not consider the price unreasonable. In fact, according to the Navy, it actually considered the price reasonable because STIM's proposal was based on a higher number of instructors than the other offerors' proposals. Also, the price proposed by STIM did not exceed the government estimate. In this regard, although the Navy did not prepare a formal cost estimate, the record shows the agency expected to pay approximately 50 million dollars for the services over the 5-year period, an amount closer to STIM's proposed price than to the prices proposed by the other offerors. In any event, an agency generally is not required to point out that a price below the government estimate is too high and, as noted by the Navy, an agency may not tell an offeror how its price stands compared to its competitors' offers. *Price Waterhouse,* 65 Comp. Gen. 205, *supra; University Research Corp.,* B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50. Consequently, we cannot conclude that the Navy was required to notify STIM during negotiations that its proposed price was high.

STIM also asserts that the Navy was required to hold discussions with the other offerors because they did not submit the resumes of all necessary contract employees. The RFP, however, did not require offerors to submit the resumes of all contract employees. Rather, it required that offerors submit resumes of 10 percent of all instructional personnel and 100 percent of all managerial and supervisory personnel. The Navy has informed us that San Diego and the second and third offerors complied with this requirement.

STIM next alleges that San Diego intends to hire STIM employees that currently are performing the instructor services contract and pay them less in salary and fringe benefits than they are receiving from STIM. STIM asserts that this practice, known as wage busting, is prohibited with respect to professional employees[2] by Office of Federal Procurement Policy (OFPP) Letter No. 78-2 (March 29, 1978) as well as by the solicitation. STIM protests that in evaluating San Diego's proposal the Navy failed to apply the anti-wage busting provisions and, thus, improperly awarded the contract to San Diego.

[2] Section 4(c) of the Service Contract Act of 1965, as amended, 41 U.S.C. § 353(c) (1982), was enacted to prevent wage busting with respect to blue collar and some white collar service contract employees. *See Aleman Food Service, Inc.,* B-216143, Nov. 15, 1984, 84-2 CPD ¶ 537.

The Navy responds that neither the provisions of the solicitation concerned with wage busting, nor the applicable regulations, require a successor contractor that might hire professional employees who had been working for the incumbent contractor to pay those employees the same wages they were receiving from the incumbent. Rather, the provisions require that the offeror submit a total compensation plan setting forth salaries and fringe benefits proposed for professional employees. If the proposal shows that the offeror proposes to pay lower compensation levels than the incumbent paid for the same work, the contracting officer is required to evaluate the proposal on the basis of maintaining program continuity, uninterrupted high quality work, and availability of required competent professional service employees. The Navy reports that San Diego did submit the compensation plan and this plan was reviewed, as required by the solicitation. The Navy states:

> The Contracting Officer's finding that [San Diego] was a responsible offeror whose salaries were comparable to average salaries paid on other Navy education contracts and to salaries paid in Tennessee, is based on previous contracting for similar services and documents reviewed in proposals provided under this solicitation.

Under our Bid Protest Regulations, we only will consider a protest by an interested party, *i.e.,* an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. §§ 21.0(a), 21.1(a) (1987). A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. Here, the protest record establishes that if San Diego were not selected the Navy, based on the proposal evaluations, would choose the second or third ranked offeror for award. STIM therefore is not interested to raise this protest issue. *See First Continental Bank Building Partnership,* B-224423, Sept. 3, 1986, 86-2 CPD ¶ 255.

STIM argues that we should consider the firm an interested party on this issue for two reasons. First, STIM contends, in its supplemental protest letter it argued that both the second and third evaluated offerors also engaged in wage busting[3] and, further, that it orally raised this issue at the conference held at the General Accounting Office. Second, STIM argues that it is interested because as alternative relief to acceptance of its offer it is requesting cancellation of the RFP and resolicitation of the requirement.

There is no merit to STIM's position. In STIM's supplemental protest, the firm generally asserts that it was the only offeror that met all the requirements of the RFP and, thus, was the only offeror eligible to receive the contract award. STIM also specifically argues that none of the other offerors complied with the RFP requirement to submit with the offers the resumes of all necessary contract personnel. We do not find STIM's general allegation, especially in view of the more specific allegation, sufficiently definite for us to consider it a protest that the second and third evaluated offerors violated anti-wage busting prohibitions. *See* 4 C.F.R. § 21.1(c)(4); *Dayton T. Brown, Inc.—Reconsideration,* B-

[3] The only objection STIM raised concerning the second and third ranked offers is that they did not contain the required resumes. As noted above, however, both offerors did submit the required resumes.

223774.4, Jan. 21, 1987, 87-1 CPD ¶ 75. Further, to the extent STIM raised this issue at the conference or in its post conference comments, to be timely a protest must be submitted within 10 working days after the protester knows or should know its protest basis. 4 C.F.R. § 21.2(a)(2). STIM acknowledges that it learned this protest basis on December 1, so that to be timely it would have to be filed here by December 15. The conference was held on December 22, however, and STIM's comments were submitted on December 31.

As to STIM's second point, while in some cases our Office will consider a timely protest by a party that is not next in line for award, those cases generally involve defects in the solicitation itself so that if the protest were sustained the solicitation might be canceled and reissued. *See H.V. Allen Co., Inc.,* B-225326 *et al.,* Mar. 6, 1987, 87-1 CPD ¶ 260. Here, the protest does not involve a solicitation defect and, if we sustained the protest, we would recommend consideration of the intervening offers for award, not that the solicitation be canceled and reissued. Consequently, we will not consider STIM an interested party under this theory.

Finally, STIM protests that the Navy failed to conduct a cost realism analysis of San Diego's proposed price. It is unclear what STIM's specific concern is in raising this issue, but it appears that it basically involves both the wage busting matter and a general concern that the Navy did not assess whether the price proposed by San Diego is realistic for the contract effort. As discussed above, however, STIM is not an interested party to protest that San Diego engaged in wage busting. Also, since this is a competitive solicitation which resulted in a fixed-price contract, the Navy was not required to conduct a cost realism analysis. *See Supreme Automation Corp., et al.,* B-224158, B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83. To the extent STIM is contending that San Diego cannot perform at its offered price, there is no legal basis to object even to a below-cost award if the offeror is otherwise responsible. *Id.* Here, the contracting officer found San Diego to be a responsible offeror, a determination we generally do not review. *See* 4 C.F.R. § 21.3(f)(5).

The protest is denied in part and dismissed in part.

B-228406, February 11, 1988

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Competition Rights
■■■ Contractors
■■■■ Exclusion

Protest that agency deprived incumbent contractor of opportunity to bid because agency did not provide it with a copy of the solicitation is denied where record shows that although agency improperly failed to solicit the incumbent, otherwise reasonable efforts were made to publicize and distribute the solicitation and three proposals were received.

Matter of: Rut's Moving & Delivery Service, Inc.

Rut's Moving & Delivery Service, Inc. (Ruts) protests any award of a contract under request for proposals (RFP) No. F11623-87-R-0051, issued by the Department of the Air Force, Scott Air Force Base, Illinois, for packing and crating services for the period of January 1 to September 30, 1988. Ruts complains that, even though it was the incumbent contractor, the agency failed to provide it with a copy of the solicitation prior to closing date for receipt of proposals, preventing it from competing under the solicitation.

We deny the protest.

The requirement, as synopsized in the *Commerce Business Daily* (CBD) on July 30, 1987, had September 17 as the closing date for receipt of proposals. However, the solicitation as issued on August 26 actually had a closing date of September 25. Notices of the solicitation also were posted in the base contracting office and sent for posting to the United States post offices in Belleville, Illinois, and St. Louis, Missouri, and the Procurement Assistance Center at Southern Illinois University in Edwardsville, Illinois.

The RFP solicited packing and crating services for three geographic areas. Within each geographic area, services were divided between three schedules: Schedule I, Outbound Services; Schedule II, Inbound Services; and Schedule III, Intra-City and Intra-Area Moves. Award was to be made to the lowest priced, acceptable offeror by area under each of the specified schedules. The RFP also notified offerors that offers would be evaluated on the basis of advantages and disadvantages to the government that might result from making multiple awards.

Eleven firms were sent solicitation packages by the Air Force. Six of these firms were from the previous bidder's list. Four proposals were received in response to the RFP and are currently being evaluated. Three of the four proposals are for the area in which Ruts is the incumbent.

Ruts, the incumbent contractor for Area I, Schedule III, was left off the new mailing list and, as a result, was not sent a solicitation package.[1] Ruts was the only firm from the prior mailing list which was not included on the new list. The Air Force claims that this omission was inadvertent. According to Ruts, it did not become aware of the new solicitation until October 1, 6 days after the closing date for receipt of proposals. Ruts filed a protest with our Office on October 5, requesting that the RFP be canceled and resolicited so that it may compete for the contract.

We first address the timeliness issue raised by the Air Force. Under our Bid Protest Regulations, protests must be filed—defined as received at our Office—within 10 working days of when the basis for it is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1987). The agency contends that the 10 working day

[1] Ruts was the incumbent contractor for Area I, Schedule III, for the contract period covering July 24 to December 31, 1987. Ruts had performed on an interim basis from January 1 to July 24 under an extension of its 1986 contract. Ruts had been the contractor for Area I, Schedule III during the calendar years 1983, 1984, and 1986.

filing period for Ruts' protest commenced on September 17, the date listed in the CBD synopsis as the closing date for receipt of proposals, because Ruts should have known by then that it had not been solicited. Since Ruts' protest did not reach our Office until October 5, the Air Force contends that its protest is untimely since it was filed beyond the 10-day deadline.

We disagree with the Air Force and find Ruts' protest timely. We think it illogical to conclude that Ruts' protest had to be filed within 10 days of September 17, the CBD's announced closing date, in order to be timely since the RFP in fact was issued with a closing date of September 25. Further, the facts conflict on whether Ruts should be charged with knowledge that the RFP was issued in August with an actual closing date of September 25. The president of Ruts states that she met with the contracting officer on July 21, 1987, to sign the contract for the period July 24 to December 31, but no mention was made of the new solicitation at this meeting even though it occurred just 9 days before the new solicitation was synopsized in the CBD. The protester adds that "[t]his was the first time since we have been doing business at the Base, that no one in the Transportation Office said anything at all about [a] new contract." Ruts also argues that the issuance of the new 1988 solicitation was out of the "normal [chronological] pattern" for this requirement and, therefore, the protester was not expecting the 1988 solicitation to be issued in August 1987. Ruts claims that it did not become aware of the new solicitation until October 1 in a telephone conversation with one of the other incumbent contractors. The agency report indicates that copies of the CBD notice were posted in the base contracting office but does not indicate if these notices were up at the time Ruts' president visited there on July 21.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. *Packaging Corp. of America*, B-225823, July 20, 1987, 87-2 CPD ¶ 65. Here, we think Ruts has provided sufficient evidence to support its version of the facts that it did not know or have reason to know prior to October 1 that a new solicitation had been issued. Also, even if we were to charge Ruts with knowledge of the September 25 closing date, its protest reached our Office on October 5, within 10 working days of September 25. We, thus, find Ruts' protest timely and will consider it on the merits.

Ruts argues that it was intentionally omitted from the bidder's mailing list. Ruts bases this allegation on what it believes to be a "series of events over the past year and a half" which display "a pattern of neglectful conduct" by the agency and which it chronicles in its comments on the agency report.

Although the Air Force admits that Ruts was left off the new bidder's mailing list and was not sent a solicitation package, it argues that this omission was inadvertent. In any event, the Air Force argues, Ruts should have been on notice of the procurement through the CBD synopsis. The Air Force concludes by stating that the burden was on the protester to ensure it received the solicitation materials and to submit its proposal in a timely manner.

The Competition in Contracting Act of 1984 (CICA) places a duty on contracting agencies to take positive, effective steps toward assuring that all responsible sources are permitted to compete. Agencies are required when procuring property or services to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." *Id.* §§ 259(c) and 403(7). The term has been further explained in the legislative history of CICA as meaning "all qualified vendors are allowed and encouraged to submit offers . . . and a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost." H.R. Rep. No. 98-1157, 98th Cong., 2d. Sess. 17 (1984). We have said that in view of the clear intent of Congress to make full and open competition the standard for conducting government procurements, we will give careful scrutiny to an allegation that potential bidders have not been provided an opportunity to compete for a particular contract. *See Trans World Maintenance, Inc.*, 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

In so doing, we consider that the agency has met its obligation if it can show that it made a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains reasonable prices. *Keener Mfg. Co.*, B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. While significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation will result in our sustaining a protest, *see Dan's Moving & Storage, Inc.*, B-222431, May 28, 1986, 86-1 CPD ¶ 496, the fact that inadvertent mistakes occur in this process will not in all cases be grounds for disturbing the procurement. *See NRC Data Systems,* 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84. Whether an agency's efforts in this regard are sufficient, thus, depends upon the facts and circumstances of each case.

Where, as here, a contracting agency has properly synopsized the proposed procurement in the CBD, a potential contractor, including an incumbent such as Ruts, is on constructive notice of the solicitation and its contents and has a duty to make reasonable efforts to obtain copies of the solicitation in order to ensure it is included in the competition. *See, e.g., G&L Oxygen and Medical Supply Services,* B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78. Ruts did not make use of the CBD. However, as we pointed out in a recent case with a similar fact pattern, *Abel Converting Company,* B-229065, Jan. 15, 1988, 67 Comp. Gen. 201, 88-1 CPD ¶ 40, contracting agencies also have a duty, stemming from the Federal Acquisition Regulation, to solicit their satisfactorily performing incumbent contractors. *See* FAR §§ 14.203-1, 14.205-1, 14.205-4 (FAC 84-11). In *Abel,* as here, the agency failed to include the incumbent contractor in its solicitation mailing list and, thus, did not solicit the incumbent. However, there the agency only received one bid on several of the items. We recommended a resolicitation on the basis that the agency's failure to solicit the incumbent contributed to the lack of competition for those items.

We think the circumstances of this case are distinguishable. We note that for the most part, the Air Force did fulfull its obligation to publicize this procurement: it posted copies of the solicitation; had a synopsis published in the CBD; and mailed copies to 11 firms on its mailing list. Nevertheless, it did fail to assure that an incumbent contractor—Ruts—was provided with a copy of the solicitation, which it should have done, although the record does not support Ruts' assertion that this omission was deliberate. The relevant inquiry then becomes what effect this omission had on the adequacy of the competition which was obtained.

Here, unlike the situation in *Abel*, where competition was not received, the Air Force received three offers covering the area in which Ruts was the incumbent. We have found this sufficient, in prior cases, to satisfy the full and open competition requirement so as to assure reasonable prices. *See, e.g., NRC Data Systems*, 65 Comp. Gen. at 738, 86-2 CPD ¶ 84 at 4. The Air Force's failure to send Ruts a copy of the solicitation, therefore, did not result in a lack of competition. For that reason, we do not think it appropriate to disturb the procurement process by recommending that the requirement be resolicited.

The protest is denied.

B-228554, February 11, 1988

Procurement

Contractor Qualification
■ Approved Sources
■■ Qualification
■■■ Standards

Protester's assertion that it will manufacture an aircraft engine part according to the original equipment manufacturer's (OEM) technical drawings does not establish that the contracting agency's requirement for engine qualification testing before approval of a source is unreasonable where the part is critical to the safe and effective operation of the engine. Since the agency is unable to secure from the OEM technical expertise to establish qualification guidelines, and the OEM's testing facilities, protest of award to OEM without consideration of protester's offer is denied.

Matter of: Hill Aviation Logistics

Hill Aviation Logistics protests the award of a contract to General Electric Co. (GE) by the Department of the Air Force for 2,260 outer combustor shells for J85 aircraft engines. Hill submitted an unsolicited proposal to supply the part after learning that the Air Force had issued solicitation No. F41608-87-R-3906 to GE. Hill offers a lower price for the engine part than does GE, but has been denied approval as a source by the Air Force because Hill's parts have not undergone engine testing.

We deny the protest.

The Air Force issued the solicitation, on October 27, 1986, only to GE, since GE is the only qualified manufacturer. The solicitation had been synopsized in the October 10, 1986, *Commerce Business Daily,* with a standard note explaining that other potential sources might be considered if the source submitted either: (1) evidence of having satisfactorily produced the required part for the government or the prime equipment manufacturer, or (2) engineering data sufficient to demonstrate the acceptability of the offered part. Hill submitted an offer on November 24, 1986, stating that it would supply a part similar to GE's, manufactured in accordance with GE's design, technical drawings, and manufacturing process. Hill later supplemented its offer with preliminary manufacturing process sheets and additional drawing sheets, and the Air Force then forwarded Hill's materials to the agency's Directorate of Material Management for evaluation.

In response to a previous attempt by another manufacturer to gain source approval, the Directorate of Material Management had concluded that source approval would require submission of a sample part and testing, and that only GE, the original equipment manufacturer, had the test facilities and technical expertise necessary to evaluate the part. Additionally, the history of the part was such that continual access to test facilities had been necessary to ensure adequate quality control and to rectify any problems associated with the part's manufacture and assembly. Because GE refuses to contract for its testing facilities and technical expertise for the purpose of facilitating source approval of a direct competitor, the cognizant Air Force engineers have been unable to offer testing, or to develop a statement of qualification requirements that a potential offeror or its product must meet in order to qualify as a source. In this respect, Federal Acquisition Regulation (FAR) § 9.202(a) (FAC 84-11) prescribes policies and procedures regarding qualification requirements, and requires, in part, that the contracting agency specify in writing and justify qualification requirements imposed, and provide potential offerors with an opportunity to demonstrate their ability to satisfy these requirements.

