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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, N.W. 20548, or by calling (202) 275-6241.

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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 of the Published Decision 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

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

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June 1988

B-230103, June 2, 1988

Procurement

Contract Management
■ Contract Administration
■■ Convenience Termination
■■■ Resolicitation
■■■■ GAO Review

Termination of contract for the convenience of the government and resolicitation of a requirement was not improper where shortly after award agency discovered that the quantity estimates for one line item in the contract were significantly understated and that award had been made based upon a mathematically and materially unbalanced offer.

Matter of: Special Waste, Incorporated

Special Waste, Incorporated (SWI), protests the action of the Defense Logistics Agency (DLA) in terminating for the convenience of the government a contract awarded to SWI under request for proposals (RFP) No. DLA200-87-R-0037 and DLA's subsequent issuance of RFP No. DLA200-88-R-0023. Both solicitations were issued for a requirements contract for the removal and disposal, over a 12-month period, of hazardous wastes located at the Defense Reutilization and Marketing Office at Chambersburg, Pennsylvania, and eight other facilities in Pennsylvania and Maryland.

The protest is denied.

The initial RFP included a schedule of 134 contract line items which specified the various materials to be removed and disposed of under the resulting contract. For each line item, the schedule listed an estimated quantity of waste material to be disposed of during the contract period. Under the provisions of the RFP, offerors were to propose unit prices for each line item in the schedule, and award was to be made to the technically acceptable, responsible offeror having the lowest total of the extended unit prices (unit price multiplied by the stated estimated quantity) for all line items in the schedule. On December 4, 1987, award was made to SWI based on its best and final offer, which was more than 50 percent lower than that of the next low offeror.

Shortly after SWI received the award and after one of the competing offerors, the incumbent contractor, raised questions concerning the estimates in several line items, two of the facilities discovered and notified the contracting officer that the estimated quantity in the contract for line item 1201 was grossly inac-

curate and that SWI's unit price for that item was very high. The line item in the SWI contract read as follows:

"Item No.	Supplies/ Services	Est. Qty.	Unit	Unit Price	Amount
1201	Containers, 1 gl. [gallon] or larger, with more than 1 inch of the wastes described in CLINs 0500-5999"	10,000	lb	$6.50	$65,000.00

The contracting officer concluded that the estimated quantity for contract line item number (CLIN) 1201 was incorrect. He explains that in previous years' contracts, the unit of measure for CLIN 1201 was expressed as "drums" (55-gallon size) as opposed to "pounds," and that this change in the unit of measure was apparently overlooked when the quantity estimate for this line item was prepared. Thus, he explains, the intended estimate of 10,000 "drums" was erroneously stated as 10,000 pounds in the RFP. This error resulted in a significantly understated estimated quantity and would have resulted in a much higher cost for that line item than the agency contemplated, since the disposal of 10,000 drums of waste materials under the terms of the contract as awarded would actually cost not $65,000 (10,000 drums at $6.50 each), but $3,575,000 (10,000 55-gallon drums at $6.50 per pound).[1]

Further, the contracting officer states that upon his postaward review of the procurement, he noticed that while the prices proposed by SWI and the second low offeror for CLIN 1201 were $6.50 and $7.00, respectively, the prices proposed for that line item by the other three offerors were $.65, $.70, and $.76. He also noted that the percentage of the protester's total contract price represented by its price for CLIN 1201 exceeded that of all other offerors; SWI's price for CLIN 1201 was 12.30 percent of its total price, while the CLIN 1201 prices for the third, fourth and fifth offerors were from .42 to .58 percent of their respective total prices.[2] The contracting officer concluded, therefore, that SWI's offer was mathematically unbalanced. Moreover, it appeared (and, indeed, the protester's comments on the agency report suggest) that the protester was aware that the government's estimate in CLIN 1201 was erroneous and that the protester priced its offer to take advantage of that error.

In light of these circumstances, the contracting officer determined that competition had been adversely affected; that the contract awarded did not actually represent the lowest cost to the government; and that disposal of the correctly estimated quantity of material under CLIN 1201 would greatly exceed the scope of the contract awarded to SWI and would "grotesquely increase" the cost to the government. Concluding that the contract had been improperly awarded, the

[1] The solicitation and contract state that for purposes of ordering and payment on CLIN 1201, one gallon of container capacity equals one pound of waste materials.
[2] The CLIN 1201 price of the second low offeror, whose offer also appears mathematically unbalanced, was 6.50 percent of its total price.

agency terminated it for the convenience of the government on December 22, 1987. SWI then protested, first to DLA, and then to this Office.[3]

SWI asserts that the initial contract was properly awarded, and that because SWI's "bid" under the initial RFP became a matter of public record after it received the award, SWI's ability to compete under the government's resolicitation of "substantially the same materials and services" has been detrimentally affected, and free and open competition is now precluded for this procurement.

Although our Office generally does not review an agency's decision to terminate a contract for the convenience of the government, since that is a matter of contract administration which is not within our bid protest function, we will review such a termination, where, as here, it is based upon an agency determination that the initial contract award was improper. *Norfolk Shipbuilding and Drydock Corp.,* B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667.

Termination of a contract is not improper when, subsequent to award, the contracting agency discovers that the solicitation under which the requirement was procured did not properly or adequately reflect the government's needs. *Norfolk Shipbuilding and Drydock Corp.,* B-219988.3, *supra.* In this case, the agency stated its estimate of waste material to be disposed of under the CLIN 1201 in numbers of pounds, whereas, correctly stated, the number should have referred to barrels, not pounds. Consequently, the solicitation estimate for that item was greatly understated and, thus, did not reflect the government's needs.

Not only does the failure of the solicitation underlying the government's contract with SWI to adequately reflect the government's needs require termination of the contract, this action was also warranted because SWI's offer was mathematically and—contrary to the protester's insistence—materially unbalanced. An offer is mathematically unbalanced when it is based upon enhanced prices for some items and nominal prices for other items, with the result that each individual item does not carry its share of the cost of the work specified for that item plus overhead and profit. *See DOD Contracts, Inc.,* B-227689.2, Dec. 15, 1987, 87-2 CPD ¶ 591; *Command Systems,* B-218093, Feb. 15, 1985, 85-1 CPD ¶ 205. Here, the record shows, and the protester does not deny, that its offer was mathematically unbalanced as to CLIN 1201.

Award can be based upon a mathematically unbalanced offer unless this offer is also materially unbalanced. *Id.* An offer is materially unbalanced if there is doubt that the offer represents the lowest cost to the government. When estimated quantities are involved, a mathematically unbalanced offer is materially unbalanced if the solicitation's estimate of the anticipated quantity of goods or services is not a reasonably accurate representation of the agency's anticipated needs. *Command Systems,* B-218093, *supra; Michael O'Connor, Inc.; Free State Builders, Inc.,* B-183381, July 6, 1976, 76-2 CPD ¶ 8. An offeror who intends to benefit unfairly from its unbalanced offer will, as did SWI, quote an enhanced

[3] At the time SWI protested to our Office, award under the revised solicitation was pending. The agency subsequently determined, due to urgent and compelling circumstances, to award the contract prior to the issuance of our decision on this protest.

price on the item(s) it knows or believes will actually be required in substantially larger quantities than those stated in the solicitation and lower or nominal prices for those items that are likely to be required in quantities as stated (if not lesser quantities). Since, in such a case, there is reasonable doubt that award based upon a mathematically unbalanced offer will result in the lowest cost to the government, the offer should be rejected, or, if a contract has been awarded, the contract should be terminated, and the requirements resolicited on the basis of a revised estimate(s). *Michael O'Connor, Inc.; Free State Builders, Inc.,* B-183381, *supra; see also Edward B. Friel, Inc., et al.,* 55 Comp. Gen. 488, (1975), 75-2 CPD ¶ 333; *Arctic Corner, Inc.,* B-209765, April 15, 1983, 83-1 CPD ¶ 414.

As discussed above, the government estimate for CLIN 1201 is indisputably understated by a substantial amount, such that SWI's mathematically unbalanced offer must be considered materially unbalanced. The offer, therefore, should not have been accepted and, accordingly, we conclude that the contract termination was proper for that reason.

Furthermore, DLA reports that the new solicitation contained revised estimates because it found that even the intended estimates under the initial solicitation did not accurately reflect its needs. Therefore, SWI's ability to compete for the requirement under the resolicitation was not, as SWI maintains, prejudiced by any disclosure of its prices under the initial solicitation. In any event, impermissible competitive prejudice is not created by a resolicitation after prices have been exposed where the resolicitation is required for compliance with federal procurement principles. *See Norfolk Shipbuilding and Drydock,* B-219988.3, *supra* at 4.

SWI further contends that the agency was precluded, under the holding in *Torncello v. United States,* 681 F.2d 756 (Ct. Cl. 1982), from terminating its contract for convenience since DLA was well aware at the time of award that other bidders offered considerably lower prices for CLIN 1201. SWI contends that instead DLA was required to attempt to negotiate with SWI with respect to CLIN 1201 a modification of its contract as to price or quantity or price and quantity.

As in *Torncello,* the instant case involves a requirements contract for the performance of work called for in a number of line items, one of which was priced by the awardee at a considerably higher price than should have reasonably been expected; but there the similarity between the two cases ends. In *Torncello,* the contracting agency characterized as a "constructive" termination for the convenience of the government its action in diverting business (work) that was called for in one line item of the contract to a competing bidder on the underlying solicitation who had offered a lower price for that line item. There, the contracting agency did not, as it did here, terminate the contract shortly after award on the basis that it was improperly awarded *ab initio.* Rather, it attempted to circumvent its contractual obligation to the awardee with respect to the erroneously estimated line item by contracting all work required under that item to a firm that had bid a lower price for the item. Here, DLA was required to terminate SWI's contract because the government estimate was grossly un-

derstated for one line item and SWI's offer was materially unbalanced. Consequently, the court's holding in *Torncello* is in no way applicable here.

The protest is denied.

B-226074, June 3, 1988

Civilian Personnel

Compensation

■ **Dual Compensation Restrictions**

■■ **Reemployed Annuitants**

A retired Air Force officer employed in a civilian position with the National Credit Union Administration is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532, on the basis of the court's decision in *Denkler v. United States,* 782 F.2d 1003 (Fed. Cir. 1986). There the court found that positions with the Federal Reserve Board are not covered by the dual compensation restrictions because the Federal Reserve Board is a "nonappropriated fund" instrumentality and the only such instrumentalities covered by the law are those of the Armed Forces. The National Credit Union Administration is an executive agency of the federal government which assesses member credit unions for funds which it uses to pay its expenses and its employees' salaries. Although these funds are collected as assessments from credit unions, they are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the Administration is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions.

Matter of: Captain Larry A., Fields, USAF (Retired)—Dual Compensation Act—Employment with National Credit Union Administration

The issue presented in this case is whether Captain Larry A. Fields, USAF (Retired), is subject to reduction in his military retired pay under the dual compensation restrictions prescribed by 5 U.S.C. § 5532 on account of his civilian employment with the National Credit Union Administration.[1] We find that his military retired pay is subject to those restrictions, applicable to military retirees who hold civilian "positions" as defined by 5 U.S.C. § 5531.

Background

Captain Larry A. Fields was placed on the retired list as a Regular officer of the United States Air Force on July 1, 1984. In January of 1985, he began civilian employment as a GS-5 auditor for the National Credit Union Administration. On the basis of this civilian employment, the Air Force has reduced Captain Fields' military retired pay pursuant to the dual compensation restrictions imposed by 5 U.S.C. § 5532, which prescribes a formula for the reduction of mili-

[1] The matter was presented to us by the Chief, Accounting and Finance Division, Directorate of Resource Management, Headquarters U.S. Air Force, Washington, D.C. It was assigned control number DO-AF-1470 by the Military Pay and Allowance Committee.

tary retired pay of retired Regular officers who are employed in civilian positions by the government.

Captain Fields wrote to the Air Force Accounting and Finance Center disagreeing with the reduction in his retired pay and asking that the matter be reconsidered. He contends that his retired pay should not have been subjected to reduction under the dual compensation provisions of 5 U.S.C. § 5532. He asserts that the Credit Union Administration uses no appropriated funds to pay his salary and, therefore, his position is not subject to the dual compensation restrictions. As support for his position he cites a 1986 federal court of appeals decision for the proposition that an organization's mere status as "an establishment of the federal government" is not a sufficient basis for application of section 5532, where that organization is a nonappropriated instrumentality not under the jurisdiction of the Armed Forces. *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986).

In requesting our decision in this matter, Air Force officials question whether the reduction in Captain Fields' retired pay is required under 5 U.S.C. § 5532, in light of the *Denkler* decision.

Dual Compensation Restrictions On Military Retired Pay

The current statutory dual compensation restrictions applicable to retired members of the uniformed services are codified in 5 U.S.C. §§ 5531 and 5532. Section 5532 places limits on the amount of retired pay a retired uniformed services member may receive if he becomes employed in a civilian "position" with the federal government. Section 5531 defines "position" for the purposes of section 5532 as a "civilian office or position . . . appointive or elective, in the legislative, executive or judicial branch of the government of the United States (including a government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) . . . ."

National Credit Union Administration

The Credit Union Administration was established in 1970 pursuant to Public Law No. 91-206, 84 Stat. 49, Mar. 10, 1970, 12 U.S.C. § 1752a(a), as an independent agency within the executive branch of the government. The basic responsibility of the Administration is to administer the provisions of the Federal Credit Union Act. The responsibility and authority for managing the Administration is vested in a three-member board appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. § 1752a(b), (d). The board has the authority to appoint Administration employees and to "expend such funds" as it deems necessary or appropriate to carry out its functions. 12 U.S.C. § 1766(i). The operations of the Administration are funded by the collection of fees from credit unions which are required to be "deposited with the Treasurer of the United States for the account of the Administration and may be expended by

the Board to defray the expenses incurred" in carrying out its functions. 12 U.S.C. § 1755(a), (d).

We have long held that the fees collected from federal credit unions for services rendered by the Bureau of Federal Credit Unions (now the National Credit Union Administration) and deposited in the Treasury represent appropriated funds. 35 Comp. Gen. 615 (1956). That is, the statutory provisions requiring that the fees from federal credit unions be deposited with the Treasurer of the United States in a special fund and making the fund available for expenditure in carrying out the Federal Credit Union Act constitute a continuing appropriation of such fees from the Treasury without further action by Congress.[2] The funds were thus found to be subject to certain restrictions and limitations applicable to the use of appropriated monies. 35 Comp. Gen. *supra,* at 618. This position was reviewed and reaffirmed in a more recent decision, *Edgar T. Callahan,* 63 Comp. Gen. 31 (1983). Since Administration employees' salaries are paid from this central fund, they are paid from appropriated funds.

The Denkler Decision

In *Denkler v. U.S.*, 782 F.2d 1003 (Fed. Cir. 1986), the U.S. court of appeals determined that staff positions with the Board of Governors of the Federal Reserve System are not covered under the Dual Compensation Act, 5 U.S.C. §§ 5531, 5532.

The case involved four claimants, Regular officers of the Army and Navy, who had retired for length of service. Each had taken a staff position with the Board of Governors of the Federal Reserve System. The Federal Reserve Board is an instrumentality of the federal government designed to set policy and prescribe monetary measures for its member Federal Reserve banks. The Board is authorized to levy assessments on the Federal Reserve banks to pay its expenses and the salaries of its employees. 12 U.S.C. § 243. Concerning these matters, the law further provides that:

> The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and *may leave on deposit in the Federal Reserve banks the proceeds of assessments* levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and *funds derived from such assessments shall not be construed to be Government funds or appropriated moneys.* 12 U.S.C. § 244. [Italic supplied.]

Thus, the Board need not deposit these funds in the Treasury, and the funds are declared not to be appropriated funds.

In the *Denkler* case the Court of Appeals held that the Federal Reserve Board's "mere status" as a government instrumentality was not a sufficient basis, by

[2] It is fundamental that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law." U.S. Const. Art. I, § 9, cl. 7.

itself, for application of section 5532 to the military retirees employed by such an organization. It found, in effect, that since the Board is a nonappropriated fund activity, employment with it is not covered by the definition in 5 U.S.C. § 5531, *supra,* since the only nonappropriated fund activities referred to there are those under the jurisdiction of the Armed Forces.

In another decision issued today, we stated that we will follow the court's judgment in the *Denkler* case. We also stated, however, that the court's opinion in *Denkler* cannot be applied to other federal agencies or organizations which are authorized to operate in any part with appropriated funds drawn from the Treasury. *See Lieutenant Colonel Ralph E. Marker, Jr., USA (Retired), and Others,* B-226546, B-226791, June 3, 1988, 67 Comp. Gen. 436 .

It is our view, therefore, that the court of appeals' decision in *Denkler* does not provide a basis in the present case for finding that Captain Fields' employment with the National Credit Union Administration does not subject him to the dual compensation restrictions of 5 U.S.C. § 5532. Unlike the situation with the Federal Reserve Board, as discussed previously, the funds used by the Credit Union Administration are appropriated funds in that they are required to be deposited in the Treasury and are drawn therefrom by virtue of a continuing appropriation provided by law. 12 U.S.C. § 1755(a) and (d), *supra.* Also, consistent with this view, and contrary to the situation with the Federal Reserve Board's funds, is the fact that no statute directs that the Credit Union Administration's funds are not to be construed as appropriated funds. Therefore, the *Denkler* decision has no effect on this case since the Credit Union Administration is an appropriated fund agency. Accordingly, Captain Fields' employment with the National Credit Union Administration does subject him to the dual compensation provisions of 5 U.S.C. § 5532, and his claim for refund of amounts withheld from him on that basis is denied.

B-226546, B-226791, June 3, 1988

Civilian Personnel

Compensation

■ Dual Compensation Restrictions

■■ Reemployed Annuitants

In *Denkler v. United States,* 782 F.2d 1003 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit held that military retirees were exempt from the restrictions of 5 U.S.C. §§ 5531 and 5532 when employed by the Board of Governors of the Federal Reserve System. The Comptroller General will follow the court's judgment, and overrules the prior contrary administrative decision in *Lieutenant Colonel Robert E. Frazier, USA (Retired),* 63 Comp. Gen. 123 (1983). Military retirees employed by the Federal Reserve Board who were not plaintiffs in the *Denkler* litigation may be allowed refunds of amounts previously deducted from their retired pay, subject to the 6-year limitation period prescribed by 31 U.S.C. § 3702(b).

Civilian Personnel

Compensation

■ Dual Compensation Restrictions

■■ Reemployed Annuitants

A retired Army officer employed in a civilian position with the Office of Civilian Radioactive Waste Management, Department of Energy, is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on the basis of the court's decision in *Denkler v. United States,* 782 F.2d 1003 (Fed. Cir. 1986), to the effect that positions with the Federal Reserve Board are not covered by those restrictions because the Board is a "non-appropriated fund instrumentality." The Department of Energy collects fees from corporations which generate nuclear waste, and it uses those funds to pay the salaries of the employees of the Office of Civilian Radioactive Waste Management. However, the funds are required by law to be deposited in the Treasury and are spent by the Department of Energy under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds;" and the Office of Civilian Radioactive Waste Management is not a "non-appropriated fund instrumentality" for purposes of the dual compensation restrictions.

Matter of: Lieutenant Colonel Ralph E. Marker, Jr., USA (Retired), and others—Dual Compensation Restrictions

In letters dated March 13, 1987, and August 17, 1987, the Director, Retired Pay Operations Army Finance and Accounting Center, requests an advance decision on whether an exemption to the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 should be made for retired military personnel holding civilian positions with certain United States agencies or organizations as the result of the 1986 judgment of the Court of Appeals for the Federal Circuit in the case of *Denkler v. United States,* 782 F.2d 1003.[1] The court of appeals held that military retirees are exempt from those restrictions when working for the Board of Governors of the Federal Reserve System, based on the court's determination that the Board was a "non-appropriated fund instrumentality" of the United States. We have decided to follow the court's judgment in that case, and to overrule our contrary decision in *Lieutenant Colonel Robert E. Frazier, USA (Retired),* 63 Comp. Gen. 123 (1983), relating to military retirees working for the Board of Governors of the Federal Reserve System. We have also concluded, however, that the court's opinion in *Denkler v. United States, supra,* cannot be applied to provide an exemption from the dual compensation laws for military retirees holding civilian positions with other federal agencies or organizations which are authorized to operate in any part with appropriated funds drawn from the United States Treasury.

Background

Dual compensation limitations applicable to retired military personnel are codified in sections 5531 and 5532 of title 5 of the United States Code. Section 5532 provides for the reduction of military retirement pay received by retirees who

[1] The request for an advance decision was forwarded here by the Assistant Secretary of the Army for Financial Management after it was approved and assigned submission number DO-A-1471 by the Department of Defense Military Pay and Allowance Committee. This request has been consolidated with another submission, DO-A-1478, involving similar issues.

obtain federal civilian employment. Section 5531 provides that these reductions apply to retired personnel who hold any:

> . . . civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a non-appropriated fund instrumentality under the jurisdiction of the armed forces) . . . .

The Board of Governors of the Federal Reserve System was created by an Act of Congress and operates under a federal statutory charter.[2] Federal courts have taken the position that it is an "executive agency" of the United States as that term is defined in 5 U.S.C. §§ 103-105.[3] However, the Board's operating expenses are not payable from the United States Treasury but instead come exclusively from special assessments levied on the member Federal Reserve banks which are left on deposit in those banks. The Board's charter states that "such assessments shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 244.

In *Lieutenant Colonel Robert E. Frazier, USA (Retired),* 63 Comp. Gen. 123, *supra,* we considered the case of a retired Army officer who had contested the reduction of his retired pay by the Army Finance and Accounting Center on account of his employment with the Federal Reserve Board. We determined that he was subject to the dual compensation limitations of 5 U.S.C. §§ 5531 and 5532 because of his federal civilian employment with the Board. He and three other retired military officers employed by the Board subsequently filed a complaint on the issue in the United States Claims Court. In *John M. Denkler, et al. v. United States,* Cl. Ct. No. 152-84C (Apr. 19, 1985), the Claims Court agreed with our determination and ordered the officers' complaint dismissed.

The four retired officers appealed the decision of the Claims Court to the Court of Appeals for the Federal Circuit. The Court of Appeals in a divided opinion in *Denkler v. United States, supra,* reached the conclusion that military retirees employed by the Federal Reserve Board were exempt from the dual compensation laws and reversed the Claims Court's holding. The Court of Appeals decision was based on an interpretation of 5 U.S.C. § 5531, quoted above, which provides that the dual compensation restrictions are applicable to military retirees appointed to civilian positions in the government of the United States "including . . . a non-appropriated fund instrumentality under the jurisdiction of the armed forces." The majority opinion noted that under 12 U.S.C. § 244 the Board's operating funds "shall not be construed to be Government funds or appropriated moneys." The majority went on to say that:

> A search of [the Federal Reserve Act] reveals no authorization of appropriations, such as is usually found in the statutory charters of governmental entities which may rely on such appropriations in whole or in any part." [4]

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[2] Act of December 23, 1913, ch. 6, 38 Stat. 251, commonly referred to as the Federal Reserve Act, as amended and as codified, 12 U.S.C. §§ 221-522.

