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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.

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Civilian Personnel

Relocation
■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service Breaks

An employee, as the consequence of an on-the-job injury, was separated from federal employment and carried on the rolls of the Office of Workers' Compensation Programs. Upon reemployment 5 U.S.C. § 8151 mandates that he be treated as though he had never left federal employment for the purpose of benefits based on length of service. Where he is reemployed at a different geographical location from his duty station at the date of separation he, therefore, is entitled to relocation expenses under 5 U.S.C. §§ 5724 and 5724a to the same extent as if he had been transferred to the new duty station without a break in service.

Civilian Personnel

Relocation
■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service Breaks

Where an individual is reemployed at his former duty station following a period of separation during which he was carried on the rolls of the Office of Workers' Compensation Programs, he is not entitled to reimbursement for expenses he incurs in relocating his residence back to that same duty station incident to the reemployment action. The individual's handicap resulting from an on-the-job injury does not justify an exception to the rule that one reappointed to federal employment following a break in service must bear the costs of traveling to his first duty station. These costs are common to all individuals appointed or reappointed to positions at locations distant from their places of residence; therefore, reimbursement for such costs cannot be viewed as ameliorating access-to-work impediments that arise as the result of a handicapping condition. However, because of equitable considerations, a report is being submitted to the Congress recommending that it authorize relocation expenses as a meritorious claim under 31 U.S.C. § 3702(d).

Matter of: Larry V. Salas and William D. Morger—Relocation Expenses—Restoration to Duty Following Injury

This decision deals with the authority of federal agencies to pay relocation expenses incident to the reemployment of individuals who, following an on-the-job injury, have been carried on the rolls of the Office of Workers' Compensation Programs (OWCP), Department of Labor. In view of the purpose behind 5 U.S.C. § 8151, we hold that such an individual may be paid relocation expenses upon

reemployment at a location other than his former duty station to the same extent as if he had been transferred between duty stations without a break in service. An individual who was reemployed at his former duty station, after having moved away from that duty station while being carried on the OWCP rolls, is not entitled to relocation expenses. For equitable reasons, the second individual's case is being referred to the Congress as a meritorious claim.

Background

We have been asked by certifying officers for the Departments of Agriculture and Interior to consider relocation expense claims presented by two individuals who have been reemployed by their respective Departments following periods of separation from government service during which each received disability compensation under the authority of 5 U.S.C. §§ 8101 *et seq.* We have addressed these two cases in a single decision because they present related issues.

Mr. Larry V. Salas was employed by the Forest Service in 1973 when he suffered an on-the-job injury. That injury was permanently disabling and Mr. Salas, thereafter, was unable to perform his duties as a forestry technician. In June 1977, when the Forest Service could no longer find lightduty work for Mr. Salas, his employment with the Department of Agriculture was terminated and Mr. Salas was transferred to the rolls of the OWCP. At the time of separation, his permanent duty station was the Kingston Work Center located in the vicinity of Truth or Consequences, New Mexico. In 1984, 7 years later, the Forest Service offered Mr. Salas a lower grade position in Silver City, New Mexico, under the Handicapped Employment Program. Mr. Salas accepted the position in Silver City, and submitted a claim for the costs he incurred in relocating his residence from Winston, New Mexico, to Silver City. The certifying officer for the Department of Agriculture is in doubt as to the agency's authority to reimburse the relocation expenses claimed.

Mr. William D. Morger was employed by the Bureau of Reclamation at Grand Coulee, Washington, when he suffered an on-the-job injury. His employment with the Department of the Interior was terminated in August 1977 and for the succeeding 8 years he was carried on the OWCP rolls. Sometime during this 8-year period Mr. Morger relocated his residence to Madera, California. On July 15, 1985, he was reemployed by the Bureau of Reclamation at Grand Coulee, his former duty station. In connection with his reemployment, Mr. Morger was issued a travel order purporting to authorize his transfer of official station from Madera to Grand Coulee. Under those travel orders he has been reimbursed relocation expenses, including travel and transportation of household goods as well as househunting and miscellaneous expenses. The certifying officer for the Department of the Interior has raised a question concerning the authority to reimburse these and other relocation expenses claimed by Mr. Morger.

Discussion

The expenses claimed by Messrs. Salas and Morger are in the nature of those authorized by sections 5724 and 5724a of title 5 of the United States Code for employees transferred in the interest of the government from one official station to another for permanent duty. This Office has held that the reference in section 5724 to a transfer from one official duty station to another requires a change in the permanent duty station of an employee without a break in service. 54 Comp. Gen. 747 (1975); *Greg T. Montgomery*, B-196292, July 22, 1980. Subsection 5724a(c) creates a limited statutory exception to this particular requirement for individuals who are reemployed at a different geographical location within 1 year following separation through reduction in force or transfer of function.

Essentially, there are three requirements that must be met before an employee is eligible to receive relocation expenses under 5 U.S.C. §§ 5724 and 5724a. The employee must be transferred from one permanent duty station to another; that transfer must be in the interest of the government; and it must be accomplished without a break in service. The records in Mr. Salas' and Mr. Morger's cases amply demonstrate that their reemployment at the particular location was viewed by the employing agency as an action taken in the interest of the government. It is the government's policy to employ those receiving disability compensation to the extent that suitable positions are available. Reemployment relieves the agency involved of the obligation to fund Federal Employees' Compensation payments and results in the productive employment of the individual in a position that serves the agency's needs. In Mr. Salas' case, the reemployment was at a different location and, thus, involved a change of official duty station, although that change of station was effected following a break in service of nearly 7 years. Mr. Morger was also reemployed following a substantial break in service; however, he was reemployed at his former duty station. His reemployment did not involve a change of official duty station.

We believe there is authority to regard an individual who has been carried on the rolls of the OWCP as transferred without a break in service when he is reemployed at a different geographical location than that which was his official duty station at the date of his separation. As to individuals who resume employment with the federal government after having been carried on the OWCP rolls, 5 U.S.C. § 8151 provides:

> (a) * * * the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

Although the Office of Personnel Management regulations implementing section 8151 do not specifically address the issue of relocation expenses, they apply that section broadly in terms of the employment benefits it accords the reemployed individual. Federal Personnel Manual, Chapter 353, Subchapter 5-1a(2), provides:

(2) *Following compensable injury.* Persons being restored after recovering from a compensable injury are generally entitled to be treated as though they had never left. The entire period an employee was receiving compensation or continuation of pay is creditable for purposes of rights and benefits based upon length of service, including within-grade increases, career tenure, and completion of the probationary period. However, employees do not earn sick and annual leave while in a nonpay status."

The effect of this regulation is to treat the reemployed individual as though he had never been separated from federal service and to accord him those rights and benefits, other than leave, that would accrue to an individual who did not have a break in service. In view of the broad remedial purpose behind 5 U.S.C. § 8151, we believe it is proper to apply this regulation for the purpose of preserving a reemployed individual's entitlement to the relocation expenses he would have received if he had been transferred without a break in service to the location at which he was reemployed. In Mr. Salas' case, he was reemployed at a different location than his duty station at the time of separation and he is, therefore, entitled to relocation expenses under 5 U.S.C. §§ 5724 and 5724a to the same extent as if he had been transferred without a break in service from the Kingston Work Center to Silver City. Since Mr. Morger was reemployed at the same location as that from which he had been separated 8 years earlier, however, 5 U.S.C. § 8151 does not have the effect of granting him the expenses that accrue to individuals transferred between duty stations.

The basic authorities to pay relocation expenses of federal employees are contained in chapter 57, title 5, of the United States Code. In addition to the transfer expense authorities discussed above, there is authority to pay a more limited range of expenses to individuals who are appointed to positions outside the continental United States and to individuals appointed to shortage-category positions. 5 U.S.C. §§ 5722 and 5723. None of these statutes provides authority to pay the relocation expenses of an individual who is appointed to a position in the United States that is not a manpower shortage category position or to an individual who is restored to a position at his former duty station, either with or without a break in service. We find no provision in the Workers' Compensation Act, 5 U.S.C. §§ 8101 *et seq.* or the regulations issued thereunder which specifically authorizes relocation expenses in a case, such as Mr. Morger's, where an individual who has been on the OWCP rolls is reemployed at his former duty station.

We are cognizant of the fact that many individuals who are reemployed following a disability have been permanently handicapped by that disability. For this reason, it is appropriate to consider whether this fact provides a basis to pay relocation expenses incident to the reappointment of a handicapped employee at his former duty station.

In early decisions, this Office concluded that illness or physical disability provided no basis for increasing the cost of transportation or travel expenses to be paid by the government. *See, e.g.,* 27 Comp. Gen. 52 (1947). More recently, however, we have made exceptions for the benefit of the handicapped. In 56 Comp. Gen. 398 (1977) and 55 Comp. Gen. 800 (1976) we authorized reimbursement of travel expenses for an attendant to accompany a handicapped employee per-

forming official travel. In 56 Comp. Gen. 398 (1977) we authorized the use of appropriated funds to reimburse a handicapped employee for the cost of a motorized wheelchair where the agency had violated the Architectural Barriers Act by installing carpeting in the employee's workplace that made a nonpowered wheelchair unusable. In each of these cases, the expenditure was directed at ameliorating an impediment to the employee's performance of his duties.

In 63 Comp. Gen. 270 (1984) we were asked to consider whether agencies may expend appropriated funds for commercial parking for the severely disabled where government parking facilities are unavailable. In that decision, we drew a distinction between those expenditures that confer a benefit which is primarily economic and those that ameliorate access-to-work impediments that arise from a severely disabled condition. Noting that ordinarily it is a federal employee's responsibility to furnish transportation to and from his place of employment, we held that an agency's appropriated funds may be used to reimburse a severely handicapped employee only to the extent he or she must, by reason of that disability, pay parking costs more than a *de minimis* amount above the costs paid by nonhandicapped employees for parking. This decision permits reimbursement for a portion of a severely handicapped individual's parking costs where, because of that handicap, he must incur higher costs to park near his place of work, while other employees are able to park at a lower cost some distance from the workplace.

Just as the cost of daily commuting to and from the workplace is to be borne by the employee, the general rule is that an employee must bear the expense of travel to his initial permanent duty station in the absence of a statute to the contrary. *Cecil M. Halcomb,* 58 Comp. Gen. 744 (1979); 53 Comp. Gen. 313 (1973). In the absence of authority such as 5 U.S.C. § 5724a(c), discussed above, this general rule applies to an individual who is reemployed by the government to the same extent that it applies to an individual appointed to his first position with the federal government. *Wallace E. Boulton,* B-192817, Dec. 18, 1978. The costs Mr. Morger incurred in relocating his residence back to his former duty station at Grand Coulee Dam, Washington, are no different than any employee who resided elsewhere would incur if he were employed or reemployed at that same location.