The Directorate reiterated the above-stated concerns and conclusions when requested to evaluate Hill's materials for source approval. Also, for these reasons, the Directorate requested and was granted a waiver from the development of a statement of qualification requirements pursuant to FAR § 9.202(b), stating that:

> [t]he simple truth is, that in this case, the government cannot comply with [FAR § 9.202(a)] because we do not have the technical expertise or facilities to do so, and we cannot contract for these services.

Hill argues that the Air Force's insistence that the J85 engine part, if supplied by Hill, be tested prior to source approval, and the Air Force's failure to develop and specify qualification requirements as provided by FAR § 9.202(a), improperly precluded Hill from qualifying as an alternate source of the part, and therefore from being awarded the contract. Hill further argues that testing should be a prerequisite to qualification only when an agency seeks to establish the credibility of an initial design concept or to assess modifications in material or di-

mensions. Hill contends that because it "would simply manufacture the part according to the General Electric drawings," it is unnecessary to include testing in any qualification procedure.

Applicable regulations permit agencies to limit competition for the supply of parts necessary to assure the safe, dependable, and effective operation of government equipment. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 17.7203(a) (DAC 86-1). Because, as stated by the Air Force, "failure of [the J85 engine part] in service could result in catastrophic engine failure and fire, resulting in extreme hazard to personnel and aircraft," we see no reason to object to the Air Force's decision to acquire the part from approved sources only. *Id.; see Electro-Methods, Inc.*, B-215841, Mar. 11, 1985, 85-1 CPD ¶ 293.

As to the need for testing, that generally is a matter within the competence of the procuring agency, so that we will not disturb the agency's position in that respect in the absence of clear evidence indicating the position is unreasonable. *D Square Engineering Co.*, B-204998, Apr. 6, 1982, 82-1 CPD ¶ 316. Here, we have no reason to doubt the Air Force's assertion that because of the critical application of the part and the complexity of the part's manufacture, prequalification testing is essential. The history of the part, as established in the record, describes various problems dealing with subtle changes in the part's configuration during its manufacture. These problems, according to the Air Force, could "not be solved by dimensional measurement to drawing requirements," but required engine testing to correct. In these circumstances, Hill's assertion that it would simply manufacture the part according to GE drawings does not establish the unreasonableness of the Air Force's technical determination that prequalification testing is needed. *See B.H. Aircraft Co., Inc.*, B-222565, B-222566, Aug. 4, 1986, 86-2 CPD ¶ 143.

Moreover, as stated previously, only GE has the necessary testing facilities and technical expertise to qualify as a source, and GE refuses to enter into a contract to provide these services. GE has stated that it does not believe it would be in its best interests to assist in source qualification of a direct competitor, and has expressed concern that such assistance, if rendered, could expose GE to potential legal actions. In addition, the record shows that the Air Force, upon realizing that competition would be limited in the procurement of this part, conducted a cost-analysis to determine if a competitive procurement an older version of the part would result in a net savings. The analysis concluded that the savings in predicted purchase price would be outweighed by the increased maintenance costs of the older part; the Air Force, however, indicates that it hopes to find a way to provide for source qualification in the future.

In sum, we have no basis to dispute the fact that the Air Force lacks the requisite technical expertise and facilities to develop and specify qualification requirements and to provide testing. Since the record supports the reasonableness of the requirements for source approval and testing, we also see no legal basis to object to the contract award to GE.

The protest is denied.

B-223775, February 12, 1988

Civilian Personnel

Compensation
■ Overtime
■■ Computation
■■■ Conflicting Statutes

Federal employees are covered by two statutes requiring compensation for overtime work, the Fair Labor Standards Act, or FLSA, and the Federal Employees Pay Act, commonly called "title 5" overtime. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit.

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Early Reporting

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Lunch Breaks

Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30-minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30-minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation.

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Early Reporting

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Lunch Breaks

Civilian police officers required to report for duty at least 15 minutes prior to the start of each shift may be allowed overtime credit for their preshift services under the Federal Employees Pay Act, title 5 of the United States Code, 5 U.S.C. § 5542. They may not be allowed credit for their meal breaks under the standards prescribed for "title 5" overtime, however, where it appeared that they

were relieved from their posts during these breaktimes and were required only to remain in contact by radio for recall on an occasional basis in emergency situations.

Civilian Personnel

Compensation

■ **Overtime**

■ ■ **Claims**

■ ■ ■ **Statutes of Limitation**

Fair Labor Standards Act claims and overtime claims under 5 U.S.C. § 5542 which are filed with the General Accounting Office (GAO) are both subject to the 6-year statute of limitations under 31 U.S.C. § 3702(b)(1). Since claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of claims arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment, as 31 U.S.C. § 3702(b)(1) bars claims presented to GAO more than 6 years after date claims accrued.

Matter of: Henry G. Tomkowiak, *et al.*—Overtime Compensation—Civilian Police Officers

This decision is in response to a request from W. Van Tassle,[1] Department of the Air Force, Headquarters Air Force Accounting and Finance Center, Denver, Colorado. The request concerns the claims of Henry G. Tomkowiak and 43 other civilian police officers[2] employed by the Air Force at Selfridge Air National Guard Base, Michigan, for overtime compensation for preshift and meal break duties under the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. § 5542. We conclude that the claimants are partially entitled to overtime compensation to the extent shown below.

Background

The claimants were employed as police officers at Selfridge Air National Guard Base at various times between 1974 and 1980. While so employed they had regular workweeks consisting of a daily 8-1/2-hour shift, 5 days per week. Each 8-1/2 hour shift included an uncompensated 1/2-hour meal break.

Mr. Tomkowiak states that his claim for overtime compensation is for the period from July 30, 1974, to July 30, 1980. He states that throughout this period he was required to arrive for duty at least 15 minutes prior to the start of his shift. During those 15 minutes he was expected to arm and equip himself,

[1] Chief, Terminations Branch, Special Accounts Division, Directorate of Settlement and Adjudication.

[2] Mr. Tomkowiak's claim was received in our Office on December 7, 1981. The claim of Mr. Arthur S. Wood, Sr., was received on March 16, 1982. Claims were received on March 11, 1982, from the following 42 employees: Charles E. Bryson, Nelson H. Brown, James F. Maahs, Thomas A. Welsh, Mark A. Richardson, James G. Feil, Andrew S. Nagy, Robert J. Bodus, George A. Sopfe, Donald R. Owens, Charles R. Redmond, Mieczyslaw K. Swidwinski, Daniel D. Farver, Terry L. Blount, Roger R. Sonnenfeld, Joseph P. Buynak, Barry K. Bumgarner, Donald E. Franklin, Edward O. Swanboro, Frank Petrucci, Richard E. Danford, Denise M. Nicks, Louis E. King, Daniel J. Rutty, Jr., James R. Tokarski, Arthur A. Jackson, Jr., Walker F. Norvell, Loren K. Follette, James M. Perry, Christopher H. Tipton, Patrick E. Nett, Allan I. Reveley, Stanley W. Shalagan, Susan Gie, Russel M. Stein, Dennis Bristol, Thomas D. Knopf, James J. Hatcher, Robert H. Scott, Robert D. Hill, Jesse H. Becton, Jo Ann Clifford.

read official notices and records, and receive verbal briefings. He reports that he was also required to be in an "on-call" status at all times, "including breaks for lunch."

Mr. Tomkowiak claims that, in consideration of these circumstances, he should be allowed overtime compensation for each period of 15 minutes of work performed prior to duty time, and an additional 30 minutes for every meal break per duty day over the 6-year period beginning July 30, 1974. The claims of the other 43 police officers are similar to the one presented by Mr. Tomkowiak.

The administrative report initially submitted by the Air Force confirmed the claimants' contention that they were required to report and perform preliminary duty before the regular 8-1/2-hour shift. The initial administrative report, however, suggested that the preshift duty should be disregarded as *de minimis* because the police officers had to arrive only 5 minutes prior to the start of their normal shift to draw weapons and radios. As to the meal breaks, the report stated that the police officers only had to be on radio call status while off the installation during their normal scheduled meal period of 30 minutes. The report stated that "[w]hile it certainly did not occur on a frequent basis, it was possible for a patrolman to be called off a meal to respond to an incident of an emergency nature."

Counsel for the claimants subsequently furnished our Office with a copy of an "Incident Worksheet" dated August 8, 1974, which was initiated because one of the claimants reported for duty 9 minutes before the start of his shift rather than the required 15 minutes prior to the start of his shift. The "Incident Worksheet" provided the following details: "Ptm. [Name Deleted]—was counseled * * * in regards to his tardiness in reporting for duty. Ptm. [Name Deleted]—was reminded of his responsibilities to report on time and of the possible consequences if this becomes a recurring problem."

We requested Air Force officials at Selfridge Air National Guard Base to explain this document in view of its implication that a strictly enforced 15-minute early reporting requirement had been in effect, notwithstanding the statements contained in the initial administrative report which indicated there was at most only a minimal, 5-minute preshift duty requirement. They acknowledged that the Incident Worksheet indicated that the Officer was required to report for duty 15 minutes prior to the start of his shift. They stated that they could not substantiate when this practice actually stopped, and that "the age of these claims makes finding formal documentation extremely difficult. Formal documentation, of any kind, prior to [June 1978] is almost nonexistent."

FLSA and Title 5 Overtime

As federal employees, claimants are covered by two statutes requiring compensation for overtime work. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, generally requires overtime pay for a workweek longer than 40 hours. The Federal Employees Pay Act, currently codified at 5 U.S.C. § 5542(a) and commonly called "title 5" overtime, requires overtime pay for work in

excess of 40 hours in an administrative workweek or in excess of 8 hours in a day. Federal employees were covered only by title 5 until May 1, 1974, when the FLSA was extended to them by Public Law 93-259, 88 Stat. 55. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit. *See* 54 Comp. Gen. 371 (1974).

FLSA Requirements

FLSA overtime at one and one-half times the rate of regular pay is ordinarily payable to nonexempt federal employees who work more than 40 hours per week. However, in providing for coverage of employees engaged in law enforcement activities, such as those involved in the present case, the Fair Labor Standards Amendments of 1974, Public Law 93-259, April 8, 1974, 88 Stat. 55, provided for special maximum hours without overtime. See section 6(c)(1)(A) of the 1974 amendments which added section 7(k) to the FLSA, 29 U.S.C. § 207(k). Beginning January 1, 1975, the maximum hours of aggregate "tours of duty" within a work period of 28 consecutive days was 240. Effective January 1, 1976, the aggregate tour of duty was reduced to 232 and 216 hours effective January 1, 1977. Effective with the first work period commencing on or after January 1, 1978, the aggregate tour of duty was reduced to 171 hours in a 28-day work period or a tour of duty of 42-3/4 hours in a 7-day work period. *See* FPM Letter 551-5, January 15, 1975, and FPM Letter 551-20, September 22, 1983, rescinding FPM Letter 551-16, January 15, 1980. Meal breaks, duty free or otherwise, are not excluded from hours worked in determining the overtime entitlement under section 7(k) of the FLSA of law enforcement employees unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4.

Opinion Of The Office Of Personnel Management on FLSA Entitlements

The Office of Personnel Management (OPM) is charged with administering the overtime provisions applicable to federal employees under the FLSA. *See* 29 U.S.C. § 204(f). On May 10, 1982, OPM's Great Lakes Region issued an opinion in response to a request made by the Federal Police Officers Association on behalf of 41 police officers at Selfridge, 34 of whom are included in the present group of claimants.

The opinion issued by OPM's Great Lakes Region notes that positions requiring law enforcement activities have been covered under the FLSA since January 1, 1975, and that employees classified in the Police series, GS-083, such as the police officers at Selfridge Air National Guard Base, are considered to be engaged in law enforcement activities. Further, law enforcement activities are specifically identified for coverage under section 7(k) of the FLSA, codified at 29 U.S.C. § 207(k). Therefore, according to OPM, the claimants are covered by this provision of the FLSA for the purpose of determining their entitlement to overtime compensation. The OPM opinion points out that in extending coverage under FLSA to employees engaged in law enforcement activities, Congress de-

parted from the standard "hours of work" concept and adopted an overtime standard keyed to the length of the "tour of duty."

The FLSA contains specific overtime provisions establishing the minimum standard for entitlement to overtime. The OPM opinion, which was predicated on Federal Personnel Manual (FPM) Letters 551-5 and 551-16, states that law enforcement employees "shall be compensated at a rate not less than one and one-half times the regular rate at which they are employed if currently their tour of duty *exceeds* 46-1/2 hours in a 7-day work period, 186 hours in a 28-day work period * * *." (Emphasis in original.) The OPM opinion adds that before law enforcement personnel can be entitled to overtime under FLSA, they must exceed these hours of duty. The OPM opinion further notes that the claim of the police officers at Selfridge is based on their statements that they were required to work 15 minutes prior to the beginning of their shift, and sometimes also during their meal periods. The OPM opinion says that these statements were supported by operating instructions dated March 1, 1974, and October 1, 1979, to the extent that the police officers were required to arrive "* * * in sufficient time before guardmount to read at least two (2) preceding shift's blotters, [and] receive a briefing * * *." The OPM opinion concludes as follows:

> Under the FLSA, Section 7(K), sleep and meal times, duty free or not, are included in hours of work in determining entitlement to overtime when the employee is on duty for 24 hours or less. Even if we were to allow full credit for your claim, (i.e., 15 minutes each day prior to beginning of the shift and 30 minutes each day for lunch) the police officers' tour of duty would not exceed the 46-1/2 hours in a 7-day work period as stipulated under Section 7(K) of the FLSA. They do not meet the requirements for entitlement to overtime under the FLSA.

The OPM opinion adds, however, that final administrative decisions on claims for overtime compensation under the FLSA and the Federal Employees Pay Act are reserved by law to the Comptroller General.

The OPM opinion was based on the provision contained in FPM Letter 551-16, dated January 15, 1980, as to the number of hours a tour of duty must exceed to activate the overtime pay requirements of the FLSA. However, with the issuing of FPM Letter 551-20, on September 22, 1983, the instructions contained in FPM Letter 551-16 concerning the overtime standards for employees engaged in law enforcement activities were rescinded. FPM Letter 551-20 announced that effective retroactively to the first work period commencing on or after January 1, 1978, the overtime standard for employees engaged in law enforcement activities was to be as follows: any period of work in excess of a tour of duty of 42-3/4 hours in a 7-day work period, or 171 hours in a 28-day work period would result in overtime pay. Therefore, to the extent inconsistent with the standard enunciated by FPM Letter 551-20, we consider the OPM opinion dated May 10, 1982, to be superseded.

Analysis

With regard to the standard of proof necessary to substantiate a claim under the FLSA, our decisions impose a special burden on the agencies. Initially, the

employee must prove that he has worked the overtime with sufficient evidence to show the amount and extent of his work as a matter of just and reasonable inference. *Christine D. Taliaferro,* B-199783, March 9, 1981. At that point, the burden of proof shifts to the employing agency to show the exact amount of overtime worked or to rebut the employee's evidence. *Civilian Nurses,* 61 Comp. Gen. 174 (1981). Additionally, we have held that while claims against the government must be predicated, if at all possible, upon official records, we will accept other forms of evidence or documentation where agency action has precluded the availability of official records which might reflect overtime. *See Christine D. Taliaferro, supra.*

In the case of the police officers at Selfridge Air National Guard Base, we find that the claimants' statements and the "Incident Worksheet" dated August 8, 1974, along with the several agency operating instructions discussed in the OPM opinion, create a reasonable inference that the law enforcement officers were expected to report and carry out duties and obligations 15 minutes prior to the start of each shift.

With respect to the police officers' 30-minute meal break during each shift, as indicated above, the Fair Labor Standards Amendments of 1974 added section 7(k) to the FLSA in order to provide special maximum hours without overtime for employees engaged in law enforcement and fire protection activities. Under the regular overtime provisions of the FLSA, found in section 7(a), only those periods during which the employee is completely relieved from duty are excluded from hours worked for the purpose of determining FLSA entitlement. FPM Letter 551-1, May 15, 1974, Attachment 4, paragraph c. In contrast, meal breaks, duty free or otherwise, are not excluded from hours worked in determining the overtime entitlement under section 7(k) of the FLSA for law enforcement and fire protection employees unless they are required to be on duty more than 24 hours. FPM Letter 551-5, January 15, 1975, Attachment 2, para. 4. Therefore, the claimants may be credited with their 30-minute meal break during each shift, subject to the applicable statute of limitations discussed below, in calculating FLSA overtime regardless of whether or not they were relieved from their posts for a meal break. *See Guards at Otis Air Force Base,* B-198065, Oct. 6, 1981.

In sum, for purposes of computing overtime compensation under the FLSA the claimants must be credited with the performance of a 43-3/4-hour tour of duty each week throughout the period in question. This includes the basic 40-hour workweek, plus an additional 3/4 hour each workday for pre-shift duties and the meal break. Under FPM Letters 551-5 and 551-20, *supra,* this gives rise to an entitlement to overtime compensation for 1 hour for each regular workweek commencing with the first pay period after January 1, 1978. Prior to that date no FLSA entitlement would accrue because the employees' creditable tour of duty of 43-3/4 hours per week did not exceed the then existing standard required to activate the overtime pay requirement of the FLSA then in effect.