[3] *See e.g., Hilliard v. Volcker,* 659 F.2d 1125, 1126 (note 4) (D.C. Cir. 1981).

[4] *Denkler v. United States,* 782 F.2d at 1005.

The majority in *Denkler* emphasized that, unlike other federal agencies and offices, the Federal Reserve Board had a statutory charter that lacked "the conventional language authorizing funds to be appropriated, even when other sources are looked to." The majority reasoned that the Federal Reserve Board was consequently to be categorized as a "non-appropriated fund instrumentality" and that since the Board was not "under the jurisdiction of the armed forces," its employees should be classified as exempt from the dual compensation laws. As a result of the decision of the Court of Appeals, final judgment was entered on behalf of the four named plaintiffs and they were awarded payment in the amounts by which their retired pay had previously been reduced under those laws.

Issues

The Army has forwarded to us the cases of three other retired officers who have held civilian positions with the Federal Reserve Board: Lieutenant Colonel Ralph E. Marker, Jr., Lieutenant Colonel Carrol P. Hickman, and Lieutenant Robert L. North. Colonel Marker and Lieutenant North have been employed by the Board continuously since 1968 and 1970, respectively. Colonel Hickman worked for the Board between 1965 and 1975. The military pay of all three was reduced under 5 U.S.C. §§ 5531 and 5532 on account of their civilian employment with the Board. The Army questions whether the three officers should now be considered exempt from those dual compensation restrictions, in light of the court of appeals' judgment in *Denkler v. United States, supra,* and if so, whether the 6-year statute of limitations of 31 U.S.C. § 3702(b) will operate to preclude a full refund of the retired pay previously withheld from them.

The Army has also forwarded the case of a fourth retired officer, Lieutenant Colonel Harold H. Brandt, for our consideration on the basis of the court of appeals' judgment in *Denkler v. United States, supra.* Colonel Brandt has held a position with the Office of Civilian Radioactive Waste Management, United States Department of Energy, continuously since 1983. The Army has reduced his military retired pay under 5 U.S.C. §§ 5531 and 5532 on account of that employment.

Colonel Brandt notes that his salary from the Department of Energy is derived from payments made by commercial electric utility companies. He suggests that he should therefore be regarded as an employee of a "non-appropriated fund instrumentality," which is "not under the jurisdiction of the armed forces," and that he should consequently be exempted from the dual compensation provisions of 5 U.S.C. §§ 5531 and 5532 under the rationale of the court of appeals' judgment in the *Denkler* case.

Employment by the Board of Governors of the Federal Reserve System

Traditionally, we have accorded great weight to the judicial opinions of the federal courts in the administrative settlement of claims and adjustment of accounts.[5] With respect to the court of appeals' opinion in *Denkler v. United States, supra,* it appears to us that the issues were fully considered by the court of appeals and that further litigation would result in no material change in its interpretation of the law. Hence, we have decided to follow the court of appeals' judgment in the *Denkler* case, and we now overrule our prior contrary decision in *Lieutenant Colonel Robert E. Frazier, USA (Retired),* 63 Comp. Gen. 123, *supra.* Thus, we no longer consider retired members of the uniformed services to be subject to the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on account of civilian employment with the Board of Governors of the Federal Reserve System.

Concerning the cases of Lieutenant Colonel Ralph E. Marker, Jr., and Lieutenant Robert L. North, our view consequently is that reductions should no longer be made in their military retired pay because of their current employment with the Federal Reserve Board. It is also our view that they are entitled to a refund of the amounts previously deducted from their retired pay based on that employment, subject to the 6-year statute of limitations prescribed by 31 U.S.C. § 3702(b).

As to the date to be used in applying the statute of limitations, 31 U.S.C. § 3702(b) provides that claims against the government which are within the settlement authority of our Office must contain the signature and address of the claimant or an authorized representative, and must be received by the Comptroller General within 6 years after the claim accrues. We have held that a request for an advance decision which does not forward such a signed claim does not toll the running of the limitation period.[6] The provisions of the statute of limitations must be strictly applied and cannot be waived or modified.[7]

In the present matter, the request for an advance decision did not forward signed claims from Lieutenant Colonel Marker or Lieutenant North. Hence, our conclusion is that they may be allowed refunds of amounts previously deducted from their pay under 5 U.S.C. §§ 5531 and 5532 only during the 6 years prior to the date of the adjustment of their accounts at the Army Finance and Accounting Center, in the absence of their submission of signed claims to our Office in the meantime.[8]

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[5] *See, e.g.,* 53 Comp. Gen. 94 (1973) and 49 Comp. Gen. 618 (1970); but compare 50 Comp. Gen. 480, 486 (1971).
[6] *James W. Gregory,* B-201936, Apr. 21, 1981. We have also held that the date of judicial action upon which an administrative claim may be based has no effect on the running of the statute of limitations, when the claimant was not a party to the litigation. *Llewellyn Lieber,* 57 Comp. Gen. 856 (1978).
[7] *James W. Gregory,* B-201936, *supra.*
[8] *See* 61 Comp. Gen. 295, 296 (1982).

For the same reasons, it is our view that any claim of Lieutenant Colonel Carrol P. Hickman for a refund of the amounts that were withheld from his retired pay between 1965 and 1975, based on his employment with the Federal Reserve Board, would now be completely barred by 31 U.S.C. § 3702(b).

Employment by the Office of Civilian Radioactive Waste Management, Department of Energy

The Office of Civilian Radioactive Waste Management was created as an organization within the Department of Energy in 1983 by the Nuclear Waste Policy Act, Public Law 97-425, January 7, 1983, 96 Stat. 2201, as codified, 42 U.S.C. §§ 10101-10226. That Act also established the Nuclear Waste Fund in the United States Treasury, and the Secretary of the Department of Energy is authorized to make expenditures from the Waste Fund for the administrative costs of the radioactive waste disposal program. 42 U.S.C. § 10222(c) and (d). The Waste Fund is funded in part by payments received from commercial utility companies for waste disposal services. 42 U.S.C. §§ 10131(b)(4) and 10222(c)(1). The Waste Fund also consists of "appropriations made by the Congress into the Waste Fund," and unexpended appropriations that were available on January 7, 1983, for civilian radioactive waste disposal activities. 42 U.S.C. § 10222(c)(2) and (3). The Department of Energy reportedly draws amounts from this fund in the Treasury to cover the operating expenses of the Office of Civilian Radioactive Waste Management.

It thus appears that, unlike the Federal Reserve Board, the Office of Civilian Radioactive Waste Management relies primarily for paying its operating expenses on amounts drawn from a special fund in the United States Treasury.

It is fundamental that: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law." [9] We have long held that fees collected by federal agencies for services rendered and deposited in the Treasury represent appropriated funds.[10] That is, the statutory provisions requiring that the fees be deposited with the Treasurer of the United States in a special fund and making the fund available for expenditure in carrying out the agency's functions constitute a continuing appropriation of such fees from the Treasury without further action by Congress.

It is, therefore, our view that the monies drawn from the Nuclear Waste Fund in the United States Treasury for the operation of the Office of Civilian Radioactive Waste Management are, as a matter of law, "appropriated funds." Hence, it is also our view that the Office of Civilian Radioactive Waste Management is not a "non-appropriated fund instrumentality" under the definition provided by the court of appeals in *Denkler v. United States, supra.* In the case of the fourth retired Army officer presented for decision, Lieutenant Colonel Harold H. Brandt, our conclusion consequently is that his military retired pay is subject to

[9] U.S. Const. Art. I, § 9, cl. 7.
[10] *See, e.g., Edgar T. Callahan,* 63 Comp. Gen. 31 (1983); 35 Comp. Gen. 615, 618 (1956).

reduction under 5 U.S.C. §§ 5531 and 5532 on account of his employment with the Office of Civilian Radioactive Waste Management.

B-227850.3, June 6, 1988

Procurement

Bid Protests
■ GAO Procedures
■ ■ Preparation Costs

Where the result of the General Accounting Office sustaining a protest of an unduly restrictive requirement is that competition for the contract will be increased and enhanced, protesters are entitled to recover costs of filing and pursuing the protest and of responding to the contracting agency's unsuccessful request for reconsideration.

Matter of: Pacific Northwest Bell Telephone Company, Mountain States Bell Telephone Company—Claim for Bid Protest Costs

The Pacific Northwest Bell Telephone Company and Mountain States Bell Telephone Company request reimbursement of the costs incurred in filing and pursuing a bid protest that we sustained, and in defending a request for reconsideration, in connection with request for proposals (RFP) No. KET-LH-87-0008 issued by the General Services Administration (GSA). We hold that the protesters are entitled to reimbursement for the claimed costs.

The protest raised two central issues. We sustained the protest in part on the basis that a requirement, challenged by the protesters, for a single contract to cover all of the states within GSA's Pacific Zone unreasonably restricted competition and unfairly discriminated against the protesters. We recommended that the procurement therefore be canceled and the RFP restructured and reissued. We further recommended that GSA reassess its approach to the cost evaluation, also challenged by the protesters, although we did not find that GSA's chosen approach was unreasonable or that it unduly restricted the competition. *See Pacific Northwest Bell Telephone Co., et al.,* B-227850, Oct. 21, 1987, 87-2 CPD ¶ 379. We affirmed the decision in response to a request by GSA for reconsideration. *See Pacific Northwest Bell Telephone Co., et al.—Reconsideration,* B-227850.2, Mar. 22, 1988, 88-1 CPD ¶ 294.

At the time of our decision on this protest, our Bid Protest Regulations (4 C.F.R. § 21.6 (1987)) stated:

(d) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to reasonable costs of:

(1) Filing and pursuing the protest, including attorney's fees . . .

(e) The General Accounting Office will allow the recovery of costs under paragraph (d)(1) of this section where the contracting agency has unreasonably excluded the protester from the procurement except where the General Accounting Office recommends . . . that the contract be awarded to the protester and the protester receives the award. . . .

In contesting GSA's single-contract requirement, the protesters successfully challenged an unduly restrictive specification and, as a result of our recommendation, the competition will be enhanced. In these circumstances, we consider it consistent with the broad purpose of the Competition in Contracting Act of 1984, 41 U.S.C. § 253 (Supp. III 1985), to increase and enhance competition, to allow recovery of the costs of filing and pursuing the protest. *Southern Technologies, Inc.,* B-224328, Jan. 9, 1987, 66 Comp. Gen. 208, 87-1 CPD ¶ 42.

Further, we think CICA contemplates that where, as here, an agency liable for protest costs asks us to reconsider the finding on which that liability is based—that a specification was too restrictive—the costs attendant to the protester's response also are reimbursable. By requesting reconsideration, the agency presumably recognizes that it may well be compelling the winning protester to respond again to the agency's actions and views. A protester's participation, to defend further a challenge that led to the full and open competition that CICA mandates, thus continues to serve the statute's stated purpose, so that reconsideration costs thereby incurred should be considered an element of the CICA protest process.

The protesters' claim for costs, including those incurred during our reconsideration, at GSA's request, of our original decision, therefore is allowed. The protesters should file their claim directly with GSA. If the parties are unable to agree on the amount within a reasonable time, this Office will determine the amount to be paid. 4 C.F.R. § 21.6(f).

B-222989, June 9, 1988

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The Secretary of the Air Force may, under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1323 (1985), *codified at* 40 U.S.C. § 490b (Supp. III 1985), provide support for child care centers for the children of civilian employees by authorizing the allotment of space under his control in government buildings, as well as the services delineated in paragraph 139(b)(3), and may do so without charge. The support provided may include the cost of making the space suitable for child care facilities, including the cost of renovation, modification or expansion of existing government-owned or leased space.

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The authority of the Secretary of the Air Force to allocate space for child care centers under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is limited to the allotment of existing space in government-owned or leased buildings. Section 139 does not grant independent authority to enter new leases for child care facilities, and we are aware of no legislation that specifically authorizes the Air Force to do so for civilian child care centers.

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The authority of the Secretary of the Air Force to allot space and to make it suitable for child care facilities under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is applicable to existing space in federal buildings. This authority extends to the expansion of existing space in military child care centers in government buildings to accommodate the children of civilian employees.

Appropriations/Financial Management

Appropriation Availability
■ Amount Availability
■■ Augmentation
■■■ Miscellaneous Revenues
■■■■ Child Care Services

Appropriations/Financial Management

Budget Process
■ Child Care Services
■■ Miscellaneous Revenues
■■■ Treasury Deposit

Reimbursement of costs associated with the provision of space allotted under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is authorized by paragraph 139(b)(2) to be made to the miscellaneous receipts or any other appropriate account of the Treasury. Section 139 does not expressly authorize funds received as reimbursement to be credited to agency appropriations. Payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must, therefore, be deposited in the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

Matter of: Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees

The Deputy Assistant Secretary of the Air Force for Accounting and Audit has requested our decision on whether appropriated funds are available to provide

certain assistance to child care centers for children of civilian Air Force employees. He asks specifically whether section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1323 (1985), *codified at* 40 U.S.C. § 490b (Supp. III 1985), or any other statute, provides authority for the Air Force to use appropriated funds to lease facilities or renovate existing government-owned or leased facilities for such child care centers, or to expand for this purpose existing facilities for children of military employees which are separately authorized by law. He also asks whether any reimbursement received under section 139 for capital improvement expenditures may be credited to the current appropriation providing child care support costs, or must be credited to the appropriation that "initially absorbed them."

In brief, we conclude that: (1) in providing support for civilian child care centers, the Secretary is authorized by section 139 to allot existing space under his control in government buildings, as well as the services delineated in section 139(b)(3), and may do so without charge; (2) the support provided also may include the cost of making the space suitable for child care facilities, including the design, renovation, and modification of existing government-owned or leased space; (3) section 139 is applicable to space in all federal buildings, and authorizes the Secretary to expand existing military day care centers to include the children of civilian employees; and (4) reimbursement received by the Air Force for its capital improvement expenditures incurred in providing space for civilian child care centers must be paid into the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

Background

In 1978, the American Federation of Government Employees and the Air Force Logistics Command (AFLC) reached an impasse in their negotiations over a collective bargaining agreement. One of the issues being pursued by the union was the establishment of day care centers for children of civilian employees. The union proposal provided: "[t]he employer will provide adequate space and facilities for a day care center at each [work site]" and stated that each center would be "self supporting, exclusive of the services and facilities provided by the employer."

The AFLC and the union initially agreed to submit to an arbitration panel this and other issues on which they could not agree. In May of 1980, the arbitration panel included the union's day care proposal in its award, but, as a result of a procedural dispute the AFLC had not participated fully in the administrative proceedings or filed exceptions to the award. The union then brought an unfair labor practice action against the AFLC for failing to implement the arbitration award.

An administrative law judge and then the Federal Labor Relations Authority (FLRA) found that the AFLC had committed an unfair labor practice by not implementing the award, and the FLRA ordered the AFLC to incorporate the terms of the arbitration award in its collective bargaining agreement with the union, 15 FLRA No. 27 (1984). The FLRA decision and order was upheld by the

U.S. Court of Appeals in *Department of the Air Force v. Federal Labor Relations Authority,* 775 F.2d 727 (6th Cir. 1985), a decision that dealt only with the administrative and procedural issues in this dispute. Neither the substantive terms of the collective bargaining agreement, nor the Air Force's authority to implement them was addressed by the court. Since the Air Force has raised with us a number of questions concerning its authority to implement the child care provision of the collective bargaining agreement, and since the union has not opposed the submission of the questions to us, our responses are provided below.

The Air Force has asked us to determine what authority it has to comply with the arbitration award by leasing space for civilian day care facilities, renovating existing government-owned or leased space to make it suitable for providing day care, or expanding existing military day care facilities to handle civilian dependents.[1]

Discussion

Section 139

Section 139 of Public Law 99-190 permits government officials to make available to child care providers space under their control in federal buildings, and certain designated services, and to do so without charge. Section 139 states in pertinent part:

(a) . . . if any . . . entity which provides or proposes to provide child care services for Federal employees applies to the officer . . . of the United States charged with the allotment of space in the Federal buildings . . . in which such . . . entity provides or proposes to provide such services, such officer . . . may allot space in such a building to such . . . entity if—

(1) such space is available;

(2) such officer . . . determines that such space will be used to provide child care services to a group of individuals of whom at least 50 percent are Federal employees; and

(3) such officer . . . determines that such . . . entity will give priority for available child care services in such space to Federal employees.

Paragraph 139(b) states in part:

(b)(1) [I]f an officer . . . allots space to an . . . entity under subsection (a), such space may be provided to such . . . entity without charge for rent or services.

(b)(2) If there is an agreement for the payment of costs associated with the provision of space allotted under subsection (a) or services provided in connection with such space, nothing in title 31, United States Code, or any other provision of law, shall be construed to prohibit or restrict payment by reimbursement to the miscellaneous receipts or other appropriate account of the Treasury.

(b)(3) . . . the term 'services' includes the providing of lighting, heating, cooling, electricity, office furniture, office machines and equipment, telephone service (including installation of lines and equipment and other expenses associated with telephone service,) and security systems (including installation and other expenses associated with security systems).

[1] The military day care centers are authorized and funded under provisions not applicable to civilian employees of the military services.

Section 139, in effect, authorizes all government agencies to use their appropriations in support of certain designated assistance to a child care facility. The statute does not mandate the provision of such assistance, but if an agency head has decided to assist a child care center, then under section 139, the agency can provide support in the form of suitable quarters and limited services, and may choose to do so without charge. In providing suitable facilities, the agency may renovate, modify or expand existing space in federal buildings.

In introducing the original version of section 139 as an amendment to the Treasury, Postal Service, and General Government appropriation bill for fiscal year 1986, Senator Trible noted that his amendment would "permit child care facilities in Federal buildings to be treated in the same manner as credit unions," *i.e.,* receiving space, utilities, and certain services without charge. Subsequently, during debate on the amended version of the bill that ultimately was enacted, Representative Conte noted that the legislation was designed to encourage these services in qualifying buildings around the country, and that the user agencies would determine the need for day care facilities and the space to be provided, and whether any additional services, such as furniture or telephones, would be furnished.

The legislative history makes it clear that section 139 was not intended to create a right or entitlement to free space or services for day care facilities, but, rather, to encourage the GSA and user agencies to make such assistance more readily available. The determination to support such facilities, based on the particular facts of each situation, still requires the individual exercise of agency judgment and administrative discretion.

Question 1

The first question asked by the Deputy Assistant Secretary is:

Does §139 of PL 99-190 (or any other statutory provision) provide authority for the use of appropriated funds to lease facilities for day care centers for children of civilian employees?

Under 10 U.S.C. § 114(a)(7), no funds may be obligated or expended for the operation and maintenance of the Air Force unless authorized by law specifically for this purpose. We are aware of no legislation other than section 139 that specifically authorizes funds for the Air Force to provide space for civilian child care centers, so it appears that section 139 would be the exclusive legislative authority under which the Air Force might lease space for this purpose.

As noted previously, under section 139 the Secretary of the Air Force may use appropriated funds to allocate space under his control in federal buildings to civilian day care centers, and he may elect to do so without charge. However, this authority is limited by paragraph 139(a)(1) to the allocation of "available" space in federal buildings, which, in our view, precludes the Air Force from leasing new space specifically for civilian child care facilities.

Question 2

The next question asked is:

Does §139 of PL 99-190 (or any other statutory provision) provide authority for the use of appropriated funds to renovate existing government owned or leased facilities to make those facilities suitable as day care centers?

As noted in our discussion of section 139, that provision authorizes an agency head to assist a child care center by, among other things, allotting to it existing space in federal buildings. In our view, this includes as well the authority to renovate or modify this space to make it suitable for use as a child care facility.

Question 3

The third question asked by the Deputy Assistant Secretary is:

. . . Does §139 of PL 99-190 now authorize the use of appropriated funds for expansion of existing day care facilities established to serve the military members to create space for children of civilian employees?

Child care centers for the children of military employees are included in the services provided and paid for in part with appropriations for the operation and maintenance of the active forces for welfare and recreation, made permanent law by Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 735, 97 Stat. 1421, 1444 (1983). Under regulations defining Air Force Morale, Welfare, and Recreation (MWR) programs and activities, and establishing eligibility and use priorities (Air Force Regulation 215-1, March 25, 1985), the responsible base commander is authorized to provide services in an MWR child care program for children of DOD civilian employees if there is sufficient space available to do so. *Id.,* at § 6(a)(9), (10), (14) and (15).

When there is no space available for children of civilian employees in an MWR facility housed in a government-owned or leased building, but the space is suitable for expansion, then section 139 authorizes the Secretary to use Air Force appropriations to do so. As noted in our first answer, however, section 139 does not authorize the leasing of new or additional space simply to permit expansion of an MWR facility for civilian children.

Question 4

The Deputy Assistant Secretary's last question is:

Reimbursement for costs incurred in providing day care facilities is optional under §139 of PL 99-190. If capital improvements are made with appropriated funds, could that portion of reimbursements received in future years representing recovery of capital improvement expenditures be credited to the then current appropriation that initially absorbed them?

Paragraph 139(b)(2) states in pertinent part:

If there is an agreement for the payment of costs associated with the provision of space allotted under subsection (a) . . . *nothing in title 31, United States Code,* or any other provision of law, *shall be construed to prohibit* or restrict *payment by reimbursement to* the miscellaneous receipts or *other appropriate account of the Treasury.* [Italic supplied.]

Under 31 U.S.C. § 1301(a) (1982),[2] an agency must use appropriated funds to pay for its authorized expenditures. Any reimbursements for these expenditures must be deposited into the Treasury as miscellaneous receipts, 31 U.S.C. § 3302(b),[3] unless an agency has specific statutory authority to retain them. Paragraph 139(b)(2) does not expressly authorize funds received from a child care center as reimbursement to be credited to agency appropriations, and deposit of such payments to the credit of either of the suggested appropriation accounts would result in an improper augmentation of Air Force appropriations.

Although the reference in paragraph 139(b)(2) to "other appropriate account of the Treasury" is not clear, a reasonable construction of its terms leads us to conclude that the underscored portion of that paragraph is intended simply to preserve the right of an agency, where specifically authorized, to deposit the funds into some "other appropriate account." We are aware of no such specific statutory authority for the Air Force, and thus we conclude that such reimbursements must be deposited in the Treasury as miscellaneous receipts.