These are not costs that remove an access-to-work impediment. They are costs that must be borne by an employee who, like Mr. Morger, has chosen to locate his residence away from his former duty station during a period of separation from the government service. We know of no authority to reimburse costs of this nature which are occasioned by the employee's decision to relocate his residence away from his duty station while being carried on the rolls of OWCP. Unlike in Mr. Salas' case, discussed above, 5 U.S.C. § 8151 is unhelpful since its effect is merely to treat Mr. Morger as having been restored without a break in service to his former post of duty, an event that carries with it no statutory entitlement to relocation expenses.

In accordance with the above, Mr. Salas may be reimbursed relocation expenses authorized under 5 U.S.C. §§ 5724 and 5724a on the basis of a permanent change of station between the Kingston Work Center and Silver City, New Mexico. Although there is no legal authority to allow Mr. Morger's moving expenses, we are submitting this case to the Congress as a meritorious claim under 31 U.S.C. § 3702(d). In our submission we are recommending that the Congress authorize normal relocation expenses as though Mr. Morger had been an employee transferred in the interest of the government. For the benefit of the government, Mr. Morger was induced to move from Madera to Grand Coulee by the offer of relocation expenses. He accepted the position at Grand Coulee, thereby reducing or eliminating the agency's payments of Federal Employees' Compensation to him based on his disability and has performed valuable services for the Bureau of Reclamation. Based upon these equitable considerations, we recommend that the Congress favorably consider this meritorious claim. Collection action against Mr. Morger should be suspended pending congressional consideration of our request.

B-229014, March 2, 1988

Civilian Personnel

Compensation
■ Severance Pay
■■ Eligibility
■■■ Involuntary Separation
■■■■ Determination

An employee sought and received a transfer from a permanent career service position in ACTION to a time-limited appointment for 5 years in the Peace Corps, which could not be extended except for extraordinary reasons. For purposes of the severance pay statute, 5 U.S.C. § 5595 (1982), we find that she was an "employee" and that she was involuntarily separated, *i.e.*, her separation from her position in the Peace Corps was against her will and without her consent. Therefore, the employee is entitled to severance pay.

Matter of: Wanda Pleasant—Severance Pay

The issue involved in this decision is whether an employee who had previously held a career appointment in ACTION and was subsequently separated from her time-limited appointment with the Peace Corps was "involuntarily separated" from her position within the meaning of that phrase as used in 5 U.S.C. § 5595(b)(2) (1982), and thus is entitled to severance pay. For the following reasons, we hold she was involuntarily separated in that manner and thus is entitled to severance pay.

Background

This decision is in response to a joint request from the ACTION/Peace Corps Employees Union, AFSCME Local 2027 (union), and the Peace Corps (agency).

This request has been handled as a labor-relations matter under 4 C.F.R. Part 22 (1987), and pursuant to 4 C.F.R. § 22.7(b) (1987), our Office is issuing a decision to the parties on their joint request. The facts of this case, which have been jointly stipulated to by the union and the agency, are as follows.

With the exception of one brief period when she was employed by the U.S. Customs Service, Ms. Wanda Pleasant was an employee of ACTION from 1977 to 1980. On August 1, 1980, she was converted to career tenure. Subsequently, she applied for and received a position with the Peace Corps without a break in service on October 17, 1981. Her initial appointment with the Peace Corps was an excepted service, time-limited appointment not to exceed April 17, 1984. Her appointment was subsequently extended not to exceed October 17, 1986.

Employees of other agencies who receive a time-limited appointment in the Peace Corps, such as Ms. Pleasant, are no longer entitled to mandatory reinstatement to their former federal positions. Instead, reinstatement is permitted at the discretion of the employing agency.[1] In Ms. Pleasant's case, the Peace Corps' request that she be given reemployment rights was denied by ACTION on November 30, 1981.

At the end of her 5 years of service with the Peace Corps, Ms. Pleasant was separated on October 17, 1986. Her position was not abolished, and there were no reasons such as misconduct, delinquency, or inefficiency for her separation. We note that both the union and the agency have stipulated and the record confirms that Ms. Pleasant is an "employee" as specially defined for purposes of the statute governing severance pay since she transferred directly from a permanent career-tenure appointment in ACTION to the time-limited appointment in the Peace Corps, without a break in service. *See* 5 U.S.C. § 5595(a)(2)(ii) and (b)(1) (1982). Thus, the only issue for resolution in this case is whether Ms. Pleasant was "involuntarily separated" from her position within the meaning of that phrase as used in section 5595(b)(2) and thus is entitled to severance pay.

The union contends that Ms. Pleasant was involuntarily separated and argues that her case is analogous to our decision in *Susan E. Baity,* B-223115, Apr. 9, 1987, and to the holding in *Sullivan v. United States,* 4 Cl. Ct. 70 (1983), *affirmed per curiam,* 742 F.2d 628 (Fed. Cir. 1984). The agency, while conceding that *Baity* was correctly decided, contends that Ms. Pleasant's case is distinguishable from *Baity* because Ms. Pleasant did not have mandatory reemployment rights and thus did not have an expectation of unlimited employment. The agency also argues that Ms. Pleasant's separation was not involuntary under the criteria set forth in *Sullivan* which we relied on in *Baity.*

Discussion and Analysis

Entitlement to severance pay is governed by 5 U.S.C. § 5595 (1982) which provides, in relevant part, that:

[1] *Compare* the previous law, section 528 of the Foreign Service Act of 1946, 22 U.S.C. § 928 (1976), *with* section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), effective February 15, 1981.

(a) For the purpose of this section—

(1) 'agency' means—

(A) an Executive agency; [and]

* * * * *

(2) 'employee' means—

(A) an individual employed in or under an agency;

* * * * *

but does not include—

* * * * *

(ii) an employee serving under an appointment with a definite time limitation, except one so appointed for fulltime employment without a break in service of more than 3 days following service under an appointment without time limitation;

* * * * *

(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who—

(1) has been employed currently for a continuous period of at least 12 months; and

(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;

is entitled to be paid severance pay in regular pay periods by the agency from which separated.

We note that neither the statute nor the severance pay regulations in 5 C.F.R. §§ 550.701 *et seq.* (1986) attempt to further define the phrase "involuntarily separated." However, the United States Claims Court and our decision in *Baity* have given meaning to those words for the purposes of severance pay.

In *Sullivan,* the Claims Court considered the case of a career-tenured employee who voluntarily accepted a temporary appointment in another agency. This temporary appointment was renewed twice but was ultimately allowed to expire, and Ms. Sullivan's employment was terminated.

The court in *Sullivan* noted that the statutory provisions governing eligibility for severance pay due to involuntary separation are to be given a generous construction and that "voluntariness" is a question of fact. *Id.* at 74-75. Before attempting to define inoluntary separation, however, the court noted a deficiency in the Office of Personnel Management's (OPM's) proffered explanation. In *Sullivan,* OPM contended that severance pay was not designed to aid an employee serving in a position with a definite time limitation because his eventual separation is not unexpected. The government also argued in *Sullivan* that an employee who resigns voluntarily to accept a term appointment chooses to place himself in a position facing unemployment. Rejecting these arguments, the *Sullivan* court noted that:

. . . term appointees know from the start they have no right to their positions beyond the period stated. However, this does not establish that when our plaintiff was asked to leave she did so voluntarily. *Sullivan, id.* at 75.

The *Sullivan* court then went on to apply OPM's administrative definition in the related area of civil service retirement eligibility to interpret the severance pay statute's meaning of "involuntarily separated." Quoting the Federal Personnel Manual Supplement 831-1, § S11-2a, the court stated that the term "involuntary separation" means:

> any separation against the will and without the consent of the employee, other than separation for cause on charges of misconduct or delinquency . . . Note, however, that whether a separation is involuntary depends upon all the facts in a particular case; it is the true substance of the action which governs rather than the methods followed or the terminology used. *Sullivan, id.* at 75.

The *Sullivan* court then determined that the record clearly refuted any suggestion that Ms. Sullivan's separation was other than against her will and without her consent. The *Sullivan* court thus held, contrary to OPM's views, that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation.

In *Susan E. Baity,* cited previously, our Office followed the Claims Court's definition of "involuntarily separated" for severance pay purposes, which was set forth in *Sullivan.* After finding that the record in *Baity* clearly refuted any suggestion that Ms. Baity's separation was other than against her will and without her consent, we noted that "[w]e are bound by the statute and any denial of severance pay based on the unique circumstances of Peace Corps employment would require an amendment to the statute."

In regard to Ms. Pleasant's case, the agency, while conceding that *Baity* was correctly decided, contends that Ms. Pleasant's case is distinguishable from *Baity* for two reasons. First, the agency notes that while Ms. Baity had mandatory reemployment rights, Ms. Pleasant had only discretionary reemployment rights under section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), since she was hired by the Peace Corps after February 15, 1981, the effective date of that Act. Secondly, the agency argues that the expiration of Ms. Pleasant's appointment was not an involuntary separation because she did not have an expectation of unlimited employment.

In regard to its first contention, the agency's argument is based to a large extent on informal advice from the Office of Personnel Management (OPM) in a letter to the Peace Corps, dated August 2, 1982. In this letter, which was written before the Claims Court's decision in *Sullivan* and our Office's decision in *Baity,* OPM expressed the view that the severance pay regulation for employees with mandatory reemployment rights, 5 C.F.R. § 550.701(b)(1)(vi), does not apply to employees who have only discretionary reemployment rights.