Title 5 Requirements

Overtime under the Federal Employees Pay Act (5 U.S.C. § 5542), commonly referred to as "title 5" overtime, is payable to federal employees whose authorized or approved hours of work exceed 40 hours in an administrative workweek or 8 hours in a day. It is payable only if ordered or approved in writing or affirmatively induced by an official having authority to do so. *Guards at Otis Air Force Base, supra; Guards at Rocky Mountain Arsenal,* 60 Comp. Gen. 523, B-199673, June 15, 1981.

Commencing with our decision in 53 Comp. Gen. 489 (1974) and in subsequent decisions, we have followed the principles set forth in *Baylor v. United States,* 198 Ct. Cl. 331 (1972), regarding the determination of whether overtime was properly ordered or approved. The standards for determining whether a meal break may be counted as work or duty time under title 5 are also discussed extensively in the *Baylor* case, in which the Court of Claims addressed the question of whether the General Services Administration (GSA) afforded its uniformed guards a duty-free lunch break. The Court held that an agency may classify a lunch break as duty free when it makes such time available and the employee is actually able to take advantage of the break. The break need not be regularly scheduled so long as it is regularly taken, even where the employee is subject to emergency call. One qualification is that the employee must be permitted to leave his post for the lunch break or the lunch break will not be considered duty free. *Jose Najar et al.,* B-213012, Nov. 3, 1983, and cases cited therein.

In our view the officers in the present case have not demonstrated under the *Baylor* standards that they were restricted to the extent that they lacked duty-free meal breaks. Although the police instructions required the officers to remain subject to radio call for emergencies during meal breaks, the record indicates that they were regularly relieved from their posts during breaktime and were free to travel off base for meals. Hence, we conclude that their meal breaks may not be counted as worktime for title 5 overtime compensation purposes. It is also our view, however, that in the circumstances presented the officers are, under the *Baylor* standards, entitled to count the 15 minutes of their preshift duties each day during the period at issue as worktime for title 5 overtime compensation purposes. In that regard, it appears from the evidence of record that they were regularly required to perform actual work for a full quarter hour each day prior to the start of their regular shifts. Hence, we conclude that under title 5 overtime they are eligible for 1-1/4 hours of overtime compensation per 5-day workweek each week throughout the period in question subject to the 6-year time limitations discussed below.

Statute of Limitations

The Act of October 9, 1940, as amended, 31 U.S.C. § 3702(b)(1), provides that every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years of the date it first

accrued or be forever barred. Filing a claim with any other government agency does not satisfy the requirements of the Act. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982); *Nancy E. Howell,* B-203344, Aug. 3, 1981. Nor does this Office have any authority to waive any of the provisions of the Act or make any exceptions to the time limitations it imposes. *Frederick C. Welch* and *Nancy E. Howell, supra.* Since the subject claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of the claims arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment.

Conclusion

Subject to the above stated 6-year time limitations under 31 U.S.C. § 3702(b)(1), we hold that the claimants are partially entitled to overtime compensation under both title 5, U.S.C. § 5542(a), and under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* As stated in *Guards at Otis Air Force Base,* B-198065, *supra,* and in *John Nyberg, et al.,* 65 Comp. Gen. 273 B-212699, Feb. 10, 1986, each claimant is entitled to be compensated under whichever statute provides the greater total compensation. Because the determination of the actual amounts due depends upon detailed computations for each of the applicable weekly periods of entitlement for each claimant, the claims are hereby remanded to the Air Force for final settlement.

B-225860, February 12, 1988

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Publicity/Propaganda

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Lump-Sum Appropriation
■■■ Administrative Discretion
■■■■ Charities

An agency may use its administrative discretion to spend a reasonable portion of appropriated funds to provide its employees with the opportunity to contribute to the Combined Federal Campaign (CFC). Such an expenditure furthers governmental interests because the CFC is a legitimate, government-sanctioned charity fund-raising campaign.

Appropriation Availability
■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Interagency Program Funding
■■■■ Charities

An interagency financing scheme to administer the Combined Federal Campaign (CFC) in the Ogden, Utah area in fiscal year 1985 was prohibited by a general prohibition on such financing enacted by the Congress for that fiscal year and each subsequent year. Because this scheme required payment to support a separate organization established to provide CFC services to all participating agencies, the amounts of which did not necessarily correspond to the value of the goods or services actually received by each agency, it also fails to qualify as an exception to the statutory prohibition in 31 U.S.C. § 1532, known as the "Economy Act" which permits one federal agency to provide goods or services for another federal agency on a reimbursable basis.

Matter of: Invoice to IRS for that Agency's Share of CFC Solicitation Expenses Incurred in Northern Utah in 1985

An Internal Revenue Service (IRS) certifying officer requests a decision as to whether he may properly certify for payment a voucher for $3,788.70, covering IRS's estimated share of the cost of services provided in fiscal year 1985 by an organization established to conduct the Combined Federal Campaign (CFC) for a group of contributing agencies. For reasons specified below, we conclude that although the IRS may use a reasonable amount of appropriated funds to support the operation of the CFC, it may not do so through interagency financing of a CFC coordinating organization or group. Therefore, the voucher may not be certified for payment.

Background

On February 12, 1986, Hill Air Force Base, Ogden, Utah, submitted a voucher for $3,788.70 to the regional IRS office in Dallas, Texas, for overhead expenses incurred by the Northern Utah Area Combined Federal Campaign Fund-Raising Program Coordinating Committee (Committee) during fiscal year 1985. These expenses and subsequent billings reflect an interagency agreement of the Ogden Air Logistics Center, IRS Ogden Service Center, Defense Depot Ogden, and USDA Forest Service, Ogden, to share CFC solicitation expenses in the northern Utah area incurred by the Committee for fiscal year 1985. The IRS signed the agreement on October 29, 1984.

Payment for the voucher submitted would be made from an appropriation for fiscal year 1985 to the IRS under the general heading "Processing Tax Returns," portions of which are allocated to regional IRS offices. This appropriation was available for various enumerated purposes, one of which was for necessary expenses of the IRS "not otherwise provided for." Title I of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1985, H.R. 5798 (incorporated by reference into the continuing resolution for fiscal year 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1963 (1984).

The certifying officer takes the position that such an appropriation is not available for CFC solicitation expenses. In his request for a decision, the officer cites a 1985 General Accounting Office (GAO) report, which indicates that agencies commonly donate employee services to the CFC campaign each year. GAO, "Fiscal Management of the Combined Federal Campaign" at 11, 12 (GGD-85-69, B-202792, July 29, 1985). He argues that, since the report fails to recount a prior practice of agency donations of cash as opposed to people, donations of cash are not authorized by the appropriation for fiscal year 1985.

Analysis

Appropriated funds may be used solely to accomplish ". . . the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a) (1982). However, we have held that an appropriation made for a particular object, by implication, confers authority to incur expenses which are reasonably necessary or incident to the proper execution of the object. B-214833, August 22, 1984; 50 Comp. Gen. 534, 536 (1971); 29 Comp. Gen. 419, 421 (1950). Consistent with this position, we have found authority for the general agency practice of permitting employees to solicit funds for government-sanctioned charities during working hours. B-155667, January 21, 1965; B-154456, August 11, 1964; B-119740, July 29, 1954. We have also found authority for the expenditure of funds for the preparation of campaign instructions and mailing labels and for the distribution of campaign materials. B-154456, *supra.*

This Office views the CFC as a legitimate, government-sanctioned charity fundraising campaign with which government agencies may cooperate. B-154456, *supra.* In this regard, the CFC has the endorsement of both the President and the Congress. In 1957, President Eisenhower established the forerunner of today's CFC by setting forth general procedures and standards for a uniform fund-raising program within the executive branch. Executive Order No. 10728, 3 C.F.R., 1954-1958 Comp., p. 387. President Kennedy formalized the CFC in 1961 and it has been maintained by presidents ever since. *See* Executive Order No. 10927, 3 C.F.R., 1959-1963 Comp., p. 454, revoked and covered by Executive Order No. 12353, 3 C.F.R., 1982 Comp., p. 139. In addition, a law governing the internal administration of the Congress ensures that its own employees have the opportunity to contribute to the CFC fund in conjunction with executive branch employees. 2 U.S.C. § 60e-1c(a), (b) (1982). As a further expression of its concern with this campaign, the Congress recently enacted guidelines for the future administration of the CFC by the executive branch. Section 618 of the Treasury, Postal Service, and General Government Appropriation Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-423 (December 22, 1987). We therefore find that agencies may expend appropriated funds to support efforts to solicit contributions to the CFC from their employees.

The question remains whether an agency may spend appropriated funds to purchase CFC solicitation services from an interagency entity. In this case, the voucher submitted would entail the IRS contributing to the expenses of the

Committee in performing these services. The Congress has enacted two restrictions which apply to such purchases. First, the Congress has enacted a general prohibition on interagency financing, effective during each fiscal year since 1971. *See* 65 Comp. Gen. 689, 690 (1986). During fiscal year 1985, the prohibition in effect read as follows:

> No part of any appropriation contained in this or any Act, shall be available for interagency financing of boards, commissions, councils, committees, or similar groups (whether or not they are interagency entities) *which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality.* [Italic supplied.]

Section 610 of the Treasury, Postal Service, and General Government Appropriation Act 1985, H.R. 5798 (incorporated by reference into the continuing resolution for fiscal year 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1963 (1984)).

We are aware of no applicable prior and specific statutory approval for the operation of the Committee. Therefore, we conclude that this prohibition extends to payments based on the interagency agreement to purchase CFC solicitation services entered into by the IRS, among other agencies, on October 29, 1984.[1]

The certifying officer indicates that the ordering office contends that this sort of interagency agreement is similar to the operation of the Federal Executive Boards and should therefore be permitted. In fact, this Office has held interagency financing of the Federal Executive Boards to be prohibited by the same statutory language, applicable in fiscal year 1986. 65 Comp. Gen. 689 (1986).

Even if one could successfully argue that this restriction did not apply to the voucher in question, payment on this voucher would still have to satisfy another restriction pertaining to an agency's purchase of services from another government entity. This is the statutory restriction on the crediting of one appropriation account with funds withdrawn from another. 31 U.S.C. § 1532. This provision requires that such reimbursements be authorized by law. In certain circumstances, the so-called Economy Act, 31 U.S.C. § 1535 could provide this authority by allowing one agency to purchase goods or services from another. That provision reads:

> 1535. Agency Agreements
>
> (a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—
>
> (1) amounts are available;
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
>
> (3) the agency or unit to fill the order is able to provide the ordered goods or services; and
>
> (4) the head of the agency decides ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.

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[1] Even though the voucher in question names only Hill Air Force Base as receiving funds, the voucher is based on an interagency agreement. The Articles of Association of the Committee stipulate that Hill Air Force Base will initially incur all costs of the Committee "and then bill the other members annually." Articles of Association of the Northern Utah Federal Fund Raising Program Coordinating Committee at paragraph IV,J,3 (February 27, 1978).

The legislative history of this provision indicates that the Congress intended that one agency use this authority to purchase services from another to effect "substantial economies" in "proper cases." H. Rep. No. 1126, 72d Cong., 1st Sess. 15. Such a situation exists where services "can be furnished by another department at less cost or more conveniently than the department ordering those services." *Id.*

The voucher reflects a per capita funding method, as outlined in the interagency agreement and in the Articles of Association of the Committee. Such a method of allocating costs does not necessarily relate to the goods or services that any one agency actually received during the year. Without the ability to ascertain exactly what goods and services its money is purchasing, there is no way that an agency can determine that it is receiving services at less cost and more conveniently than it could have provided for itself. Hence, per capita funding arrangements which do not identify what goods or services each participant actually receives, such as employed in the case at hand, will not satisfy this requirement of 31 U.S.C. § 1535.

Accordingly, we conclude that the voucher for $3,788.70 presented in this case may not be certified for payment.

B-227188, February 12, 1988

Civilian Personnel

Relocation
■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Amount Determination

Transferred employee was authorized 120 days Temporary Quarters Subsistence Expenses (TQSE) and a househunting trip. He did not take househunting trip, but his wife did. The agency paid for her househunting trip, but deducted the 7 days paid for her trip from the employee's 120 days of TQSE. Employee's reclaim for the 7 days of TQSE for himself and his children was properly denied, since these are discretionary items and the agency interpretation of the regulations and travel orders is not unreasonable.

Matter of: James F. Kilfoil—Temporary Quarters Subsistence Expenses—Deduction For Wife's Househunting Trip

This responds to a request for an advance decision by the Acting Chief, Travel Section, National Finance Center, U.S. Customs Service. She seeks an opinion on the propriety of paying the reclaim of James F. Kilfoil, a Customs employee, for 7 days additional subsistence expenses while occupying temporary quarters incident to a permanent change of duty station which had been disallowed because of a househunting trip taken by the employee's wife. We conclude that although applicable regulations do not require that the claim be denied, the agency in its discretion may do so.

Mr. Kilfoil was transferred from New York, New York, to Miami, Florida. By travel order dated January 21, 1986, he was authorized temporary quarters subsistence expenses (TQSE) for himself and his immediate family for a 60-day period, which was subsequently extended to allow an additional 60 days for a total of 120 days. He was also authorized a round trip between the old and new official duty stations to seek permanent residence quarters, *i.e.,* a househunting trip, for himself and his spouse.

Mr. Kilfoil reported for duty at his new official duty station on April 24, 1986. He was not accompanied by his wife or 2 children at that time. Mrs. Kilfoil conducted a househunting trip to the Miami area from June 4 to June 11, 1986, and Mr. Kilfoil was reimbursed for her househunting trip. His wife and children thereafter joined him at his temporary quarters.

The agency interpreted the Federal Travel Regulations (FTR), FPMR 101-7 (September 1981) *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985), para. 2-5.1 and a provision of the U.S. Customs Handbook to mean that he was only entitled to 113 days of TQSE, the amended authorization of 120 days less 7 days for his wife's househunting trip previously paid. In the agency's view, even though Mr. Kilfoil neither claimed nor was paid househunting expenses for himself, the operative fact requiring a reduction in his TQSE was that the claim of his wife for 7 days' househunting was paid. Therefore, the agency concluded that Mr. Kilfoil was entitled only to 113 days of TQSE. On reclaim, Mr. Kilfoil agrees that his wife's TQSE period was properly reduced, but he disputes the 7 days' disallowance for himself.

In support of its position, the agency relies on a provision found in the U.S. Customs Service Travel Handbook. Specifically, paragraph G, *"Effect on Temporary Quarters,"* on page 914 provides that the number of days authorized for a househunting trip "will be deducted from an employee's temporary quarters entitlement." The agency also points out that paragraph 2-5.1 of the FTR provides that, as a general policy, the period of TQSE should be reduced or avoided if a round trip to seek permanent residence quarters has been made.

We do not believe either the Customs Service Handbook provision or the FTR provision discussed above poses an absolute bar to payment of the full 120 days of TQSE to Mr. Kilfoil. Both regulations assume that payment of househunting expenses is otherwise proper and payable. The underlying rationale for both regulations is that neither employees nor their spouses should ordinarily be reimbursed for both househunting expenses and full TQSE. Payment of the full 120 days of TQSE to Mr. Kilfoil in the circumstances of this case would not violate that policy. Mr. Kilfoil cannot be paid nor does he claim househunting expenses for himself. However, TQSE is a discretionary item and the agency's interpretation of the travel voucher, its own Handbook provisions and the Federal Travel Regulations, is not unreasonable. *Constantine Bolaris,* B-206546, April 3, 1984.

Accordingly, Mr. Kilfoil's claim for the additional period of TQSE is denied.

B-230090.2, February 12, 1988

Procurement

Bid Protests
■ GAO Procedures
■ ■ Protest Timeliness
■ ■ ■ Time/Date Notations
■ ■ ■ ■ Establishment

A protest is filed for purposes of General Accounting Office (GAO) timeliness rules when it is received in GAO. The GAO time/date stamp establishes the time of receipt absent other evidence to show actual earlier receipt.

Matter of: Koger Properties Inc.—Request for Reconsideration

Koger Properties Inc. requests that we reconsider our January 26, 1988, dismissal as untimely of the firm's protest concerning the rejection of its bid under solicitation for offers No. R7-01-87, issued by the General Services Administration. We dismissed Koger's protest because it was filed in our Office more than 10 working days after the basis for the protest was first known.

Koger requests that we reconsider our dismissal on the ground that it mailed its protest within the 10-day time limit. Specifically, Koger argues that it received notice that it was an unsuccessful bidder on January 7, 1988, and it mailed a protest letter to the General Accounting Office (GAO) 8 working days later on January 20, 1988. We deny the request for reconsideration.

The term "filed" as defined in our Bid Protest Regulations means receipt of the protest and other submissions in GAO. 4 C.F.R. § 21.0(g) (1987). Thus, the fact that Koger may have mailed its protest letter within the 10-day period is not relevant to the timeliness of the filing.

Moreover, the GAO time/date stamp establishes the time we receive protest materials absent other evidence to show actual earlier receipt. *Ogden Allied Services Corp.—Reconsideration*, B-224692.2, Oct. 20, 1986, 86-2 CPD ¶ 471. Our time/date stamp shows receipt of Koger's protest letter, dated January 20, 1988, on January 26, 1988, which is more than 10 working days after January 7, 1988, the date Koger received the information on which it based the protest. Since there is no evidence that we received the letter before the 10-day period expired, the protest was properly dismissed as untimely.

The request for reconsideration is denied.