B-219258, June 10, 1988

Civilian Personnel

Relocation

■ Residence Transaction Expenses

■■ Inspection Fees

■■■ Reimbursement

A transferred employee claimed reimbursement for the costs of a home inspection and a pool inspection, both of which were recommended by his real estate agent. His claim for reimbursement for those fees, on the basis that once they were inserted in the contract they qualified as "required services," is denied. The term "required" as used in the applicable statute and regulations relates only to those services which are imposed on the employee by state or local law or by the lender as a precondition to the sale or purchase of a residence.

Matter of: Leonard L. Garofolo—Real Estate Expenses—Home and Pool Inspection Fees

This decision is in response to a request from the Assistant Secretary for Administration and Management, U.S. Department of Labor, concerning the entitlement of one of its employees to be reimbursed certain real estate inspection fees incurred incident to a permanent change of station. We conclude the employee is not entitled to reimbursement for the following reasons.

[2] Section 1301(a) states:

"Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

[3] Section 3302(b) provides:

"Except as provided in section 3718(b) of this title [not applicable here], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

Background

Mr. Leonard L. Garofolo, an employee of the Department of Labor, purchased a residence in connection with his transfer. Among the expenses claimed were a house inspection fee ($225) and a pool inspection fee ($125). Both items were disallowed by the agency on the basis that they were not services required by the employee's mortgage lender and were not otherwise identified in the Federal Travel Regulations as reimbursable.

Mr. Garofolo asserts that there is nothing in the law or regulations which would bar reimbursement for these fees. He argues that the decisions of this Office denying reimbursement do so only where the fees charged were not for a "required service customarily paid by the seller or buyer." He contends that the real estate experts in the Northern California area recommend home inspections and consider it imprudent for residential buyers to purchase property without them. Based on that recommendation, Mr. Garofolo had such terms incorporated into his purchase agreement. It is his view that once such terms are inserted into a purchase agreement, they thereafter become "required" elements in the agreement and the costs incurred are reimbursable.

Opinion

Section 5724a of title 5, United States Code (1982), provides, in part, that an employee may be reimbursed various expenses associated with a transfer including,

(a)(4) Expenses of the . . . purchase of a home at the new official station required to be paid by him . . . .

The regulations implementing this provision are contained in chapter 2, part 6 of Federal Travel Regulations (FTR) (Supp. 4, Aug. 23, 1982), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1985). Paragraph 2-6.2d(1) of the FTR lists various miscellaneous expenses which may be reimbursed in connection with real estate transactions while paragraph 2-6.2d(2) lists those items which may not be reimbursed. These inspection fees are not specifically listed as either reimbursable or nonreimbursable fees under these two provisions of the FTR. Additionally, FTR para. 2-6.2f, which authorizes reimbursement for other incidental charges, limits reimbursement to those expenses which are imposed for required services on the seller or the buyer to the extent they do not exceed the customary rate in the locality of the residence.

Mr. Garofolo has suggested that the concept behind the word "required" as used in the law and regulations has been satisfied if at any point in the process of selling or purchasing a residence the employee is required to incur an expense. We disagree. Other than those specifically itemized expenses listed in FTR para. 2-6.2d(1) as reimbursable, reimbursement for the cost of incidental charges under FTR para. 2-6.2f depends upon whether they are "required services." We have ruled that of those services which are imposed on the employee as purchaser or seller, only those services which are required by a lending institution

or by state or local law and which are imposed as a precondition to the purchase and sale of a residence may be reimbursed. *See Wesley J. Lynes,* B-182412, May 14, 1976 (appraisal and inspection fee—lender requirement); *Robert E. Grant,* B-194887, Aug. 17, 1979 (termite inspection fee—local law, roof inspection fee—lender requirement); *Robert J. Holscher,* B-215410, Nov. 14, 1984 (weatherization inspection fee—state law). Where the service performed was not imposed by law or a mortgage lender we have uniformly denied reimbursement. *Robert D. Good,* B-224765, Aug. 17, 1987; *Wayne J. Girton,* B-185783, Apr. 29, 1976; *John H. Martin,* B-184594, Feb. 12, 1976 (home inspection fees).

In the present case, even though a home and pool inspection were recommended, there was no requirement by the mortgage lender or by state or local law that they be inserted in the purchase agreement as a condition of the purchase. Accordingly, since Mr. Garofolo could have consummated the transaction without these inspections, they did not qualify as required services, and the agency disallowance of his claim is sustained.

B-226937, June 10, 1988

Civilian Personnel

Travel

■ Actual Subsistence Expenses

■■ Reimbursement

■■■ Amount Determination

A Veterans Administration employee transferred from Michigan to New York was authorized 60 days of temporary quarters subsistence expenses. He was allowed full payment in the amount of $3,256.81 on his claim for reimbursement of his meal costs based on his itemized listing of the actual cost of each meal and an agency determination that these costs were reasonable. Additional reimbursement is denied on a supplemental claim in the amount of $950 for groceries the employee later asserted had been transported from Michigan to New York and used in temporary quarters. The Federal Travel Regulations limit reimbursement to reasonable expenses, and the record provides no basis to disturb the agency's determination that his reasonable subsistence expenses had already been fully reimbursed. Furthermore, the record shows that the $950 claimed was an estimate. Such estimate is insufficient to establish actual grocery costs, as the regulations require.

Matter of: Angelo N. Grandelli—Temporary Quarters Subsistence Expenses—Meal Costs

In this case, we decide that Mr. Angelo N. Grandelli is not entitled to additional temporary quarters subsistence expenses claimed in the amount of $950.[1]

Background

Mr. Grandelli is an employee of the Veterans Administration. He was transferred from Battle Creek, Michigan, to Brooklyn, New York, in 1986. The Veter-

[1] The Director, Office of Budget and Finance, Veterans Administration, requested this decision.

ans Administration authorized him temporary quarters subsistence expenses for the 60-day period between June 1 to July 30, 1986, while he made arrangements to obtain a permanent residence in the vicinity of Brooklyn.

In accordance with this authorization, Mr. Grandelli rented a furnished house in Brooklyn during that 60-day period for use as temporary lodgings for himself, his wife, and his four children. He subsequently filed a claim for reimbursement of their expenses for lodgings, meals, and laundry during that period.

Concerning the meals expense portion of his claim, Mr. Grandelli itemized the costs of a breakfast, a lunch, and a dinner for each day of the 60-day period. He claimed reimbursement in a total amount of $3,256.81 for 180 meals consumed during that period. Upon inquiry from agency officials, he explained that most of the itemized costs were based on the expense of groceries used for meals prepared at home, but that higher costs were listed for some meals which had been purchased at restaurants. The responsible agency officials then determined that the amount claimed was reasonable, and Mr. Grandelli was authorized full reimbursement of the $3,256.81 claimed.

After he received that reimbursement, Mr. Grandelli claimed additional reimbursement in the amount of $950 for groceries that he said were purchased in Michigan and used for meal preparation in the Brooklyn temporary quarters. He essentially asserted that his original claim was in error in that he failed to take into account additional foodstuffs which were purchased at grocery stores at his old duty station in Michigan, and which were transported to New York and then consumed during the period of his occupancy of temporary quarters in Brooklyn.

The Veterans Administration denied Mr. Grandelli's supplemental claim for $950. The agency concluded that an overall review of the amount claimed for meals showed the prior expenditures claimed to be reasonable for a family of six. Since he had been reimbursed the full amount claimed, the agency held he was entitled to no further reimbursement. The agency further concluded that his failure to itemize the additional groceries precluded a proper review of the extra amount claimed. Mr. Grandelli requested a final ruling from the Comptroller General.

Analysis and Conclusion

We agree that the supplemental claim should be denied. Under the Federal Travel Regulations, reimbursement is limited to actual subsistence expenses incurred, provided these are reasonable as to amount. Federal Travel Regulations (FTR), para. 2-5.4a, *incorp. by ref.,* 41 C.F.R. § 101-7.003. It is the responsibility of the employing agency, in the first instance, to determine whether the expenses claimed are reasonable in amount. We will not substitute our judgment for that of the agency, in the absence of evidence that the agency's determination was clearly erroneous, arbitrary, or capricious. *See Jesse A. Burks,* 55 Comp. Gen. 1107, 1110 (1976); and 56 Comp. Gen. 604 (1977).

In addition, the actual expenses for meal costs must be itemized in a manner that will "permit at least a review of the amounts spent daily for (1) lodging, (2) meals and (3) other allowable items of subsistence . . . ." FTR para. 2-5.4b. A mere estimate of the cost does not permit the employing agency to review the amounts spent daily for subsistence. Consequently, estimates of meal costs are not generally acceptable. *See* B-171098, Jan. 28, 1971; B-169923, Aug. 14, 1970.

Here, Mr. Grandelli has furnished no description of the food he transported from Michigan to New York, nor has he provided any information as to how he established its value at $950. In these circumstances, we have no basis to conclude that the $950 value assigned to the food was anything more than a rough estimate of actual cost. Moreover, we have no basis to disturb the Veterans Administration's determination that his reasonable subsistence expenses had already been fully reimbursed.

We note that the official form on which Mr. Grandelli submitted his meal costs (Standard Form 1012) specifically instructed him to show the amount incurred for each meal and the daily total meal cost. The form stated that failure to provide the information required to support the claim could result in loss of reimbursement. It is our view that under this standard, Mr. Grandelli has not met his burden of proving the liability of the United States for the additional amounts at issue here, which are in excess of the amounts previously allowed as actually and reasonably incurred for meal costs.

We therefore deny his supplemental claim.

B-229452, June 10, 1988

Civilian Personnel

Relocation

■ Residence Transaction Expenses

■■ Appraisal Fees

■■■ Reimbursement

Civilian Personnel

Relocation

■ Residence Transaction Expenses

■■ Relocation Service Contracts

■■■ Use

A transferred employee incurred an expense to have his old residence appraised before trying to sell it himself. He later used the services of a relocation company under contract to his agency, and he claimed reimbursement for the cost of the earlier appraisal. Paragraph 2-12.5b of the Federal Travel Regulations prohibits reimbursement to an employee for any personally incurred real estate expenses that are similar or analogous to any expenses the agency is required to pay to a relocation company. Since the relocation company had the property appraised as part of their contract to purchase the residence from the employee, which service was paid for by the agency, the employee may not be reimbursed his appraisal costs.

Matter of: James T. Faith—Real Estate Appraisal Cost—Relocation Service Contract

This decision is in response to a request from an Authorized Certifying Officer, Bureau of Reclamation, Department of the Interior. It concerns the entitlement of one of its employees to be reimbursed a real estate appraisal fee incident to a permanent change of station in June 1986. We hold that he is not entitled to reimbursement for the following reasons.

Background

Mr. James T. Faith, an employee of the Bureau of Reclamation, was transferred from Miles City, Montana, to Yakima, Washington, effective June 22, 1986. As part of the process of attempting to market his residence himself, he secured an appraisal of the property at a cost of $125. He later chose to use the services of a relocation company under contract with the Bureau of Reclamation. As part of the relocation company's procedure, they also had the property appraised and on October 22, 1986, made an offer to Mr. Faith to purchase his residence. Following Mr. Faith's acceptance of the offer, the relocation company submitted its expense bill to the Bureau of Reclamation in the amount of $10,449.94, and that bill was paid on February 24, 1987.

In July 1987 Mr. Faith submitted a voucher for real estate expense reimbursement. He included in the voucher a claim for the cost he incurred for the appraisal of his residence. That expense was disallowed by his agency and on appeal has been submitted here.

Ruling

Section 5724c of title 5, United States Code, authorizes federal agencies to enter into contracts to provide relocation services to transferring employees including, but not limited to, the making of arrangements for purchase of an employee's residence at his old duty station. The regulations implementing this section are contained in Part 12 of Chapter 2, Federal Travel Regulations (FTR), FPMR 101-7, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1986), as amended by Supp. 11, July 25, 1984. Paragraph 2-12.5 of the FTR provides, in part:

2-12.5 *Procedural requirements and controls.*

* * * * *

b. *Dual benefit prohibited.* Once an employee is offered, and decides to use, the services of a relocation company, reimbursement to the employee shall not be allowed for expenses authorized under Chapter 2, Parts 1 through 10, that are analogous or similar to expenses or costs for services that the agency will pay under the relocation service contract.

The customary cost of a marketing appraisal incurred by a transferring employee is reimbursable under FTR para. 2-6.2b. However, under the above language, where an obligation has been incurred by an agency to reimburse expenses to a relocation service, any expenses incurred by an agreeing employee in connec-

tion with the residence to be sold and which are analogous to or duplicative of expenses for services performed by the relocation company may not be reimbursed. According to the documents in the present case, one of the necessary services performed by the relocation company and included in their service fee was the cost of securing an appraisal. In view thereof, Mr. Faith may not be reimbursed for his cost of securing a similar appraisal.

B-230731, June 10, 1988

Procurement

Sealed Bidding
■ Bid Guarantees
■■ Responsiveness
■■■ Invitations for Bids
■■■■ Identification

Protest that agency unreasonably rejected protester's bid as nonresponsive is sustained where sole defect was a typographical error in solicitation number on bid bond, bond contained correct bid opening date and there was no other ongoing procurement with which bond could otherwise be confused.

Matter of: Kirila Contractors, Inc.

Kirila Contractors, Inc. protests the rejection of its bid and the award of a contract to Devore Construction, Inc. under invitation for bids (IFB) No. DACA31-88-B-0001, issued by the United States Army Corps of Engineers for construction of the Army Reserve Keystone Training Area in Geneva, Pennsylvania. Kirila's bid was rejected because the accompanying bid bond contained an erroneous solicitation number. We sustain the protest.

The IFB required the submission of a bid bond or other suitable bid guarantee in the amount of 20 percent of the bid. Kirila was the apparent low bidder on the amended bid opening date of February 9, 1988. The bid bond submitted with Kirila's bid referenced another solicitation under the heading "Bid Identification" on the bond form; specifically, the bond cited IFB No. DACW31-88-B-0001 (IFB-DACW) instead of the correct IFB No. DACA31-88-B-0001 (IFB-DACA). The bond correctly identified the bid opening date as February 9 and the solicitation as involving construction work. Because of the erroneous solicitation number, however, the Corps determined the bid bond was defective and unenforceable, and rejected Kirila's low bid as nonresponsive.

The Corps rejected Kirila's bid based on its conclusion that the bond would not be enforceable because the reference to another solicitation number made it unclear as to whether the bond was intended to pertain to the solicitation under which it was submitted. In this regard, the Corps noted that there were a number of similarities between the solicitation identified on the bond and that under which it was submitted. Both solicitations (IFB-DACW and IFB-DACA) were set aside for small businesses, both were construction projects requiring

bonds with a penal sum of 20 percent and both had the same original bid opening date. The Corps also was concerned that there was another bid opening on the same day, albeit for a solicitation other than IFB-DACW.

Kirila argues that the Corps' doubts about the enforceability of the bond are unreasonable because bids under IFB-DACW were in fact opened on November 24, 1987, as scheduled, and a contract awarded on January 20, 1988, approximately 3 weeks before the February 9 amended bid opening date for IFB-DACA. Thus, at the time Kirila submitted its bid, IFB-DACW was not a pending procurement. Furthermore, Kirila argues it did not submit a bid on IFB-DACW or on the other solicitation opened by the Corps on February 9, nor did its surety issue any other bid bonds for Corps procurements for which bids were due on that date.

The submission of a required bid bond is a material condition of responsiveness with which a bid must comply at the time of bid opening. *Baucom Janitorial Service, Inc.,* B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bond is alleged to be defective, the determinative question is whether the bond is enforceable by the government against the surety notwithstanding the defect. *See J.W. Bateson Co., Inc.,* B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472. If uncertainty exists at the time of bid opening that the bidder has furnished a legally binding bond, the bond is unacceptable and the bid, therefore, must be rejected as nonresponsive. *See A & A Roofing Co., Inc.,* B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463.

Whether a bid bond is acceptable even if it cites an incorrect solicitation number depends upon the circumstances. Where there are clear indicia on the face of the bond to identify it with the correct solicitation, the bond is acceptable. In such cases, the incorrect solicitation number is merely a technical defect which does not affect the enforceability of the bond. *See Instruments & Controls Service Co.,* B-224293.2, Feb. 17, 1987, 87-1 CPD ¶ 170; *Custodial Guidance Systems, Inc.,* B-192750, Nov. 21, 1978, 78-2 CPD ¶ 355. On the other hand, an incorrect solicitation number may make a bid bond defective where there is another ongoing solicitation to which the incorrect number could refer and, as a result, reasonable doubt exists as to whether the government could enforce the bond. *See Fitzgerald & Co., Inc.—Request for Reconsideration,* B-223594.2, Nov. 3, 1986, 86-2 CPD ¶ 510, *affirming Kinetic Builders, Inc.,* B-223594, Sept. 24, 1986, 66 Comp. Gen. 871, 86-2 CPD ¶ 342. Under the circumstances here, we find that Kirila's bid bond was acceptable despite its reference to the wrong solicitation number.

The protester argues, and the Corps does not disagree with the possibility, that the erroneous reference in the bond to the other solicitation—one incorrect letter—is a typographical error. Moreover, while there were many similarities between the two solicitations, the solicitation number erroneously cited in the bond refers to a solicitation under which bids had been opened 2½ months earlier and a contract already awarded 3 weeks prior to the bid opening date for IFB-DACA. While the Corps states that there was another solicitation with the same February 9 bid opening date, that solicitation number (DACA31-88-B-0206) is considerably different from the number cited in Kirila's bond, and the Corps

has offered no other reason to assume that the bond might pertain to that solicitation. Moreover, Kirila did not bid on either IFB-DACW or the other solicitation opened on February 9.

In our view, since Kirila's bond cited the correct bid opening date and there was no ongoing solicitation with which the bond could have been confused, the incorrect solicitation number did not affect the enforceability of the bond, and the bond thus was acceptable. Accordingly, the Corps' rejection of Kirila's low bid based on the defect in the bond was improper. As a result, we recommend that the Corps terminate the contract awarded to Devore Construction, Inc. and make award to Kirila Contractors, Inc., if otherwise appropriate. Further, under the circumstances, we find that Kirila is entitled to the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988); *see also* 52 Fed. Reg. 46445, 46447-8.

The protest is sustained.

B-222732, June 13, 1988

Appropriations/Financial Management

Accountable Officers
■ Certifying Officers
■■ Liability
■■■ Waiver
■■■■ Statutory Regulations

Questions concerning (1) the financial liability of an authorized certifying official arising out of the performance of his official duties, (2) the relief of a certifying official's financial liability as authorized by law and (3) the compromise of any debt found due and owing to the United States arising out of the failure of an authorized certifying official to properly perform his duties, are not subject to resolution under the Department of State's grievance procedures since they fall outside its jurisdiction as specified by law.

Appropriations/Financial Management

Accountable Officers
■ Liability
■■ Debt Collection

Where an improper certification of payments of pay was intentionally made by an authorized certifying officer, resulting in overpayments of pay to 25 Foreign Service National employees in the amount of $17,899.89, and only $6,699 was recovered after Department of State (Department) improperly reduced the indebtedness following employee's filing of grievance under Foreign Service statutory grievance procedures, the Department must attempt to recover uncollected balance of debt.

Appropriations/Financial Management

Accountable Officers
■ Disbursing Officers
■■ Relief
■■■ Illegal/Improper Payments
■■■■ Overpayments

Administrative acquiescence by certain Department of State (Department) officials is not a basis for relieving authorized certifying official of personal liability for intentionally certifying improper payments resulting in loss to the United States. The Department officials notified of his actions were not in the certifying officer's direct chain of command and may not have had authority to reverse his action or had knowledge that it was improper.

Appropriations/Financial Management

Accountable Officers
■ Disbursing Officers
■■ Relief
■■■ Illegal/Improper Payments
■■■■ Overpayments

Payroll Branch Chief who certified voucher (SF-1166 Voucher and Schedule of Payments) based upon memorandum voucher certified by her supervisor (an authorized certifying official) is justified in relying upon the information certified by her supervisor and is not responsible for the correctness of the facts set forth in supervisor's certification.

Matter of: Mr. Roger B. Feldman, Comptroller, Department of State

This is in response to your request for our opinion regarding the proper treatment of an indebtedness arising in favor of the United States because of an improper certification of payments of pay made by an authorized certifying official of the Department of State (Department). The indebtedness, resulting from an unauthorized upgrading and consequent overpayments of salary to 25 Foreign Service National (FSN) employees, amounted to $17,899.89. Steps were initiated to collect this indebtedness by setoff against the certifying official's lump-sum leave payment due upon his retirement.

After the certifying official challenged the impending setoff by filing a complaint under the Department's grievance procedures, the Department set off only $6,699, and now proposes "writing off" the unrecovered balance of $11,200.89. The reduction was apparently based upon the fact that the certifying official's superiors knew of the unauthorized salary payments and had authority to stop them, but failed to do so for some period of time.

For the reasons given below, it is our opinion that questions concerning the financial liability of an authorized certifying official arising out of the performance of his official duties are not subject to resolution under the Department's grievance procedures since they fall outside its scope as specified by law. The same applies to questions concerning relief of a certifying official's financial liability as authorized by law and the compromise of any debt found due and owing the United States arising out of his failure to properly perform his duties.

As will be explained in more detail below, these are not matters which are subject to the Secretary's control; they do not involve matters affecting the negotiable terms and conditions of employment; and they involve matters which are subject to independent statutory hearing procedures.

We also find that the 25 FSN employees are indebted to the United States for the full amount of the overpayments each received. The Department is required to attempt to collect the amounts due from the employees involved unless the debts are waived pursuant to 5 U.S.C. § 5584 or collection is terminated in accordance with the Federal Claims Collection Act standards, found at 4 C.F.R. Parts 101-105.

Partly in response to an informal request from an official in the Department's Inspector General's Office, and partly because we recognize that the submission raised several matters which require analysis and comment in order to prevent recurrence of this situation, we have provided a rather detailed response in order to assist the Department in overcoming some deficiencies noted as a result of our review.

Background

On December 2, 1982, Mr. Robert Gingles, Director of the Regional Administrative Management Center (RAMC) in Paris, France, who is also an authorized certifying official, sent the following memorandum certification to Mary LeBlanc, RAMC Payroll Branch Chief, a subordinate of Mr. Gingles and also a certifying official:

I have just been informed that the attached upgradings, based on new FSN Standards, have been approved. Please process with an effective date of November 28, 1982 so that the employees will receive the increases in their December 23 paychecks.

This document will serve as a Certified Voucher for the establishment of the new rates. Personnel Actions will be received in due course.

Pursuant to Authority Vested in me, I certify that this voucher is correct and proper for payment.