It is true that Ms. Pleasant did not have mandatory reemployment rights but only discretionary reemployment rights under section 310 of the Foreign Service Act of 1980, 22 U.S.C. § 3950 (1982), since she was hired by the Peace Corps after February 15, 1981, the effective date of that Act. Furthermore, it is also true that the severance pay regulation for employees with mandatory reemployment rights, 5 C.F.R. § 550.701(b)(1)(vi), does not apply to employees who have only discretionary reemployment rights, and that, indeed, the severance pay

regulations in 5 C.F.R. Part 550.701 do not specifically mention employees with discretionary reemployment rights. However, by virtue of the "exception clause" of 5 U.S.C. § 5596(a)(2)(ii) (1982), quoted above, an employee, such as Ms. Pleasant, who was appointed for fulltime employment without a break in service of more than 3 days following service under an appointment without time limitation is clearly an "employee" for purposes of entitlement to severance pay. The fact that OPM's regulations do not specifically deal with coverage of an employee under these specific circumstances cannot serve to defeat a statutory entitlement to severance pay. *See Sullivan v. United States,* 4 Cl. Ct. 70, 72-74 (1983). Thus, the fact that Ms. Pleasant had only discretionary reemployment rights is irrelevant as to whether she is an "employee" for purposes of the severance pay statute.

The agency's second contention is that the expiration of Ms. Pleasant's appointment was not an involuntary separation because she did not have an expectation of unlimited employment. This contention is essentially the same as OPM's "presumption theory," which the Claims Court rejected in *Sullivan.* Both *Sullivan* and *Baity,* cited previously, demonstrate that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation.

In regard to Ms. Pleasant's separation, the record here shows that her separation was against her will and without her consent at the time of actual separation. There is no evidence to suggest that Ms. Pleasant could have stayed on or that she consented to be separated. Based on the criteria enunciated in the Claims Court's decision in *Sullivan* and our decision in *Baity,* we conclude that Ms. Pleasant was "involuntarily separated from the service" within the meaning of 5 U.S.C. § 5595(b)(2) (1982). As we noted above, *Sullivan* demonstrates that the appropriate point for determining whether a person was involuntarily separated is at the time of actual separation. Thus, Ms. Pleasant's expectations at the beginning of her time-limited appointment are not necessarily material to the determination of whether she was involuntarily separated. Furthermore, as we likewise noted in *Baity,* we are bound by the language of the severance pay statute, and any denial of severance pay based on the unique circumstances of Peace Corps employment would require an amendment to the statute.

Accordingly, we conclude that Ms. Pleasant's separation from the Peace Corps was involuntary as required by 5 U.S.C. § 5595(b)(2) (1982), and we hold that she is entitled to receive severance pay.

B-229892, March 3, 1988

Procurement

Competitive Negotiation
■ Offers
■■ Late Submission
■■■ Acceptance Criteria

A late proposal was properly rejected after the initial evaluation in accordance with alternate late proposal clause, where the agency found that the proposal did not offer any significant cost or technical advantage to the government.

Matter of: Genesys Research, Inc.

Genesys Research, Inc. (GRI), protests the rejection of its proposal as late under request for proposals (RFP) No. NIH-ES-87-04, issued by the National Institute of Environmental Health Sciences (NIEHS), Department of Health and Human Services (HHS).

We deny the protest.

The RFP sought proposals for the testing of the cytogenetic properties of approximately 100 chemicals. Five proposals were received by the closing date. GRI's proposal was received 1 day late. The RFP incorporated by reference Public Health Service Acquisition Regulation (PHSAR) § 352.215-10, 51 Fed. Reg. 43357 (1986), 52 Fed. Reg. 44397 (1987) to be codified at 48 C.F.R. § 352.215-10, which states:

> Notwithstanding the procedures contained in the provision of this solicitation entitled Late Submissions, Modifications, and Withdrawals of Proposals, a proposal received after the date specified for receipt may be considered if it offers significant cost or technical advantages to the Government, and it was received before proposals were distributed for evaluation, or within five calendar days after the exact time specified for receipt, whichever is earlier.

PHSAR § 315.412(c)(2) requires the contracting officer to determine, with the assistance of cost and technical personnel, whether the proposal meets the criteria of the regulation; that is, if the proposal offers significant cost or technical advantages to the government. Thus, the contracting officer submitted GRI's proposal, along with those timely received, to the peer review panel for evaluation. GRI's proposal was one of three found to be technically acceptable by the panel. The contracting officer also consulted with a contract specialist and the project officer to determine whether GRI's proposal offered any significant cost or technical advantages.[1]

GRI's proposal offered the highest cost and the evaluation report of the peer review panel established that two other proposals were received that were technically equal or better. The project officer also found that there was "nothing that would lead him to believe that further negotiations with GRI would result

[1] GRI has urged that alleged inconsistencies in the record cast doubt on whether the contracting officer fulfilled her responsibilities to consult with appropriate personnel to make this determination. From our review of the record, we find that the contracting officer properly fulfilled her responsibilities in accordance with PHSAR § 315.412(c)(2).

in advantages over the other acceptable offers." Therefore, the contracting officer concluded that GRI offered no significant cost or technical advantage to the government, and excluded it from further consideration.

An agency may consider a proposal that is received after the date required in the solicitation only if one of the exceptions to the rule against considering late proposals applies. *Design Data Systems,* B-225718.2, Mar. 5, 1987, 87-1 CPD ¶ 253; *ComPath Business Telephone Systems,* B-213575, May 22, 1984, 84-1 CPD ¶ 543. GRI's proposal was late and under HHS' applicable rules could only be considered if it offered a significant cost or technical advantage.

We find that the contracting officer's decision to reject GRI's proposal as late was reasonable, since, as submitted, the proposal offered neither a significant cost nor technical advantage to NIEHS. In this regard, "significant cost or technical advantage" clearly contemplates that an offer be more than merely technically acceptable.

GRI claims that NIEHS applied the "significant advantage test" prematurely. Since the RFP contemplated best and final offers (BAFOs) and GRI would apparently have been included in the competitive range, but for its late submission, GRI argues that it would be in the government's best interests to conduct discussions and solicit and review GRI's BAFO prior to deciding whether it met the "test," since this might show that GRI's proposal as revised offered the requisite significant cost or technical advantage.

We agree with HHS that the determination of whether a late proposal offers a significant advantage is properly made from evaluating the initial proposal. PHSAR § 315.412(c)(2) provides that the contracting officer determine whether a late proposal meets the requirements of PHSAR § 352.215-10 (quoted above) and "therefore can be considered." This provision clearly indicates that an affirmative determination be made whether a late proposal offers the requisite "significant advantage" before the proposal "can be considered." It necessarily follows that this determination be made before discussions are conducted and BAFOs are received. Moreover, the late proposal clause at issue is based upon the same exception to the requirement that late proposals be rejected that was contained in Federal Procurement Regulation (FPR) § 1-3.802-2 (1964 ed.).[2] Our decisions discussing the FPR provision recognize its implicit requirement that a finding of significant technical or cost advantage be made before a late proposal may be further considered. *See e.g. Capital Systems Group, Inc.,* 59 Comp. Gen. 717 (1980), 80-2 CPD ¶ 190; *National Motors Corporation, et al.,* B-189933, June 7, 1978, 78-1 CPD ¶ 416 at 22-23.

The protest is denied.

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[2] The provisions of FPR § 1-3.802-2 were not made part of the Federal Acquisition Regulation (FAR). However, the Public Health Service, HHS, after notice to the Chairman of the Civilian Agency Acquisition Council, published PHSAR §§ 315.412(c) and 352.215-10 as deviations from the FAR. 51 Fed. Reg. 43355 (1986); 52 Fed. Reg. 44397 (1987).

B-229581, March 4, 1988

Procurement

Bid Protests

■ Non-Prejudicial Allegation

■■ GAO Review

Protest is dismissed where protester objects to an item purchase description which has not been incorporated into a solicitation since General Accounting Office has jurisdiction over protests concerning solicitations and contract awards only.

Procurement

Socio-Economic Policies

■ Preferred Products/Services

■■ Handicapped Persons

Decision by Committee for Purchase from the Blind and Other Severely Handicapped to include item on list of commodities and services to be procured from workshops for blind or severely handicapped individuals is not subject to review by General Accounting Office in light of exclusive authority vested in the Committee under the Wagner-O'Day Act to establish and maintain the procurement list in accordance with the overall purpose of the act.

Matter of: Abel Converting, Inc.

Abel Converting, Inc., protests the amendment by the General Services Administration (GSA) of the item purchase description for National Stock Number (NSN) 7920-00-823-9772 paper towels. Abel contends that by amending the item description to permit flat fold (as opposed to pop-up) packaging for the towels, GSA made it possible for blind workshops to manufacture them, thereby restricting commercial competition for the towels in violation of the Competition in Contracting Act of 1984 (CICA). We dismiss the protest.

Abel is the incumbent contractor for the NSN 9772 paper towels at the Pennsylvania Army Depot in New Cumberland, Pennsylvania. Effective November 9, 1987, the Committee for Purchase from the Blind and Other Severely Handicapped, pursuant to its authority under the Wagner-O'Day Act, 41 U.S.C. §§ 46-48c (1982), added the New Cumberland depot's requirement for the towels to its procurement list of commodities and services to be produced or provided by workshops for blind or severely handicapped individuals. Under the Wagner-O'Day Act, once an item has been added to the procurement list, contracting agencies are required to procure the item from qualified workshops for blind or other severely handicapped individuals with the objective of increasing employment opportunities for those individuals. The Committee for Purchase is authorized to add and delete commodities and services from the list as it deems appropriate. *See KCL Corp.*, B-227593, July 16, 1987, 87-2 CPD ¶ 52.

According to Abel, GSA amended the packaging requirements in the purchase description for the towels to facilitate inclusion of the towels on the Committee for Purchase's procurement list. GSA denies that this was the case, explaining that it had previously amended the item description to require pop-up packag-

ing as part of its effort to standardize the packaging requirements for all towels in the same class, but had subsequently been advised by potential suppliers that a paper towel with the density and weight of the NSN 9772 towel could not be packaged in a pop-up dispenser. GSA then reviewed the contract file and determined that pop-up packaging was not a minimum need of the government. The purchase description was therefore revised to permit flat fold packaging.

Abel argues that revision of the purchase description to permit flat fold packaging was improper since only pop-up packaging will meet the minimum needs of the government. The protester contends that although our Office does not in general consider protests that specifications should be made more restrictive, our review is appropriate in this instance since relaxation of the requirement to allow flat fold packaging makes it possible for qualified workshops (which, according to the protester, lack the machinery to package in pop-up dispensers) to manufacture the towels, thereby restricting competition for the item by leading the Committee for Purchase to add the towels to its procurement list.