B-228470, February 16, 1988

Procurement

Bid Protests

■ GAO Procedures

■■ Interested Parties

Large business is an interested party to protest that the award price under a small business set-aside is unreasonable, since, if successful, the requirement could be resolicited on a non-set-aside basis, and large businesses would be eligible for award.

Procurement

Sealed Bidding

■ Bids

■■ Evaluation Errors

■■■ Price Reasonableness

Where the contracting officer makes a finding of price reasonableness based solely on a government estimate, and the estimate is shown to have been calculated improperly, the price reasonableness determination is invalid and should be redetermined based on a properly calculated estimate.

Matter of: Black Hills Refuse Service

Black Hills Refuse Service protests the award of a contract to Fish Sanitation under invitation for bids (IFB) No. R2-03-88-01, issued by the Forest Service, United States Department of Agriculture, as a total small business set-aside for garbage hauling. Black Hills contends that the Forest Service improperly determined that Fish's price was reasonable. We sustain the protest.

Background

Three bids were received by the September 15, 1987, bid opening date, as follows:

Sander Sanitation	$71,500.00
Fish	$39,504.00
Black Hills Refuse Service	$27,766.20

The government estimate was $25,013.50. Sander Sanitation's bid was rejected as nonresponsive because it failed to offer on all requirements, and Black Hills was ineligible for award because it is a large business. As Fish thus was the low (and only) responsive bidder, the contracting officer proceeded to consider the firm's responsibility and the reasonableness of its price. In this latter regard, the agency asked Fish why there was such a large discrepancy (36 percent) between its bid and the government estimate. Fish explained that its price might seem high because it took into account a predicted increase in the dumping, or "tipping," fees required to dump at the city landfill. The contracting officer contacted the Superintendent of Sanitation for Rapid City, South Dakota, who re-

portedly confirmed that the tipping fees could triple by May 1, 1988. Based upon this information, the contracting officer revised the government estimate to $34,813.50. Since Fish's price was only approximately 13 percent above this revised estimate, he determined that Fish's bid was reasonable and awarded the firm the contract. Work on the contract has not been suspended while the protest is pending, on the ground that the potential health hazard of unremoved garbage provides an urgent and compelling reason to proceed with performance. *See* Bid Protest Regulations, 4 C.F.R. § 21.4(b) (1987).

Black Hills claims that the revised government estimate was calculated incorrectly due to erroneous figures and misunderstandings about the sanitation business, and that the contracting officer thus did not make a valid finding of price reasonableness, as he is required to do under Federal Acquisition Regulation (FAR) § 14.407-2 (FAC 84-8), before making award. Black Hills further argues that Fish's price is unreasonable under a correct government estimate, and concludes that Fish's contract should be terminated; that the set-aside should be withdrawn; and that the solicitation should be reissued on an unrestricted basis.

The Forest Service responds, first, that, as a large business, Black Hills is not an interested party to protest a small business set-aside procurement and, secondly, that the contracting officer used reasonable judgment in revising the government estimate and in finding Fish's bid reasonable.

Interested Party

Under our Bid Protest Regulations, only an "interested party" may protest a federal procurement. 4 C.F.R. § 21.1(a). An interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *Therm-Air Mfg. Co., Inc.*, 59 Comp. Gen. 255 (1980), 80-1 CPD ¶ 119; *Canaveral Towing & Salvage, Inc.*, B-211627.2 *et al.*, Dec. 19, 1983, 83-2 CPD ¶ 702.

Here, a decision in Black Hills' favor could necessitate a resolicitation since there was no responsive bidder other than Fish. While the contracting officer would not be required to withdraw the set-aside determination under these circumstances, this could be the result in view of the limited small business competition generated and the absence of a reasonable small business bid; were the set-aside withdrawn, Black Hills would be eligible to compete. We note in this regard that, in order to conduct a procurement as a small business set-aside, the contracting officer must have a reasonable expectation that (1) offers will be obtained from at least two responsible small businesses; and (2) that the award can be made at a reasonable price. FAR § 19.502-2 (FAC 84-31). We conclude that the possibility of a withdrawal of the set-aside in the event of a resolicitation constitutes a sufficient stake in the outcome of the protest to render Black

Hills an interested party. This conclusion is consistent with prior decisions in which we have permitted large businesses to protest the issue of price reasonableness in a small business set-aside context under facts similar to those here. *See, e.g., U.S. Elevator Corp.*, B-224237, Feb. 4, 1987, 87-1 CPD ¶ 110.

Price Reasonableness

The contracting officer explains that he calculated the revised estimate by first increasing the current tipping fees by $1.40 (from $0.70 to $2.10) per cubic yard based on the information from the Superintendent of Sanitation; multiplying the estimated 7,000 uncompacted cubic yards of garbage by the $1.40 increase to determine the total cost increase of $9,800; and then adding this amount to the original $25,013.50 estimate to reach the new estimate of $34,813.50. Although Fish's bid price was 13 percent higher than this revised estimate, the Forest Service found that this was not an unreasonable premium to pay a small business, and that Fish's price therefore was reasonable.

Black Hills contends that the revised government estimate was calculated based on an excessive increase in tipping fees, and thus was not a valid standard for determining price reasonableness. Specifically, Black Hills asserts that the use of 7,000 cubic yards, the uncompacted volume, to calculate the impact of the increase in tipping fees is not rational because, as a matter of industry practice, sanitation contractors do not dump loose yards of garbage, but, rather, compact the garbage in the trucks to produce a significantly smaller number of cubic yards. This practice, Black Hills explains, produces significant cost savings, and thus should have resulted in a lower revised estimate, as the compaction ratio apparently can range from 4:1 (as conceded by the awardee), to Black Hills' higher alleged ratio of between 5:1 and 7:1.

A determination of price reasonableness is a matter of judgment within the administrative discretion of the contracting officer, and we will not question such a determination unless it is unreasonable or there is a showing of fraud or bad faith by the agency. *U.S. Elevator Corp.*, B-224237, *supra*. We conclude that the agency's determination here was unreasonable.

We find that the record supports Black Hills' argument that by calculating the revised estimate based on loose, rather than compacted cubic yards of waste, the agency overstated the increase in the estimate by a factor of from four to seven times. Thus, instead of an increase of $9,800, the estimate might reasonably have increased only $1,400 to $2,450, resulting in a significantly greater difference between Fish's bid and the revised estimate. There is nothing in the record indicating that the agency would have found Fish's bid reasonable in comparison to such a lower revised estimate.

The Forest Service reports it was advised by the Superintendent of Sanitation that the tipping fees were based solely on the volume capacity of the truck, and that the fees for a truckload of waste therefore would be the same whether or

not compacted. The Forest Service concludes that its calculations thus reasonably were based on the full 7,000 cubic yards of loose, noncompacted waste.

We think the Forest Service's position is untenable, based on the record here. The fact that the tipping fees are assessed per truckload is not controlling; rather, the dispositive consideration is the fact that the agency has ignored information bearing on the number of truckloads that can be expected under the contract. Again, as Black Hills asserts, and even Fish agrees, compaction of waste is the industry norm since it allows the packing of more waste into a truckload, thereby reducing the number of trips needed for the collection process and, concomitantly, the cost of performing. The agency's calculations (*i.e.*, ignoring compaction) thus result in a higher number of truckloads than will actually be experienced, and a correspondingly excessive estimate of the tipping fees. Since taking compaction into account thus would result in a much smaller increase in the government estimate than the agency calculated, the price reasonableness determination is in doubt.

Therefore, by separate letter to the Secretary of Agriculture, we are recommending that the contracting officer recalculate the government estimate, taking into consideration prevailing norms of the sanitation industry, as discussed in our decision, as well as all other relevant information, including the tipping fees actually in effect at the time of the recalculation. If, based on this information (including the recalculated estimate), Fish's bid price is found to be unreasonable, the requirement should be resolicited. Further, prior to any resolicitation, the Forest Service should reexamine the validity of the set-aside determination.

The protest is sustained.

B-228090.2, February 18, 1988

Procurement

Bid Protests
■ GAO Procedures
■■ GAO Decisions
■■■ Reconsideration

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

In deciding whether a protester might have been prejudiced by an agency's failure to hold meaningful discussions, the General Accounting Office does not require the firm to establish with certainty what would have resulted absent the procurement deficiency. Before the procurement or contract will be disturbed, however, and especially where cost is an important selection factor, there must be some evidence that the protester would have been competitive with the awardee but for the agency's improper actions.

Matter of: B.K. Dynamics, Inc.—Reconsideration

B.K. Dynamics, Inc., requests that we reconsider our decision in *B.K. Dynamics, Inc.*, B-228090, Nov. 2, 1987, 67 Comp. Gen. 45, 87-2 CPD ¶ 429, in which we denied B.K.'s protest of the award of a contract under Department of the Air Force request for proposals (RFP) No. F49620-87-R-0006.

We deny the request.

The RFP was issued to obtain a contractor to provide international cooperative research and development assessments. The solicitation provided that technical merit would be the most important factor in the selection decision, although cost also would be important. The Air Force received five proposals and determined that the proposal submitted by Techplan Corporation was technically superior, but placed four offers, including that submitted by B.K., in the competitive range. The Air Force conducted written discussions with those four offerors concerning only their cost proposals, and requested best and final cost offers. B.K.'s best and final cost offer was $1.2 million higher than Techplan's $1.93 million final cost offer. The Air Force awarded the contract to Techplan.

In its protest to our Office, B.K. alleged that the Air Force improperly failed to hold technical discussions with the firm. B.K. asserted that if the Air Force had conducted technical discussions, B.K. might have been able to raise its technical score above that of Techplan. We agreed with B.K. that since the Air Force did hold discussions, it was obligated to point out technical deficiencies and weaknesses it discovered in B.K.'s proposal. We denied the protest, however, because we found that B.K. did not demonstrate it was prejudiced by the Air Force's actions. In this regard, we noted that B.K. itself was uncertain whether technical discussions would have enabled the firm to raise its proposal to the level of Techplan's. Moreover, we pointed out, the RFP provided that technical merit and cost would be considered in choosing the successful offeror, and B.K. did not suggest it could have lowered its cost proposal sufficiently to be competitive with Techplan.

In its request for reconsideration, B.K. argues that because it did not know what issues the Air Force would have raised during discussions and because it did not have access to Techplan's proposal, it could not have been more definite regarding the effect technical discussions would have had on its offer. B.K. further argues that any cost reductions would have been directly dependent upon the technical issues that were raised, and that B.K. certainly would have lowered its cost proposal to some degree if technical discussions had been held. B.K.'s states:

> In essence, the GAO has required that, in order for B.K. to obtain relief, B.K. must predict with certainty what would have resulted *if* the Air Force had obeyed the law. In the circumstances present in this procurement, such a demand is unreasonable, illogical and inconsistent with prior case law. (Emphasis in original.)

We find no merit in B.K.'s position. In deciding whether a protester might have been prejudiced by an agency's actions, we do not require the firm to, in B.K. words, "predict with certainty what would have resulted." Rather, we think it

important that, before we disturb a procurement or a contract, there be some evidence, especially where price or cost is an important selection factor, that the protester would have been competitive with the awardee but for the agency's action. *See Sperry Corp.*, B-224351, B-224351.2, Sept. 26, 1986, 86-2 CPD ¶ 362; *Centennial Computer Products, Inc.*, B-211645, May 18, 1984, 84-1 CPD ¶ 528. Neither the record on B.K.'s protest, nor the firm's reconsideration request, persuades us that this would have been the case here.

In our prior decision, we noted that the Air Force evaluators had found that B.K. had a thorough understanding of the agency's needs, and that its proposal had not been marked down very much in any area. The evaluators also concluded the proposal could not have been improved significantly without replacing key personnel. However, the weaknesses the evaluators did notice were of the sort that may well have been resolved through technical discussions. For example, B.K. did not give samples of the Contract Data Requirements Lists formats for required deliverables; B.K.'s proposal for certain line items listed in the statement of work did not demonstrate sufficient program manager involvement; and B.K. failed to address or elaborate on certain factors. Another example, taken from the contracting officer's memorandum of B.K.'s debriefing, is: "some of the proposed personnel were also a bit overqualified for certain of the tasks which called for a single, full-time individual to be identified."

The fact is, then, that although B.K.'s proposal had weaknesses, it was substantially complete and acceptable as submitted. Further, as stated above, B.K.'s final cost offer was more than $3 million, whereas Techplan's was less than $2 million. Given the fact that cost was an important evaluation criterion, we simply do not see how B.K.'s correction, through discussions, of what the Air Force basically considered to be minor matters—certain of which would seem to warrant cost increases anyway—reasonably could have led to such a significant improvement in technical ranking and reduction in proposed costs as to have made the selection of B.K. a real possibility. B.K.'s current suggestion to the contrary is made with the benefit of knowing the contract price, and provides no basis to disturb our view of the realities of the competition.

For a party to prevail in a request for reconsideration, it must show that our prior decision is factually or legally wrong. 4 C.F.R. § 21.12 (1987). Since B.K. has not done so, the request for reconsideration is denied.

B-211159, February 19, 1988

Military Personnel

Pay

■ Retirement Pay

■■ Amount Determination

■■■ Computation

■■■■ Effective Dates

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, commonly referred to as the "Tower amendment," was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

Military Personnel

Pay

■ Retirement Pay

■■ Amount Determination

■■■ Computation

■■■■ Effective Dates

A provision included in the appropriation acts applicable to the Department of Defense in effect between January 1, 1982, and December 18, 1985, prohibited any service member "who, on or after January 1, 1982, becomes entitled to retired pay" from rounding 6 months or more of service to a full year for purposes of computing retired pay. The Department determined that this prohibition applied to retired pay computations under the Tower amendment, 10 U.S.C. § 1401a(f), in the case of service members who retired after January 1, 1982, but who had their retired pay computed on the basis of their eligibility to retire on an earlier date when that prohibition was not in effect. The Comptroller General sustains the Department's determination, in view of the wording of the provision, but notes that reductions in retired pay under the provision should have ceased after it expired in December 1985.

Matter of: Captain Glenn L. Gaddis, USN (Retired)—Military Retired Pay—Tower Amendment

Captain Glenn L. Gaddis, USN (Retired), claims that the Navy has improperly imposed a reduction in his military retired pay.[1] We conclude that while the reduction in question may have been required under a provision of an appropriation act which was in effect at the time of his retirement on March 1, 1985, that reduction should have been terminated after the provision expired on December 18, 1985.

[1] This action is in response to correspondence received from the Commander of the Navy Finance Center, forwarding Captain Gaddis' claim.

Background

Captain Gaddis retired from the Navy on March 1, 1985, under the provisions of 10 U.S.C. § 6321 after completing more than 40 years' active service. Although his actual date of retirement occurred in 1985, it was to his advantage to have his retired pay calculated on the basis of his eligibility to retire at an earlier date under the computation authorized by 10 U.S.C. § 1401a(f) —commonly referred to as the "Tower amendment"—which provides:

> (f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section . . . .

This provision was adopted by the Congress to alleviate the so-called "retired pay inversion" problem, which was created by the fact that for several years upward cost-of-living adjustments of retired and retainer pay had occurred in greater amounts and at greater frequency than increases in active duty basic pay. The result was that many of those who remained on active duty after becoming eligible for retirement were losing considerable amounts of retired pay. The computation of retired pay under the alternate method provided by 10 U.S.C. § 1401a(f) involves calculating the maximum amount of retired pay based not on a service member's actual retirement date but rather on his earlier eligibility for retirement. *See* 59 Comp. Gen. 691 (1980); 56 Comp. Gen. 740 (1977).

In Captain Gaddis' case both he and the accountable Navy officials agree that the most favorable computation under 10 U.S.C. § 1401a(f) is premised on his eligibility to have voluntarily retired as a Navy captain, pay grade 0-6, on September 30, 1974. The controversy here involves the amount of service with which he should be credited on that date for retirement purposes under 10 U.S.C. § 1401a(f). On September 30, 1974, he had completed 29 years and 8 months of active service, but if he had actually retired on that date he would have been credited with 30 years' service due to the operation of 10 U.S.C. § 6328 (1970 ed.), which provided:

> In determining the total number of years of service to be used as a multiplier in computing the retired pay of officers retired under this chapter, a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded.

With the application of this provision Captain Gaddis would have received retired pay computed on the basis of 30 years multiplied by 2.5 percent, or 75 percent of the applicable rate of basic pay, with cost-of-living adjustments. He suggests that this is the proper method to be used in the computation of his retired pay under 10 U.S.C. § 1401a(f).

The Navy, however, has taken the position that 10 U.S.C. § 6328 (1970 ed.) may not be used in computing the amount payable to Captain Gaddis, and that his retired pay under 10 U.S.C. § 1401a(f) should instead be computed on the basis of the 29 years and 8 months of active service he had actually completed on September 30, 1974. This results in his retired pay being computed on the basis

of 29.67 years multiplied by 2.5 percent, or 74.18 percent of the applicable rate of basic pay, with cost-of-living adjustments. Because of this difference the gross monthly retired pay for the month of March 1985 claimed by Captain Gaddis, $3,858, exceeds by $42 the amount credited to him by the Navy, $3,816.

Captain Gaddis points out that if he had actually retired in 1974, his retired pay for March 1985 would have been payable at the higher rate claimed. In effect, he suggests that he is being penalized for electing to remain on active duty beyond his optimum retirement date in 1974, and that this is contrary to the terms and the congressional purpose of the Tower amendment, 10 U.S.C. § 1401a(f).