December 2, 1982 [signature] Robert L. Gingles Authorized Certifying Officer

Since the RAMC Paris did not normally accept memorandum vouchers from posts it serviced, the Payroll Branch Chief discussed this matter with Mr. Gingles who, she states, stressed the propriety of his certification.[1] She also states that Mr. Gingles told her that the requisite personnel actions would be forthcoming and implied that the increases should not await the documentation. Another round of discussions took place, and once again Mr. Gingles directed the processing of the payments. Based upon this, Ms. LeBlanc certified the voucher (SF 1166) for payment, authorizing payment of the 25 FSN employees at the new rates.

[1] In her affidavit to Charles Kinn of the Inspector General's office dated September 29, 1983, Mary LeBlanc stated concerning Mr. Gingles voucher that:
"This Memorandum Voucher was unusual. RAMC's Payroll Branch does not, cannot and will not accept such memoranda from the posts we service."

At the time he was directing the Payroll Branch Chief to process these payments at the new rates and certifying to their propriety, it appears that Mr. Gingles was aware of the fact that the requisite procedures necessary to accomplish what were in effect, promotions, and to authorize the salary increases, had not been completed.[2] By memorandum dated January 27, 1983, to Mr. John Sinozich of Personnel in the Paris Embassy, Mr. Gingles stated:

> Enclosed are the job descriptions for the Disbursing Unit of RAMC. As we heard from Washington in November 1982 that these jobs were reclassified we notified payroll effective PP24 of the changes to the employees grades as follows. . . .

The information provided also shows that on March 2, 1983, Mr. Gingles notified Administrative Counselor Emmons of his actions and his reason for taking them. Mr. Emmons was employed by the Embassy in Paris and was not in Mr. Gingles' chain of command. Additionally, none of the persons Mr. Emmons spoke to concerning this matter appeared to be supervisors of Mr. Gingles.[3]

On April 11, 1983, Mr. Gingles notified the Office of the Assistant Secretary for Security of his actions and his reason for raising the pay of the 25 FSN employees. On the same day, the Regional Security Officer at the Paris Embassy notified the Department's Inspector General's office. The IG's office investigated this matter, following which it contacted the Comptroller's office and the Director General of the Foreign Service-Director of Personnel's office on April 28, 1983, asking them what action they intended to take. In response to the IG's inquiry, they notified Mr. Gingles on May 10, 1983, to direct the Payroll Branch Chief to revert all salaries increased as a result of Mr. Gingles' prior instruction to the grade and salary in effect on November 28, 1982.

Thereafter, the Department's Committee of Inquiry into Fiscal Irregularities convened on September 19, 1983, and determined that the unauthorized upgrading of the 25 FSN employees at the Paris RAMC resulted in salary overpayments between November 28, 1982, and May 10, 1983, in the amount of $17,899.89. The Committee determined that the fiscal irregularity in this amount was a personal liability solely of Mr. Gingles, and that the Payroll Branch Chief was not responsible for the loss. These findings were approved by the Comptroller on November 2, 1983.

In response to a specific inquiry from the Comptroller prior to his approving these findings, the Committee also considered whether the overpayments should be recovered from the 25 benefiting employees. The Committee determined that this would be inappropriate stating:

> The FSNs were not responsible for the overpayments, nor did they have any reason to believe they were not entitled to the increased payments at the time they received them.[4]

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[2] At the time of his action, position classification standards involving the affected FSN employees were under review. However, they were not approved for implementation until June 12, 1983. It was Mr. Gingles' expressed dissatisfaction with delays surrounding the Department's approval process that apparently motivated his action.
[3] Nothing in the submission indicates if and when Mr. Gingles' immediate supervisor, the Information Systems Officer with the Bureau of Administration, was informed about these actions by Mr. Gingles or was contacted by anyone else in order to institute corrective action before the improper payments were made.
[4] Memorandum dated October 20, 1983, from Elizabeth A. Gibbons, Chairperson of the Committee to Roger Feldman, Comptroller.

The Committee Chairperson then notified Mr. Gingles of the decision and requested that he make full restitution of the amount of the overpayment.[5] Mr. Gingles contested the Committee's findings and subsequently filed a grievance under chapter 11 of the Foreign Service Act of 1980, 22 U.S.C. §§ 4131-4140, as implemented by Vol. 3 of the Foreign Affairs Manual (FAM), Personnel, ch. 660 and 22 C.F.R. ch. IX. The Foreign Service Grievance Board granted interim relief on January 30, 1984, by ordering suspension of collection action against Mr. Gingles until the Board had time to make a decision. However, the grievance was then resolved administratively without a decision by the Board, through an agreement negotiated between Mr. Gingles and then Deputy Assistant Secretary for Personnel, Mr. Steigman, signed by his successor, Mr. Cohen, holding Mr. Gingles accountable for a loss in the amount of $6,699. This amount was then set off against the lump-sum payment for unused annual leave due Mr. Gingles upon his retirement. We have been provided nothing that would indicate the basis for collecting this lesser amount other than the statement in a memorandum dated October 18, 1985, from Deputy Assistant Secretary Cohen to the Comptroller which states:

Mr. Gingles' superiors knew (for months) of the salary payments, and had the authority to stop them.

Apparently, the date selected for cutoff of Mr. Gingles' liability was January 27, 1983, the date Mr. Gingles provided Mr. Sinozich in Personnel at the Paris Embassy job descriptions for the Disbursing Unit of RAMC and indicated that the jobs were reclassified, based upon notification received from Washington in November 1982.

Because there is still an outstanding liability in the account of Mr. Gingles to the extent of the unrecovered portion of his total liability, the Comptroller asks whether he may now write off this amount. He is also concerned with whether failure to take action by superiors affords a basis for providing relief from liability for authorized certifying officers.

Discussion

1. Relationship of Grievance Procedures to Liability and Relief of Certifying Officers

With respect to decisions of the Foreign Service Grievance Board, we have held that:

. . . when the Foreign Service Grievance Board has rendered a final determination in an individual case, *over which it has jurisdiction,* this Office is without jurisdiction to reverse, modify or otherwise review that ruling, even though we may disagree with the Board's conclusion. The forum for such review, if timely brought, is in one of the District Courts of the United States.[6] [Italic supplied.]

[5] Memorandum dated November 3, 1983, from Elizabeth A. Gibbons, Chairperson of the Committee to Robert Gingles.

[6] *Pierre L. Sales—Foreign Service Grievance Board—GAO Jurisdiction,* 62 Comp. Gen. 671, 672-73 (1982). *See also Perry L. Peterson,* B-207676, May 7, 1984.

While this matter was not resolved by a decision of the Board but instead, by the Deputy Assistant Secretary of Personnel, chs. 10 and 11 of the Foreign Service Act of 1980 and their implementing regulations do provide for the resolution of grievances prior to reaching the Board whenever possible.[7] Thus, the official delegated responsibility by the Department to resolve grievances prior to a Board determination[8] is authorized to act in *appropriate cases* to resolve the grievance, subject to an appeal to the Board.

The key provision relating to the jurisdiction of the Board (and the related jurisdiction of the Deputy Assistant Secretary for Personnel) is section 1101 of the 1980 Act, 22 U.S.C. § 4131, which defines what constitutes a grievance over which the Board exercises either decision-making or recommendatory authority. It provides that:

(a)(1) Except as provided in subsection (b) of this section, for purposes of this subchapter, the term 'grievance' means *any act, omission, or condition subject to the control of the Secretary* which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including—

* * * * *

(B) other alleged violation, misinterpretation, or misapplication of applicable laws, regulations, or published policy affecting *the terms and conditions of the employment* or career status of the member;

* * * * *

(G) *alleged denial of* an allowance, premium pay, or other *financial benefit to which the member claims entitlement under applicable laws or regulations.*

(b) *For purposes of this subchapter, the term 'grievance' does not include—*

* * * * *

(4) *any complaint or appeal where a specific statutory hearing procedure exists,* . . . [Italic supplied.]

A certifying official is personally responsible for the accuracy of the information or computations stated in or supporting a payment voucher as well as the legality of the payment from the appropriation or fund involved. A certifying official who authorizes a payment that is improper, incorrect or illegal, is jointly and severally liable with the person or persons who benefited from the improper payment to repay to the United States the amount of the loss incurred as a result of the illegal, improper or incorrect payment. 31 U.S.C. § 3528(a).

Section 3528(b) also vests exclusive authority for relief from this liability under specified criteria in the Comptroller General of the United States.[9] In this connection, it should be noted that agency authority under 31 U.S.C. § 3711(a) to compromise and settle debts up to $20,000 owed to the United States does not include debts arising from exceptions raised by GAO (or under our standards) in

[7] 22 U.S.C. § 4113(d), 4114(a) and 4134; 22 C.F.R. § 903.1; 3 FAM 663.3, 664.1-664.4.
[8] At the agency level, the official delegated responsibility for resolving grievances within the Department is the Deputy Assistant Secretary for Personnel. 3 FAM 664.2.
[9] *See* 55 Comp. Gen. 297 (1975) for a discussion of the liability of a certifying official and the basis for granting relief under the statute.

the accounts of accountable officers. 31 U.S.C. § 3711(b). Unlike cases involving physical losses or deficiencies,[10] we have not delegated authority to agencies to grant relief from liability for losses arising under 31 U.S.C. § 3528, regardless of the amount involved.

In view of these statutory provisions, it is clear that questions of accountability of authorized certifying officials (or any accountable officer) and the recovery of indebtedness arising in favor of the United States for losses incurred as a result of the officer's failure to properly perform his functions are matters that are not "subject to the control of the Secretary [of State]." 22 U.S.C. § 4131(a)(1); and are subject to an existing "specific statutory hearing procedure." 22 U.S.C. § 4131(b)(4).

Thus, questions about a certifying official's liability are excluded from the scope of grievances as defined by 22 U.S.C. § 4131(a) over which the Board or departmental official may exercise decision-making authority.

Conditions of Employment

As indicated earlier, the Department has the obligation to negotiate in good faith with the exclusive representative with respect to conditions of employment, and to execute a collective bargaining agreement embodying agreed upon terms.[11] These terms may include procedures to resolve complaints for breach of the collective bargaining agreement with provision for appeal to the Board from adverse administrative determinations.[12] Section 1002 of the 1980 Act defines "conditions of employment" subject to collective bargaining under ch. 10 to mean:

> . . . personnel policies, practices, and matters whether established by regulation or otherwise, affecting working conditions, but does not include policies, practices and matters . . . (C) to the extent such matters are specifically provided for by Federal statute . . . . 22 U.S.C. § 4102(5) (1982).

This definition is virtually identical to that set forth in 5 U.S.C. § 7103(a)(14)(C) concerning negotiated grievance procedures applicable to employees of the civil service. Both this Office and the Federal Labor Relations Authority have held that the exception from "conditions of employment" of matters "specifically provided for by Federal statute" precludes subjecting accountable officer liability and relief to collective bargaining and handling under negotiated grievance procedures.[13] Although the definition in 22 U.S.C. § 4102(5)(C) expressly applies only to ch. 10 of the 1980 Act, we think that it also describes the "conditions of employment" as used in 22 U.S.C. § 4131(a)(1)(B) over which the Board may exercise its authority to hear "grievances," since there is an obvious interrelationship between chs. 10 and 11 of the 1980 Act. Thus, in our opinion, matters "specifically provided for by Federal statute" are excluded under 22 U.S.C. § 4131(a)(1)(B).

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[10] *See* 54 Comp. Gen. 112 (1974) and 59 Comp. Gen. 113 (1979). *See also* 7 GAO § 28.14(3)(a).
[11] Section 1013(e) of the 1980 Act, 22 U.S.C. § 4113(e) (1982).
[12] Section 1014(a) of the 1980 Act, 22 U.S.C. § 4114(c) (1982).
[13] *Forest Service—Grievance Procedure for Accountable Officers*, B-213804, Aug. 13, 1985; *National Treasury Employee Union and Internal Revenue Service*, 14 FLRA No. 15, Mar. 16, 1984.

Denial of Financial Benefit

Under 22 U.S.C. § 4131(a)(1)(G), the Board in a grievance proceeding may determine whether an employee is entitled to a lump-sum leave payment upon retirement under the laws and regulations applicable to employees of the Department, and may address the amount of that payment. It does not have the authority to determine the extent, if any, of the liability of a certifying official, to relieve the certifying official, to compromise a claim against the certifying official, or to review setoffs against the lump-sum leave payment, since these are outside the scope of the Board's authority under applicable provisions of law.

Statutory Hearing Procedures

As discussed above, the Congress has vested the exclusive statutory authority to relieve certifying officials under certain strict criteria in this Office. This relief process is generally based upon the written record, since rarely are elements of credibility or veracity at issue in these cases. Furthermore, the law provides for judicial review at the request of the individual when collection action is initiated under 5 U.S.C. § 5512. Thus, issues of accountable officer liability and relief are excluded from the Foreign Service grievance procedures by virtue of 22 U.S.C. § 4131(b)(4).

In sum, it is our opinion that the attempt to resolve or reduce Mr. Gingles' liability through the grievance mechanism was unauthorized.

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2. Collection from FSN Employees

The salary overpayments to the 25 FSN employees constituted debts owed to the United States. The Department had a responsibility to attempt to recover those overpayments (31 U.S.C. § 3711(a)(1), 4 C.F.R. § 102.1(a)). Upon notification of their indebtedness, the 25 FSN employees could (1) repay the amounts owed, (2) could contest the indebtedness, or (3) could request waiver under 5 U.S.C. § 5584. As discussed below, Mr. Gingles' indebtedness would be reduced either by the amount of any recovery from the 25 FSN employees or by the amount of any waiver granted under section 5584.

We understand that collection from the 25 FSN employees may not be practical. For example, local law may preclude such recovery under these circumstances, or the employees may be financially unable to repay the debt from limited resources in a reasonable period of time. In this situation (as well as others set forth in the Federal Claims Collection Act Standards, 4 C.F.R. Parts 101-105), the Department may wish to suspend or terminate collection action against the 25 FSN employees. However, this determination in no way changes the Department's responsibility to seek recovery from Mr. Gingles of the full remaining unpaid balance of the indebtedness.

Waiver of Overpayments

The law authorizes the Comptroller General and the heads of executive agencies, in accordance with standards promulgated by the Comptroller General, to waive claims of the government for erroneous payments of pay and allowances

and certain other items when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee receiving the erroneous payment or any other person interested in obtaining a waiver of the claim.[14] Heads of executive agencies (including the Secretary of State) are authorized to waive claims in amounts not exceeding $500, whereas only the Comptroller General may waive claims in excess of that amount.[15] We are required to give full credit in the accounts of accountable officers when auditing and settling their accounts for any amounts with respect to which collection by the United States is waived.[16]

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3. Administrative Acquiescence

As mentioned earlier, the apparent reason Mr. Gingles was not charged with the full amount of the overpayments was that his superiors allegedly knew for months of the payments and could have stopped them. We do not think this fact should constitute a basis for relief under 31 U.S.C. § 3528.[17] We question the soundness of any determination that would alleviate a certifying official's liability merely because he informed some other agency official of an action he knew was improper at the time he took it.

As we indicated earlier, Mr. Gingles did not notify his immediate supervisor nor did he notify anyone in the Comptroller's office (which appears to exercise some authority over certifying officials) although he did notify various other Department officials. It is not clear to what extent any of these other officials were responsible for acting on this matter or whether they unreasonably delayed in acting or in referring the matter to those who had the authority to act. In fact, it appears that once the appropriate department officials became aware of Mr. Gingle's actions, they instituted steps to correct them by ordering him to rescind his prior unauthorized promotion of his employees.

Fundamentally, this does not appear to be a case of an innocent mistake by a certifying official that could be corrected only by other officials possessing additional facts the certifying official did not have. Instead it appears that at all times, the certifying official knew his action was improper and had the requisite power and authority—first to prevent its occurrence and thereafter to bring a halt to its continuation.[18] Therefore, we do not think this is a situation where administrative acquiescence should even be considered as a possible basis for partial or total relief.

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[14] 5 U.S.C. § 5584(a) and (b) (1982) as amended by Pub. L. No. 99-224, § 1(a), Dec. 28, 1985, 99 Stat. 1741.

[15] 5 U.S.C. § 5584(a)(2)(A) and 4 C.F.R. § 91.4(b).

[16] 5 U.S.C. § 5584(d). 49 Comp. Gen. 571 (1970). Fault on the part of the certifying official does not affect the waiver decision. We have held that "other person having an interest in obtaining a waiver of the claim" means someone more closely associated or connected with the recipient than the accountable officer for purpose of precluding waiver under 5 U.S.C. § 5584(b)(1) since otherwise, it would serve to render the waiver provision useless for all practical purposes. B-177841-O.M., Oct. 23, 1973.

[17] This discussion would not apply, of course, to the extent credit is granted in the certifying officer's account as a result of a waiver being granted to any or all of the 25 FSN employees under 5 U.S.C. § 5584.

[18] *See* B-223372, Nov. 12, 1986.

4. Certification Responsibility

As discussed earlier, although Mary LeBlanc, RAMC Payroll Branch Chief, actually certified the vouchers (SF-1166 Voucher and Schedule of Payments) which resulted in the overpayments to the 25 FSN employees, the Committee determined that Mr. Gingles was solely responsible for the loss. Although the passage of time has now made it impossible for us to impose liability on the Payroll Chief should we conclude that she was the official responsible for the loss resulting from her certification of the payroll vouchers,[19] we nonetheless must review her role since it has an impact on the liability of Mr. Gingles. For example, were Ms. LeBlanc the sole party responsible for the loss, Mr. Gingles might have the basis for a claim for the amount set off against his lump-sum retirement because, as discussed earlier, the Board had no authority to act on matters involving accountable officers' liability and thus any amount collected by way of setoff would have been improper.

Under 31 U.S.C. § 3528, the certifying official who signs the voucher is responsible for the existence and correctness of the facts cited in the certificate, voucher, or supporting papers and the legality of the proposed payment, and is liable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate made by him, as well as for any payment prohibited by law or which did not represent a legal obligation. We have held that once there has been certification by an authorized official, later administrative processing of vouchers does not constitute certification for purposes of liability under 31 U.S.C. § 3528. 23 Comp. Gen. 953 (1944); 21 Comp. Gen. 841 (1942). We observed in a letter dated March 30, 1960, to the Secretary of the Treasury, B-142380:

> Where the certifying officer who certifies the voucher and schedule of payments is different from the certifying officer who certifies the basic vouchers, we have consistently applied the principle that the certifying officer who certifies the basic vouchers is responsible for the correctness of such vouchers and the certifying officer who certifies the voucher-schedule is responsible only for errors made in the preparation of the voucher-schedule. . . .

Thus, in situations involving successive certifications, the official making the second certification is entitled to rely upon the first certification for the purpose of determining liability and the second official is to be held accountable only for the correctness of the voucher schedule he certifies. We have also held that to the extent that the second certifying official might question the propriety of the previous certification, that official should in the interest of good administration bring the matter to the attention of the first certifying official. 55 Comp. Gen. 388, 390 (1975).

In the present situation, Mary LeBlanc certified the voucher schedule based upon the memorandum certification of her supervisor who, she indicates, assured her that it was proper. Since she twice questioned the propriety of the first certification with Mr. Gingles before finally certifying the voucher, we think that she was entitled to rely upon his certification in this situation.

[19] 31 U.S.C. § 3526(c), B-181466, Nov. 19, 1974; B-199542, Nov. 7, 1980; B-206591, Apr. 27, 1982.

Therefore, we agree with the Committee that Ms. LeBlanc was not liable for the loss. However, in the future, we recommend that in order to avoid confusion over this issue, certifying officials be directed not to accept memorandum certifications such as this. Should a question arise because a memorandum certification is executed, the second official should refuse to certify the voucher schedule, and instead, have it certified by the official making the first certification in memorandum format.

5. Conclusion

Since matters of certifying official liability are excluded from the scope of the Foreign Service grievance procedures, the "settlement" under this authority was unauthorized, and Mr. Gingles remains indebted to the United States for the unrecovered balance of $11,200.89. To the extent possible, the indebtedness should be recovered from the 25 FSN employees who received salary overpayments. If a waiver is requested and granted, Mr. Gingles' indebtedness should be reduced by the amount of the waiver. However, if collection action against the 25 FSN employees is suspended or terminated in accordance with the Federal Claims Collection Standards, recovery of the indebtedness from Mr. Gingles should still be pursued. Should the debt prove uncollectible and collection action against Mr. Gingles also be terminated, then the debt may be adjusted and written off in accordance with the procedures set forth in 31 U.S.C. § 3530.

B-230396, June 15, 1988

Appropriations/Financial Management

Claims Against Government

■ **Statutes of Limitation**

Civilian Personnel

Compensation

■ **Retroactive Compensation**

■ ■ **Statutes of Limitation**

An employee's claim for backpay, which accrued more than 6 years from the date the claim was filed in GAO, is barred by the 6-year limitation set forth in 31 U.S.C. § 3702(b) (1982). Although the employee argues that the delay in filing the claim with GAO was due to the agency's failure to advise him of his right to appeal its decision to GAO, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b).

Matter of: Carmine A. Barone—Backpay—Barring Act

Mr. Carmine A. Barone has appealed the determination by our Claims Group (Z-2864701) dated September 21, 1987, that his claim for backpay is barred under 31 U.S.C. § 3702(b) since it was not received by the General Accounting Office within the 6-year time limitation specified in that provision. For the reasons stated below, we sustain the Claims Group's determination.

Background

Mr. Barone, a grade GS-13 Safety Specialist with the Occupational Safety and Health Administration (OSHA), Department of Labor, contends that he was required to perform the duties of a grade GS-14 Area Director from February 2, 1975, until June 3, 1979. Mr. Barone claims that he contacted the Region VII Regional Administrator for OSHA in March 1979 and requested backpay for the period of time he was performing the duties of a grade GS-14 Area Director. Mr. Barone states further that this request was denied by the Regional Administrator.

The first written claim by Mr. Barone for backpay was a memorandum to OSHA dated August 19, 1986. This claim was denied by the agency on November 14, 1986, based on the agency's determination that the 6-year statutory time limitation contained in 31 U.S.C. § 3702(b) for filing claims against the United States had expired since the timeframe for Mr. Barone's claim ended on June 3, 1979. Mr. Barone requested a review of the agency's decision in a letter received by the Claims Group on November 25, 1986. Mr. Barone based his request on his belief that the agency should have advised him of his right to appeal the denial of the claim he contends he made in March 1979. He believes that the statute of limitations should be waived in this case.