We dismiss the protest because the protester has failed to state a cognizable basis for protest. Under CICA, a protest is defined as an objection by an interested party to a solicitation or to the award or proposed award of a contract. 31 U.S.C. § 3551 (Supp. III 1985). Here, Abel is not objecting to the terms of a solicitation or to a proposed award; it is objecting to the purchase description of an item which has been included on the procurement list for qualified workshops and thus effectively has been removed from procurement in the competitive market. A complaint about a purchase description which has not been incorporated into a solicitation is not a protest within the definition of CICA, and thus does not fall within our jurisdiction. *See Centronics Sales & Service Corp.,* B-225514, Dec. 3, 1986, 86-2 CPD ¶ 640.

Moreover, while Abel attempts to characterize its protest as a limited challenge to GSA's determination to revise the packaging requirements, Abel's underlying objection concerns the Committee on Purchase's decision to include the towels on the procurement list for qualified workshops, a decision which is not subject to review by our Office in light of the exclusive authority vested in the Committee for Purchase to establish and maintain the list in accordance with the overall purpose of the Wagner-O'Day Act. *KCL Corp.,* B-227593, *supra.* In any event, we see no basis to question the decision to include the towels on the procurement list even assuming, as Abel initially suggested, that GSA relaxed the packaging requirements solely to facilitate inclusion of the towels on the list. Even if GSA had done so, in our view, it would not be improper to modify a feature such as packaging—which relates fundamentally to user preference or convenience—in order to promote inclusion of the towels on the procurement list.

The protest is dismissed.

B-229724, March 4, 1988

Procurement

Payment/Discharge

■ **Payment Priority**

■■ **Payment Sureties**

Consistent with doctrine of subrogation which allows a payment bond surety who pays the debts of his principal to assert all the rights of the creditors who were paid to enforce the surety's right to be reimbursed, payment bond surety has priority over an assignee bank to $2,902.29 paid by the surety to subcontractor materialmen.

Matter of: Priority of Payment Between Payment Bond Surety and Assignee

A disbursing officer with the United States Army, Corps of Engineers, asks about priority of payment of remaining contract funds between a payment bond surety and an assignee bank. For the reasons given, we find that the payment bond surety has priority.

Background

On July 30, 1985, the Pittsburgh District, Army Corps of Engineers, awarded a contract (DACW 59-85-C-0083) to Danbury Construction Co. for dredging a boat launching ramp in the Buffalo Creek Recreation Area, Buffalo Creek, West Virginia. The contract price was just under $100,000. Consistent with Miller Act requirements, 40 U.S.C. §§ 270a-270d, Danbury posted performance and payment bonds from the Fidelity and Deposit Company of Maryland.

On October 4, 1985, the Danbury Construction Company assigned its right to all contract proceeds to the First National Bank of Bellevue, Ohio. The Corps of Engineers accepted the assignment on October 9, 1985.

The facts indicated that the contractor completed the project; however, during the course of the work, the payment bond surety was required to make two payments to subcontractors totalling $2,902.29. On June 11, 1987, the Corps disbursing officer received a request from the Corps District Office of Counsel requesting that he pay the surety the $2,902.29 the surety paid the two subcontractors under the payment bond. In view of the assignment to the bank, the disbursing officer is concerned about conflicting claims to the $2,902.29 and thus asks us to determine who has priority.

Legal Discussion

The doctrine of subrogation allows a payment bond surety who pays the debts of his principal to assert all the rights of the creditors who were paid to enforce the surety's right to be reimbursed. *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136-37 (1962). For example, when a surety meets its obligations on a payment bond by paying claims of laborers and materialmen, it is subrogated to what-

ever rights the contractor and laborers had in undisbursed funds. *Id.* at 141. The surety's right has been held to relate back to the date of the surety bond, entitling it to priority over all subsequent lienholders and general creditors. *Western Casualty and Surety Co. v. Brooks,* 362 F.2d 486, 489-90 (4th Cir. 1966).

As an assignee can acquire no greater right to contract proceeds than its contractor-assignor had, and an assignor's right to payment under a government contract is subject to the surety's right to be reimbursed for amounts paid on the contractor's behalf, a payment bond surety would have priority over an assignee. 63 Comp. Gen. 533, 535 (1984).

In this instance, Fidelity and Deposit Company of Maryland, the payment bond surety, made two payments totalling $2,902.29 to subcontractors under the payment bond. The payment bond was executed several months prior to the assignment of contract proceeds to the First National Bank of Bellevue, Ohio. Consistent with the legal principles described, Fidelity and Deposit Company has priority over First National, as assignee, for the amount paid by the surety. We understand there are sufficient remaining contract proceeds to pay the surety.

B-226122, March 8, 1988

Civilian Personnel

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

When transferred federal employees can demonstrate a reasonable need, temporary quarters subsistence expenses (TQSE) may be paid for periods prior to the moving day at the old permanent residence and after the delivery day of household goods at the new permanent residence. Hence, an employee of the National Security Agency who was transferred from Ottawa, Canada, to Fort Meade, Maryland, may be allowed TQSE for his use of a hotel in Ottawa prior to the time his household goods were picked up at his old residence there, if he can demonstrate that the residence was unavoidably rendered uninhabitable prior to that time because of the packing of his furniture. The employee was also properly allowed TQSE for an additional night's temporary lodgings following the delivery of his household goods in Maryland because the delivery was made late in the day and without advance notice, and in those circumstances the employee could neither move into his new residence immediately nor avoid being charged for staying an additional night at his hotel.

Matter of: William D. Dudley—Transferred Employee—Temporary Quarters Subsistence Expense

An employee of the National Security Agency upon transfer to a new duty station may be paid temporary quarters subsistence expenses for the days he resided in temporary commercial lodgings before his household goods were picked

up from his residence at the old duty station only upon a showing that the temporary lodgings were reasonably necessary.[1]

Background

In February 1986 William T. Dudley, an employee of the National Security Agency received permanent change-of-station orders transferring him from Ottawa, Canada, to Fort Meade, Maryland. Mr. Dudley vacated his permanent residence in Ottawa on June 24, 1986, and occupied temporary quarters there and in Maryland through the night of July 21, 1986.

Mr. Dudley's household goods were picked up at his old residence in Ottawa on June 26, 1986, but they were packed a day earlier on June 25. The household goods were delivered to his new residence in Maryland on July 21.

The National Security Agency allowed Mr. Dudley temporary quarters subsistence expenses (TQSE) for the period from June 26, 1986 (date of pickup), through July 21, 1986 (date of delivery), but disallowed TQSE for the days of June 24 and 25 and July 22 when the household goods were not in transit. Mr. Dudley questions the correctness of the disallowance of the TQSE he claimed for those days. He states that the purpose of his starting TQSE in Ottawa on June 24 was to launder bed linens, etc., to have everything ready for the packers early on June 25. He also states that the specific date for delivery at the new station in Maryland was not known until late on July 21, and because of the lateness of the hour he had incurred an obligation to pay for an additional night at a motel on "21/22 July."

In requesting an advance decision in this matter, the responsible officials of the National Security Agency state that they have consistently followed the policy "that the pickup and delivery dates of household goods are the single most important factors in determining the TQSE eligibility period, absent justifiable reasons why the period should be extended." They question whether this policy is proper under the applicable statutes and regulations and also whether Mr. Dudley may be allowed the additional TQSE claimed on the basis of his explanations.

Discussion

An employee transferred in the interest of the government from one official station to another for permanent duty may be authorized subsistence expenses while occupying temporary quarters. 5 U.S.C. § 5724a(a)(3). Computation of eligibility period is specified in implementing provisions of the Federal Travel Regulations (FTR) para. 2-5.2f, *incorp. by ref.*, 41 C.F.R. § 101-7.003, as follows:

When computing the length of time allowed for temporary quarters at Government expense, the time period will begin for the employee . . . when . . . the employee . . . begins the period of use of

[1] Mr. Albert Depetro, Finance and Accounting Officer, National Security Agency, Ft. Meade, Maryland, requested our decision.

such quarters for which a claim of reimbursement is made. . . . The period of eligibility shall terminate when the employee . . . occupies permanent residence quarters or when the authorized period of time expires, whichever occurs first.

The Federal Travel Regulations further provide that the "administrative determination as to whether the occupancy of temporary quarters is necessary and the length of time for occupancy shall be made on an individual-case basis." FTR para. 2-5.1. Temporary quarters are to be regarded as an expedient to be used only for so long as is necessary for the employee to move into permanent residence quarters. FTR para. 2-5.2a(3). An employee shall be allowed subsistence expenses when occupancy of temporary quarters is determined necessary. FTR para. 2-5.2a(1).[2]

We have held that temporary quarters are to be regarded as an expedient to be used only so long as is necessary. *See Ben L. Zane,* B-194159, Oct. 30, 1979. For reimbursement to be allowed for the expenses of occupying temporary quarters a determination must therefore be made, on an individual basis in consideration of all the surrounding circumstances, that they were necessarily occupied. *Ben L. Zane,* B-194159, *supra.* Ordinarily this is a matter for determination by the employing agency, but our Office may make such determination predicated on the facts presented to us by the agency and the employee. *Ben L. Zane,* B-194159, *supra; Irving R. Warnasch,* B-193885, June 8, 1979; *Douglas C. Staab,* B-185514, Sept. 2, 1976.

In addition, we have expressed the view that, when an employee can demonstrate a reasonable need, TQSE may be allowed for periods prior to the time the employee's household goods are picked up at the old residence and after the time they are delivered to the new residence. *Irving R. Warnasch,* B-193885, *supra.* We have authorized TQSE in such circumstances, for example, when the permanent residence could not reasonably be occupied as living quarters by the employee because the utilities were disconnected, or necessary furniture was unavailable. *Irving R. Warnasch,* B-193885, *supra; Ben L. Zane,* B-194159, *supra.*

In the present case, therefore, it is our view that while the pickup and delivery dates of Mr. Dudley's household goods are factors to be taken into consideration in determining his need for temporary quarters, the period of his eligibility for TQSE may properly be extended if the record discloses the existence of other factors demonstrating a reasonable need for his use of temporary quarters before the pickup date and after the delivery date.

Mr. Dudley claims additional TQSE for the evening and morning of July 21 and 22, 1986, on the basis that his household goods were delivered to his new permanent residence too late in the day on July 21 for him to make proper arrangements for moving in that day, particularly since he was not furnished with advance notice concerning the time of arrival of the moving van. Our view is that under the statute and regulations governing the payment of TQSE, transferred

[2] Supplemental administrative directives applicable to the National Security Agency are contained in Volume 2 of the Joint Travel Regulations (2 JTR). Those directives conform to the governing provisions of the Federal Travel Regulations cited here. See para. C13004 and C13005, 2 JTR.

employees should be granted a reasonable period of time to unpack and make their new homes habitable after their household goods are delivered. It is also our view that employees' eligibility for TQSE should not be terminated on the day their household goods are delivered if, because of a lack of advance notice of the moving van's time of arrival, the employees have incurred an obligation to pay for temporary lodgings for an additional night.