In their administrative report, the accountable Navy officials base their position on guidance they received from the Department of Defense concerning laws enacted in 1981 and 1983. The first of these was section 772 of the Department of Defense Appropriation Act, 1982, Public Law 97-114, December 29, 1981, 95 Stat. 1565, 1590, which placed the following limitation on the expenditure of funds under that act in the creditability of active service for part of a year:

SEC. 772. Effective January 1, 1982, none of the funds appropriated by this Act shall be available to pay the retired or retainer pay of a member of the Armed Forces for any month who, on or after January 1, 1982, becomes entitled to retired or retainer pay, in an amount that is greater than the amount otherwise determined to be payable after such reductions as may be necessary to reflect adjusting the computation of retired pay or retainer pay that includes credit for a part of a year of service to permit credit for a part of a year of service only for such month or months actually served . . . .

Although this provision applied only to funds appropriated for fiscal year 1982, it was reenacted in legislation providing appropriations for the Department of Defense in succeeding years.

In addition, section 923 of the Department of Defense Authorization Act, 1984, Public Law 98-94, September 24, 1983, 97 Stat. 614, 643, amended 10 U.S.C. § 6328 effective October 1, 1983, to read as follows:

In determining the total number of years of service to be used as a multiplier in computing the retired pay of officers retiring under this chapter, each full month of service that is in addition to the number of full years of service creditable to an officer is counted as one-twelfth of a year and any remaining fractional part of a month is disregarded.

The Navy officials say that they base their position in Captain Gaddis' case on two memoranda issued by the Department of Defense about these legislative enactments. The first memorandum is dated September 29, 1983, and is from the Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics. It is concerned primarily with the application of Public Law 98-94 and states that notwithstanding the amendment of 10 U.S.C. § 6328 to eliminate the "6-month rounding rule" effective October 1, 1983—

A member who uses the Tower amendment to compute his retired or retainer pay as though he had retired on a date prior to October 1, 1983, may round six months or more of service credit to a full year to effectuate the language of the Tower amendment, which provides that his retired or retainer pay shall not be less than it would have been had he retired on an earlier date.

The second memorandum is dated February 1, 1984, and was issued by the Department of Defense's Office of General Counsel. It concurs with the earlier memorandum with respect to the application of Public Law 98-94 and states that even though the "6-month rounding rule" had been deleted from 10 U.S.C. § 6328 effective October 1, 1983—

> With respect to a member who retires after [September 30, 1983], the Tower amendment would permit such member to compute his retired pay using the six-month rounding rule if that rule were in effect on the date of his earlier retirement eligibility.

This memorandum states it is the further opinion of the Office of General Counsel, however, that under the provision of the Department of Defense annual appropriation act which was first enacted as section 772 of Public Law 97-114—

> . . . a member may not be paid that portion of retired pay resulting from application of the 'six-month rounding rule' to the extent that it exceeds what he would be entitled to based on the full months in excess of a whole year actually served. . . . . .
>
> It is important to note that the [provision] did not by its terms amend the entitlement provisions of the law. It is, however, an absolute prohibition on the use of funds to satisfy that entitlement and, therefore, 'supersedes' the entitlement provisions, including those contained in the Tower amendment. . . . . .
>
> The prohibition . . . applies to *all* members who become entitled to retired or retainer pay on or after January 1, 1982 . . . . There is no distinction between members using the Tower amendment and others. Thus, it is the opinion of this office that the [provision] acts as a restriction, not on the entitlement to, but on the *payment* of, certain portions of retired or retainer pay, even to members who have used the Tower amendment to compute retired pay. . . . If the [provision] should fail to be enacted during a subsequent fiscal year, . . . [a member using the Tower amendment] would begin to receive the full amount of retired pay to which he is entitled. (Italics in original.)

The opinion of the Office of General Counsel refers to the memorandum issued earlier by the Assistant Secretary of Defense and concludes, "The discussion in that memorandum on the six-month rounding rule is consistent with this memorandum, although it did not specifically address the effect of the [appropriation act limitation] on Tower amendment computations."

Analysis and Conclusion

The legislative histories of Public Laws 97-114 and 98-94 do not reflect that Congress specifically considered the question presented here, which concerns the effect of those enactments on the computation of military retired pay under the Tower amendment.[2] We recognize that as a general rule, however, the construction of a statute by those charged with its execution is to be sustained in the absence of a showing of plain error, particularly when that construction has been consistently applied with congressional assent.[3] Here we find the effect

[2] Concerning Public Law 97-114, § 772, *see* H.R. Rep. No. 333, 97th Cong., 1st Sess. 12, 287 (1981); S. Rep. No. 273, 97th Cong., 1st Sess. 127 (1981), and H.R. Rep. No. 410 (Conference), 97th Cong., 1st Sess. 53 (1981). Concerning Public Law 98-94, § 923, *see* H.R. Rep. No. 352, 98th Cong., 1st Sess. 227, *reprinted in* 1983 U.S. Code Cong. & Ad. News 1160, 1164.

[3] *See Howe v. Smith*, 452 U.S. 473, 485 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Colonel William N. Jackomis, USAF (Retired)*, 58 Comp. Gen. 635, 638 (1979).

given by the Department of Defense to the enactments at issue to be consistent with the terms of the statutory language, and we also note that the Congress did not act to overrule the Department's interpretation but instead reenacted without change the limitation of Public Law 97-114 in subsequent appropriation acts.[4] Hence, we have no basis to disturb the Department's determination in the matter.

Nevertheless, we note that under the Department's interpretation, the reduction in Captain Gaddis' retired pay is predicated solely on the provisions of section 772 of Public Law 97-114, as reenacted in subsequent appropriation acts. That provision was last reenacted as section 8054 of the Department of Defense Appropriation Act, 1985, Public Law 98-473, October 2, 1984, 98 Stat. 1837, 1904, 1933, and was in effect at the time of Captain Gaddis' retirement on March 1, 1985. The provision continued in effect after the end of fiscal year 1985 on September 30, 1985, until December 18, 1985, due to the operation of a series of continuing appropriations resolutions.[5] It was not, however, included in the Department of Defense Appropriation Act, 1986, Public Law 99-190, December 19, 1985, 99 Stat. 1185, or in appropriation laws enacted since then. Hence, we conclude that while it was appropriate to impose a reduction in Captain Gaddis' retired pay under section 8054 of Public Law 98-473, as in effect from March 1 through December 18, 1985, there is no basis for the reduction for the period from and after December 19, 1985.

Accordingly, we deny Captain Gaddis' claim for additional retired pay believed due for the period from March 1 through December 18, 1985, but we allow his claim for the additional retired pay for the period from and after December 19, 1985.

B-228857, February 22, 1988

Appropriations/Financial Management

Federal Assistance

■ Bonds

■■ Refinancing

■■■ Advance Payments

■■■■ Minority Businesses

Unless it receives adequate legal consideration, the Small Business Administration (SBA) has no authority to agree to a refinancing proposal whereby Minority Enterprise Small Business Investment Companies (MESBICs) would prepay high-interest rate debentures held by SBA for the purpose of refinancing them with new debentures that SBA would agree to purchase at the current lower interest rates. An alternative proposal under which MESBICs would pay a so-called prepayment penalty in the form of a non-interest bearing note payable over a 10-year period as consider-

[4] *See* Pub. L. No. 97-377, § 768, Dec. 21, 1982, 96 Stat. 1830, 1862; Pub. L. No. 98-212, § 762, Dec. 8, 1983, 97 Stat. 1421, 1450; and Pub. L. No. 98-473, § 8054, Oct. 12, 1984, 98 Stat. 1837, 1904, 1933.

[5] Pub. L. No. 99-103, Sept. 30, 1985, 99 Stat. 471; Pub. L. No. 99-154, Nov. 14, 1985, 99 Stat. 813; Pub. L. No. 99-179, Dec. 13, 1985, 99 Stat. 1135; and Pub. L. No. 99-184, Dec. 17, 1985, 99 Stat. 1176.

ation for SBA's reduction of the interest rate on the existing debentures, is not acceptable either because the purported consideration is inadequate.

Matter of: The Honorables Dale L. Bumpers and Lowell Weicker, Jr., United States Senate

This opinion is in response to your joint letter with The Honorable Lowell Weicker, Jr., Ranking Minority Member, dated August 17, 1987, requesting our Office to review a ruling of the General Counsel of the Small Business Administration (SBA) that SBA could not allow Minority Enterprise Small Business Investment Companies (MESBICs) to prepay high-interest rate debentures held by the SBA for the purpose of refinancing them with new debentures that SBA would agree to purchase at the current lower interest rates. For the reasons set forth hereafter and subject to the exception discussed herein, we agree with the General Counsel's view that, unless SBA receives adequate legal consideration, SBA has no authority to agree to the proposed refinancing, which would, in effect, require the government to waive its contractual right to interest at the higher rate stated in the original debentures. Moreover, we do not think that an alternative proposal made by the National Association of Investment Companies (NAIC),[1] under which MESBICs would pay a so-called "prepayment penalty" to SBA as consideration for SBA's agreement to reduce the interest rate on these debentures for the remainder of their terms, would remedy the legal deficiencies of the original proposal.

Background

Under section 303(c) of the Small Business Investment Act (Act), 15 U.S.C. § 683(c), SBA is authorized to provide financial assistance to MESBICs (as defined by section 301(d) of the Act, 15 U.S.C. § 681(d)), by purchasing debentures from them. The interest rate on debentures issued by MESBICs is established in accordance with section 317 of the Act, 15 U.S.C. § 687i, which grants MESBICs an interest subsidy of 3 percent for the first 5 years of the term of the debenture.[2]

Because current interest rates are significantly lower than they were 5 years ago and the 5-year subsidy period on MESBIC debentures that SBA purchased in those years has expired or is about to expire, many MESBICs wish to refinance these debentures at today's lower interest rates. Accordingly, in 1986 NAIC asked SBA whether MESBICs could refinance their indebtedness to SBA by prepaying their existing high interest rate debentures and selling new debentures to SBA at the much lower interest rate then in effect.

[1] By letter dated October 21, 1987, a Committee staff member furnished us with a copy of this proposal and requested us to include an analysis of its legality in our opinion.

[2] Specifically, section 317 of the Act provides that for the first 5 years of the term of a debenture purchased by SBA from a section 301(d) licensee (MESBIC), the interest rate "shall be the greater of 3 per centum or 3 percentage points below the interest rate . . ." that is applicable to debentures issued by small business investment companies (SBICs) that do not qualify as MESBICs under section 301(d) of the Act.

On March 28, 1986, SBA's General Counsel issued a memorandum that, while recognizing the right of MESBICs "to prepay their indebtedness to SBA without penalty," held that SBA had no authority to agree to the proposed refinancing. The General Counsel's memorandum reads as follows in that respect:

> . . . But the right to prepay without penalty does not carry with it the right to have the proposed indebtedness refinanced on terms that amount to a gift, which is precisely the result of a refinancing at a lower rate. Except in a compromise case due to a debtor's inability to make payment in accordance with the terms of the debt instrument, SBA has no authority to waive its contractual rights in consideration of the debtor's payment of (or undertaking to pay) a lesser sum. To the extent that SBA discharges a debtor from the obligation to pay interest at the rate of X percent, in consideration of the debtor's promise to pay interest at the rate of X minus Y percent, it is making a gift equal to the difference between the two rates; and such an action exceeds SBA's legal authority.
>
> . . . prepayment/refinancing is precluded only when SBA, as creditor, receives no consideration other than the promise to pay interest at a lower rate.

After being advised of SBA's position regarding the original debenture refinancing proposal, NAIC made an alternative proposal. Under this proposal, MESBICs seeking refinancing would tender to SBA a non-interest-bearing promissory note, payable in annual installments over a 10-year period, in a face amount equal to the prepayment penalty that would be required under the SBA formula for debenture prepayments by SBICs that do not qualify as MESBICs under section 301(d) of the Act. In return, SBA would agree to lower the interest rate on the debentures for the remainder of their terms to the rate currently paid by (non-MESBIC) SBICs.

In a memorandum dated May 13, 1987, SBA's Chief Counsel for Investment, Office of Finance and Legislation, concluded that the NAIC proposal was unacceptable because it "ignores the substantial difference" between the present value of a sum of money (the prepayment penalty) and the discounted value of the same sum when it is paid in annual installments over a 10-year period, without interest. You have asked us to review SBA's position that neither the original nor alternative proposal are legally acceptable.

Analysis

It has long been recognized that unless specifically authorized by statute, the officers and agents of the government have no authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the United States without adequate legal consideration or a compensating benefit. 62 Comp. Gen. 489, 490 (1983); B-207165, May 3, 1982, 45 Comp. Gen. 224, 227 (1965); *Union National Bank v. Weaver,* 604 F.2d 543, 545 (7th Cir. 1979).

This principle is applicable to SBA's contractual right to interest on the existing debenture in accordance with the interest rate set forth therein and, in the absence of specific statutory authority, would prohibit SBA from agreeing to lower the interest rate on these debentures without adequate legal consideration. The original proposal SBA was asked to consider, in which MESBICs would refi-

nance their indebtedness to SBA by substituting new lower rate debentures for the existing higher rate debentures, does not provide for the payment of any additional consideration to SBA.

Thus, the first issue for us to consider is whether SBA has specific statutory authority that would allow it to relinquish its contractual right to receive interest at the higher interest rate provided for in the existing debentures without additional consideration. Our review of SBA's enabling legislation reveals one provision that is relevant in this respect. Under section 5(b)(7) of the Small Business Act, as amended, 15 U.S.C. § 634 (b)(7), which is made applicable to the functions and activities authorized by the Small Business Investment Act in section 308(f) thereof, 15 U.S.C. § 687(f), the Administrator of SBA has authority to:

> . . . *take any and all actions* . . . when he determines such actions are necessary or desirable *in* making, servicing, *compromising, modifying,* liquidating, or otherwise dealing with or realizing on *loans.* [Italics supplied.]

See, generally, 44 Comp. Gen. 549 (1965); and 58 Comp. Gen. 138 (1978).

While this provision undeniably gives the Administrator of SBA broad authority to take various actions in dealing with loans, including authority to modify the terms of a loan, we have held that the Administrator's authority to deal with loans under this section "is not unlimited." *See* B-181432, August 11, 1978, and cases cited therein. Moreover, in several cases, we have implicitly rejected the view that this provision gives SBA the authority to modify a loan agreement to the detriment of the United States without consideration. For example, in B-181432, March 13, 1975, we held that SBA could not agree to accept guarantee fees from banks after a supposedly guaranteed loan went into default, thereby committing itself to honor the guarantee, since such action would modify, to the government's detriment, a provision of the loan guarantee agreement that required payment of the guarantee fee before a loan was covered by SBA's guarantee.[3] *See also,* B-181432, October 20, 1978 and B-181432, February 19, 1976. Thus, it is our view that the Administrator's authority under 15 U.S.C. § 634(b)(7) to modify the terms of a loan should not be interpreted as allowing SBA to waive the government's right to receive interest at the rate stated in the existing debentures without adequate legal consideration.

In reaching this conclusion, which is consistent with SBA's position in this case, we are not questioning the view of SBA's General Counsel that MESBICs "have a right to prepay their indebtedness to SBA without penalty." However, prepayment is not legally acceptable *if it is part of an arrangement* whereby, without additional legal consideration, SBA agrees to purchase new debentures bearing a lower rate of interest. Allowing refinancing in such circumstances for the sole purpose of enabling a MESBIC to reduce the interest it must pay to SBA is tantamount to providing the MESBIC with a loan bearing a floating rate of interest, albeit at a rate that would only decrease. Obviously, a MESBIC would only

[3] While our decision in that case did not specifically address limits on the Administrator's authority under 15 U.S.C. § 634(b)(7), SBA's submission to us, as quoted in the decision, cited that provision as providing support for its position that it had authority to modify the guarantee agreement by waiving the requirement that a loan was not covered by SBA's guarantee until the fee was paid. Our decision concluded that SBA had no such authority.

take advantage of this refinancing option when interest rates had declined. However, if interest rates increased, SBA would be "locked in" at the original interest rate for the remainder of the term of the debenture. Since the statute authorizing the program envisions debentures bearing a fixed interest rate, with a 3 percent subsidy for the first 5 years, allowing MESBICs to refinance whenever interest rates went down would provide MESBICs, in our view, with a significant additional benefit and concession not contemplated by the enabling legislation. *See* 15 U.S.C. §§ 683(b) and 687i. For this reason, SBA has adopted the policy of requiring any MESBIC that prepays a debenture prior to its maturity to wait until after the original maturity date on that debenture before SBA will process its application for new financing. In our view, that policy appears to be reasonable and consistent with the underlying legislation.

Our conclusion that SBA does not have authority to implement the proposal is subject to one exception. As stated by SBA's General Counsel, an exception to the refinancing prohibition exists in a "compromise case." We agree that based on the express authority the Administrator of SBA has under 15 U.S.C. § 634(b)(7) to "compromise" loans, SBA can agree to reduce the interest rate on existing debentures based on the "debtor's inability to make payment in accordance with the terms of the debt instrument." As we recognized in 62 Comp. Gen. 489, at 492 (1983), a compromise can be justified under this type of statutory authority when there is "some genuine doubt as to the collectibility of the entire amount of an undisputed debt." However, the desire of MESBICs to reduce the amount of money they must pay to service their debt, albeit understandable, does not constitute genuine doubt as to the debt's collectibility that would justify such a compromise.