By letter dated September 21, 1987, our Claims Group determined that Mr. Barone's claim was barred by the 6-year limitation in 31 U.S.C. § 3702(b) since the claim was not timely filed with the General Accounting Office and we have no authority to waive the statutory time limitation. Mr. Barone now seeks a reconsideration of our Claims Group determination, reiterating his belief that the statutory time limitation should be waived since he had not been timely notified of his right to file a claim with the General Accounting Office.

Opinion

Under the Barring Act of October 9, 1940, as amended and now codified at 31 U.S.C. § 3702(b) (1982), every claim or demand against the United States cognizable by the General Accounting Office must be received in this Office within 6 years from the date it first accrued or be forever barred. If a claim is not received within 6 years it may not receive consideration on the merits.

We have consistently held that the filing of a claim with another agency does not satisfy the requirements of the act and does not stop the running of the 6-year limitation. *Russell T. Burgess,* B-195564, Sept. 10, 1979. We have taken this position even where a delay in filing was the fault of the agency and not the employee. *Frederick C. Welch,* 62 Comp. Gen. 80 (1982); *Jones and Short, et al.,* B-205282, June 15, 1982. Moreover, we have consistently held that this Office does not have any authority to waive or make any exceptions to the time limitations contained in the Barring Act. *Welch, supra; Burgess, supra.*

We note that there is no regulatory requirement that an agency notify an employee that he has a right to appeal an agency determination. We do have an

instruction contained in section 7.1, title 4, GAO Policy and Procedures Manual for Guidance of Federal Agencies, which instructs the heads of all agencies that claims received by them 4 years after the date of their accrual should be forwarded to our Claims Group. If, however, this instruction is not complied with, we are without authority to waive or modify the application of 31 U.S.C. § 3702(b). *Welch, supra; Jerry L. Courson,* B-200699, Mar. 2, 1981.

Since Mr. Barone's claim was received in this Office on November 25, 1986, more than 6 years from the date it first accrued, it is barred by the above-cited act and may not be considered by this Office. The action by our Claims Group is hereby sustained.

B-230254, B-231363, June 16, 1988

Procurement

Contract Management
■ Contract Administration
■■ Convenience Termination
■■■ Invitations for Bids
■■■■ Reinstatement

Where a contract is properly awarded to the low bidder under an invitation for bids (IFB), but subsequently is terminated for convenience because the agency and the awardee are unable to agree on contract requirements, there is no merit to the contention that the agency is required to reinstate the IFB and make award to the second low bidder.

Matter of: Capital Hill Reporting, Inc.

Capital Hill Reporting, Inc., protests the issuance of request for quotations (RFQ) No. 88-05, and the proposed issuance of invitation for bids (IFB) No. 88-18, by the Federal Communications Commission (FCC) for stenographic reporting and transcription services. Capital Hill, which was the second low bidder under an earlier solicitation for such services, IFB No. 88-07, contends that after the termination for convenience of the contract with the low bidder under that solicitation, Ann Riley and Associates, the FCC should have awarded a contract to Capital Hill, rather than resoliciting the requirement.[1] We deny the protests.

IFB 88-07 required bidders to submit prices per page for furnishing to the FCC estimated quantities of original typed pages of the records of FCC hearings. Separate prices also were required for additional copies ordered before or after transcription. The IFB provided further for sales of copies to the public as follows:

A. The Contractor agrees to sell copies of transcripts, or portions thereof to the Comm. respondent(s), . . . intervenors, parties to the proceedings and amici curiae and, in the case of public proceedings, to the general public. The Commission agrees that such sales shall be made under the

[1] The RFQ was for services for a 3-month period following the termination of the contract with Riley; the proposed IFB is for the subsequent 12-month period.

conditions and at the prices hereinafter set forth in the Bid Schedule. The parties further agree that all copies sold to the Comm. must be of sufficiently high quality to enable the Comm. to reproduce them and distribute additional copies, or portions thereof, for its own use and as it deems necessary in the public interest.

B. Pursuant to Public Law 92-463 [the Federal Advisory Committee Act], the Comm. reserves the right to make copies of transcripts available to the public at the actual cost of duplication as listed in the Comm. Fee Schedule. The Fee Schedule currently allows a duplication charge of $.10 per page. However, because of the Commission limited reproduction facilities and the greater speed with which the Contractor can reproduce copies it is contemplated that the Contractor will perform this function at a price which does not exceed the price to the Government for additional copies under Bid Schedule Items B1b and B1c and which also does not appreciably exceed the price established in the Comm. Fee Schedule for copies of Comm. documents.

The FCC received nine bids and made award to Riley after the contracting officer requested that Riley verify its bid of $27,618, which was substantially lower than the other bids and the government estimate of $100,000.

In the initial weeks of the contract, the FCC learned that Riley was charging the public for copies of transcripts prices far in excess of the prices charged the FCC. Since the FCC believed that the contract required that sales to the public be at prices set forth in the bid schedule for additional copies ordered by the agency, the agency requested Riley to revise its charges to comply with this requirement. Riley responded that its interpretation of the contract was that the public could obtain copies from the FCC at the price stated in the contract, but that copies obtained from the contractor must be purchased at whatever price the contractor established. The parties were unable to reach an agreement on this issue, and the FCC terminated Riley's contract for convenience citing defective specifications regarding prices to be charged the general public.

When the FCC issued RFQ 88-05 for an interim, 3-month stenographic services contract,[2] Capital Hill protested to our Office that it should have received award of the 12-month contract under the original IFB, and that the FCC should not have resolicited the requirement. The resolicitation created an auction, argues the protester, and the same result will occur, it says, under the proposed IFB, which the agency has not yet issued. The protester contends that the initial IFB clearly provided that prices charged the public must be the same as those charged the FCC and that the agency did not have a compelling reason for, in effect, canceling that solicitation.

Even if we were to agree with the protester that the initial solicitation was reasonably clear concerning the requirement to charge the same prices to both the FCC and the general public, there is no merit to the protester's contention that it is now entitled to an award under that solicitation. Assuming the IFB was clear and otherwise adequate for purposes of award, it appears from the record that award was properly made since Riley's bid took no exception to the requirements of the IFB, the bid was low, and the firm verified the bid when the possibility of a mistake was called to its attention. The fact that a dispute aris-

[2] The agency revised the solicitation to read: "The Contractor is obligated to provide transcripts to third parties on whatever basis they are ordered. Third parties must be able to purchase copies at the same price the Government pays for additional copies." Capital Hill received the 3-month contract under the RFQ.

ing later between the contracting parties over contract terms caused the agency to terminate the contract does not mean that the agency is now required to reinstate the IFB and make award to the second low bidder. In short, there is no merit to Capital's argument that the agency is legally required to make award to it under initial IFB, absent some compelling reason not to do so.

The protests are denied.

B-223816, June 17, 1988

Miscellaneous Topics

Agriculture
■ Agricultural Loans
■■ Default
■■■ Interest
■■■■ Waiver

The Farmers Home Administration (FmHA) appears to have broad statutory authority that would allow it to terminate the accrual of interest on the guaranteed portion of defaulted loans. However, under the regulations FmHA has promulgated to implement its statutory authority, FmHA may only terminate the accrual of interest on loans in limited circumstances if the borrower is eligible for such a debt reduction in accordance with the applicable regulatory requirements.

Matter of: Farmers Home Administration—Authority to Terminate Accrual of Interest

This decision is in response to a request from the Administrator of the Farmers Home Administration (FmHA) for a decision from our Office as to FmHA's authority "to administratively terminate interest accrual" on the guaranteed portion of defaulted loans in certain circumstances. While it is our view, for the reasons set forth hereafter, that FmHA does have statutory authority that would allow it to terminate the accrual of interest on defaulted loans in the circumstances cited, we believe its authority to do so has been restricted by the regulations it has adopted to implement the statute. Under those regulations, FmHA may only terminate the accrual of interest on a loan in limited circumstances if the borrower is eligible for such a debt reduction in accordance with the applicable requirements set forth in the regulations.

Background

FmHA has been approving requests from its state offices to terminate the accrual of interest on the guaranteed portions of defaulted loans. FmHA has been adhering to this policy "on an administrative basis" in order to make the Business and Industry Division of FmHA "function in a manner consistent with the private sector." After questions were raised about the legality of the practice by the Office of General Counsel of the Department of Agriculture, FmHA submit-

ted the matter to us for our "concurrence in this interest accrual termination policy."

As explained in the submission, FmHA would like to continue "to administratively terminate interest accrual" when requested by its state offices in the following circumstances:

1) FmHA has repurchased the guaranteed portion of the loan from the holder(s), 2) There will likely be a loss on the loan, and 3) The lender has terminated interest accrual on the unguaranteed portion of the loan.

FmHA sets forth various reasons to support its proposal. We have summarized FmHA's reasons below.[1]

1. FmHA's termination of interest accrual on loans of this type "would be consistent" with the policy in the private sector.

2. The termination of interest accrual would tend to expedite the liquidation process.

3. The termination of interest accrual is already permitted once an order for relief in bankruptcy is entered.

4. Accrued interest is shown as an asset on FmHA's "book," creating a false impression to anyone reviewing FmHA's operations since FmHA "knew from the beginning it was uncollectible."

Analysis

Our Office has consistently held that, unless specifically authorized by statute, the officers and agents of the government do not have any 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. *See* 45 Comp. Gen. 224, 227 (1965); 44 Comp. Gen. 746, 749 (1965); and 41 Comp. Gen. 169, 172 (1961). *See also Union National Bank v. Weaver,* 604 F.2d 543, 545 (7th Cir. 1979), which endorsed our unpublished decision B-181432, March 13, 1975.

This rule is clearly applicable to the defaulted loans that are the subject of FmHA's proposal. As explained in the submission, FmHA is proposing to terminate the accrual of interest on the guaranteed portion of loans after repurchase by FmHA. Under Paragraph X(D) of the Lender's Agreement (Form FmHA 449-35), the holder of the guaranteed portion of a loan must assign "all rights, title, and interest in the loan" to FmHA when it requests payment from FmHA. Upon payment by FmHA, FmHA is "subrogated to all rights of Holder(s)." This includes the holder's right to receive interest on the unpaid principal at the interest rate specified in the note. It is this right to accrued interest on the outstanding balance of the guaranteed portion of the loan that FmHA is proposing

[1] FmHA's submission cited six separate reasons from which we have culled the four main arguments that FmHA relies on to support its proposal.

to relinquish. Unless FmHA receives valid legal consideration or a compensating benefit, it cannot waive its right to accrued interest on these loans, in the absence of specific statutory authority to do so. *See* B-226058, July 21, 1987, 66 Comp. Gen. 577.

In our view, none of the reasons cited by FmHA in its submission constitute the type of compensating benefit that is required in order for FmHA to relinquish its contractual rights to receive interest on the guaranteed portion of the loans at the stated rate. The reasons set forth by FmHA represent an attempt to justify its proposal from a policy, rather than a legal, standpoint. Our Office has consistently held that such policy considerations are not a valid substitute for adequate consideration and cannot be used to justify an agency's waiver of the government's rights under a contract. *See* B-226058, July 21, 1987 (66 Comp. Gen. 577); B-223329, October 17, 1986 (66 Comp. Gen. 51); and 35 Comp. Gen. 56, 59 (1955).

As stated above, however, our Office has recognized that, even in cases where there is no compensating benefit, the government's rights under a contract may still be waived if there is specific statutory authority to do so. *See* 62 Comp. Gen. 489 (1983) and B-226058, July 21, 1987. FmHA's enabling legislation contains such a provision which authorizes the Secretary of Agriculture, acting through FmHA and its Administrator, to:

(d) compromise, adjust, reduce, or charge-off claims, and adjust, modify, subordinate, or release the terms of security instruments, leases, contracts, and agreements entered into or administered by the Farmers Home Administration under any of its programs, as circumstances may require, to carry out this chapter. The Secretary may release borrowers or others obligated on a debt incurred under this chapter from personal liability with or without payment of any consideration at the time of the compromise, adjustment, reduction, or charge-off of any claim, except that no compromise, adjustment, reduction, or charge-off of any claim may be made or carried out—

(1) on terms more favorable than those recommended by the appropriate county committee utilized pursuant to section 1982 of this title; or

(2) after the claim has been referred to the Attorney General, unless the Attorney General approves; 7 U.S.C. § 1981(d).

Clearly, this provision gives the Administrator of FmHA considerable discretion to compromise, adjust, reduce, or charge off claims against borrowers, whether or not FmHA receives any consideration for agreeing to relinquish its right under the loan agreement in this fashion. We think that this provision would authorize FmHA to adjust or reduce the borrower's obligation under a loan by terminating the accrual of interest on the unpaid balance of the loan in the circumstances cited in FmHA's submission.

However, FmHA's broad discretion under 7 U.S.C. § 1981(d) appears to have been significantly restricted by the regulations FmHA has adopted to implement the statute. *See* 7 C.F.R. Part 1864—Debt Settlement. These regulations set forth the policies and procedures under which FmHA exercises its statutory authority to adjust (reduce), cancel, or charge off debts owed to it. *See* 7 C.F.R. § 1864.2. In our view, FmHA's proposal to administratively terminate interest accrual on guaranteed loans purchased by FmHA if there is "likely" to be a loss

on the loan and the lender has terminated interest accrual on the unguaranteed portion of the loan, is not consistent with its authority under these regulations. For example, under 7 C.F.R. § 1864.3, FmHA's authority to compromise or adjust (reduce) claims is conditioned upon the borrower's payment or promise to pay FmHA a lesser amount to satisfy the entire debt. Other conditions further limit FmHA's authority under this regulatory provision.

Under FmHA's proposal, as we understand it, however, FmHA would unilaterally reduce its claim against a borrower by the amount of interest that would otherwise accrue on the unpaid guaranteed balance of the loan without obtaining any payment or assurance of payment from the borrower with respect to the balance remaining after the adjustment. This is not consistent with the concept of compromise or adjustment of a claim as set forth in FmHA's own regulations. *See* 7 C.F.R. §§ 1864.2(a)(1) and (2), and 1864.3.

Similarly, FmHA's authority under the regulations to charge off or cancel debts is limited to special circumstances. For example, FmHA is authorized to take such actions if there is no known security for the loan or if the borrower has disappeared, died, or declared bankruptcy. *See* 7 C.F.R. §§ 1864.4, 1864.5 and 1864.7. FmHA's proposal to terminate the accrual of interest, however, is not limited to loans or borrowers that fall within these categories.

Thus, while we think that FmHA would have the authority under 7 U.S.C. § 1981(d) to adopt this proposal to terminate the accrual of interest on defaulted loans in the circumstances cited, it is our view that such authority has been restricted by the regulations FmHA has adopted. Accordingly, since these regulations have the full force and effect of law, it is our opinion that unless or until such regulations are changed, FmHA may only terminate the accrual of interest on a loan if the borrower is eligible for such a debt reduction under the applicable regulations.

B-226452, June 21, 1988

Appropriations/Financial Management

Appropriation Availability

■ Time Availability

■■ Fiscal-Year Appropriation

■■■ Travel Expenses

The reimbursable relocation expenses of transferred service members should be charged as an obligation against the appropriation current when their permanent change-of-station orders are issued, and their rights to reimbursement vest when the change-of-station move is then performed under those orders. Payment of the reimbursable expenses should be made from the appropriation so obligated, rather than some other appropriation that may later be current when the travel is completed and the claim for reimbursement is processed.

Appropriation Availability
■ Amount Availability
■■ Fiscal-Year Appropriation
■■■ Dislocation Allowances

Service members who commenced permanent change-of-station moves between October 1 and December 19, 1985, were entitled to a dislocation allowance at a rate equal to 2 months' basic allowance for quarters. Funds appropriated for the Department of Defense by fiscal year 1986 continuing resolution for that period remained available for payment of the dislocation allowance to those service members at that rate, even though the regular appropriation act of December 19, 1985, reduced the rate at which the allowance could be paid.

Matter of: Staff Sergeant Frank D. Carr, USMC—Transferred Service Member—Dislocation Allowance

The issue presented here is whether Staff Sergeant Frank D. Carr, United States Marine Corps, is entitled to payment of a dislocation allowance equal to 2 months of basic allowance for quarters (BAQ) on the basis of a permanent change of station he completed before December 19, 1985, even though his claim for reimbursement was partially processed after the enactment on that date of the Department of Defense (DOD) Appropriation Act, 1986, which provided that "(n)one of the funds appropriated by this Act shall be available to pay a dislocation allowance . . . in excess of one month's basic allowance for quarters."[1] Since he commenced travel pursuant to his transfer orders prior to the enactment of the Appropriation Act, we conclude that Sergeant Carr is entitled to payment of the dislocation allowance for 2 months.

Background

Sergeant Carr was transferred from Quantico, Virginia, to Okinawa, Japan, by permanent change-of-station (PCS) orders dated October 3, 1985. His dependents were not authorized to accompany him on this assignment. In conformity with these orders, he reported to his new duty station in Okinawa on November 11, 1985, after taking leave and arranging for the relocation of his dependents within the United States.

Section 407 of title 37, United States Code, authorizes payment of a dislocation allowance to a service member ordered to make a PCS move. Payment of the dislocation allowance was first authorized by the Career Incentive Act of 1955, and the allowance was designed to reimburse transferred service members for a wide range of miscellaneous relocation expenses, including those relating to lost rent deposits, the purchase of new automobile tags, and the rental of temporary

[1] This action is in response to a request for an advance decision from the Disbursing Officer, 3d Force Service Support Group, Fleet Marine Force, Pacific, FPO San Francisco 96604-8800. The request was forwarded here, via the Marine Corps Finance Center and the Commandant of the Marine Corps, by the Per Diem, Travel and Transportation Allowance Committee after being assigned PDTATAC Control No. 87-1.

lodgings.[2] The dislocation allowance was originally authorized in an amount equal to 1 month's BAQ, but 37 U.S.C. § 407 was amended on November 8, 1985, to raise the rate of the dislocation allowance to an amount equal to 2 months' BAQ, effective for moves begun after September 30, 1985.[3]

Shortly thereafter, however, the increased allowance was eliminated. Section 8079 of the DOD Appropriation Act, 1986, imposed this limitation on payment of the allowance:

> Sec. 8079. None of the funds appropriated by this Act shall be available to pay a dislocation allowance pursuant to section 407 of title 37, United States Code, in excess of one month's basic allowance for quarters.

Although fiscal year 1986 began on October 1, 1985, the DOD Appropriation Act, 1986, was not enacted until December 19, 1985.[4] Nevertheless, concerning section 8079 of that Act, quoted above, the Assistant Secretary of Defense for Force Management and Personnel stated in a memorandum dated January 24, 1986, that "once funds are appropriated, all general provisions of the Appropriation Act must be followed in utilizing those funds." The memorandum further stated the opinion that consequently on or after December 19, the dislocation allowance at the higher rate "cannot be paid even if the member qualified for the increased rate prior to that date."

After Sergeant Carr arrived in Okinawa in November 1985, he was paid a dislocation allowance equal to 1 month of his BAQ rate, but delays occurred beyond December 18, 1985, in processing the balance of his claim for relocation expenses. In accordance with section 8079 and the Assistant Secretary of Defense's memorandum, his claim for the second month was denied.

Sergeant Carr has submitted a supplemental claim voucher requesting payment of the dislocation allowance for the second month, and the responsible Disbursing Officer asks whether, in the circumstances, the supplemental claim should be processed for payment.

Analysis and Conclusion

The established rule is that legal rights and liabilities in regard to per diem and other travel allowances vest when travel is performed under orders. Moreover, travel orders may not be canceled or modified retroactively to increase or decrease the rights which have become fixed under the applicable statutes and regulations unless there is an apparent error on the face of the orders or unless it is clearly demonstrated that a provision which was previously determined and definitely intended had been omitted through error or inadvertence in the preparation of the orders. *Warrant Officer John W. Snapp, USMC,* 63 Comp. Gen. 4, 8 (1983), and cases cited therein.

[2] Public Law 20, § 2(12), 84th Cong., Mar. 31, 1955, ch. 20, 69 Stat. 18, 21. *See* S. Rep. No. 125, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News 1839, 1855.
[3] Public Law 99-145, § 611, Nov. 8, 1985, 99 Stat. 583, 639.
[4] *See* Public Law 99-190, sec. 8079, Dec. 19, 1985, 99 Stat. 1185, 1215.

We have also held, consistent with the foregoing, that PCS orders may not be canceled after the travel and transportation activities necessary to complete the transfer have been accomplished unless the orders were materially in error when issued. *Vernon E. Adler,* B-204210, Apr. 5, 1982.

The PCS orders issued to Sergeant Carr on October 3, 1985, were not issued in error and constituted valid orders. He performed his travel under those orders beginning on October 16, 1985, and he reported for duty in Okinawa on November 11, 1985. Thus, under the rule cited above, his legal rights and liabilities in regard to travel allowances became fully vested at that time under the laws and regulations then in effect. Under Public Law 99-145, Nov. 8, 1985, discussed above, he became entitled to a dislocation allowance equal to 2 months' BAQ. He was, however, paid for only 1 month because the field officer had not yet received guidance on the increased dislocation allowance.

With the enactment of the DOD Appropriation Act, 1986, on December 19, 1985, the Department of Defense construed section 8079 thereof as an absolute bar to payment of the dislocation allowance at a rate of more than 1 month's BAQ even if the member qualified for the increased amount prior to that date.

We disagree. We believe that a member whose right to a travel allowance became vested prior to December 19, 1985, is entitled to be paid from the appropriation account established under the continuing resolution which provided appropriations for fiscal year 1986 for the period prior to enactment of the Appropriation Act itself.

In 62 Comp. Gen. 9 (1982), we reversed an earlier ruling [5] and held as follows:

> After considering all relevant arguments, we now conclude that to the extent an annual appropriation act does not provide sufficient funding for an appropriation account to cover obligations validly incurred under the terms of a continuing resolution, the funds made available by the resolution remain available to pay these obligations.

In reaching that conclusion, we relied on a provision of the applicable continuing resolution which stated in section 103:

> Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution. Public Law 97-92, § 103, 95 Stat. 1183, 1193 (1981).

We characterized that provision as providing "that funds appropriated by the continuing resolution are to remain available to liquidate obligations incurred within the availability period of the continuing resolution." 62 Comp. Gen. 9, at 11. Accordingly, we held that, to the extent the annual appropriation act does not provide sufficient funding to cover obligations validly incurred under a continuing resolution, the excess obligations should be charged to and paid from the appropriation account established under the continuing resolution. 62 Comp. Gen. 9, at 12.

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[5] Letter to Senator William Proxmire, B-152554, February 17, 1972.

Since the continuing resolutions providing funds for DOD for fiscal year 1986 contain the identical provision[6] contained in section 103 of the fiscal year 1982 resolution discussed in 62 Comp. Gen. 9, we reach the same conclusion with respect to the continued availability of funds provided by the 1986 continuing resolution to pay obligations validly incurred thereunder. We find no indication in the fiscal year 1986 appropriation act or its legislative history that Congress intended section 8079 to apply retroactively.