However, National Security Agency officials now report that they followed this policy in Mr. Dudley's case, and that by their calculations he has already been reimbursed in the amount of $54.88 for his lodging expenses for the night of July 21-22, 1986. It appears that a mutual misunderstanding occurred concerning the listings of his daily lodging expenses that led him to believe that he had not been reimbursed for that night. That is, in reimbursing him for his claimed expenses for "July 21" the agency officials intended to cover the lodging expenses he had incurred for the evening of July 21-22, but in his claim voucher he instead listed these expenses as having accrued on "July 22." This mutual misunderstanding about the listing of the dates on which his lodging expenses accrued affected the basis upon which the agency reimbursed him throughout the claim period.

Thus, the confusion over the calendar days designated for lodging reimbursement caused Mr. Dudley to claim the Ottawa hotel rate of $41.99 on July 8, 1986, even though he had checked out that day and then checked into the Maryland lodging the same day at a daily rate of $54.88. He should now be reimbursed the difference, since the National Security Agency designates July 8 as a lodging day in Maryland.

As to Mr. Dudley's claim for additional TQSE for the period he maintained temporary quarters in Ottawa before his household goods were picked up at his old permanent residence on June 26, 1986, that claim relates to the packing of the goods prior to their pickup. We understand that transferred employees are often able to make arrangements with packers and movers to leave sufficient furnishings unpacked so that the residence can reasonably be used as living quarters up until the time the household goods are actually removed from the premises. Our view is that an employee's use of temporary quarters in those circumstances would not be a matter of necessity, but would instead be a matter of personal preference or convenience for which no TQSE could properly be allowed. Alternately, we understand that such arrangements are not possible in some situations, and the residence is rendered uninhabitable before the moving van arrives because the necessary furnishings have been packed away and cannot be used. Our view is that an employee's use of temporary quarters in those circumstances would be necessary, warranting payment of TQSE. The determination of necessity under the facts of a particular case is that of the agency in the first instance. *Ben L. Zane,* B-194159, *supra.*

The statement submitted by Mr. Dudley in support of his claim for TQSE on June 24 and 25, 1986, does not give us enough information concerning the amount of time, if any, his old residence was unavoidably rendered uninhabitable prior to June 26, 1986, because of the packing of his household goods. Hence,

on the basis of the record before us we have no alternative but to remand the claim for TQSE for that period to the National Security Agency. However, if he is now able to provide a new and more detailed explanation demonstrating that his use of temporary quarters for some period prior to June 26 was a matter of necessity rather than personal convenience, we would have no objection to a readjudication of his claim by the National Security Agency and the allowance of additional TQSE to him for that period.

The claim voucher and related documents are returned for further processing consistent with the conclusions reached here.

B-228411.3, *et al.*, March 10, 1988

Procurement

Contractor Qualification
■ Organizational Conflicts of Interest
■■ Allegation Substantiation
■■■ Evidence Sufficiency

The government is not required to exclude from a competition a firm that might possess advantages and capabilities due to the prior experience of its parent company, if there is no evidence of preferential treatment by the government or access to information unavailable to other offerors, and the parent company did not prepare material leading predictably, directly and without delay to the work statement.

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Sufficiency

The disclosure of precise numerical weights in an evaluation scheme is not required where the solicitation clearly advises offerors of the broad scheme to be employed and gives reasonably definite information concerning the relative importance of the evaluation factors in relation to each other.

Procurement

Competitive Negotiation
■ Offers
■■ Designs
■■■ Evaluation
■■■■ Technical Acceptability

Where an agency states its specifications in terms of detailed design requirements set forth in clear and unambiguous terms in a request for proposals, and states that it will evaluate major areas of the specifications, a submission of "conceptual designs" prepared in response to the solicitation's proposal instructions that did not include the detailed designs required by the specifications is not sufficient.

Procurement

Competitive Negotiation
■ **Requests for Proposals**
■ ■ **Evaluation Criteria**
■ ■ ■ **Subcriteria**
■ ■ ■ ■ **Disclosure**

An agency is not required to specify evaluation subfactors in a request for proposals (RFP) where those subfactors are reasonably related to or encompassed by the stated evaluation criteria, and offerors were on notice of the importance of the subfactors from the RFP itself.

Procurement

Competitive Negotiation
■ **Requests for Proposals**
■ ■ **Amendments**
■ ■ ■ **Submission Time Periods**
■ ■ ■ ■ **Effects**

Language in a letter from the agency and in an amendment to a solicitation giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of a request for best and final offers where all offerors submitted revisions to their proposals and no offerors were prejudiced.

Procurement

Competitive Negotiation
■ **Discussion**
■ ■ **Adequacy**
■ ■ ■ **Criteria**

Where an agency led an offeror into the areas of its proposals that required amplification and afforded it the opportunity to submit a revised proposal, meaningful discussions were conducted.

Matter of: Associated Chemical and Environmental Services, U.S. Pollution Control, Inc., and Chemical Waste Management, Inc.

Associated Chemical and Environmental Services (ACES), U.S. Pollution Control, Inc. (USPCI), and Chemical Waste Management, Inc. (CWM), protest the award of a contract to EBASCO Constructors, Inc., under request for proposals (RFP) No. DACA47-87-R-0034, issued by the Army Corps of Engineers for the interim removal and disposal of hazardous waste at Basin F, at the Rocky Mountain Arsenal in Colorado. The protests raise common issues: whether EBASCO has an organizational conflict of interest; whether the RFP properly informed offerors of the relative importance of the evaluation factors and whether those factors were used in selecting the successful offeror; whether the Corps properly and specifically requested best and final offers (BAFOs); and whether the Corps failed to conduct meaningful discussions with each of the protesters.

We deny the protests.

Background

The RFP, issued on May 26, 1987, contemplated a firm, fixed-price contract for the cleanup of Basin F, a 93-acre hazardous waste surface impoundment located in the Rocky Mountain Arsenal, which is a 27-square mile chemical waste site approximately 10 miles from the center of downtown Denver. The work consists of the installation of a force main or vacuum truck liquid removal system to remove up to 4 million gallons of contaminated liquid to government-provided storage tanks; the treatment by absorption of contaminated sludge material; the installation of a waste pile at a designated location; the excavation and removal of the existing basin liner and all solidified waste material to the waste pile; the installation of surface impoundments and runoff control structures; and the re-contouring of the excavated area to provide natural drainage after the work is completed.

The RFP required the submission of a three-volume technical proposal, to be evaluated in five areas, in descending order of importance: (1) operation and work plans; (2) price; (3) schedule; (4) experience, record of performance, and corporate commitments in organization and personnel; and (5) safety, health, and emergency response plan. The solicitation stated that award would be made to the responsible offeror within the competitive range who received the highest point score using the established evaluation formula and whose offer had been evaluated as most advantageous to the government, technical, price, and other factors considered. The RFP also provided that award might be made on the basis of initial proposals, without discussions, and reserved the right to the Corps to accept other than the lowest offer.

The Corps received 11 proposals from 7 offerors on August 7, 1987. A 23-member source selection board evaluated the initial technical proposals (pricing data was not evaluated at this time), and determined that only four proposals were in the competitive range. The Corps conducted written discussions with these four offerors via letters of August 18, addressing twelve common questions to all offerors and a number of specific questions to individual offerors. The August 18 letters stated that the Corps required a letter of clarification in response to the questions as well as an affidavit from a surety with respect to performance and payment bonds. The four offerors responded by the August 26 closing date.

Because the Department of Labor, on August 26, issued a change in the wage rate determination applicable to the solicitation, the Corps issued Amendment No. 10 on August 31, increasing some of the wage rates and stating that proposals would be received until 4 p.m. on September 9. In addition, in response to considerations raised in the initial proposals, the Corps decided to encourage offerors to submit alternate vacuum truck liquid removal system proposals. Because of these changes, the Corps determined that it would redefine the competitive range to include all offerors. Accordingly, on August 31, the Corps notified all offerors that alternate proposals and responses to Amendment No. 10 were due by September 9, and sent the three offerors initially excluded from the competitive range clarification questions and a request for an affidavit from a surety, with a response required by September 9.

The Corps received 14 proposals from the 7 offerors. The source selection board reviewed the initial point scores and determined that no further discussions were necessary. Based on the final total point scores for all factors, the Corps awarded a contract to EBASCO for its alternate proposal—Contaminated Liquid Removal Base Bid—in the amount of $21,939,429, on September 24. ACES, USPCI and CWM, with proposals ranked 14th, 12th, and 10th, respectively, protested to our Office following award. The Corps has proceeded with contract performance.

Conflict of Interest

All three protesters allege that EBASCO is ineligible for contract award because of work previously performed at the Rocky Mountain Arsenal by its parent company, Ebasco Services, Inc., that constitutes an organizational conflict of interest.

The protesters first assert that EBASCO, through its parent company, assisted in preparing the work statement for the RFP at issue or provided material leading directly to that work statement. They also contend that EBASCO enjoyed a competitive advantage as a result of preference and unfair action by the Corps because of EBASCO's access to Basin F data gathered under an Ebasco Services contract with the Army Materiel Command (AMC) that was not accessible to other offerors.

The Corps asserts that the design, work plan and specifications for the Basin F project were executed by Woodward-Clyde Consultants, a design contractor, and that neither EBASCO nor its parent company participated in the preparation of the work statement. The Corps admits that Ebasco Services did perform investigative work at the Arsenal, including Basin F, but indicates that EBASCO was only one of a number of firms whose work was incorporated into the work statement for informational purposes. The Corps further advises that the RFP provided, at three different places, the name, address and telephone number of the person to contact to obtain documents from the Rocky Mountain Arsenal library, including those prepared by Ebasco Services, all of which were either accessible to the public or available to potential offerors under this RFP despite their classified or restricted status. This information was reiterated, according to the Corps, at the preproposal conference. Furthermore, the Corps maintains, the RFP included all essential information known to the government concerning the contents and characteristics of the hazardous chemicals in Basin F, including any information previously gathered by Ebasco Services.