NAIC's alternative proposal raises a different issue. Having determined that SBA has no specific statutory authority to agree to waive the government's rights to interest at the rate provided for in the existing debentures without adequate legal consideration, we must decide whether the alternative proposal would provide SBA with the necessary consideration missing from the original proposal. In return for SBA's agreement to reduce the interest rate on the existing debentures for the remainder of their terms, NAIC has proposed that MESBICs give SBA non-interest-bearing notes, payable over a 10-year period, in face amounts equal to the prepayment penalty that SBA would require from SBICs that do not qualify as MESBICs. In our view, such a "prepayment penalty" would not constitute adequate legal consideration to support SBA's modification of the existing debentures.

As explained by SBA's Chief Counsel for Investment in his memorandum of May 13, 1987, the purpose of a prepayment penalty is to enable the creditor to realize the same return on the prepaid principal that it would have received on the original investment. In other words, the amount of money paid as the penalty, plus the interest that accrues thereon, should equal the amount of interest that SBA would have earned on the original debentures. This would constitute adequate legal consideration. *See* B-223329, October 17, 1986 (66 Comp. Gen. 51) .

However, under the NAIC proposal, MESBICs would pay the required prepayment penalty, without any interest, over a 10-year period, thus ignoring the "substantial difference" between the present value of money and its discounted value when it is paid over a 10-year period. If SBA agreed to this proposal, after the 10-year period had elapsed and the prepayment penalty was fully paid, SBA would have substantially less money, assuming all other factors remain the same, than would be the case if it had not agreed to the proposal.[4] In these circumstances, we believe the purported consideration that SBA would receive for agreeing to reduce the interest rate on these debentures is essentially illusory, consisting, in reality, of nothing more than the payment of a lesser sum of money in exchange for a greater sum. This does not constitute adequate legal consideration.

In accordance with the foregoing, we agree with SBA that it does not have the authority to agree to either of these refinancing proposals.

Unless released earlier by you or your staff, this opinion will be available to the public 30 days from today.

B-226132, February 26, 1988

Appropriations/Financial Management

Claims by Government
■ Bonds
■■ Forfeiture
■■■ Funds
■■■■ Use

Under section 579c of title 16 of the United States Code, proceeds received from bond forfeitures can reimburse general Forest Service appropriations to the extent of the costs of repairs related to the bond forfeitures. The language of section 579c stating "cover the cost to the United States" for the needed repairs supports this conclusion. Moneys received that exceed these costs should be deposited into the miscellaneous receipts of the Treasury.

Matter of: USDA Forest Service—Authority to Reimburse General Appropriations with the Proceeds of Forfeited Performance Bond Guarantees.

The United States Department of Agriculture, Forest Service, asks whether it can use the proceeds from performance bond forfeitures to reimburse general appropriations used for repairing damage to United States lands. For the reasons given, we find that the Service can make these reimbursements to the extent of the costs of the repairs.

[4] This point is conceded in a background paper your staff furnished to us dated August 7, 1987, that was prepared by NAIC regarding this proposal, which states that the government could lose as much as $3.4 million if the proposal was implemented (or somewhat less, depending on the maturity dates of the existing debentures).

The Forest Service states that it requires performance bond guarantees from occupants of the National Forest System, including commodity contractors. Occasionally these occupants cause damage to lands and do not make the necessary repairs. This results in the Forest Service itself having to make the needed repairs, often prior to collecting the proceeds from the performance bonds. It cites as an example the need to undertake immediate erosion control measures after a fire.

As a remedy, the Service would like to use general appropriations supporting the type of repair involved to pay for the necessary work, and subsequently reimburse that appropriation with the later-received performance bond proceeds. The Forest Service maintains that the law does not specifically authorize such reimbursements, but cites our decision in 64 Comp. Gen. 625 (1985), involving use of forfeited bond proceeds to fund replacement contracts, as support for its suggestion. Currently, the Forest Service is using applicable appropriations to make the repairs, but is depositing the later-received bond proceeds into the general fund of the Treasury. In this regard, the Forest Service has informed us that most often it uses the lump-sum appropriation for the "National Forest System" to fund the repairs. *E.g.*, Pub. L. No. 99-591, 100 Stat. 3341-268 (1986). Occasionally it uses the "Construction" appropriation instead when road construction is necessary, and may use other applicable lump-sum appropriations.

Legal Discussion

We think the problem raised by the Forest Service is resolved by section 579c of title 16 of the United States Code. Section 579c provides that moneys received by the United States from bond forfeitures or deposits by occupants for failure to complete performance of required improvement, protection or rehabilitation work shall be covered into the Treasury and are appropriated and made available "to cover the cost to the United States" of any related improvement, protection, or rehabilitation work. The statute establishes the same process for moneys received from judgments, compromises or settlements of claims involving present or potential damage to lands or improvements. Section 579c also provides that moneys received in excess of amounts expended in performing required work shall be transferred to the Treasury as miscellaneous receipts.

When repairs must be undertaken before bond forfeitures are received, the Forest Service would have a responsibility to act immediately and would have to use available appropriations to make the repairs. If this had occurred prior to enactment of section 579c, the Forest Service would have used available general appropriations for the repairs. Passage of section 579c did nothing to diminish the Forest Service's need to act. Thus, it would still have to use the appropriation generally available for the repairs.

In the past, the Forest Service was not authorized to apply defaulted bond proceeds, or any other proceeds, received after expenditure of general appropriations on repairs, to the costs incurred by the general appropriation. All such proceeds had to be deposited into the Treasury as miscellaneous receipts. To

some extent, this made no sense since the moneys received were intended to cover the costs of repairing damage to Forest Service lands.

Although its legislative history provides little guidance on section 579's intention, we think it reasonable to construe it as establishing a system for funding repairs which is intended to operate in conjunction with generally available appropriations. The language of section 579c is consistent with this view. We interpret the language "cover the cost to the United States of any improvement, protection or rehabilitation work . . ." as meaning to cover the costs of the repairs whether initially funded from general appropriations or from deposits in the 579c account. Thus, when proceeds from bond forfeitures subsequently are received, they are to be covered back into the general appropriation used to the extent of the costs.

The requirement in section 579c to deposit into the Treasury as miscellaneous receipts proceeds from forfeited performance bonds that exceed repair costs is also consistent with our view. That requirement also evidences an intention that moneys deposited by non-government users of Forest Service lands for repairing damages attributable to such use, be retained by the Forest Service.

We emphasize that our conclusion in no way impinges on our long-established principle that when an agency has a specific appropriation for a particular expense and also a general appropriation broad enough to cover the same expense, it must use the specific appropriation regardless of the amount left in the appropriation. *See, e.g.,* B-202362, March 24, 1981. Also applicable is the rule that when an agency has two specific appropriations available for the same expense, an agency's election to use one will require the agency to continue using the one selected to the exclusion of the other. 59 Comp. Gen. 518, 520-21 (1980). The exhaustion of the elected appropriation does not justify using the funds of the other appropriation. *See* 31 U.S.C. § 1532. These rules, however, are not applicable in this situation.[1] We construe section 579c as being intended to complement general appropriations, and not as establishing an equally available appropriation or a separate specific appropriation to be used to the exclusion of general appropriations.

B-228555, February 26, 1988

Procurement

Sealed Bidding

■ Bids

■■ Errors

■■■ Error Substantiation

A protester has shown clear and convincing evidence that its low bid was mistaken because of a malfunction in its bid preparation computer software where there was a considerable disparity be-

[1] Our decision in 64 Comp. Gen. 625 (1985), involving use of forfeited bond proceeds, also is not directly applicable.

tween the low bid and the other bids and the software manufacturer has confirmed that there was a "bug" in the software that could cause this problem.

Procurement

Sealed Bidding
■ Low Bids
■ ■ Error Correction
■ ■ ■ Price Adjustments
■ ■ ■ ■ Propriety

An agency reasonably found that a low bidder did not show by clear and convincing evidence its intended bid price, so as to permit correction of its alleged mistake in bid, where there is an unexplained and untraceable discrepancy in the labor, material and equipment costs that causes a relatively wide range of uncertainty in the possible intended bid price, ranging from less than one percent to 5.7 percent below the next low bid price.

Matter of: Northwest Builders

Northwest Builders protests the Veterans Administration's denial of its request to correct an alleged mistake in its low bid submitted in response to invitation for bids (IFB) No. 648-128-87.

We deny the protest.

The IFB, issued on August 14, 1987, sought bids for the construction of two committal shelters at the Willamette National Cemetery. On bid opening, September 14, 1987, at 2 p.m., four bids were received as follows:

Northwest	$267,500
Michael Watt, Inc.	$394,556
Lorentz Brown Co.	$407,000
Gene Matney Construction Co.	$421,901

On the same day, Northwest notified the contracting officer by telegram that there was a mistake in its bid and that due to a computer malfunction, approximately $105,000 was inadvertently omitted from the bid price. The contracting officer asked for an explanation of the mistaken bid as well as substantiating original documentation for verification of the claim. Northwest promptly provided VA with evidence to support its mistake claim.

On September 30, 1987, VA determined that while there was some evidence of a mistake, the protester's intended bid could not be ascertained. Although Northwest was not allowed to correct its bid, it was allowed to withdraw. Northwest was orally notified of the decision and advised that a formal decision was forthcoming, which Northwest received on October 6. Also, on September 30, VA awarded the contract to the second low bidder. After receiving the written final decision, Northwest filed a protest on October 19, 1987, with our Office alleging that it submitted clear and convincing evidence of its mistake and its intended bid.

VA first argues that Northwest's protest is untimely. VA asserts that since Northwest was orally advised of VA's decision on September 30, 1987, but did not file a protest until October 19, more than 10 working days later, the protest is untimely under our Bid Protest Regulations.

We have held that oral notification of the basis of a protest is sufficient to start the 10-day period for filing a protest and a protester may not delay filing its protest until receipt of formal written notification of the protest basis. *The George Washington University,* B-222313.4, Oct. 2, 1986, 86-2 CPD ¶ 375. However, we generally resolve disputes over timeliness or doubts surrounding the date that a protester first became aware of the basis of the protest, in favor of the protester. *See Menasco, Inc.,* B-223970, Dec. 22, 1986, 86-2 CPD ¶ 696.

Here, Northwest claims that when it called the contracting officer on September 30, it was never informed of the award to the second low bidder, the contracting officer never indicated that a final decision had been reached, and there was insufficient information on that date to file a protest. In fact, Northwest alleges that it was told to await a full review of VA's position in a forthcoming letter. This account is supported by a memorandum of the September 30 conversation written by the contracting officer, in which he explains he gave Northwest only the "gist" of a decision and that a letter was forthcoming. There is no mention in this memorandum of an award or a final decision.

Thus, since there is a legitimate dispute as to the date the protester became aware of the basis for protest and what the protester was told on September 30, we shall resolve all doubts in favor of Northwest. *Menasco Inc.,* B-223970, *supra.* Since Northwest did not receive the final decision until October 6, 1987, its protest filed on October 19 is considered timely.

Northwest explains that the mistake arose from its use of new computer software, which provides bid estimating, bid analysis and spreadsheet capabilities, to prepare its bid. According to the protester, on Sunday, September 13, 1987, the day before bid opening, Northwest printed out its detailed estimates in order to prepare its bid due the next day. These estimates were for costs, such as labor, materials, insurance and taxes, but did not include subcontractor costs because subcontractor bids were not to be received until bid opening day. This summary estimate data was then manually entered into a program called "Bid Analysis" which is designed to allow the separate entry of the subcontractor quotes as they are received while incorporating all other estimates to arrive at a total bid for a particular job.

On bid opening day, September 14, 1987, Northwest printed out a bid analysis spreadsheet at 9:23 a.m. This spreadsheet reflected an estimated total bid of $131,074 for the contract, including $14,945 of subcontractor bids already received. Northwest explains that as the day progressed towards the 2 p.m. bid opening time, subcontractor quotations were received via telephone or in person and were immediately entered into the computer.

According to Northwest, all subcontractor bids were not received until 1:55 p.m., because there was difficulty in obtaining competitive quotes from a roofing sub-

contractor. The spreadsheet on the computer screen at that time, which contained subcontractor bids and estimates, indicated a total bid between $268,000 and $269,000. Since there was no indication of any problem, Northwest states that it lowered this to $267,500 for competitive purposes and called its representative at the place where bids were submitted. This was the bid price submitted to VA by Northwest's representative at 1:58 p.m.

After being apprised of the bid opening results, Northwest printed out a hard copy of the bid analysis spreadsheet at 2:17 p.m. The total bid figure on the 2:17 printout was $372,980, approximately $105,000 over the bid originally submitted to VA.

To support its claim of a mistake of approximately $105,000 due to computer error, Northwest provided VA with computer estimate and spreadsheet printouts. Upon VA's request, on September 23, the protester also submitted five sworn affidavits, which explained the events of the bid opening day.

Northwest alleges that it also provided VA the subcontractor quote sheets that were used in preparing this bid on September 22 as requested by VA. Northwest's correspondence at that time indicates that it submitted copies of this data to the appropriate VA office. VA denies having received the subcontractor quote sheets until the protest was filed; however, VA did not follow up to ascertain what happened to the requested quotes.

As of September 30, Northwest had been unable to explain exactly why the computer screen data was not consistent with the hard copy, although it asserted an apparent computer error. In its September 15 and 22 letters to VA, Northwest advised VA that the software manufacturer stated that the scenario where the bid totals on the computer screen and the hard copy did not match up could only occur in conditions that did not exist, to Northwest's knowledge, when it submitted its bid on September 14. In these letters, Northwest offered to recreate the computer file. In this regard, the data on the original computer disc used to prepare the bid had been destroyed in Northwest's attempts to ascertain what went wrong with the computer software.

Northwest states that it recreated a file identical to the bid file using the malfunctioning software, and on September 22 offered VA a computer disc copy of the bid file and the facilities to recreate the malfunction. Northwest states that the recreation of the software error showed a bid total on the computer screen significantly less than the total on the hard copy. VA did not respond to Northwest's offer.

After discussions with and analysis by the software manufacturer, Northwest confirmed that the bid analysis software malfunctioned and failed to recalculate portions of the spreadsheet on the computer screen. The software manufacturer explains the software was such that under certain circumstances when copying a bid file and then viewing the spreadsheet, as was done here, the price figure that is supposed to be the total bid that appears on the computer screen is erroneous. On the other hand, the bid total on the printed hard copy accurately reflected the data input. Northwest states that it was unaware of this aspect of

the software and relied upon the erroneous total appearing on the computer screen when it submitted its bid. As a result of this situation, the software manufacturer has issued a warning notice dated October 7, 1987, to the users of the bid analysis software and has modified the software to correct this problem.

The Federal Acquisition Regulation (FAR) authorizes an agency to correct a mistake if clear and convincing evidence establishes both the existence of the mistake and the bid actually intended. FAR § 14.406-3(a) (FAC 84-12). Additionally, the FAR provides that if evidence of a mistake is clear and convincing only as to the mistake, but not as to the intended bid, or the evidence reasonably supports the existence of a mistake but is not clear and convincing, the agency may permit a withdrawal of the bid. FAR § 14.4063(c) (FAC 84-12).

We have consistently held that a bidder who seeks upward correction of an error in his bid alleged prior to award must submit not only clear and convincing evidence showing that a mistake was made, but also the manner in which the mistake occurred and the intended bid price. The closer an intended bid is to the next low bid, the more difficult it is to establish that it is the bid actually intended and the higher the standard of proof used in scrutinizing the evidence submitted; for these reasons, correction is often disallowed when a corrected bid would come too close to the next low bid. *See Schoutten Construction Co.,* B-215663, Sept. 18, 1984, 84-2 CPD ¶ 318; *D. L. Draper Associates,* B-213177, Dec. 9, 1983, 83-2 CPD ¶ 662.

Correction, however, may be allowed even though the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the amount of the intended bid would fall within a *narrow* edge of uncertainty and remain low after correction. *Conner Brothers Construction Co., Inc.,* B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ 103; *Vrooman Constructors, Inc.— Request for Reconsideration,* B-218610.2, Mar. 17, 1986, 86-1 CPD ¶ 257. The sufficiency of the evidence to establish the intended bid depends on the extent of the range of uncertainty and the closeness of the corrected bid to the next low bid. The closer the top of the range of uncertainty is to the next low bid, the more difficult it is to establish an intended bid. *Id.; Sam Gonzales Inc.,* B-216728, Feb. 1, 1985, 85-1 CPD ¶ 125. When the requested correction would bring the low bid within 1 percent of the next low bid, there can be almost no uncertainty in proving the amount of the intended bid. *Conner Brothers Construction Co., Inc.,* B-228232.2, Feb. 3, 1988, 88-1 CPD ¶ 103, *Aleutian Constructors,* B-215111, July 12, 1984, 84-2 CPD ¶ 44.

Since the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency, and because the weight to be given to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination unless there is no reasonable basis for the decision. *Swank Enterprises,* B-228340, Nov. 18, 1987, 87-2 CPD ¶ 493.

VA found that it is "reasonably clear" that a bid mistake was made by Northwest because (1) the protester's corrected bid of $372,980 is very close to the government estimate of $375,000 and the prices of other bidders, and (2) the origi-

nal bid was 29 percent below the government estimate and 32 percent below the next lowest bidder.