As to when obligations are considered to be incurred, we decided that issue in a 1984 decision requested by the Department of Transportation. We held that ". . . for all travel and transportation expenses of a transferred employee, an agency should record the obligation against the appropriation current when the employee is issued travel orders."[7] We also recognized that the government is not required to reimburse expenses until the employee actually incurs them, but that did not change our conclusion that the obligation arises at the time of the issuance of the orders. 64 Comp. Gen. 45, at 47.

In the present case, therefore, it is our view that the dislocation allowance payable to Sergeant Carr became an obligation against the appropriation current when his PCS orders were issued on October 3, 1985, and that his entitlement to the allowance vested when he then began his move in compliance with those orders. This would necessarily have involved a charge to the appropriation account established under the continuing resolution providing funds for the DOD between October 1 and December 18, 1985. The laws then in effect did not prohibit payment of the dislocation allowance in any amount less than the full rate prescribed by 37 U.S.C. § 407, as amended, that is, an amount equal to 2 months' BAQ.

Furthermore, consistent with the provisions contained in the continuing resolution described above, our view is that to the extent the annual DOD Appropriation Act of December 19, 1985, did not provide funding at that higher rate, obligated funds nevertheless remained available under the continuing resolution to pay Sergeant Carr and other service members similarly situated who had established an entitlement to the dislocation allowance at that rate prior to December 19, 1985. Hence, our conclusion is that Sergeant Carr is entitled to payment of the dislocation allowance at that higher rate, even though his claim for payment was not processed by December 19, 1985.

Sergeant Carr's supplemental claim voucher, with supporting documentation, is returned to the Marine Corps Finance Center for further processing consistent with the conclusions reached here.

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[6] *See* Public Law 99-103, § 103, Sept. 30, 1985, 99 Stat. 471, 473. *See also* Public Law 99-154, Nov. 14, 1985, 99 Stat. 813; Public Law 99-179, Dec. 13, 1985, 99 Stat. 1135; and Public Law 99-184, Dec. 17, 1985, 99 Stat. 1176.

[7] 64 Comp. Gen. 45, 48 (1984). *See also* 64 Comp. Gen. 901 (1985). Although these decisions relate to transferred civilian employees, our view is that the reasoning and the conclusions reached are applicable as well to the situation of transferred members of the uniformed services.

B-229309, June 21, 1988

Procurement

Payment/Discharge
■ Shipment Costs
■■ Additional Costs
■■■ Evidence Sufficiency

Procurement

Payment/Discharge
■ Shipment Costs
■■ Overcharge
■■■ Payment Deductions
■■■■ Propriety

Where notations on the Government Bill of Lading showed that standard equipment was ordered by the shipper but special equipment was furnished by the carrier, the carrier may offer evidence to show that government shipping agents ordered the special equipment. However, to refute the bill of lading notations the evidence must clearly show that the notations were mistaken. Since it did not, the General Services Administration's (GSA) actions in recovering overcharges from the carrier for the special equipment are sustained.

Procurement

Payment/Discharge
■ Shipment Costs
■■ Additional Costs
■■■ Evidence Sufficiency

Procurement

Payment/Discharge
■ Shipment Costs
■■ Overcharge
■■■ Payment Deductions
■■■■ Propriety

General equitable considerations concerning the interpretation of government contracts do not affect a carrier's obligation under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1982), to collect only the applicable charges shown in the carrier's tender or tariff filed with the Interstate Commerce Commission. Where the carrier files two tenders, both of which are in effect and contain applicable rates for the same shipments, the government is entitled to use the lower rates. Therefore, there is no basis to reverse GSA's collection of overcharges, which was based on alternation provisions in both tenders giving the government the benefit of the lower rates.

Procurement

Payment/Discharge
■ Unauthorized Contracts
■■ Quantum Meruit/Valebant Doctrine

The General Accounting Office allows payment for transportation charges on a *quantum meruit* basis only where there is no valid transportation contract or applicable tariff or tender which dictates the proper amount due. In a case where neither condition pertains payment on a *quantum meruit* basis would be inappropriate; the lowest applicable charges must be collected.

(67 Comp. Gen.)

Procurement

Contract Management
■ Contract Administration
■■ Contract Terms
■■■ Modification
■■■■ GAO Authority

The General Accounting Office has no jurisdiction under 50 U.S.C. § 1431 to reform executive agency transportation contracts to facilitate national defense.

Matter of: United Carriers, Inc.—Special Equipment Charges and Lowest Applicable Rates

United Carriers, Inc. (United), requests our review under 31 U.S.C. § 3726 (1982) of numerous audit actions taken by the General Services Administration (GSA) which resulted in substantial amounts being deducted from monies otherwise due the carrier based on GSA's determinations that United charged the government for transportation services it did not order and used rates for the services ordered that were not the lowest applicable rates. We sustain GSA's audit actions.

Background

After the United States government paid United for transporting numerous Freight All Kinds shipments (apparently all for the Department of Defense) under special rate tenders offered to the government as permitted in 49 U.S.C. § 10721 (1982), GSA determined in its rate audit that United collected overcharges on at least 132 shipments, which GSA deducted from monies otherwise due the carrier on unrelated bills in the absence of voluntary refund. GSA's overcharge determinations involved two issues: (1) whether the government ordered special equipment (generally, trailers longer than 40 feet), for which there was a 15-cent-per-mile additional charge, and (2) whether lower applicable rates published in a different United tender than the one used by the carrier should be used as the charge basis for the shipments.[1]

Special Equipment Issue

GSA initially determined that the government did not order special equipment because the notations on the Government Bills of Lading (GBL), the transportation contracts between United and the government, indicated that standard equipment—40-foot trailers—was ordered. United replied that government shippers in each instance ordered special equipment and that the GBL notations indicating standard equipment were mistaken. United offered copies of its dis-

[1] The carrier states that of the 132 shipments involved, 89 involve the issue of tender applicability, 16 involve the special equipment issue, and 27 involve both issues.

patch sheets which referred to special equipment. A United official elaborated in a letter of June 1, 1987, addressed to GSA:

When charges based on special equipment are at issue, United Carriers relies on its dispatch records to show that special equipment was ordered. The standard practice is for the government agency or government contractor to place requests for transportation by phone. At that time, the kind of equipment required is designated and duly noted on the dispatch sheet of United Carriers. The dispatch sheets are prepared at the time the call is received based on the information received over the phone from the person requesting service on behalf of the government. These records are prepared in the usual course of business and are maintained in our files.

Where equipment charges are at issue the dispatch sheets show that oversized equipment was ordered and that the equipment charges were correctly billed. I do not know the reason why the request for oversized equipment is not shown on the government bills of lading, but it is my experience that the person who prepared the bill of lading is not the same person who orders equipment and is unaware that special equipment has been ordered.

United also contends that since special equipment was furnished, and since GSA does not deny that it was required to transport the shipment, the carrier is entitled to recover on a *quantum meruit* basis.

We agree, as United points out, that the presumption of correctness of notations on the GBLs that the government ordered no special equipment is not conclusive. 53 Comp. Gen. 868 (1974). We have accepted documents made in the regular course of a carrier's business as evidence of material facts, and these documents and other evidence have been accepted to rebut the GBL notations and establish a different contract of carriage than shown on the GBL. *See Terminal Transport Company, Inc.,* 44 Comp. Gen. 799 (1965); *Navajo Freight Lines, Inc.,* B-186603, Dec. 22, 1976. However, we do not find that the evidence referred to by the carrier clearly shows that the government ordered special equipment.

Copies of dispatch sheets in the record do not specify whether the notations "45" (which we assume refer to 45-foot trailers) were entered as a result of requests made by the government shipping agents, or as a result of the dispatcher's unilateral choice of equipment for the carrier's convenience, or as a result of the dispatcher's estimate of what the particular shipment may have required. The carrier's letter of June 1, 1987, does not clarify the situation. It refers to "the kind of equipment required" rather than the kind of equipment ordered, as if the dispatcher may have been transforming a routine request for pick-up into an order for special equipment. Under these circumstances, particularly in the absence of any evidence from the shipping agencies regarding the order of special equipment, the presumption of correctness of the GBL notations prevails. Unless United clearly shows that the government ordered special equipment by presenting additional probative evidence that GSA is unable to refute, we are required to uphold GSA's audit actions because the tender's special equipment charge does not apply without an order by the shipping agencies. *See Trans Country Van Lines, Inc.,* 53 Comp. Gen. 603 (1974); 51 Comp. Gen. 208 (1971).

As to the argument that higher charges should be allowed on a *quantum meruit* basis, our cases allow payment for transportation services on such a basis only when there is no valid transportation contract or applicable tariff or tender which, by statute, dictates the proper amount due. In this case there is a valid

transportation contract and an applicable tender; the question is which of the services offered in the applicable tender the carrier is entitled to charge for. Therefore, payment on a *quantum meruit* basis would be inappropriate; only the applicable tender charges may be reimbursed. Accordingly, GSA actions concerning the special equipment issue are sustained.

Lowest Applicable Rate Issue

Two United tenders, No. ICC 100 and 106, were in effect when United transported the relevant shipments. Tender 100 contained lower rates for those shipments than Tender 106. GSA applied Tender 100's lower rates in its audit determinations based on an alternation provision in paragraph 20.g of both tenders, stating that:

> This tender shall not apply where charges for service provided under this tender exceed charges otherwise applicable for the same service.

United offers four reasons why the lower rates in Tender 100 should not be applied. The first reason is that it made a clerical mistake when it issued Tender 106 by not including a provision in it expressly cancelling Tender 100 that was so obvious, or patent, that the government shipping agents knew that the mistake was made. The second reason is that since, in United's view, both tenders are identical except for the generally higher rates in Tender 106, application of the alternation provision would defeat the intention to apply the higher rates subsequently offered in Tender 106 and render them void in their inception if the earlier, filed rates in Tender 100 were applied.

The third reason United offers is that the alternation provision should not apply where two tenders are involved, as in this case, but alternation should only apply if one tender is alternated with a commercial tariff containing rates offered to the public generally. Finally, the carrier argues that the Comptroller General has authority to reform the GBL transportation contract under 50 U.S.C. § 1431 giving effect to United's intention to cancel Tender 100 when it issued Tender 106. United cites *Paragon Energy Corp. v. United States,* 645 F.2d 966, 971 (Cl. Ct. 1981).

Carriers are required by the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1982), to collect only the applicable charges shown in tariffs or tenders filed with the Interstate Commerce Commission. *See Interpretation of Government Rate Tariff for Eastern Central Motor Carriers Assn. Inc.,* 323 I.C.C. 347, 352 (1964). Where there are conflicting applicable rates, as there are in this case, the shipper is entitled to the lower. This is true regardless of the equities even though a carrier does not intend that the lower of the conflicting rates apply and even though they are the result of a mistaken tariff publication. *Metropolitan Metals, Inc. v. Pennsylvania R. Co.,* 314 I.C.C. 737 (1961). The first reason United gives for avoiding the lower applicable rate tender is a general rule of government contracting providing for equitable relief from a mistaken, burdensome contract. That general rule is contrary to the particular state of the law concerning interstate transportation contracts just cited and is inapposite here.

Although a carrier may appropriately argue equitable reasons why an applicable rate should not be the basis of a transportation contract because the rate is unreasonable, those equitable reasons can be presented to the Interstate Commerce Commission only, which has primary jurisdiction over the reasonableness of rates. *United States v. Western Pac. R. Co.,* 352 U.S. 59 (1956). Otherwise, the carrier is obliged by law to collect the rate shown in the lowest, applicable tariff or tender. This was the basis of GSA's audit actions. *See Middlewest Motor Freight Bureau v. United States,* 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied,* 402 U.S. 999 (1971).

Although United properly notes that some principles of contract construction apply to interpreting rate tenders, its second reason for not applying the lowest applicable rate tender—that a subsequently filed rate tender should not be interpreted to be void at its inception because of an applicable tender filed initially—does not apply in this case. United contends that Tender 106, containing the higher rates, was issued after Tender 100 and intended to supersede Tender 100. GSA, on the other hand, has furnished us copies of the two tenders and established that Tender 100 was issued after Tender 106. We also note that the two tenders were not identical. Besides containing different rates than Tender 100, as well as other distinctions, Tender 106 applied from fewer origin points than Tender 100, which essentially applied between all points in the United States. Therefore, there is no factual basis to conclude that Tender 106 was void at its inception or impliedly cancelled the lower rates in Tender 100.

Concerning United's third reason for not applying Tender 100—that Tender 106's alternation provision can only be used in connection with another commercial tariff offering rates to the general public—United has referred to no authority holding that one tender's alternation provision cannot be used in connection with another tender. Also, the language of the tender's alternation provision, as quoted above, certainly indicates no such limitation. We recently gave effect to an alternation provision similar to Tender 106's, holding that the alteration provision in one tender allowed the use of lower, applicable rates in another tender. *Retroactive Modification of Rate Tender,* 65 Comp. Gen. 563 (1986). *See also, Von Der Ahe Van Lines, Inc.,* B-190610, June 13, 1978, and *Starflight, Inc.,* B-210740, Sept. 27, 1983, which held that where a carrier offers applicable rates in two separate tenders, the government is entitled to the lower of the two rates.

The last of the carrier's reasons for not applying Tender 100 is the authority under 50 U.S.C. § 1431 (1982) to reform a contract on the basis of equitable considerations to facilitate the national defense. We held in *British, Dutch and Italian Claims for Fuel and Services for U.S. Navy Vessels,* B-225673, *et al.,* Nov. 6, 1987, 67 Comp. Gen. 52, that GAO has no jurisdiction under that section and that any reformation made thereunder would not be subject to our review. Therefore, if reformation is appropriate under section 1431 to facilitate the national defense, and we offer no opinion on that subject, it must be obtained from the agencies with which United made its contracts of carriage.

Accordingly, we conclude that GSA properly used Tender 100, which contains the lowest, applicable rates. Therefore, GSA's actions in that regard are sustained.

B-229337, June 21, 1988

Civilian Personnel

Travel
■ **Advances**
■■ **Overpayments**
■■■ **Debt Collection**
■■■■ **Waiver**

Military Personnel

Travel
■ **Advances**
■■ **Overpayments**
■■■ **Debt Collection**
■■■■ **Waiver**

Authority to waive uniformed services members', National Guard members' and civilian employees' debts arising out of erroneous payments of travel and transportation allowances was added to 10 U.S.C. § 2774, 32 U.S.C. § 716, and 5 U.S.C. § 5584, by Public Law 99-224, 99 Stat. 1741. As provided in section 4 of Public Law 99-224, the authority applies only to debts arising out of payments made on or after the effective date of the law, December 28, 1985.

Civilian Personnel

Relocation
■ **Household Goods**
■■ **Weight Restrictions**
■■■ **Liability**
■■■■ **Waiver**

Military Personnel

Relocation
■ **Household Goods**
■■ **Weight Restrictions**
■■■ **Liability**
■■■■ **Waiver**

A long-standing practice of the government in arranging transportation of employees' and service members' household goods incident to transfers of duty stations is for the government to contract with commercial carriers using government bills of lading (GBLs). Upon completion of the shipment the government pays the carrier and collects any excess charges from the member or employee for exceeding his or her authorized weight allowance or for extra services. Employees' or members' resulting debts do not arise out of "erroneous" payments, and therefore are not subject to consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

Military Personnel

Relocation
■ Household Goods
■■ Advance Payments
■■■ Liability
■■■■ Waiver

Under the armed services voluntary do-it-yourself (DITY) program, transferred members move their own household goods and receive an incentive payment based on 80 percent of what it would have cost the government to move them by commercial carrier. The member may receive an advance payment based on his estimated weight of the goods with final settlement being made based on actual weight of the goods. In some cases because of inaccuracies in the weight estimate, the member must repay part of the advance received. The resulting debt is not subject to waiver consideration under 10 U.S.C. § 2774 because it did not arise out of an "erroneous payment," but was the result of the regular operation of the program. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

Civilian Personnel

Relocation
■ Mobile Homes
■■ Reimbursement
■■■ Overpayments
■■■■ Liability

Military Personnel

Relocation
■ Mobile Homes
■■ Reimbursement
■■■ Overpayments
■■■■ Liability

Uniformed services members and civilian employees are entitled to movement of their mobile homes in lieu of household goods at government expense upon a change in duty station. Their maximum entitlement is an amount equal to the cost of moving their maximum entitlement of household goods. In some cases the government arranges the move and pays the carrier the full cost, and in other cases the members or employees receive an advance and arrange the move themselves. In either case if the members or employees incur a debt to the government because of exceeding their maximum entitlement, the debts may not be considered for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584, because they resulted from the regular operation of the program and did not arise out of "erroneous" payments. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

Matter of: Transportation Debt Waivers—Household Goods and Mobile Homes

This decision concerns the application of the authority to waive debts of uniformed services members and civilian employees arising out of erroneous payments of transportation allowances. It is being issued in response to several questions presented by the Air Force concerning under what circumstances the waiver authority may be applied to debts arising out of (1) shipments of members' or employees' household goods using commercial carriers under govern-

ment bills of lading (GBLs), (2) members moving their own household goods under the do-it-yourself (DITY) program, and (3) movement of employees' or members' mobile homes.[1] Also presented were several questions concerning application of the waiver authority in connection with advance payments of travel allowances which are not being addressed here because related questions are currently under consideration in two other cases.

As is explained below, we find that generally the types of debts discussed here do not result from "erroneous" payments and, therefore, are not subject to consideration for waiver under the waiver statutes.

Waiver Authority

As amended by Public Law 99-224 (December 28, 1985), § 2, 99 Stat. 1741, section 2774(a) of title 10, United States Code (Supp. III 1985), authorizes the waiver of—

> A claim of the United States against a person arising out of . . . an erroneous payment of travel and transportation allowances, to or on behalf of a member or former member of the uniformed services . . . the collection of which would be against equity and good conscience and not in the best interests of the United States . . . .

Similar waiver authorities apply to civilian employees, 5 U.S.C. § 5584 (1982 & Supp. III 1985), and to members of the National Guard, 32 U.S.C. § 716 (1982 & Supp. III 1985).

This additional authority to waive claims arising out of erroneous travel or transportation payments is applicable to payments made on or after the effective date of the new legislation, December 28, 1985. *See* Public Law 99-224, § 4, *supra.* Therefore, in answer to one of the Air Force's questions, it is the date when the erroneous payment was made which determines whether the case comes within the time period of the statute; payments made prior to December 28, 1985, are excluded from coverage under the new authority.

Also, by its express terms, this waiver authority applies only to claims "arising out of an erroneous payment." Thus, before a claim can be considered for waiver, it must be determined that the claim arose from an "erroneous payment" within the scope of the waiver statute. It is this provision which determines the answers to the remaining questions discussed below.

GBL Household Goods Shipments

It is the long-standing and standard practice of government agencies to ship the total weight of a qualifying individual's household goods at government expense and to then collect any charges for excess weight from the individual. In this regard, paragraph U5340-A of the Joint Federal Travel Regulations provides in part:

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[1] The questions were presented to our Claims Group along with several related individual waiver requests by the Deputy Director, Settlement and Adjudication, Headquarters Air Force Accounting and Finance Center, Denver, Colorado.

General. The Government's maximum transportation obligation is the cost of one through HHG [household goods] movement of a member's prescribed weight allowance (*see* par. U5310-B) in one lot from and to authorized places at a valuation equivalent to the lowest applicable rate established in the carrier's tariffs. The member will bear all costs of transportation arising from:

1. transportation of weights in excess of the member's maximum authorized HHG weight allowance . . . .[2]

When a household goods shipment is made under this system, the GBL constitutes a contract between the government and the carrier under which the carrier is entitled to be paid for its services. Therefore, we conclude that there is no "erroneous payment" for purposes of the waiver statutes where the government in the first instance pays or bears the cost of a household goods shipment which exceeds the applicable weight allowance in reliance on collection of the overweight charges from the employee or member in accordance with the standard procedures described above. In these circumstances, the government has committed no "error," but has merely made payment in the normal course of business to satisfy its obligation to the carrier. Thus, the initial payment of excess weight charges by an agency in accordance with this standard practice is not "erroneous," and claims against service members or employees arising from such payments may not be considered for waiver under the waiver statutes, 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584.

We do recognize, however, that there may be some cases where the excess weight charges were incurred as the result of government error, such as where the excess weight was shipped on the basis of erroneous authorizing orders. We expect that these cases will be unusual, and they should be dealt with on a case-by-case basis.

DITY Moves

The DITY program is a voluntary system available to members of the armed forces who choose to move their own household goods incident to a change of duty station. Under the program the service member receives an incentive payment from the service equal to 80 percent of what it would have cost the government to ship the household goods (not in excess of the member's weight allowance) by commercial carrier, less the cost incurred by the government for the DITY move.[3] The program is authorized by 37 U.S.C. § 406(k) and implementing regulations found in the JFTR, paragraph U5320-E, and the individual services' regulations. It is designed to provide a savings to the government while providing extra income to participating service members in the form of the incentive payment. The statute authorizes the advance payment of the incentive payment to the member. The final settlement is computed after the move is completed based (in most cases) on certified weight tickets the member obtains to establish the weight of the goods.

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[2] Essentially identical provisions were included in the Joint Travel Regulations, para. M8007-2, superseded by the JFTR. Also, similar provisions applicable to civilian employees are found in the Federal Travel Regulations, para. 2-8.3b(5) (Supp. I 1981).

[3] The major direct cost incurred by the government in most DITY moves is the rental paid by the government for the truck or trailer the member uses.

The Air Force submission indicates that their advance payments to members participating in the DITY program are based on estimates furnished by the members of the weight of their household goods. Because of inaccuracies in weight estimates, at times the members have received a greater amount in the advance payments than they are entitled to upon final settlement. The Air Force questions whether the resulting debts are appropriate for waiver in this type of case.

Advances made to members participating in the DITY program are made on the basis of the estimated weights of the members' household goods with the knowledge that the actual weights upon which final settlement will be made probably will be somewhat different. This is the way the program is designed to operate, and the fact that upon final settlement a member is found to have received more in the advance than he is ultimately entitled to would not convert the advance to an "erroneous payment" within the meaning of the waiver statute. Therefore, this type of debt would not be appropriate for consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Here too, we recognize that there may be some instances where overpayments were caused by government error, which will be dealt with on a case-by-case basis.[4]

Mobile Home Movements

Under 37 U.S.C. § 409, for uniformed services members, and 5 U.S.C. § 5724(b) for civilian employees, transportation of a mobile home is authorized incident to a change in duty station. The types of allowances authorized are prescribed in implementing regulations,[5] with the maximum entitlement being, in most cases, the maximum amount to which the service member or employee would be entitled for transportation of household goods.