The Federal Acquisition Regulation (FAR) generally requires contracting officials to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, and 9.505 (FAC 84-12); *see ESCO, Inc.*, B-225565, Apr. 29, 1987, 66 Comp. Gen. 404, 87-1 CPD ¶ 450. In particular, the FAR provides that if a contractor (1) prepares or assists in preparing a work statement to be used in competitively acquiring a

system or services, or (2) provides material leading directly, predictably, and without delay to such a work statement, then the contractor generally may not supply the system or services unless more than one contractor has been involved in preparing the work statement. FAR § 9.505-2(b)(1). This restriction is intended to avoid the possibility of bias where a contractor would be in a position to favor its own capabilities. *Coopers & Lybrand,* B-224213, Jan. 30, 1987, 66 Comp. Gen. 216, 87-1 CPD ¶ 100.

Furthermore, the mere fact of a prior or current contractual relationship with a firm does not in itself create an organizational conflict of interest for that firm or that firm's subsidiary. *Ross Bicycles, Inc.,* B-217179, *et al.,* June 26, 1985, 85-1 CPD ¶ 722, *aff'd on reconsideration,* B-219485.2, July 31, 1985, 85-2 CPD ¶ 110. A particular offeror may possess unique advantages and capabilities due to the prior experience of its parent company, and the government is not required to attempt to equalize competition to compensate for it, unless there is evidence of preferential treatment or other action. *Ross Bicycles, Inc.,* B-217179 *et al., supra.*

We do not find that the Corps acted improperly in including EBASCO in the competition. It is undisputed that Woodward-Clyde Consultants, a development and design contractor, prepared the work statement for the RFP at issue and that EBASCO was not specifically employed to assist that firm. Ebasco Services was one of many contractors whose research material was used by Woodward-Clyde and ultimately incorporated by reference or specifically included in the work statement. The Corps has provided affidavits by the project managers from Woodward-Clyde and the Corps stating that EBASCO had no role in preparing the statement of work. Woodward-Clyde used the information contained in studies prepared by Ebasco Services and others that were available from the Arsenal library because those documents contained general information about hazardous materials for use on various Arsenal projects; the documents were not prepared specifically for inclusion in the RFP at issue. Although the Corps acknowledges that a few of the actions included in the RFP were among the recommendations provided in the general planning information of the Basin F closure plan prepared by Ebasco Services, that document did not lead directly and immediately to the RFP work statement since the procedures outlined were standard toxic waste cleanup procedures and did not provide any detail concerning the cleanup procedures that were so extensively detailed in the RFP. Moreover, not all suggestions raised in the closure plan were included in the RFP, and the RFP discusses many procedures not addressed in the closure plan.

In sum, EBASCO's parent company was only one of several contractors whose research materials on the Arsenal were ultimately incorporated by reference in the work statement, and the record does not demonstrate that specific reports prepared by Ebasco Services led directly to the work statement. On this basis, we do not think the Corps had to exclude EBASCO's offer from consideration for award.

The protesters second argument to support their position on this issue involves a 1984 indefinite delivery contract, No. DAAK11-84D-0017, between Ebasco Services and AMC, which the protesters argue is evidence that EBASCO had

unfair access to Basin F composition information through its parent company. That contract consists of 27 task orders involving surveys and studies concerning environmental contamination at the Arsenal. Four task orders cited by the protesters involve Basin F work: (1) Task Order No. 13, the Basin F closure plan, prepared in December of 1985; (2) Task Order No. 17, issued January 24, 1986, involved the evaluation of the incineration feasibility of Basin F waste as part of a permanent Basin F remedy; (3) Task Order No. 27, issued March 12, 1986, involved a conceptual design for a landfill for the Arsenal; and (4) Task Order No. 31, Basin F Interim Action Support, issued in April of 1987. The objective of Task Order No. 31 is to sample and analyze soil, sludge, surface water and ground water in and around Basin F in support of the Basin F project, to assess the southern pool liquid to determine if it is treatable conventionally, and to provide technical expertise regarding the Basin F removal action (*i.e.,* review design documents, provide consultant services).

The first three cited task orders either are not directly relevant to the award in issue and/or led to information included in the RFP or clearly available from the Arsenal library.[1] The protesters assert that under Task Order No. 31, however, Ebasco Services developed a chemical analysis program to be used to characterize Basin F liquids and solids, collected liquid samples from Basin F, and evaluated alternatives for the treatment of Basin F southern end liquid including backup calculations, schedule implications, and cost estimates, all of which were accessible to EBASCO through Ebasco Services, and not to other offerors.

The Corps contends that the information gathered under Task Order No. 31 did not allow EBASCO to determine the composition of the Basin F contents since Ebasco Services did not conduct chemical analyses of Basin F sludge, soil or overburden, conduct geotechnical work in Basin F, or provide the Corps with additional characterization of the Basin F sludge, as alleged by the protesters. Nor does the Corps believe that EBASCO's proposal contained information that indicated it had extensive additional knowledge of the Basin F site. Rather, another contractor, whose analysis was referenced in the RFP and was available at the Arsenal library, took the samples from Basin F. Moreover, the analysis of Basin F sludge was conducted, as stated above, by Woodward-Clyde and made available to offerors in the RFP itself.

The Corps notes that Ebasco Services did perform an analysis of two water samples taken from the southern pool of Basin F under Task Order No. 31 that indicated that the quality of the southern pool, which consists predominantly of rainwater runoff, was similar to that of the northern pool and thus no change to the Basin F Interim Action Project design was necessary, and that further treatability studies for the southern pool liquid were never conducted. The

[1] Task Order No. 13 was of a general nature, not specifically prepared for the interim cleanup of Basin F; did not involve sampling or testing of the contents of Basin F; and was specifically referenced in the RFP as available from the Arsenal library. Task Order No. 17 included taking one sample and preparing Basin F liquid volume measurements, and taking a sample and analyzing Basin F soil; was provided in the Appendix to the Safety Plan in the RFP; and was available from the Arsenal library. The concept design report for the Basin F landfill for this project, Task Order No. 27, was not prepared by Ebasco Services and was available to the public from the Arsenal library.

Corps states that the only other task conducted under Task Order No. 31 by Ebasco Services that relates to the interim, rather than the final, remediation of Basin F—an assessment of the liquid volume of the basin—provided information on the extent of surface elevation fluctuation of the contaminated liquid at different seasons of the year. This information appeared as elevation estimates in the RFP drawings; was reflected in the dates published in the RFP as preferred for commencement of the liquid pumping operation; and did not involve sampling of Basin F contents. AMC has informed the Corps that the remainder of Task Order No. 31, the sampling and analysis of contamination below the Basin F liner, has been deleted from the Ebasco Services contract.

We find that although Ebasco may have possessed an advantage due to the prior experience of its parent company on the AMC contract, the Corps was not required to neutralize that advantage since there was no evidence of preferential treatment of EBASCO or other action that gave EBASCO an unfair competitive advantage. The record does not establish that EBASCO possessed any information on the composition of Basin F materials that was unavailable to other offerors. In this respect, we note that the protesters suggest that the Corps may have allowed EBASCO, through its parent, unrestricted access to Basin F so that the firm was able to gather unauthorized samples from Basin F; the record, however, does not support the contention and the Corps, which specifically denies it, points out that strict government security measures are maintained at the Arsenal because of the hazardous situation that exists there.

We therefore find that EBASCO did not have an undue competitive advantage over other offerors that required its exclusion from award consideration.

Evaluation Criteria

First, USPCI and CWM argue that the RFP's listing of five specific evaluation factors in descending order of importance was overly broad, a defect that could have been cured by providing the numerical weighting of the factors.

The solicitation provided that award of the contract would be made to the highest scored proposal on the basis of the five major evaluation factors, listed in order of importance: operation and work plan, price, schedule, experience, and the safety, health and emergency response plan ("SHERP "). The actual weights given to the evaluation factors were as follows: operation and work plans 36 percent, price 30 percent, schedule 14 percent, experience 11 percent, and SHERP 9 percent.

A solicitation must clearly advise offerors of the broad scheme to be employed and give reasonably definite information concerning the relative importance of the evaluation factors in relation to each other. This, however, does not mean that the disclosure of the precise numerical weights to be used in the evaluation is required. *Raytheon Support Services Co.*, B-219389.2, Oct. 31, 1985, 85-2 CPD ¶ 495.

We think the RFP's statement that proposals were to be evaluated in five decreasingly important areas gave offerors a reasonably definite outline of how proposals were to be judged. We recognize that the actual weights given to the evaluation factors did not decrease by equal percentages. Nevertheless, we do not think they were necessarily inconsistent with the RFP's stated scheme, or that they were skewed in such a way as to lead us to conclude that offerors were misled about the evaluation scheme. *See Raytheon Support Services Co.,* B-219389.2, *supra; Bayshore Systems Corp.,* B-184446, Mar. 2, 1976, 76-1 CPD ¶ 146.

Second, ACES and USPCI allege that the Corps failed to follow the evaluation factors set forth in the RFP because the Corps, in evaluating proposals, focused not just on conceptual designs but on the offerors' responses to requirements set forth in the RFP design specifications and drawings. The protesters argue that most of these responses, at least in detailed form, were not actually required until after award or, in some cases, after the notice to proceed. The basis for this argument is that the RFP's proposal information section advised offerors that the operation and work plan should include only a "conceptual design" for each of the major aspects of the project. The protesters suggest that fully detailed plans were not actually due until the post-award plan review conference.

The RFP had approximately 250 pages of detailed design specifications including a summary of work, 9 additional appendices and a 135 page site-specific safety plan with 13 appendices and 25 drawings. The contract award section stated that any proposal not offering to provide all of the specific work contained in the RFP would not be considered to be in the competitive range.

The section of the RFP specifications relied upon by the protesters in support of their contention involves the preperformance plan review conference. That conference is to be held following award and before notice to proceed, for the purpose of discussing the contractor's plans with the contractor's superintendent, quality control personnel, safety personnel and the contracting officer, to make sure that all persons involved understand the contractor's plans. The section contains a notation that certain plans are due 21 calendar days after award and others, 21 calendar days after notice to proceed, referring to the submission of the required 10 copies of each plan for the purpose of the conference.

We find no legal merit to the protesters' position. Simply put, we think it obvious that the fact that the selected offeror was to discuss its plans with the agency personnel at a point after award, and did not actually have to submit copies of plans before then, did not relieve a firm from submitting with its proposal a complete response to the RFP's extensive specifications and requirements. We do not see how ACES or USPCI reasonably could have expected the Corps to accept, in lieu of a full response, simply the mere statement that the offeror would comply with the solicitation's extensive specifications, numerous drawings and appendices, and elaborate safety plan.