Moreover, the manufacturer of the bid analysis software has persuasively confirmed that the problems encountered with its computer software by Northwest were legitimate and that the discovery of the software "bug" was attributable to Northwest. Indeed, the manufacturer has corrected this software and recalled the malfunctioning software. This evidence, together with the disparity in bid prices, clearly and convincingly establishes that Northwest made a mistake in bid and that the computer software "bug" may have caused the mistake.

VA contends, however, that the only computer printout or other evidence that purports to show the intended bid price was printed after bid opening. VA states that the computer spreadsheets printed prior to bid opening are incomplete because they do not reflect total project cost. VA states:

> Comparing the spreadsheet printed prior to bid opening and the report printed after bid opening reveals additional subcontractor quotes in the latter report. It is not possible to determine, however, exactly when these additional line-item figures were obtained or whether these numbers actually correspond with those obtained prior to the submission of its bid.

VA therefore declined Northwest's request for correction.

Computer generated printouts can support a bidder's claim for correction of a mistake in bid. *See, e.g., D.L. Draper Associates,* B-213177, *supra.* Moreover, it is true, as contended by Northwest, that each of the subcontractor quotation sheets which Northwest has provided is dated and timed-in; that each sheet clearly reflects subcontractor price quotes; that a review of these quote sheets shows that every quote was received before the 2 p.m. bid opening deadline; that a comparison of the subcontractor quote sheets and the 2:17 p.m. printout, which reflects Northwest's intended bid price, reveals that there are no inconsistencies between these documents; and that the sheets corroborate each and every subcontractor quote appearing in the 2:17 printout.

However, our review also shows some unexplained discrepancies in Northwest's computer generated estimates and printouts. As discussed above, Northwest claims that it prepared its estimates for its own labor, material and equipment on the day prior to bid opening. According to Northwest, the 9:23 a.m. printout on bid opening day, the last printout made by Northwest prior to bid opening, reflects this data and a few subcontract quotes. However, our review shows that Northwest made significant downward adjustments in its total price figures for labor, materials and equipment from the 9:23 a.m. printout to the post-bid-opening 2:17 p.m. printout, the document which Northwest alleges shows its intended bid price. Nowhere in the record does Northwest explain why, much less even mention, that it lowered its estimates for labor, materials and equipment during bid opening day; Northwest only states that it entered subcontract quotes into the system after the 9:23 a.m. printout and that these other figures had been entered on August 13.

We calculate that if Northwest had *not* lowered the estimates contained on the 9:23 a.m. printout for labor, materials and equipment, its intended bid price

would be more than $20,000 greater than the $372,980 total bid figure shown on the 2:17 p.m. printout.[1] That is, although Northwest's price may still be low, it would be within one half of one percent of the next low bid.

This unexplained and untraceable differential between the pre-bid opening and post-bid opening estimates for labor, materials and equipment casts doubt on whether Northwest's intended bid price was $372,980 or as much as $20,000 more. This creates a relatively wide range of uncertainty in Northwest's intended price ranging from less than one percent to 5.7 percent below the next low bid. Since the top of this range would be well within one percent of the next low bid, correction can only be allowed where there is almost no uncertainty in proving the amount of the intended bid. *Conner Brothers Construction Co., Inc.*, B-228232.2, *supra.*

Given the unexplained and undocumented nature of the changes in Northwest's labor, materials and equipment costs and the extreme closeness of the upper range of Northwest's possible bid to the next low bid, we cannot conclude that the VA acted unreasonably in finding that Northwest did not establish clear and convincing evidence of its intended price. The fact that VA did not note this particular discrepancy does not preclude our Office, in its review of the record, from determining that VA otherwise had a reasonable basis to reject Northwest's claim for correction.

The protest is denied.

B-229973, February 26, 1988

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Signatures
■■■■ Sureties

Bidder's failure to sign an otherwise proper bid bond may be waived if the bond is submitted with a signed bid.

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Validity

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid bond.

[1] In making this calculation, we have considered the total decreases in labor, materials and equipment and the applicable percentages used in the bid analysis software program to account for the costs of insurance, employee benefits, workmens compensation, contingency, fee, bond and the other factors used in this program to determine the total bid price.

Matter of: Phillips National, Inc.

Phillips National, Inc., protests the proposed award of a contract to Tumpane Services Corp. under Department of the Navy invitation for bids No. N62474-87-B-2801. Phillips complains that the bid bond Tumpane submitted was not signed, and did not include a corporate seal. The Navy proposes to accept the bid because the bid itself was properly signed, so that the defects in the bond may be waived.

The Navy is correct that Tumpane's bid is acceptable. We have held that a bidder's failure to sign an otherwise proper bid bond may be waived if the unsigned bond is submitted with a signed bid, since the surety would be liable on the bond notwithstanding the defect. *See General Ship and Engine Works, Inc.,* 55 Comp. Gen. 422 (1975), 75-2 CPD ¶ 269; *Geronimo Service Co.,* B-209613, Feb. 7, 1983, 83-1 CPD ¶ 130. We also have held that the validity of a bid is not affected by the bidder's failure to affix its corporate seal to the bid bond. *See Siska Construction Co., Inc.—Request for Reconsideration,* 64 Comp. Gen. 384 (1985), 85-1 CPD ¶ 331.

The protest is denied.

B-226005, February 29, 1988

Civilian Personnel

Relocation
■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Eligibility

Transferred employee may disestablish residence at the old duty station even though the spouse did not disestablish residence there. Thus, the employee is entitled to temporary quarters subsistence expenses. However, the employee may not be reimbursed for the first 10-day period of lodging for which receipts are not available since regulations require receipts for lodging before reimbursement is allowed. Federal Travel Regulations (FTR) para. 2-5.4b.

Civilian Personnel

Relocation
■ Residence Transaction Expenses
■■ Leases
■■■ Termination Costs
■■■■ Reimbursement

Pursuant to a permanent change-of-station transfer, employee paid lessor of rented apartment one month's rent as required by terms of unexpired lease when employee terminates lease because of job transfer but is unable to give 30-day notice to lessor. Rent paid may not be reimbursed. An underlying premise upon which the lease termination expense benefit is grounded is that the leased quarters were actually vacated. This premise was unfulfilled here because employee continued to occupy the apartment for part of the month and her husband continued to occupy the apartment

during the entire month. In any event, FTR para. 2-6.2h, providing for reimbursement of lease termination expenses, requires employee to make reasonable efforts to sublet apartment. Where facts reveal that employee's spouse rented apartment immediately after employee terminated lease, employee failed to make reasonable efforts to sublet.

Civilian Personnel

Relocation
■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Spouses
■■■■ Eligibility

Where transferred employee's spouse failed to join employee at new duty station, the employee's claim for temporary quarters subsistence expense for spouse is denied since there is no evidence that the spouse vacated or intended to vacate the residence at the old station.

Civilian Personnel

Relocation
■ Residence Transaction Expenses
■■ Leases
■■■ Termination Costs
■■■■ Reimbursement

Transferred employee is not entitled to reimbursement of a rental deposit forfeited at new permanent duty station where employee terminated employment at new duty station prior to occupancy of rented quarters.

Civilian Personnel

Relocation
■ Miscellaneous Expenses
■■ Reimbursement
■■■ Eligibility

Transferred employee is entitled to $350 miscellaneous expenses allowance where record shows residence was established at new duty station and employee moved household effects from one state to another.

Civilian Personnel

Relocation
■ Household Goods
■■ Temporary Storage
■■■ Expenses
■■■■ Weight Certification

Rental expense for self-storage facility for temporary storage of household goods and personal effects may not be reimbursed in the absence of proof of weight of the items stored.

Matter of: Patsy S. Ricard—Relocation Expenses

This decision is in response to a request from the Accounting and Finance Officer, Defense Contract Administration Services Region (DCASR), Los Angeles, Defense Logistics Agency (DLA). It concerns the entitlement of a former employee to be reimbursed certain relocation and travel expenses incurred incident to a permanent change of station. We conclude that the former employee is entitled to temporary quarters subsistence expenses, but only for lodging for which receipts are submitted and miscellaneous expenses of $350, in addition to mileage and travel subsistence. Employee is not entitled to temporary quarters subsistence expenses for spouse, to reimbursement of terminated lease expenses, to reimbursement of rent deposit forfeited at new duty station, or to reimbursement for temporary storage of household goods and personal effects.

Background

Ms. Patsy S. Ricard, who had been an employee with the Army Missile Command, Redstone Arsenal, Alabama, accepted a position with the DLA in Los Angeles, California. Travel orders authorized reimbursement for the transportation of her spouse; the use of a privately owned vehicle (POV) as her approved mode of travel; delayed dependent travel; transportation and storage of household goods; unexpired lease expenses; temporary quarters subsistence expenses (TQSE); and miscellaneous expenses.

Ms. Ricard departed Huntsville, Alabama, on October 8, 1985, by POV and arrived in the Los Angeles metropolitan area on October 11, 1985. Ms. Ricard states that she first reported to work at DLA on October 15, 1985. Ms. Ricard's husband did not accompany her and never traveled to Los Angeles in connection with Ms. Ricard's permanent change of duty station. He had been authorized delayed travel, as indicated above, for the purpose of completing the Fall Term ending November 20, 1985, as a part-time lecturer at the University of Alabama in Huntsville. However, on November 7, 1985, Ms. Ricard returned to Huntsville on annual leave. Upon her return to Huntsville Ms. Ricard requested that she be placed in a leave without pay (LWOP) status for the purpose of finding another job. Her request for LWOP effective November 16, 1985, for up to 45 days was granted by DLA in Los Angeles. While in a LWOP status, Ms. Ricard was rehired by the Redstone Arsenal effective December 29, 1985. When DLA was so notified, her appointment with DLA was terminated effective December 28, 1985, without a break in her federal service.

Ms. Ricard filed a travel voucher for her transfer claiming expenses for mileage for her travel by POV from Huntsville to Los Angeles and for travel subsistence (per diem) from October 8 to October 11, 1985. These items were not questioned and have been paid. She also submitted a claim for TQSE for herself for temporary lodging from October 11 through November 6, 1985. The agency disallowed TQSE for the period October 11-20, 1985, since no lodging receipts were presented. Lodging from October 21 through November 6, 1985, for which lodging receipts were presented was allowed.

Other items of expenses claimed which were disallowed included reimbursement for lease termination expenses at the old duty station; TQSE for her spouse; reimbursement of a rental deposit forfeited at the new duty station; reimbursement for rental of self storage facilities at the new station; and a miscellaneous expense allowance.

Discussion

Lodging Expenses—Necessity for Receipts

As a general rule, we have disallowed reimbursement where an employee has not submitted the required lodging receipts and cannot confirm the actual amounts paid for subsistence expenses while occupying temporary quarters at a new duty station. *Anthony P. DeVito,* B-196950, March 24, 1980; *Franklin G. Goss,* B-200841, November 19, 1981. The Federal Travel Regulations, FPMR 101-7 (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985), provide that "[r]eceipts shall be required at least for lodging . . . expenses" when reimbursement is claimed for temporary quarters expenses at a new duty station. FTR para. 2-5.4b. Thus, claims associated with temporary lodging expenses without lodging receipts may not be allowed and Ms. Ricard is not entitled to reimbursement for temporary lodging costs for the period October 11-20, 1985.

Lease Termination Expenses

Ms. Ricard has claimed $320 in unexpired lease expenses. This amount constitutes the rent on her apartment in Huntsville, Alabama, for the period October 1-31, 1985. Ms. Ricard's orders, which she received on September 19, 1985, required her to report for duty on September 29, 1985. She was not notified of them in time to give her landlord 30 days written notice before October 1, even though Ms. Ricard did not depart for her new duty station until October 8, 1985. The lease provided for subletting, assignment, or securing of a replacement only upon written approval and permission of the owner. The lease also provided for job transfer termination of the lease upon 30 days written notice to the landlord from the first of any month, provided further that written evidence of transfer was provided. The lease was apparently in Ms. Ricard's name and not that of her husband. She terminated the lease based upon the job transfer termination clause and thereby had to pay rent for an additional month because she was not able to give 30 days written notice by October 1, 1985. It is the $320 rent paid for October 195 for which Ms. Ricard claims reimbursement. However, the record indicates that Ms. Ricard's husband immediately rented the same apartment for the month of October 1985 at a rate of $420.

This produced the anomalous result of both Ms. Ricard and her husband holding independent leases for the same apartment for the same period of time, giving each the right to fully occupy the premises to the exclusion of all others with both having paid separate and full rent for this period. Further, the record

shows that for at least the first eight days of October Ms. Ricard continued to occupy the same apartment.

We note that an underlying premise upon which the lease termination expense benefit is grounded is that the leased premises were actually vacated and the employee no longer continued to receive a benefit from the terminated lease. This was clearly not the case with Ms. Ricard as she continued to occupy the leased premises until October 8th and her husband continued to occupy the apartment without interruption through the entire month of October, along with the household goods of both. Therefore, since the premises were never vacated by the Ricard family during the period of time for which Ms. Ricard seeks reimbursement for rent paid, reimbursement may not be authorized.

Further, even assuming that the premises could be considered vacated by Ms. Ricard after October 8th, we do not find that reasonable steps were taken to mitigate damages as required by paragraph 2-6.2h of the FTR as explained below. The criteria to be applied to determine whether Ms. Ricard is entitled to reimbursement for the rent of $320 for October 1985 incurred in settling her unexpired lease are set forth in paragraph 2-6.2h of the FTR and in paragraph C14003 of Volume 2, JTR which requires that "(2) such expenses cannot be avoided by sublease or other arrangement . . . ."

While expenses incurred or losses suffered in connection with early termination of leases or inability to terminate such leases may be reimbursed under paragraph 2-6.2h of the FTR, implicit in those provisions is the premise that the expenses incurred are reasonable and that the employee attempted to avoid their imposition, or at least attempted to minimize them. *Jeffrey S. Kassel,* 56 Comp. Gen. 20 (1976); *Edward J. Jason,* B-186035, Nov. 2, 1976. *Compare Norman Mikalac,* 62 Comp. Gen. 319 (1983).

Although Ms. Ricard contends that she attempted to sublet the residence in September 1985, the conclusion that such attempts were not seriously undertaken is shown by the fact that her husband, who was occupying the apartment with her, leased the apartment immediately after Ms. Ricard gave formal notice of termination of the lease to her lessor.

Temporary Quarters Subsistence Expenses for Spouse

Section 5724a of title 5, United States Code (1982), authorizes the reimbursement of certain expenses incurred by an employee for whom the government pays travel and transportation expenses incident to a permanent change of station. Among those expenses authorized are temporary quarters subsistence expenses for the employee and his immediate family. The regulations governing these matters are contained in Chapter 2, Part 5 of the FTR. Paragraph 2-5.2c of the FTR provides:

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

In our decisions, we have generally considered a residence to have been vacated when an employee's family ceases to occupy it for the purposes intended. *See George L. Daves,* 65 Comp. Gen. 342 (1986), and cases cited therein. In determining whether the family has ceased to occupy a residence at his former duty station, we examine the action taken by an employee and his family before and after departure from that residence. The focus of our inquiry, generally, has been whether the employee, in light of all the facts and circumstances, has manifested by objective evidence the intent to vacate the former residence. Conversely, when evidence to support the employee's intent to cease occupancy of the residence at a particular time is not present, we have not authorized payment. *See George L. Daves, supra,* and cases cited therein.

The focus of our decisions is that reimbursement for TQSE is based on whether the residence at the former station has been disestablished. In the present case, although Ms. Ricard vacated her apartment and terminated her lease, arranged for shipment of household goods and traveled to her new duty station, her spouse remained in Huntsville. In fact, as indicated above, he immediately rented in his own name the same apartment he and Ms. Ricard had been residing in prior to the termination by her of her lease for the purpose of continuing his residency without interruption. Ms. Ricard's spouse never conducted any travel to Los Angeles during the time of Ms. Ricard's relocation. Since the record is without contradiction that Ms. Ricard's spouse never "vacated the residence quarters in which they were residing at the time the transfer was authorized" as required by FTR para. 2-5.2c, Ms. Ricard is not entitled to TQSE for her spouse incident to her transfer to Los Angeles.

Forfeiture of Rental Deposit at New Duty Station

The record is not clear as to where the premises were located for which Ms. Ricard apparently paid and forfeited a $125 rental deposit or whether the rental deposit was paid on a temporary residence or permanent quarters. However, the record does contain a reference by Ms. Ricard to a deposit made on an apartment in Anaheim, California. Apparently, the deposit was forfeited when Ms. Ricard returned to Huntsville without ever occupying permanent quarters in the Los Angeles area.

The FTR provides in para. 2-5.4a that only actual charges for meals, lodging, and other items not applicable here, are allowable subsistence expenses. Thus, a rental deposit, which is in the nature of a security deposit, is distinguishable from a subsistence expense in the nature of rent for lodging, and therefore is not a reimbursable subsistence expense under the FTR. *David E. Nowak,* 65 Comp. Gen. 805 (1986).

Miscellaneous Expenses

Miscellaneous expenses may be reimbursed to an employee with an immediate family in the amount of $700 without support or documentation of those expenses. FTR paragraph 2-3.3a, as amended, in part, by GSA Bulletin FPMR A-

40 (Supp. 4, August 23, 1982). Paragraph 2-3.3a also provides that an employee without immediate family is entitled to $350 in miscellaneous expenses. We have held that where there is a change of residence involving movement of household effects or when the transfer is from one state to another it may be assumed that miscellaneous expenses have been incurred. *Franklin G. Goss,* B-200841, *supra,* and cases cited therein.