There are two methods for arranging for the movement of a mobile home. One method is for the government agency to arrange for and pay the costs associated with the transportation, subject to collection from the employee or service member of any excess costs. The other method is for the employee or member to arrange the transportation and file a voucher at the conclusion of the move. Advances of funds are authorized in connection with the second method, with the advance being calculated based on the employee's or member's maximum entitlement to shipment of household goods from the old to the new station.

In connection with either arrangement, at times the costs incurred exceed the authorized allowances or there are charges for items such as repairs or maintenance to the mobile home which are not included in the authorized allowances. In such cases, similar to the excess costs for moving household goods, the employee or member is found to be in debt when final settlement is made for the

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[4] In this regard, the Air Force also asked whether waiver could be considered for a debt arising when a member is actually overpaid for a DITY move upon settlement. Clearly a case such as this does involve an erroneous payment by the government and is therefore appropriate for waiver consideration.

[5] Joint Federal Travel Regulations, Chapter 5, Part F (uniformed services personnel), and Federal Travel Regulations, Chapter 2, Part 7 (civilian employees).

excess costs the government has paid on his or her behalf or for a portion of the advance the employee or member received.

As with the situations involving household goods discussed above, the government's payment to the mobile home movers or the advances made to the employees or members who arrange their own transportation are not "erroneous" payments. They are payments made in accordance with the authorized practice with the understanding that excess costs are to be collected from the employee or member. Therefore, debts resulting from these practices are not subject to consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Here again, we recognize that there may be some cases where the excess payments resulted from government error such as improper orders. Those unusual cases will be dealt with on a case-by-case basis also.

Conclusion

The individual cases the Air Force submitted relating to the discussion above will be returned under separate cover for further consideration by the Air Force under these guidelines. Any unusual cases which appear to constitute exceptions to the general rules may be submitted to us along with a full report as to the circumstances, including any erroneous orders or other applicable documentation.

B-230411, June 23, 1988

Civilian Personnel

Compensation

■ **Arbitration Decisions**

■ ■ **GAO Review**

Where an arbitrator failed to take jurisdiction of an issue that was a matter of interest and not grievance arbitration, we will consider the claims under 4 C.F.R. Part 31 (1988). A grievance was not filed in this case, and the employees' rights to environmental differential pay for the period of time prior to implementation of the new collective bargaining agreement are based on statutes and regulations which exist independently from the collective bargaining agreement.

Civilian Personnel

Compensation

■ **Hazardous Duty Differentials**

■ ■ **Eligibility**

■ ■ ■ **Administrative Determination**

Employees claim hazardous duty differential for a period prior to arbitration award. The entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. The claims are denied.

Matter of: AFGE Local 2413—Retroactive Environmental Differential Pay—Effect of Arbitration Award

Mr. Joseph F. Henderson, Staff Counsel, American Federation of Government Employees (AFGE), requests a decision on behalf of AFGE Local 2413 for 53 employees of the Maritime Administration who claim retroactive environmental differential pay for exposure to asbestos. The claims are denied since the employees have not provided clear and convincing evidence that the agency acted in an arbitrary and capricious manner in denying retroactive environmental differential pay for the periods involved.

Background

The claimants here are all employed by the Maritime Administration, Central Region, Beaumont Reserve Fleet, Beaumont, Texas. As a result of a favorable interest arbitration award,[1] a new labor-management agreement between the Maritime Administration and AFGE Local 2413 became effective June 7, 1984. The agreement provided that all wage grade employees at the Beaumont Reserve Fleet shall receive environmental differential pay as authorized by Federal Personnel Manual (FPM) Supplement 532-1, Appendix J, Part II, asbestos, on a full-time basis.

The union contends that the same conditions which warranted the current payment of environmental differential pay existed prior to the arbitrator's decision, and that the employees are entitled to such pay from May 9, 1975, to the date of the current agreement, June 7, 1984.[2]

The agency contends that our Office is precluded by our regulations in 4 C.F.R. § 22.7(a) (1988) from taking jurisdiction on the merits of an arbitration award which is final and binding under 5 U.S.C. § 7122(b) (1982). In response, the union contends that the backpay claims for environmental differential pay were never an issue in the arbitration itself as the arbitrator never accepted jurisdiction of the claims. Thus, the union argues that the claims were not rejected by the arbitrator, but were deferred for lack of jurisdiction and authority.

Opinion

We agree with the union's contention that this Office is not precluded from taking jurisdiction under the circumstances presented in this case. The record shows that the arbitrator failed to take jurisdiction on the issue of retroactive environmental differential pay since this was interest and not grievance arbitration, and he felt that he had no authority to do so. A grievance was not filed

[1] Interest arbitration concerns new terms and conditions of employment whereas grievance or rights arbitration concerns disputes involving the terms and conditions of the existing collective bargaining agreement. *Lodge 802, Etc. v. Pennsylvania Shipbuilding Co.*, 835 F.2d 1045 (3rd Cir. 1987).

[2] The AFGE recognizes that a portion of the claims may be barred by our 6-year statute of limitations, 31 U.S.C. § 3702(b)(1) (1982).

in this case, and the employees' rights to environmental differential pay are based on statutes and regulations which exist independently from the collective bargaining agreement. Therefore, we will consider the claims as existing separately from our labor-management authority, and we will adjudicate them under our general claims authority in 4 C.F.R. Part 31 (1988). *See Samuel R. Jones,* 61 Comp. Gen. 20, at 25 (1981); 4 C.F.R. § 22.7(c) (1988).

In the area of environmental differential pay, we have consistently held that the authority to determine whether a particular situation warrants payment of a hazardous duty differential is a decision which is vested primarily in the employing agency. We will not substitute our judgment for that of the agency officials who are in a better position to investigate and resolve the matter, unless there is clear and convincing evidence that the agency's decision was wrong or that it was arbitrary and capricious. 58 Comp. Gen. 331 (1979); *Joseph Contarino, et al.,* B-202182, Jan. 19, 1982.

The record shows that the agency followed the standards for exposure to asbestos promulgated by the Occupational Safety and Health Administration (OSHA) in 29 C.F.R. § 1910.1001(b) (1976).[3] Further, the employees were protected against exposure by respirators or other required protective devices or by safety measures, and the union has not presented any evidence to show that the agency acted in an unreasonable manner when it followed the OSHA standards for exposure to asbestos.

Accordingly, on the record before us, we cannot say that the Maritime Administration was either wrong or arbitrary and capricious in refusing to pay environmental differential pay for periods prior to the arbitrator's award and prior to the addition of the pay provision in the collective bargaining agreement. Therefore, the employees' claims are denied.

B-230393, June 27, 1988

Appropriations/Financial Management

Appropriation Availability

■ Time Availability

■■ Time Restrictions

■■■ Advance Payments

The Veterans Administration's advance purchase of coupons, which are redeemable for cash if unused, for use in procuring medical articles would not violate the prohibition against advances of public money, because it would fall within the exception in 31 U.S.C. § 3324(d) for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency."

[3] The arbitrator used a different standard than OSHA in his determination that the employees were entitled to environmental differential pay prospectively under the new agreement.

Matter of: Veterans Administration—Advance Payments of Coupons for Publications

The Director of the Office of Budget and Finance, Veterans Administration (VA), requests our decision to resolve whether the VA can properly make payments in advance to the New York Academy of Medicine for coupons which may be exchanged for articles published in medical journals and medical books. For the reasons given below, we conclude that these payments would be proper.

The New York Academy of Medicine sponsors a program which allows medical libraries to obtain particular articles published in medical journals or books, which are in some cases rare and expensive, at the cost of $7.00 per article. The participating medical libraries purchase coupons for use in procuring the medical articles, thereby allowing the New York Academy of Medicine to save on bookkeeping costs, and in turn keep the article expenses low. Unused coupons can be returned to the Academy for an immediate cash refund.

The question is whether the advance payment for coupons, to be used for the purchase of publications, violates the general prohibition against advances of public money contained in 31 U.S.C. § 3324(b). An exception to this prohibition is set forth in 31 U.S.C. § 3324(d), which provides:

> The head of an agency may pay in advance from appropriations available for the purpose . . . (2) charges for a publication printed or recorded in any way for the auditory or visual use of the agency.

This Office has held that items which are read, such as books, pamphlets, newspapers, and periodicals constitute publications. *See* 57 Comp. Gen. 583 (1978); 41 Comp. Gen. 211 (1961). Clearly, the medical articles at issue are publications as contemplated by the statute, and the VA could make advance payment directly for the articles.

The advance purchase of coupons which are redeemable for cash, if unused, has been found to be proper in certain cases by our Office. *See* 39 Comp. Gen. 201 (1959) (reimbursement for coupon books, which are exchanged for purchase of gasoline at reduced prices for vehicles used for official business, and which are redeemable for cash if unused, is not in violation of the advance payment prohibition.) Although in B-139388, June 4, 1959, we held that the advance payment to the American Standards Association (Association) for a coupon book to be used in procuring specification standards issued from time to time by the Association violated the advance payment prohibition, that case is distinguishable from the current one. When B-139388 was decided, the statutory exception to the advance payment prohibition (then contained in 31 U.S.C. § 530) only extended to subscriptions for newspapers, magazines and other periodicals for official use. The specification standards issued from time to time did not fall within the scope of this exception.

In the instant case, we conclude that advance payment for the medical articles is proper, and therefore the VA may purchase coupons in advance to exchange

for the articles (or a cash refund if the coupons are unused) pursuant to 31 U.S.C. § 3324(d).

B-225263, June 28, 1988

Civilian Personnel

Relocation
■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Manpower Shortages

Civilian Personnel

Travel
■ Advances
■■ Debt Collection
■■■ Waiver
■■■■ Manpower Shortages

An appointee to a manpower shortage category position was issued orders erroneously authorizing reimbursement of relocation expenses as though he were a transferred employee, and he was given an advance of funds to cover some of those expenses. After he completed travel to his duty station the error was discovered. The employee has no legal right to reimbursement of the expenses of the house-hunting trip and temporary quarters subsistence expenses he incurred, even though the orders purportedly authorized reimbursement of these expenses, since the expenses were in excess of those prescribed by statute and the government is not bound by orders or advice contrary to the applicable statutes. The government's resulting claim against the employee for repayment of the travel advance can be considered for waiver under 5 U.S.C. § 5584 to the extent that (1) the advance was used for the erroneously authorized temporary quarters subsistence expenses and (2) the employee remains indebted to the government for repayment of the amounts advanced after the advance has been applied against the legitimate expenses. Since in this case the employee's legitimate expenses exceed the amount of the travel advance, however, there is no net indebtedness which would be appropriate for waiver consideration.

Matter of: Rajindar N. Khanna—Waiver—Erroneous Relocation Travel Advance

A finance and accounting officer with the U.S. Army Corps of Engineers, Baltimore District, has requested an advance decision concerning the claim of Mr. Rajindar N. Khanna for certain relocation expenses he was erroneously authorized in his travel orders. For the reasons explained below, we hold that Mr. Khanna may not be reimbursed for the expenses he claims. Moreover, the government's claim for repayment of the funds Mr. Khanna received as a travel advance may not be waived for the reasons set forth below.

Background

Mr. Khanna was hired by the Corps of Engineers as an Electrical Engineer, GS-12, a shortage category position, and directed to report to Fort Myer, Arlington,

Virginia, by travel orders dated July 1, 1986. He was erroneously authorized reimbursement of expenses as though he were an incumbent employee undergoing a permanent change of station, including the expenses of a househunting trip and temporary quarters subsistence expenses, and he was given a travel advance in the amount of $3,280. Block 17 of Mr. Khanna's travel order contained the following statement:

> Employee authorized househunting trip to begin on 12 July 1986 through 17 July 1986. Employee is autorized [sic] for advance for househunting trip. The full amount will be given to the employee when he reports to his new duty station, due to the fact that the employee does not wish an advance to be issued for househunting trip.

Mr. Khanna had performed a househunting trip, reported to Fort Myer on July 21, 1986, and had begun to occupy temporary quarters when it was discovered that his travel orders were in error. As a new hire in a manpower shortage category position, Mr. Khanna's authorized reimbursement should have been limited to his travel, the travel of his family, and the transportation of his household goods. The Corps of Engineers determined that Mr. Khanna's entitlement to reimbursement for those items equaled $4,601.84. It set off $3,280, the amount of his travel advance, from that amount and determined that he should be reimbursed the difference, which equals $1,321.84. Mr. Khanna's travel orders were amended to reflect the change in his entitlements on August 5, 1986, and he was notified of the error. Mr. Khanna's present claim of $2,665.27 consists of $525 for a househunting trip and $2,140.27 for 42 days of temporary quarters.

Analysis and Conclusions

The Comptroller General has long held that an employee must bear the expense of travel and transportation to his first permanent duty station in the absence of a specific statute providing otherwise. *See* 63 Comp. Gen. 31 (1983); 53 Comp. Gen. 313 (1951). One such statutory provision, and the one pursuant to which Mr. Khanna derives his entitlements, is 5 U.S.C. § 5723 (1982). That provision authorizes reimbursement of the travel and transportation expenses of a manpower shortage category position appointee and immediate family and includes the movement of his household goods from his place of residence at the time of selection to his first duty station. However, it does not include reimbursement of a househunting trip, temporary quarters subsistence expenses or the other expenses authorized in 5 U.S.C. § 5724a for employees who are being transferred from one official station to another.

The Comptroller General has no authority to authorize reimbursement of amounts greater than those provided for by the applicable statutory and regulatory authorities. We have consistently held that provisions of travel orders which do not conform to the applicable statutes and regulations are ineffective and cannot create an entitlement to travel allowances. *See* 63 Comp. Gen. 4 (1983). Furthermore, with regard to erroneous advice, it is a well-settled rule of law that the government cannot be bound beyond the actual authority conferred upon its agents by statute or regulation. As a result, the government is not prevented from repudiating erroneous advice given by one of its officials.

See 59 Comp. Gen. 28, 31 (1979) and cases cited therein. Hence, we conclude that Mr. Khanna has no legal right to reimbursement of the expenses of the house-hunting trip and the temporary quarters subsistence expenses he incurred, even though his orders purportedly authorized reimbursement of these expenses.

Since 1968, however, the Comptroller General has had the authority, as granted by 5 U.S.C. § 5584, to waive a federal employee's liability for overpayments of pay or allowances where collection would be "against equity and good conscience and not in the best interests of the United States." Under an amendment to 5 U.S.C. § 5584 enacted by Pub. L. No. 99-224, approved December 28, 1985, 99 Stat. 1741, the Comptroller General's waiver authority was extended to claims arising from erroneous payments of travel and transportation expenses.

In the legislative history of Pub. L. No. 99-224, at page 2 of House Report No. 102, 99th Cong., 1st Sess. (1985), reprinted in 1985 U.S. CODE CONG. & AD. NEWS 2659, 2660, it was stated that:

> . . . GAO's experience demonstrates that hardship has been caused in many travel, transportation and relocation cases and that employees have been required to make substantial refunds to the Government as a result of circumstances which were not their fault. This is particularly true when, as the General Accounting Office has found, many of these claims arise from erroneous agency authorizations which an employee relies on in good faith to his detriment.

We consider a travel advance payment to be erroneous and subject to waiver to the extent it was made to cover the expenses erroneously authorized and the employee actually spent the advance in reliance on the erroneous travel orders.[1] However, waiver is only appropriate to the extent that an employee is indebted to the government for repayment of the amounts advanced. So, for example, if an employee has both legitimate expenses and expenses which should not have been authorized, the travel advance must first be applied against the legitimate expenses. Any outstanding amount of the advance may then be applied against the erroneously authorized expenses and that amount could be considered for waiver.

This approach is consistent with the view that travel advances are made for expenses which are legally supportable; the advance is not meant to represent a final determination of the amount to which a traveler is entitled. Travelers who receive advanced travel funds are on notice that they are entitled to be reimbursed only for legally authorized expenditures. Further, we believe that this approach is in accord with our line of cases in which we hold that there is no authority to grant waiver in cases where no payment has been made. This situation occurs when an error is discovered at voucher settlement before the employee has been paid and there had been no travel advance. *See Rebecca T. Zagrinski*, B-224850, Sept. 10, 1987, 66 Comp. Gen. 642 and cases cited.

The Corps of Engineers correctly applied the advance of $3,280 against the legitimatly authorized expenses of $4,601.84. Therefore, in this case there is no net

[1] It should be emphasized that an erroneous travel advance is appropriate for waiver consideration only when the employee expends the money. The travel advance would still be considered merely a loan to the employee to the extent that no expenditures or expenditures not in accordance with those authorized by the travel order are incurred.

indebtedness, and the government has no claim to assert against Mr. Khanna which would provide a basis for waiver.

Accordingly, Mr. Khanna has no legal right to reimbursement of the expenses of the househunting trip and the temporary quarters subsistence expenses he incurred. Further, waiver of Mr. Khanna's travel advance in the amount of those expenses is not appropriate since there is no net indebtedness after the advance is applied against the legitimately authorized expenses.

B-226842, June 28, 1988

Military Personnel

Travel
■ Advances
■■ Overpayments
■■■ Debt Collection
■■■■ Waiver

Under the waiver statutes, the Comptroller General may waive claims against federal employees and service members, amounting to more than $500, arising from overpayments of pay or allowances if collection would be against equity and good conscience. The Comptroller General and agency heads have concurrent jurisdiction to waive claims amounting to $500 or less. Effective December 28, 1985, the waiver statutes were amended to include claims arising from erroneous payments of travel and transportation expenses. As a result of this amendment, travel advance payments are subject to waiver to the extent that expenses are incurred by an employee or service member in reliance on erroneous authorizations. Hence, under 10 U.S.C. § 2774, as amended, waiver of indebtedness may be considered in the case of a member of the Air Force who was over-advanced $326.60 for his transfer to a new duty station, where it is shown that he received the overpayment as the result of an erroneous travel authorization and errors made in the computation of his entitlement. Since the record before us does not indicate whether the standards for waiver have been met in this particular case, the case is remanded to the Air Force for its determination of whether to grant waiver.

Matter of: Major Kenneth M. Dieter—Waiver—Erroneous Travel Advance

John K. Scott, Deputy Assistant Comptroller of the Air Force for Accounting and Finance, asks our opinion as to whether an application for a waiver of indebtedness may be considered in the case of Major Kenneth M. Dieter, who was advanced $326.60 in excess of his entitlement to travel allowances for his transfer to a new duty station. We conclude that, under the terms of the waiver statute now in effect and the conditions described below, the Air Force may waive the claim against Major Dieter for the collection of part of that amount, provided it determines that he was without fault in the matter and that collection would be against equity and good conscience.

Background

Prior to his transfer from the University of Texas, Austin, Texas, to the United States Air Force Academy, Colorado Springs, Colorado, in August 1986, Major Dieter received a travel advance of $1,296.50 to apply against expenses to be incurred in performing his official change of station. After his arrival at the Air Force Academy, final settlement of his travel voucher revealed that Major Dieter had been over-advanced $326.60 for per diem and mileage for himself and travel allowances for his dependents. The discrepancies determined during this reconciliation showed that the advance was excessive because mileage payments were based on a distance of 883 miles between the two duty stations rather than the official mileage of 875 miles. This error in mileage authorized the member 3 travel days instead of 2.[1] The member was also over-advanced funds for his dependents at the 100 percent rate rather than the 75 percent rate for his wife and 50 percent rate for each child. Major Dieter does not dispute the computation of the excessive travel advance.

Major Dieter requests waiver of repayment of the $326.60 erroneously advanced travel funds. The Air Force has forwarded his request for our opinion as to whether waiver consideration is appropriate in the circumstances of this case, in light of the amendments to the waiver statute made by Public Law 99-224 in 1985.

Discussion

The Comptroller General and the heads of federal agencies have concurrent authority, as granted by 5 U.S.C. § 5584, 32 U.S.C. § 716, and 10 U.S.C. § 2774, to waive a federal employee's or service member's liability for overpayments of up to $500 of pay or allowances where collection would be "against equity and good conscience and not in the best interests of the United States," and there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of any person having an interest in obtaining a waiver of the claim. Under amendments to 5 U.S.C. § 5584, 32 U.S.C. § 716, and 10 U.S.C. § 2774 enacted by Public Law 99-224, approved December 28, 1985, 99 Stat. 1741, this waiver authority was extended to erroneous payments of travel and transportation expenses.[2]

[1] The regulation in effect at the time Major Dieter's travel was performed, paragraph M1050-2, Volume 1 of the Joint Travel Regulations provided that 1 day of travel time will be allowed for each 350 miles of the official distance of the ordered travel when performed by privately owned conveyance. One additional day of travel is allowed in excess of multiples of 350 miles provided the excess is 176 miles or more. Since in this case the official distance is 875 miles, only 2 days of travel time were allowable.

[2] The amendments made by Public Law 99-224 to the civilian employee waiver statute, 5 U.S.C. § 5584, use the term "travel, transportation and relocation expenses and allowances," whereas the amendments to the two waiver statutes for the members of the uniform services, 10 U.S.C. § 2774 and 32 U.S.C. § 716, use the term "travel and transportation allowances." Although the terminology differs, no difference in the scope of the coverage was intended.

In the legislative history of Public Law 99-224, at House Report No. 102, 99th Cong., 1st Sess. 2, *reprinted in* 1985 U.S. Code Cong. & Ad. News 2659, 2660, it was stated that:

> . . . GAO's experience demonstrates that hardship has been caused in many travel, transportation and relocation cases and that employees have been required to make substantial refunds to the Government as a result of circumstances which were not their fault. This is particularly true when, as the General Accounting Office has found, many of these claims arise from erroneous agency authorizations which an employee relies on in good faith to his detriment.

We believe that the situation of expenses incurred as the result of an erroneous travel advance fits this description to the extent that the travel advance was made to cover the expenses erroneously authorized and the employee actually spent the advance in reliance on the duly authorized, albeit erroneous, travel orders.[3] However, waiver is only appropriate to the extent that an employee is indebted to the government for repayment of the amount advanced after the advance has been applied against the legitimate expenses. *See* our companion case decided today, *Rajindar N. Khanna,* B-225263, June 28, 1988, 67 Comp. Gen. 493. In this case, after Major Dieter's legitimate expenses are applied against the advance, there remains a balance of $326.60 owed by him. It is that amount which is appropriate for waiver consideration.