Moreover, the fact is that, no matter what ACES and USPCI might have thought when entering the competition, the Corps made it very clear to the firms, through the negotiations questions (which we discuss in the last section of

this decision), what the RFP contemplated and the agency expected. We do not think the protesters could, at that point, rely on how they initially read the RFP, so we do not find they were prejudiced by the evaluation in that regard.

Third, the protesters allege that the Corps improperly evaluated offerors' schedules. CWM alleges that the Corps based its evaluation on three unidentified significant subfactors: target performance dates for the beginning of the liquid removal system pumping and its completion, and for the final completion of the contract. USPCI and ACES contend that the Corps deviated from the evaluation criteria by comparing the length of offerors' proposed schedules against each other rather than considering each offeror's schedule in light of its technical approach, and USPCI further alleges that the Corps considered submissions not required until after award in its evaluation. CWM also states that the Corps should not have downgraded its proposal with respect to schedule in the final evaluation since it had not altered its proposed schedule between the initial and final evaluations.

Schedule was the third most important factor in the evaluation scheme. The liquid removal system pumping schedule constituted 7 percent of the total technical points available (1,090): 5.25 percent allocated to the beginning date and 1.75 percent to the completion date. Contract completion constituted 4.5 percent.

The RFP instructions reflected the importance of schedule for specific parts of the project. They called for the submission of a schedule of work activities with up to 100 components, depicted in terms of calendar days reflecting both the start and finish of all activities and the final completion date of the work and listed the significant work activities involved in the project with the contaminated liquid removal system as the first of nine major work elements. The specifications stated that a detailed schedule of all work activities was required with beginning and completion dates for each major work element. Under Liquid Transfer Schedule, the RFP stated that the contamination liquid removal system should be completed and operational prior to September 15, 1987 (revised from September 1, 1987). The section further stated that the three tanks to receive the liquid would be ready by September 15 and October 30, and the contractor should take all necessary measures to meet the deadlines. In addition, drawings of the surface impoundments included in the RFP noted that a construction period of 6 months (from December to May) was assumed. In addition, the minutes of the fully attended preproposal conference, which were provided to all offerors with an amendment to the RFP, emphasized the importance of completing the contaminated liquid removal during the fall, prior to winter weather delays and the addition of more liquid to the basin by spring rainfall. In response to questions concerning the preferred timeframe for work completion at the preproposal conference the Corps stated, "as soon as possible," again stressing the necessity to minimize the timeframe for completion of the project. Finally, during discussions, the Corps asked each offeror for details on steps it could take to reduce its overall construction timeframe and condense its schedule.

We find nothing improper in the Corps' evaluation of the schedule factor. It is clear from the numerous references to the importance of schedule in the RFP, at the preproposal conference, and in the discussion questions to all offerors, that a short period of performance was desirable. The Corps specified a desired performance goal date for the completion of the liquid removal system of September 15,[2] and noted that a 6 month construction period was assumed in its calculations for the surface impoundments. Moreover, the Corps repeatedly emphasized the importance of a short timeframe because of the problem of weather delays and rainfall accumulation. In sum, we think that offerors were on notice of the importance of the target dates for the liquid removal system and of the short suggested timeframe for contract completion, and we find nothing wrong in the way the Corps considered those matters.

In addition, USPCI's contention that the Corps used submissions required after award in its evaluation of schedule, and CWM's contention that its schedule was improperly downgraded, are not correct. The evaluation sheets submitted for our review show that the Corps evaluated only the specific timetables proposed by each offeror for the various stages of the project. In addition, CWM's score as to schedule was reduced because other offerors improved their schedules in response to the discussion question to all offerors to shorten the overall construction timeframe and condense their schedules.

Best and Final Offers

All three protesters allege that the Corps failed properly to request BAFOs from all offerors in the competitive range as required by FAR § 15.611(a) (FAC 84-16).

Generally, in negotiated procurements, agencies must conduct written or oral discussions with all responsible offerors within the competitive range before awarding a contract. *Metron Corp.*, B-227014, June 29, 1987, 87-1 CPD ¶ 642. Upon completion of discussions, the contracting officer must request BAFOs. That request must include notice that discussions are concluded, notice that this is the opportunity to submit a BAFO, and a common cutoff date and time. FAR § 15.611(b). However, where an amendment to a solicitation does not specifically request offerors to submit their BAFOs, language giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of a request for BAFOs. *James R. Parks Co.*, B-186031, June 16, 1976, 76-1 CPD ¶ 384.

Here, the Corps conducted discussions with the four offerors in the original competitive range, requesting responses (termed "letters of clarification" by the Corps) to the discussion questions by August 26. However, because of an August 26 change in the wage rate determination and its effect on offerors' proposed prices, and because of the Corps' decision to encourage the submission of alternate vacuum truck liquid removal system proposals, the Corps determined that it would include all offerors in the competitive range. Accordingly, the August 31 letters sent to all offerors included Amendment No. 10 (the wage rate modifi-

[2] This date was extended due to delay in the procurement process. As a result, the Corps utilized number of days proposed for the various stages of the project in evaluating offerors' proposed schedules.

cation) and gave notice that alternate proposals, responses to the discussion questions (if not already provided), the affidavit from a surety of intent to provide payment and performance bonds (if not already provided), and responses to Amendment No. 10, were required no later than September 9, 1987, at 4 p.m. Amendment No. 10, stated at the top of page 1: "Date for Receiving Proposals, 87 Sep 9" and in paragraph 3 of page 2: "Proposals will be received until 4:00 p.m., local time at place of receiving proposals, 87 Sep 9."

Although the Corps admits that it did not explicitly advise offerors that BAFOs were requested, it argues that because the RFP provided for the possibility of award on the basis of initial offers and because offerors were advised of a common cutoff date for the receipt of proposals, offerors were on notice that they should have provided their best offers. Indeed, the Corps argues, all offerors were given the opportunity to respond, and did in fact respond to the agency's concerns.

It is clear that from the record that all offerors were treated equally by the Corps and that all offerors were given, and in fact understood, that they had the opportunity to revise their proposals in the technical, schedule and price areas. Neither ACES nor USPCI has asserted that it was prejudiced by the Corps' actions. CWM, which alleges that it would "in all likelihood" have lowered its price and improved its competitive position, would have had to reduce its price by more than 30 percent in order to have been in a position to have received the contract, and has not demonstrated or even asserted that it contemplated such a large price reduction. Accordingly, we do not find that any of the protesters was prejudiced by the Corps' failure specifically to request BAFOs, so that the failure provides no basis on which to object to the procurement.

Meaningful Discussions

The three protesters allege that the Corps failed to conduct meaningful discussions with each of them.

The requirement for discussions with all responsible offerors whose proposals are in the competitive range includes advising them of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. FAR §§ 15.610(c)(2) and (5); *Furuno U.S.A., Inc.,* B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Agencies are not, however, obligated to afford offerors all-encompassing discussions, *Training and Management Resources, Inc.,* B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244, or to discuss every element of a technically acceptable, competitive range, proposal that has received less than the maximum possible score, *Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture,* B-219343.3, Oct. 4, 1985, 85-2 CPD ¶ 380, but generally must lead offerors into the areas of their proposals which require amplification. *Furuno U.S.A., Inc.,* B-221814, *supra.*

(1) CWM

CWM alleges that the Corps' written discussions failed to point out certain deficiencies in the company's initial proposal which subsequently were addressed in the Corps' debriefing letter: CWM's schedule, its price, its operation and work plan, and its SHERP.

The weakness identified by the Corps in CWM's schedule concerned the amount of time required to begin the liquid pumping operation and to complete the entire project, making CWM the 10th lowest ranked offeror out of 11 on this evaluation factor, with 33 out of a possible 140 points. The Corps' discussion letter to CWM included a question addressed to all offerors concerning the ability to reduce the overall construction timeframe, minimize the impact of the addition of further liquids to the basin due to weather conditions, and condense the schedule. CWM declined to change its schedule in response to this question.

We think the Corps conducted adequate discussions with CWM with regard to schedule. CWM proposed the second longest schedule. The Corps emphasized the importance of a short timeframe in the RFP and the preproposal conference, as discussed above with regard to the evaluation criteria, and, in the discussion questions concerning schedule, clearly indicated that this was an area of CWM's proposal that needed revision. CWM had the opportunity to shorten its schedule and declined to do so.

With regard to price, the Corps did not raise this issue with CWM since it considered CWM's price to be reasonable and had included CWM in the competitive range. Agencies may inform an offeror that its cost is considered to be too high or unrealistic, FAR § 15.610(d)(3)(ii), but the record here contains no evidence that the Corps believed that CWM's costs were unreasonably high. In fact, CWM's proposal ranked eighth in price out of the 11 initial proposals, while the awardee's proposal ranked sixth, and CWM has not suggested any specific reasons why the Corps should have found CWM's price to be unreasonable or unrealistic.

The Corps noted three weaknesses in CWM's operation and work plan relating to the absorption process: its lack of unconfined compressive strength tests for the reagent formula, its lack of a schedule for post-processing tests of the same nature, and its proposal to mix clean soil with the sludge to be placed in the waste pile thereby increasing the size of that pile. The Corps' discussion questions were directly related to the weaknesses later identified by the Corps: clarification of CWM's tests for compressive strengths, its post-processing acceptance testing procedures, its proposed absorption process mix, and its specific additive dosages and ratios. We also note here that CWM ranked first in the initial technical evaluation anyway, and that the areas mentioned account for only 30 out of a possible 450 points.

(2) ACES

The second protester, ACES, also alleges that the Corps' written discussions failed to point out deficiencies subsequently addressed in the Corps' briefing letter concerning operation and work plan, SHERP, and schedule.

ACES first challenges the adequacy of the eight questions relating to its initial operation and work plan, where it received 192 out of a possible 360 points, and its SHERP, where it received 64 out of possible 90 points, making its technical ranking 10th out of 11 initial proposals. Most of the weaknesses later identified by the Corps concern ACES' lack of detail in its proposal, in particular as to ACES' in-situ absorption process and sources of the absorption agent, flyash, sample collection in the quality assurance-quality control plan, placement of material into the waste pile, and leachate pumping system, including the method of screening solids prior to pumping. Other weaknesses concerned ACES' utilization of phosphoric acid after processing, and its failure to include an air dispersion model required by the SHERP.