Paragraph 2-3.2a of the FTR states that a miscellaneous expense allowance will be payable to an employee who has discontinued a residence and established a new residence in connection with a permanent change of duty station. Thus, an employee who transfers to a new duty station and establishes a residence there is entitled to $350 in miscellaneous expenses even if her family remains at the old duty station in their former residence. The fact that Ms. Ricard's spouse did not abandon the residence at the old duty station does not affect Ms. Ricard's entitlement to miscellaneous expenses for herself. It merely reduces her entitlement from $700 to $350. *Deward W. Moore,* B-187874, May 31, 1977. Even though we have concluded that Ms. Ricard's husband is not entitled to TQSE since he did not disestablish his residence in Huntsville, Alabama, Ms. Ricard did disestablish her residence in Huntsville, effective the date she reported for duty at her new duty station in Los Angeles. Thus, Ms. Ricard is entitled to a miscellaneous expense allowance in the amount of $350.

Temporary Storage of Household Goods and Personal Effects

Temporary storage of household goods and personal effects is authorized by 5 U.S.C. § 5724(a)(2) (Supp. III 1985), and implementing regulations in FTR, Chapter 2, Part 8. The DLA denied the rental expense for self-storage facility on the basis that Ms. Ricard did not provide any evidence as to what was placed in storage. In this regard, FTR paragraph 28.5(b)(1) requires that a "receipted copy of the warehouse or other bill for storage costs is required to support reimbursement." We have held that as long as the receipted bill on which the claim for storage costs is based shows the storage dates, storage location, and the actual weight of the household goods stored, we will consider such documentation as adequate for reimbursement of temporary storage expenses. However, since Ms. Ricard has not been able to present a bill for the storage costs, her claim for reimbursement of temporary storage of household goods may not be paid. 53 Comp. Gen. 513 (1974); *Franklin G. Goss,* B-200841, *supra;* and *Kurt P. Goebel,* B-191539, July 5, 1978.

B-229103, February 29, 1988

Civilian Personnel

Travel
■ Temporary Duty
■■ Per Diem
■■■ Additional Expenses
■■■■ Rest Periods

An employee in an official travel status made an unauthorized daytime stopover as a rest stop instead of continuing travel to his destination, which by his own admission he could have reached well before nightfall. His claim for additional per diem incident to the rest stop may not be allowed. Our decisions do not approve rest stops unless travel during normal periods of rest are involved. 54 Comp. Gen. 1059 (1975).

Matter of: Dr. John B. Cheatham—Rest Stop

This is in response to a letter from Dr. John B. Cheatham requesting further consideration of our Claims Group's settlement Z-2864688, dated August 18, 1987, which disallowed his claim for additional per diem. For the reasons stated below, we find no basis for overturning our Claims Group's determination.

Background

Dr. Cheatham, an employee of the Army, was authorized to perform temporary duty travel from Fort Gordon, Georgia, to Fort Huachuca, Arizona, and return during the period September 22-25, 1986. His authorized itinerary provided that he was to fly to Tuscon, Arizona, rent an automobile, and drive to Fort Huachuca the same day. He was then to report to the billeting office at Fort Huachuca that afternoon to determine if adequate government quarters were available. His authorization went on to state as a caveat that failure to use such available quarters "will result in loss of quarters portion of per diem."

Dr. Cheatham did not perform travel to Fort Huachuca as authorized. He arrived in Tuscon at 12:51 p.m. local time on September 22, 1986, but instead of driving to Fort Huachuca that afternoon and reporting to the Fort billeting office as instructed, he chose to use Tuscon as a rest stop. He remained there until 6:15 a.m. the next day at which time he drove to Fort Huachuca. At the completion of business at Fort Huachuca on the afternoon of the 24th, he drove back to Tuscon, remained there overnight, and returned to Fort Gordon on September 25.

Because Dr. Cheatham claimed reimbursement at the Tuscon rate ($73) for his overnight there on September 22 rather than the Fort Huachuca rate ($50), his agency submitted the claim to our Claims Group for direct settlement. Our Claims Group disallowed the claim, concluding that the stopover in Tuscon was unauthorized and, thus, a matter of personal convenience. Z-2864688, cited above. The Claims Group's denial was based on the lack of authorization for the change in travel plans.

Dr. Cheatham states that he had traveled nearly 9 hours by the time he arrived in Tuscon. Since he was still confronted with a 1-1/2 to 2 hour drive to Fort Huachuca, he argues that to require him to travel that additional distance without rest would violate both the letter and the spirit of the regulations regarding exercise of prudence while traveling.

Ruling

In our decision in 54 Comp. Gen. 1059 (1975), we considered a per diem claim incident to an unauthorized overnight stop in a situation similar to Dr. Cheatham's. We ruled that the employee may not be reimbursed. In reaching that conclusion and citing to our decisions in B-164709, Aug. 1, 1968, and B-135092, Mar. 10, 1958, we stated that this Office has never approved payment for a rest stop unless travel during normal periods of rest are involved. The determining factor is the hours of the day at which the employee must travel. Further, if night travel is not involved, per diem for a rest stop is not authorized. 54 Comp. Gen. 1059, 1061, cited above.

In the present case, Dr. Cheatham arrived in Tuscon at 12:51 p.m. local time. Since the maximum travel time to Fort Huachuca was 2 hours, he would have arrived there at approximately 3 p.m. local time, long before nightfall and well before normal hours of rest would be involved. Therefore, we find no basis to overturn our Claims Group's settlement of the claim.

Appropriations/Financial Management

An agency may use its administrative discretion to spend a reasonable portion of appropriated funds to provide its employees with the opportunity to contribute to the Combined Federal Campaign (CFC). Such an expenditure furthers governmental interests because the CFC is a legitimate, government-sanctioned charity fund-raising campaign.

254

An interagency financing scheme to administer the Combined Federal Campaign (CFC) in the Ogden, Utah area in fiscal year 1985 was prohibited by a general prohibition on such financing enacted by the Congress for that fiscal year and each subsequent year. Because this scheme required payment to support a separate organization established to provide CFC services to all participating agencies, the amounts of which did not necessarily correspond to the value of the goods or services actually received by each agency, it also fails to qualify as an exception to the statutory prohibition in 31 U.S.C. § 1532, known as the "Economy Act" which permits one federal agency to provide goods or services for another federal agency on a reimbursable basis.

255

Surcharge assessed by telephone service providers to implement Utah Public Service Commission's lifeline telephone service program by which lower income individuals receive less expensive service is not a tax, but part of an authorized rate for telephone services. The surcharge represents a partial redistribution of costs incurred by telephone service providers whereby the poorer users pay less for their services. 64 Comp. Gen. 655 (1985) distinguished.

221

■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Utility Services
■■■■ Use Taxes

United States Department of the Interior can pay a surcharge levied indiscriminately against the United States, commercial businesses, and private residences, pursuant to a Utah Public Service Commission lifeline telephone service program that provides discounted residential telephone rates for Utah residents eligible for various public assistance programs. Discrimination by a public utility in setting its rates is not unlawful when based upon a classification corresponding to economic differences among its consumers.

220

Claims by Government
■ Bonds
■■ Forfeiture
■■■ Funds
■■■■ Use

Under section 579c of title 16 of the United States Code, proceeds received from bond forfeitures can reimburse general Forest Service appropriations to the extent of the costs of repairs related to the bond forfeitures. The language of section 579c stating "cover the cost to the United States" for the needed repairs supports this conclusion. Moneys received that exceed these costs should be deposited into the miscellaneous receipts of the Treasury.

276

Federal Assistance
■ Bonds
■■ Refinancing
■■■ Advance Payments
■■■■ Minority Businesses

Unless it receives adequate legal consideration, the Small Business Administration (SBA) has no authority to agree to a refinancing proposal whereby Minority Enterprise Small Business Investment Companies (MESBICs) would prepay high-interest rate debentures held by SBA for the purpose of refinancing them with new debentures that SBA would agree to purchase at the current lower interest rates. An alternative proposal under which MESBICs would pay a so-called prepayment penalty in the form of a non-interest bearing note payable over a 10-year period as consideration for SBA's reduction of the interest rate on the existing debentures, is not acceptable either because the purported consideration is inadequate.

271

Civilian Personnel

Compensation
■ Overtime
■■ Claims
■■■ Statutes of Limitation

Fair Labor Standards Act claims and overtime claims under 5 U.S.C. § 5542 which are filed with the General Accounting Office (GAO) are both subject to the 6-year statute of limitations under 31 U.S.C. § 3702(b)(1). Since claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of claims arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment, as 31 U.S.C. § 3702(b)(1) bars claims presented to GAO more than 6 years after date claims accrued.

248

■ Overtime
■■ Computation
■■■ Conflicting Statutes

Federal employees are covered by two statutes requiring compensation for overtime work, the Fair Labor Standards Act, or FLSA, and the Federal Employees Pay Act, commonly called "title 5" overtime. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit.

247

■ Overtime
■■ Eligibility
■■■ Early Reporting

■ Overtime
■■ Eligibility
■■■ Lunch Breaks

Civilian police officers required to report for duty at least 15 minutes prior to the start of each shift may be allowed overtime credit for their preshift services under the Federal Employees Pay Act, title 5 of the United States Code, 5 U.S.C. § 5542. They may not be allowed credit for their meal breaks under the standards prescribed for "title 5" overtime, however, where it appeared that they were relieved from their posts during these breaktimes and were required only to remain in contact by radio for recall on an occasional basis in emergency situations.

247

■ Overtime
■■ Eligibility
■■■ Lunch Breaks

Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30-minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30-minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to

law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation.

247

Relocation
■ Household Goods
■■ Temporary Storage
■■■ Expenses
■■■■ Weight Certification

Rental expense for self-storage facility for temporary storage of household goods and personal effects may not be reimbursed in the absence of proof of weight of the items stored.

286

■ Miscellaneous Expenses
■■ Reimbursement
■■■ Eligibility

Transferred employee is entitled to $350 miscellaneous expenses allowance where record shows residence was established at new duty station and employee moved household effects from one state to another.

286

■ Residence Transaction Expenses
■■ Leases
■■■ Termination Costs
■■■■ Reimbursement

Pursuant to a permanent change-of-station transfer, employee paid lessor of rented apartment one month's rent as required by terms of unexpired lease when employee terminates lease because of job transfer but is unable to give 30-day notice to lessor. Rent paid may not be reimbursed. An underlying premise upon which the lease termination expense benefit is grounded is that the leased quarters were actually vacated. This premise was unfulfilled here because employee continued to occupy the apartment for part of the month and her husband continued to occupy the apartment during the entire month. In any event, FTR para. 2-6.2h, providing for reimbursement of lease termination expenses, requires employee to make reasonable efforts to sublet apartment. Where facts reveal that employee's spouse rented apartment immediately after employee terminated lease, employee failed to make reasonable efforts to sublet.

285

■ Residence Transaction Expenses
■■ Leases
■■■ Termination Costs
■■■■ Reimbursement

Transferred employee is not entitled to reimbursement of a rental deposit forfeited at new permanent duty station where employee terminated employment at new duty station prior to occupancy of rented quarters.

286

■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Amount Determination

Transferred employee was authorized 120 days Temporary Quarters Subsistence Expenses (TQSE) and a househunting trip. He did not take househunting trip, but his wife did. The agency paid for her househunting trip, but deducted the 7 days paid for her trip from the employee's 120 days of TQSE. Employee's reclaim for the 7 days of TQSE for himself and his children was properly denied, since these are discretionary items and the agency interpretation of the regulations and travel orders is not unreasonable.

258

■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Reimbursement
■■■■ Eligibility

Transferred employee may disestablish residence at the old duty station even though the spouse did not disestablish residence there. Thus, the employee is entitled to temporary quarters subsistence expenses. However, the employee may not be reimbursed for the first 10-day period of lodging for which receipts are not available since regulations require receipts for lodging before reimbursement is allowed. Federal Travel Regulations (FTR) para. 2-5.4b.

285

■ Temporary Quarters
■■ Actual Subsistence Expenses
■■■ Spouses
■■■■ Eligibility

Where transferred employee's spouse failed to join employee at new duty station, the employee's claim for temporary quarters subsistence expense for spouse is denied since there is no evidence that the spouse vacated or intended to vacate the residence at the old station.

286

Travel

■ Temporary Duty

■■ Per Diem

■■■ Additional Expenses

■■■■ Rest Periods

An employee in an official travel status made an unauthorized daytime stopover as a rest stop instead of continuing travel to his destination, which by his own admission he could have reached well before nightfall. His claim for additional per diem incident to the rest stop may not be allowed. Our decisions do not approve rest stops unless travel during normal periods of rest are involved. 54 Comp. Gen. 1059 (1975).

292

Military Personnel

Pay
■ Retirement Pay
■■ Amount Determination
■■■ Computation
■■■■ Effective Dates

A provision included in the appropriation acts applicable to the Department of Defense in effect between January 1, 1982, and December 18, 1985, prohibited any service member "who, on or after January 1, 1982, becomes entitled to retired pay" from rounding 6 months or more of service to a full year for purposes of computing retired pay. The Department determined that this prohibition applied to retired pay computations under the Tower amendment, 10 U.S.C. § 1401a(f), in the case of service members who retired after January 1, 1982, but who had their retired pay computed on the basis of their eligibility to retire on an earlier date when that prohibition was not in effect. The Comptroller General sustains the Department's determination, in view of the wording of the provision, but notes that reductions in retired pay under the provision should have ceased after it expired in December 1985.

267

■ Retirement Pay
■■ Amount Determination
■■■ Computation
■■■■ Effective Dates

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, commonly referred to as the "Tower amendment," was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

267

Relocation
■ Household Goods
■■ Vessels
■■■ Shipment

The definition of the term "household goods" contained in the Joint Federal Travel Regulations, promulgated under the authority in 37 U.S.C. § 406(b), may be revised to include small boats and canoes so such articles may be moved at government expense as part of uniformed service members' household goods shipments. Upon such revision 53 Comp. Gen. 159 (1973) would be superseded.

230

Procurement

since the agency has not assured itself that it is actually making award at the lowest overall cost available to the government as required by law.

226

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

In deciding whether a protester might have been prejudiced by an agency's failure to hold meaningful discussions, the General Accounting Office does not require the firm to establish with certainty what would have resulted absent the procurement deficiency. Before the procurement or contract will be disturbed, however, and especially where cost is an important selection factor, there must be some evidence that the protester would have been competitive with the awardee but for the agency's improper actions.

264

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Where agency did not consider protester's proposed costs unreasonable and those costs did not exceed the government's estimate, it was not necessary for the agency to notify protester during discussions that its proposed costs were too high.

236

■ **Offers**
■■ **Evaluation**
■■■ **Cost Estimates**

Agency's mechanical application of government estimate of staffhours to each offeror's proposed wage rates to determine evaluated costs for each offeror does not satisfy the requirement for an independent analysis of each offeror's proposed costs.

226

■ **Offers**
■■ **Cost Realism**
■■■ **Evaluation**
■■■■ **Administrative Discretion**

Agency need not perform a cost realism analysis where solicitation is competitive and results in the award of a fixed-price contract.

236

■ Requests for Proposals
■■ Competition Rights
■■■ Contractors
■■■■ Exclusion

Protest that agency deprived incumbent contractor of opportunity to bid because agency did not provide it with a copy of the solicitation is denied where record shows that although agency improperly failed to solicit the incumbent, otherwise reasonable efforts were made to publicize and distribute the solicitation and three proposals were received.

240

Contractor Qualification
■ Approved Sources
■■ Qualification
■■■ Standards

Protester's assertion that it will manufacture an aircraft engine part according to the original equipment manufacturer's (OEM) technical drawings does not establish that the contracting agency's requirement for engine qualification testing before approval of a source is unreasonable where the part is critical to the safe and effective operation of the engine. Since the agency is unable to secure from the OEM technical expertise to establish qualification guidelines, and the OEM's testing facilities, protest of award to OEM without consideration of protester's offer is denied.

244

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Signatures
■■■■ Sureties

Bidder's failure to sign an otherwise proper bid bond may be waived if the bond is submitted with a signed bid.

284

■ Bid Guarantees
■■ Sureties
■■■ Acceptability

Solicitation provision which, in accordance with a deviation from the Federal Acquisition Regulation (FAR), precludes the use of individuals as security for bid, payment and performance bonds unless they deposit adequate tangible assets with the government is not objectionable where the deviation properly was authorized under the FAR, and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

234

■ Bid Guarantees
■■ Validity

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid bond.

284

■ Bids
■■ Evaluation Errors
■■■ Price Reasonableness

Where the contracting officer makes a finding of price reasonableness based solely on a government estimate, and the estimate is shown to have been calculated improperly, the price reasonableness determination is invalid and should be redetermined based on a properly calculated estimate.

261

■ Bids
■■ Errors
■■■ Error Substantiation

A protester has shown clear and convincing evidence that its low bid was mistaken because of a malfunction in its bid preparation computer software where there was a considerable disparity between the low bid and the other bids and the software manufacturer has confirmed that there was a "bug" in the software that could cause this problem.

278

■ Low Bids
■■ Error Correction
■■■ Price Adjustments
■■■■ Propriety

An agency reasonably found that a low bidder did not show by clear and convincing evidence its intended bid price, so as to permit correction of its alleged mistake in bid, where there is an unexplained and untraceable discrepancy in the labor, material and equipment costs that causes a relatively wide range of uncertainty in the possible intended bid price, ranging from less than one percent to 5.7 percent below the next low bid price.

279