Therefore, we consider the travel advance payment which Major Dieter received to be erroneous and subject to waiver to the extent that it was made to cover the expenses erroneously authorized and incurred by Major Dieter in detrimental reliance on the erroneous orders. However, since the amount of the debt is less than $500 and the record before us is insufficient to enable us to determine whether the standards for waiver are met in Major Dieter's case, we are returning his waiver application to the Air Force for further consideration. Waiver may be allowed if it is determined that collection would be "against equity and good conscience," and that there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of Major Dieter or any other person having an interest in obtaining a waiver of the claim.

Further, waiver consideration should be consistent with the standards for travel advances we have provided here. As a general rule we would presume that expenses incurred in accordance with erroneous orders were made in reliance on those orders. However, under certain circumstances we believe it would be inappropriate to assume detrimental reliance. For example, with regard to the mileage payments based on the inaccurate distance, it could not be said that Major Dieter relied on this error to his detriment since he was going to drive the distance regardless of the specific mileage allowed. Similarly, with regard to the overpayment for travel allowances for Major Dieter's dependents, there is no evidence in the record before us that Major Dieter expended additional funds in reliance on the erroneous authorization. Therefore, the amount of Major Diet-

[3] It should be emphasized that an erroneous travel advance is appropriate for waiver consideration only when the employee expends the money. The travel advance would still be considered merely a loan to the employee to the extent that no expenditures or expenditures not in accordance with those authorized by the travel order are incurred.

er's expenses relating to the mileage and dependents' allowance overpayments would not appear to be appropriate for waiver allowance.

Major Dieter did, however, rely on the erroneous authorization of 3 days per diem since he took the extra day and it is assumed he would not have done so if only 2 days had been authorized. Therefore, the amount Major Dieter expended for the extra day of per diem would appear to be appropriate for waiver allowance.

Therefore, the claim of Major Dieter for waiver is remanded to the Air Force for its determination in accordance with the foregoing.

B-230604, June 30, 1988

Procurement

Sealed Bidding
■ Contract Awards
■■ Propriety
■■■ Low Bid Displacement
■■■■ Post-Bid Opening Periods

Air Force award of a construction contract containing additive items to other than the apparent low bidder determined at the time of bid opening on the basis of funds then available, because funding subsequently was reduced, was inconsistent with applicable regulations; the solicitation instead should have been canceled and the requirement resolicited, as the regulations clearly do not provide for a post-bid opening redetermination of the low bidder.

Matter of: Huntington Construction, Inc.

Huntington Construction, Inc., protests the Department of the Air Force's award of a contract to Pavex Corporation under invitation for bids (IFB) No. F02601-88-B-0013 for the construction of a ground-launched cruise missile disassembly facility. Huntington was the apparent low bidder as determined by funding available at bid opening. Huntington contends that the agency improperly displaced it as the low bidder when, after bid opening, the Air Force reduced the available funding by deleting both an additive item and that item's funding, and used the revised funding figure to recalculate the apparent low bidder.

We sustain the protest.

The IFB incorporated the provision at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.236-7082 (DAC 84-14) entitled "Additive or Deductive Items." That provision is required by DFARS § 36.303 for construction projects for which available funding may be insufficient for all desired work. It states that award will be made to the bidder offering the low aggregate amount for the base item, plus or minus (in order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined to be available before bid opening. The clause further provides that after the low bidder is determined on that basis:

. . . award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, *Provided* that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of items.

The competitors were advised that $188,117 was available at the February 17, 1988, bid opening, and Huntington was determined to be the apparent low bidder by $23,653 for the base item (construction of a road) and four additive items (a fence, a road, lighting, and a metal building).

	Protester	Awardee	Govt. Cost Est.
Base item	$ 77,000	$ 37,056	$ 41,190
Add. 1	20,000	21,288	19,193
Add. 2	20,000	24,606	40,598
Add. 3	15,000	39,136	48,730
Add. 4	25,000	58,567	38,406
	$157,000	$180,653	$188,117

Two days after bid opening, the agency deleted the requirement for additive 4, so as to free $38,406 (the government estimate for the additive) for the separate purchase of two higher priority items also required for operation of the disassembly facility, a defueling system and utility connections for administrative trailers. The contracting officer then, in effect, made a second, lower determination of the amount of funding available ($149,711) for the construction, and a second determination of the apparent low bidder, displacing Huntington and substituting Pavex instead, since Pavex's bid was lower by $9,914 for the base item and additives 1, 2 and 3 combination. On February 23, the agency awarded the contract to Pavex.

Huntington protested the award on March 4, arguing that as the lowest bidder as of bid opening it was entitled to the contract. The Air Force nevertheless authorized continued performance of the contract on the grounds that prompt completion of the facility is necessary to meet United States obligations under the Intermediate Range Nuclear Force treaty. Work on the contract was basically completed by April 1.

The agency reports that all of the work—including the disassembly facility, the defueling system and the utility connections—had to be accomplished within a $200,000 statutory cost limitation, although the defueling system and utility connections were to be procured separately. The Air Force admits, however, that the award was inconsistent with the provisions of the additive/deductive clause because the act of decreasing the available funding below the amount announced at bid opening displaced Huntington despite the solicitation statement that the amount of funding determined to be available before bid opening "shall be controlling for determining the low bidder." The agency states that, instead, it should have canceled and resolicited the requirement to insure that all parties were competing on an equal basis. We agree.

The additive/deductive clause and regulations are clear as to the basis on which the low bidder must be determined: the funding available when bids are opened. This method of bid evaluation was adopted in response to allegations that the selection of low bidders was being manipulated after bid opening through the amount of funds made available for contracting. *Valley Construction Co.*, B-184391, Dec. 15, 1975, 75-2 CPD ¶ 393. Moreover, we have urged the general adoption of this method of bid evaluation for construction procurements because, in our view, it strengthens the integrity of the procurement process. *See H.M. Byars Construction Co.*, 54 Comp. Gen. 320, 332 (1974), 74-2 CPD ¶ 233; *Rock, Inc.*, B-186961, Nov. 9, 1976, 76-2 CPD ¶ 394. We note that the protester argues that improper fund manipulation is exactly what occurred here.

We recognize that the clause only provides the agency with direction on how to treat a post-bid-opening increase in available funding, and that the instant procurement involves a post-bid-opening decrease in available funding. Nevertheless, in view of the clause's purpose—to prevent the agency from manipulating the selection of the low bidder by designating the low bidder on the basis of the amount of funds available prior to bid opening—it follows that once the low bidder is determined at bid opening the clause properly limits the award to that firm on those combinations of items for which its bid is low, regardless of a later increase or a decrease in available funding. *Valley Construction Co.*, B-184391, *supra;* B-170168, Sept. 10, 1970.

Consequently, we agree with the Air Force that the restrictions are equally applicable to any post-bid-opening change in funding, whether it is an increase or a decrease, which has the effect of altering the apparent low bidder. In other words, under these rules there is only one proper awardee, the designated apparent low bidder—assuming the firm is otherwise responsive and responsible. In view of the foregoing, we think if any bidder was entitled to award in the procurement, it was the protester.

The agency argues that Huntington was not prejudiced by the improper award to Pavex since no contract should have been awarded at all in the procurement. Consequently, the agency urges that the protester is not entitled to either bid preparation costs, which Huntington claims in the amount of $1,750.00, or the cost of pursuing the protest, claimed as $3,431.50. (As stated above, the contract work has been completed.)

We disagree. We first note that although the protester could not have received the award in the procurement, given the fact that Huntington was not low on the combination of items actually purchased, the contract work commenced on March 1, just 3 days before the protest was filed on March 4. The agency, which admits its award error, could have terminated the award and initiated corrective action in the form of a resolicitation at that time.

More importantly, however, since even the Air Force concedes it should have canceled the solicitation and issued a new one, the award to Pavex clearly deprived the protester of a proper chance at winning a resolicitation. We have held that a protester is entitled to its bid preparation and protest costs, where

the agency's improper action precludes the cancellation and resolicitation of the requirement since the improper action prevents the protester from having a fair opportunity to compete for the award. *Consolidated Construction.*, B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529.

The protest is sustained. The protester should submit its claim for costs, which is for a total of $5,181.50, directly to the Air Force. If the parties cannot agree on the amount due, our Office will determine the amount. 4 C.F.R. § 21.6(f) (1988).

Appropriations/Financial Management

Appropriation Availability
■ Amount Availability
■■ Fiscal-Year Appropriation
■■■ Dislocation Allowances

Service members who commenced permanent change-of-station moves between October 1 and December 19, 1985, were entitled to a dislocation allowance at a rate equal to 2 months' basic allowance for quarters. Funds appropriated for the Department of Defense by fiscal year 1986 continuing resolution for that period remained available for payment of the dislocation allowance to those service members at that rate, even though the regular appropriation act of December 19, 1985, reduced the rate at which the allowance could be paid.

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■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The Secretary of the Air Force may, under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1323 (1985), *codified at* 40 U.S.C. § 490b (Supp. III 1985), provide support for child care centers for the children of civilian employees by authorizing the allotment of space under his control in government buildings, as well as the services delineated in paragraph 139(b)(3), and may do so without charge. The support provided may include the cost of making the space suitable for child care facilities, including the cost of renovation, modification or expansion of existing government-owned or leased space.

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■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The authority of the Secretary of the Air Force to allocate space for child care centers under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is limited to the allotment of existing space in government-owned or leased buildings. Section 139 does not grant independent authority to enter new leases for child care facilities, and we are aware of no legislation that specifically authorizes the Air Force to do so for civilian child care centers.

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■ Purpose Availability
■■ Office Space
■■■ Use
■■■■ Child Care Services

The authority of the Secretary of the Air Force to allot space and to make it suitable for child care facilities under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is applicable to existing

space in federal buildings. This authority extends to the expansion of existing space in military child care centers in government buildings to accommodate the children of civilian employees.

444

■ Time Availability
■■ Fiscal-Year Appropriation
■■■ Travel Expenses

The reimbursable relocation expenses of transferred service members should be charged as an obligation against the appropriation current when their permanent change-of-station orders are issued, and their rights to reimbursement vest when the change-of-station move is then performed under those orders. Payment of the reimbursable expenses should be made from the appropriation so obligated, rather than some other appropriation that may later be current when the travel is completed and the claim for reimbursement is processed.

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■ Time Availability
■■ Time Restrictions
■■■ Advance Payments

The Veterans Administration's advance purchase of coupons, which are redeemable for cash if unused, for use in procuring medical articles would not violate the prohibition against advances of public money, because it would fall within the exception in 31 U.S.C. § 3324(d) for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency."

491

Budget Process
■ Child Care Services
■■ Miscellaneous Revenues
■■■ Treasury Deposit

Reimbursement of costs associated with the provision of space allotted under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is authorized by paragraph 139(b)(2) to be made to the miscellaneous receipts or any other appropriate account of the Treasury. Section 139 does not expressly authorize funds received as reimbursement to be credited to agency appropriations. Payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must, therefore, be deposited in the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

444

Claims Against Government
■ Statutes of Limitation

An employee's claim for backpay, which accrued more than 6 years from the date the claim was filed in GAO, is barred by the 6-year limitation set forth in 31 U.S.C. § 3702(b) (1982). Although the employee argues that the delay in filing the claim with GAO was due to the agency's failure to

advise him of his right to appeal its decision to GAO, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b).

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Civilian Personnel

Compensation

■ Arbitration Decisions

■■ GAO Review

Where an arbitrator failed to take jurisdiction of an issue that was a matter of interest and not grievance arbitration, we will consider the claims under 4 C.F.R. Part 31 (1988). A grievance was not filed in this case, and the employees' rights to environmental differential pay for the period of time prior to implementation of the new collective bargaining agreement are based on statutes and regulations which exist independently from the collective bargaining agreement.

489

■ Dual Compensation Restrictions

■■ Reemployed Annuitants

A retired Air Force officer employed in a civilian position with the National Credit Union Administration is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532, on the basis of the court's decision in *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986). There the court found that positions with the Federal Reserve Board are not covered by the dual compensation restrictions because the Federal Reserve Board is a "nonappropriated fund" instrumentality and the only such instrumentalities covered by the law are those of the Armed Forces. The National Credit Union Administration is an executive agency of the federal government which assesses member credit unions for funds which it uses to pay its expenses and its employees' salaries. Although these funds are collected as assessments from credit unions, they are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the Administration is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions.

433

■ Dual Compensation Restrictions

■■ Reemployed Annuitants

A retired Army officer employed in a civilian position with the Office of Civilian Radioactive Waste Management, Department of Energy, is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531 and 5532 on the basis of the court's decision in *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986), to the effect that positions with the Federal Reserve Board are not covered by those restrictions because the Board is a "non-appropriated fund instrumentality." The Department of Energy collects fees from corporations which generate nuclear waste, and it uses those funds to pay the salaries of the employees of the Office of Civilian Radioactive Waste Management. However, the funds are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the Administration is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions.

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■ Dual Compensation Restrictions

■■ Reemployed Annuitants

In *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit held that military retirees were exempt from the restrictions of 5 U.S.C. §§ 5531 and 5532

when employed by the Board of Governors of the Federal Reserve System. The Comptroller General will follow the court's judgment, and overrules the prior contrary administrative decision in *Lieutenant Colonel Robert E. Frazier, USA (Retired)*, 63 Comp. Gen. 123 (1983). Military retirees employed by the Federal Reserve Board who were not plaintiffs in the *Denkler* litigation may be allowed refunds of amounts previously deducted from their retired pay, subject to the 6-year limitation period prescribed by 31 U.S.C. § 3702(b).

436

■ Hazardous Duty Differentials
■■ Eligibility
■■■ Administrative Determination

Employees claim hazardous duty differential for a period prior to arbitration award. The entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. The claims are denied.

489

■ Retroactive Compensation
■■ Statutes of Limitation

An employee's claim for backpay, which accrued more than 6 years from the date the claim was filed in GAO, is barred by the 6-year limitation set forth in 31 U.S.C. § 3702(b) (1982). Although the employee argues that the delay in filing the claim with GAO was due to the agency's failure to advise him of his right to appeal its decision to GAO, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b).

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Relocation
■ Residence Transaction Expenses
■■ Inspection Fees
■■■ Reimbursement

A transferred employee claimed reimbursement for the costs of a home inspection and a pool inspection, both of which were recommended by his real estate agent. His claim for reimbursement for those fees, on the basis that once they were inserted in the contract they qualified as "required services," is denied. The term "required" as used in the applicable statute and regulations relates only to those services which are imposed on the employee by state or local law or by the lender as a precondition to the sale or purchase of a residence.

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Relocation
■ Residence Transaction Expenses
■ ■ Appraisal Fees
■ ■ ■ Reimbursement

■ Residence Transaction Expenses
■ ■ Relocation Service Contracts
■ ■ ■ Use

A transferred employee incurred an expense to have his old residence appraised before trying to sell it himself. He later used the services of a relocation company under contract to his agency, and he claimed reimbursement for the cost of the earlier appraisal. Paragraph 2-12.5b of the Federal Travel Regulations prohibits reimbursement to an employee for any personally incurred real estate expenses that are similar or analogous to any expenses the agency is required to pay to a relocation company. Since the relocation company had the property appraised as part of their contract to purchase the residence from the employee, which service was paid for by the agency, the employee may not be reimbursed his appraisal costs.

453

Travel
■ Actual Subsistence Expenses
■ ■ Reimbursement
■ ■ ■ Amount Determination

A Veterans Administration employee transferred from Michigan to New York was authorized 60 days of temporary quarters subsistence expenses. He was allowed full payment in the amount of $3,256.81 on his claim for reimbursement of his meal costs based on his itemized listing of the actual cost of each meal and an agency determination that these costs were reasonable. Additional reimbursement is denied on a supplemental claim in the amount of $950 for groceries the employee later asserted had been transported from Michigan to New York and used in temporary quarters. The Federal Travel Regulations limit reimbursement to reasonable expenses, and the record provides no basis to disturb the agency's determination that his reasonable subsistence expenses had already been fully reimbursed. Furthermore, the record shows that the $950 claimed was an estimate. Such estimate is insufficient to establish actual grocery costs, as the regulations require.

451

Relocation
■ **Expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Manpower Shortages**

Travel
■ **Advances**
■■ **Debt Collection**
■■■ **Waiver**
■■■■ **Manpower Shortages**

An appointee to a manpower shortage category position was issued orders erroneously authorizing reimbursement of relocation expenses as though he were a transferred employee, and he was given an advance of funds to cover some of those expenses. After he completed travel to his duty station the error was discovered. The employee has no legal right to reimbursement of the expenses of the house-hunting trip and temporary quarters subsistence expenses he incurred, even though the orders purportedly authorized reimbursement of these expenses, since the expenses were in excess of those prescribed by statute and the government is not bound by orders or advice contrary to the applicable statutes. The government's resulting claim against the employee for repayment of the travel advance can be considered for waiver under 5 U.S.C. § 5584 to the extent that (1) the advance was used for the erroneously authorized temporary quarters subsistence expenses and (2) the employee remains indebted to the government for repayment of the amounts advanced after the advance has been applied against the legitimate expenses. Since in this case the employee's legitimate expenses exceed the amount of the travel advance, however, there is no net indebtedness which would be appropriate for waiver consideration.

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■ **Advances**
■■ **Overpayments**
■■■ **Debt Collection**
■■■■ **Waiver**

Authority to waive uniformed services members', National Guard members' and civilian employees' debts arising out of erroneous payments of travel and transportation allowances was added to 10 U.S.C. §2774, 32 U.S.C. §716, and 5 U.S.C. §5584, by Public Law 99-224, 99 Stat. 1741. As provided in section 4 of Public Law 99-224, the authority applies only to debts arising out of payments made on or after the effective date of the law, December 28, 1985.

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Military Personnel

Relocation
■ Household Goods
■■ Advance Payments
■■■ Liability
■■■■ Waiver

Under the armed services voluntary do-it-yourself (DITY) program, transferred members move their own household goods and receive an incentive payment based on 80 percent of what it would have cost the government to move them by commercial carrier. The member may receive an advance payment based on his estimated weight of the goods with final settlement being made based on actual weight of the goods. In some cases because of inaccuracies in the weight estimate, the member must repay part of the advance received. The resulting debt is not subject to waiver consideration under 10 U.S.C. § 2774 because it did not arise out of an "erroneous payment," but was the result of the regular operation of the program. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

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■ Household Goods
■■ Weight Restrictions
■■■ Liability
■■■■ Waiver

A long-standing practice of the government in arranging transportation of employees' and service members' household goods incident to transfers of duty stations is for the government to contract with commercial carriers using government bills of lading (GBLs). Upon completion of the shipment the government pays the carrier and collects any excess charges from the member or employee for exceeding his or her authorized weight allowance or for extra services. Employees' or members' resulting debts do not arise out of "erroneous" payments, and therefore are not subject to consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

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■ Mobile Homes
■■ Reimbursement
■■■ Overpayments
■■■■ Liability

Uniformed services members and civilian employees are entitled to movement of their mobile homes in lieu of household goods at government expense upon a change in duty station. Their maximum entitlement is an amount equal to the cost of moving their maximum entitlement of household goods. In some cases the government arranges the move and pays the carrier the full cost, and in other cases the members or employees receive an advance and arrange the move themselves. In either case if the members or employees incur a debt to the government because of exceeding their maximum entitlement, the debts may not be considered for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584, because they resulted from the regular operation of the program and did

not arise out of "erroneous" payments. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

485

Travel
■ Advances
■■ Overpayments
■■■ Debt Collection
■■■■ Waiver

Authority to waive uniformed services members', National Guard members' and civilian employees' debts arising out of erroneous payments of travel and transportation allowances was added to 10 U.S.C. § 2774, 32 U.S.C. § 716, and 5 U.S.C. § 5584, by Public Law 99-224, 99 Stat. 1741. As provided in section 4 of Public Law 99-224, the authority applies only to debts arising out of payments made on or after the effective date of the law, December 28, 1985.

484

■ Advances
■■ Overpayments
■■■ Debt Collection
■■■■ Waiver

Under the waiver statutes, the Comptroller General may waive claims against federal employees and service members, amounting to more than $500, arising from overpayments of pay or allowances if collection would be against equity and good conscience. The Comptroller General and agency heads have concurrent jurisdiction to waive claims amounting to $500 or less. Effective December 28, 1985, the waiver statutes were amended to include claims arising from erroneous payments of travel and transportation expenses. As a result of this amendment, travel advance payments are subject to waiver to the extent that expenses are incurred by an employee or service member in reliance on erroneous authorizations. Hence, under 10 U.S.C. § 2774, as amended, waiver of indebtedness may be considered in the case of a member of the Air Force who was over-advanced $326.60 for his transfer to a new duty station, where it is shown that he received the overpayment as the result of an erroneous travel authorization and errors made in the computation of his entitlement. Since the record before us does not indicate whether the standards for waiver have been met in this particular case, the case is remanded to the Air Force for its determination of whether to grant waiver.

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Miscellaneous Topics

Agriculture
■ Agricultural Loans
■■ Default
■■■ Interest
■■■■ Waiver

The Farmers Home Administration (FmHA) appears to have broad statutory authority that would allow it to terminate the accrual of interest on the guaranteed portion of defaulted loans. However, under the regulations FmHA has promulgated to implement its statutory authority, FmHA may only terminate the accrual of interest on loans in limited circumstances if the borrower is eligible for such a debt reduction in accordance with the applicable regulatory requirements.

471

Procurement

■ Contract Administration
■■ Convenience Termination
■■■ Resolicitation
■■■■ GAO Review

Termination of contract for the convenience of the government and resolicitation of a requirement was not improper where shortly after award agency discovered that the quantity estimates for one line item in the contract were significantly understated and that award had been made based upon a mathematically and materially unbalanced offer.

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Payment/Discharge
■ Shipment Costs
■■ Additional Costs
■■■ Evidence Sufficiency

■ Shipment Costs
■■ Overcharge
■■■ Payment Deductions
■■■■ Propriety

General equitable considerations concerning the interpretation of government contracts do not affect a carrier's obligation under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1982), to collect only the applicable charges shown in the carrier's tender or tariff filed with the Interstate Commerce Commission. Where the carrier files two tenders, both of which are in effect and contain applicable rates for the same shipments, the government is entitled to use the lower rates. Therefore, there is no basis to reverse GSA's collection of overcharges, which was based on alternation provisions in both tenders giving the government the benefit of the lower rates.

■ Shipment Costs
■■ Additional Costs
■■■ Evidence Sufficiency

■ Shipment Costs
■■ Overcharge
■■■ Payment Deductions
■■■■ Propriety

Where notations on the Government Bill of Lading showed that standard equipment was ordered by the shipper but special equipment was furnished by the carrier, the carrier may offer evidence to show that government shipping agents ordered the special equipment. However, to refute the bill of lading notations the evidence must clearly show that the notations were mistaken. Since it did not, the General Services Administration's (GSA) actions in recovering overcharges from the carrier for the special equipment are sustained.

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