We find that the Corps did conduct adequate discussions with ACES on these matters by leading the firm into the areas of its proposal that required amplification. The Corps' discussion questions requested additional information on ACES' amount of absorption agent and its proposed absorbent-to-sludge ratio, and the control of emissions in ACES' in-situ absorption process; asked for an outline of ACES' quality assurance and control plan and inquired concerning frequency and methods of taking samples for testing of materials so as to assure that performance criteria are met during the absorption process; requested details regarding the system for placement of material into the waste pile; and asked for information on the pumping intake system and its cleaning. The Corps notes with regard to ACES' failure to list sources of its absorption agent that the RFP required, and the Corps required for evaluation of the adequacy of ACES' absorption process, information on the materials to be used and the quantities of each, as well as a design analysis and calculations, drawings and specifications. In addition, the Corps states that the RFP specifically noted in the design specifications that the supply of flyash was very limited. The Corps also asked questions about ACES' absorption agent calculations and other information relating to its use of flyash.

Further, the Corps did not address the adverse effect of phosphoric acid after processing because ACES raised this problem in its response to the discussion question. An agency is not required to reopen discussions concerning a problem that arises in a BAFO. *Inter-Continental Equipment, Inc.,* B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122.

With regard to ACES' failure to include a required air dispersion model in its SHERP, specifications clearly required the submission of a site-specific air dispersion model, and the Corps in fact addressed the deficiency in discussions.

Finally, concerning ACES' schedule, ACES' proposal received the lowest initial score of all offerors because ACES proposed the longest timeframe. The Corps addressed the deficiency in ACES' schedule in the discussion question addressed to all offerors concerning the ability to reduce the overall construction timeframe and condense the schedule due to possible adverse effects of weather, and specifically asked ACES for details on timeframe and activities between award of the contract and beginning and completion of the liquid pumping operation.

We think ACES clearly was on notice that its schedule was an area of its proposal that needed revision.

(3) USPCI

The third protester, USPCI, also alleges that the Corps identified informational weaknesses in USPCI's proposal in its debriefing letter that were not revealed by the Corps to USPCI during discussions concerning the firm's operation and work plan and its SHERP, schedule, and experience.

USPCI first challenges the adequacy of the 11 questions addressed to all offerors and the 33 questions addressed to USPCI dealing with USPCI's operation and work plan, which received 111.5 out of 360 possible points, and its SHERP, which received 49.5 out of 90 possible points, giving USPCI the lowest technical score of the 11 initial proposals.

The weaknesses identified by the Corps concern USPCI's lack of design information or detail in its proposal and USPCI's failure to furnish an air dispersion model. The information weaknesses relate to all major areas of USPCI's proposal including the liquid pumping operation, the absorption process, the waste pile construction, material removal the runoff/runon control plan, and the quality control plan. The discussion questions posed by the Corps in the technical area were directed toward eliciting more specific, detailed information from USPCI. One general question asked for "more breakdown of all data called for in the RFP." Specific questions addressed to USPCI only or to all offerors were for more information (specifically mentioning that the problem of screening solids from the liquid was not addressed), on absorption post-processing acceptance testing, on leachate pumping from the waste pile, material removal and runoff control. In fact, USPCI admits that it failed to provide the detailed information requested by the Corps because it determined that the RFP proposal instructions required conceptual designs only and that detailed plans were not required until after award. Other questions requested information that was required by the RFP but not included in USPCI's proposal concerning USPCI's utilities installation, its mobilization plan, its air dispersion model, the development of action levels and protective equipment for use in the event of a health or safety emergency, and the identification of work zones.

As was the case with the other protesters, we think this record establishes that the Corps met its responsibility to conduct meaningful discussions with USPCI with regard to the firm's operation and work plan and SHERP. The Corps led USPCI into the areas of its proposal that required amplification through both general questions requesting more detailed data and specific questions relating to gaps in each of the major technical areas of USPCI's proposal later cited as weaknesses.

USPCI also challenges the adequacy of discussions concerning its schedule, which received 74 out of 140 possible points and ranked fifth out of 11 proposals, and its experience, which received 20 out of 110 possible points and ranked last. The Corps, however, in effect addressed the deficiency in USPCI's schedule in the discussion question addressed to all offerors concerning the ability to reduce

the overall construction timeframe and condense the schedules due to possible adverse effects of weather, and in the question to USPCI concerning the exact number of days after award that would elapse before beginning and completion of the liquid pumping operation. These discussion questions to USPCI put the firm on notice that this was an area of its proposal that needed revision.

Finally, the record shows the Corps did not address discussion questions to the deficiencies in USPCI's experience, corporate commitments or personnel because the agency felt that the requirement for this information was clearly stated in the RFP. We will not object to the Corps' decision. The RFP called for offerors to reference all comparable construction work and to include certain specific details; clearly required key personnel to be committed to the entire work effort; and asked for specific information concerning corporate commitments. USPCI addressed these areas in its proposal, listing its construction experience, specifically noting that it did not intend to commit its key personnel to the entire work effort, and supplying the required information regarding its corporate commitments. We do not think the Corps had a duty to inquire further of USPCI as to this information, as the firm's proposal reflected business decisions on manpower allocation clearly requested by the solicitation.

The protests are denied.

B-228696, March 10, 1988

Civilian Personnel

Travel

■ Bonuses

■■ Acceptance

■■■ Propriety

An employee, while traveling on official business, was denied lodging the first night at the selected hotel due to their overbooking. The hotel issued a bonus lodging certificate to the employee for one night of free lodging. Such a certificate is the property of the government and not the employee since the general rule is that a federal employee is obligated to account for any gift, gratuity or benefit received from private sources incident to the performance of official duty. Also, allowing the employee to retain the certificate would result in double reimbursement to the employee since the government paid for lodging at a substitute hotel that evening.

Matter of: Elizabeth Duplantier—Use of Bonus Lodging Certificates

This decision is in response to a request from the Director, Office of Finance and Accounting, Department of Housing and Urban Development (HUD), for an opinion regarding the use of bonus lodging certificates given as compensation for denied lodging while on temporary duty travel. Specifically, the question concerns a HUD employee on temporary duty who was issued a bonus lodging certificate by a hotel which was overbooked and denied her lodging the first night of her travel. The employee subsequently used this certificate for lodging on one night of personal travel. The agency asks whether the bonus lodging cer-

tificate, granted because of denied lodging, can be used for personal travel or does it belong to the government. For the reasons stated below, we hold that the bonus lodging certificate is the property of the government and may not be used by the employee for personal travel.

Background

During the period May 11 through May 17, 1987, a group of HUD employees on temporary duty travel to New York City were denied lodging upon arrival at their hotel on the first night even though they had confirmed reservations. In order to compensate for the overbooking, the hotel issued a bonus lodging certificate to each employee for one night of free lodging. All but one employee used the bonus certificate to cover the cost of lodging on one of the nights later in the week while still on official business.

Ms. Elizabeth Duplantier, Office of the Inspector General, Boston Regional Office, believed that the bonus certificate belonged to her since it was compensation for her inconvenience. Consequently, Ms. Duplantier used the bonus certificate to stay over one additional night in New York City for personal reasons.

By memorandum dated May 21, 1987, the agency notified Ms. Duplantier that, after reviewing the travel voucher she submitted for her trip, her travel costs were being reduced by $85 which represents one night's lodging at the hotel which issued the bonus lodging certificate. The agency stated that, since the certificate was issued to Ms. Duplantier while she was in official travel status incident to government business, the agency believes the coupon should have been applied to a night's lodging while she was still in travel status later in the week.

By memorandum dated May 29, 1987, Ms. Duplantier requested that the agency reconsider its decision to reduce her travel voucher by $85. Ms. Duplantier questions the requirement that the bonus certificate be applied to official rather than to personal travel because she feels the certificate belonged to her insofar as it represented compensation for her inconvenience. She further stated that she believes her situation is analogous to a person giving up a seat on an airline and obtaining a free flight coupon. She notes that there is a Comptroller General decision holding that such a benefit accrues to the employee.

Opinion

Reimbursement of the necessary travel expenses of a federal employee on official business is a matter for payment from appropriated funds in accordance with the provisions of chapter 57 of title 5, United States Code, and the implementing regulations issued by the General Services Administration. Our Office has long held that a federal employee may not also be reimbursed from private sources for expenses incident to the performance of official travel, and any such payments tendered to the employee are viewed as having been received on behalf of the government. *See John B. Currier,* 59 Comp. Gen. 95 (1979), and

cases cited therein. *See also* Federal Travel Regulations, para. 1-1.6b (Supp. 9, May 14, 1984), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1987). The purpose for this is to avoid any conflict of interest, since it is fundamental that an employee must account for any gratuity received from private sources incident to the performance of official duty, and also to prevent double reimbursement to the employee for the same travel.

Thus, in *Johnny Clark,* B-215826, Jan. 23, 1985, we held that an employee may not make personal use of non-transferable bonus lodging points earned as a result of a combination of government-funded and personal travel. Since the bonus points accumulated by the employee in *Clark* were acquired in part through the use of federal funds, any awards or benefits which accrued from the hotel's promotional program are the property of the United States and must be relinquished to an appropriate agency official. Moreover, we held in *Clark* that the fact that these bonus lodging points were non-transferable was of no consequence since, inasmuch as the points were the property of the government, the employee who received the lodging points has no more legal right to them than any other person.

We have also held that, where a federal employee travels on official business and is denied boarding on a scheduled airline flight, it is the government that stands to be damaged by the airline's default in overbooking the flight and this payment must be turned over to the government. *See, Currier, supra.;* 41 Comp. Gen. 806 (1962); *Tyrone Brown,* B-192841, Feb. 5, 1979. *See also* FTR, para. 1-3.5b. No exceptions have been permitted even where the government incurs no additional subsistence expense or the employee reports for duty at the same time as originally intended.

However, we have allowed an employee to keep payments made by an airline for *voluntarily* vacating his seat on an overbooked airplane. *Charles E. Armer,* 59 Comp. Gen. 203 (1980); *Edmundo Rede, Jr.,* B-196145, Jan. 14, 1980. We did so in part because the Civil Aeronautics Board (CAB) had just issued regulations to encourage airline passengers to voluntarily relinquish their seats. We reasoned that the purpose of CAB's regulations would be frustrated if we did not allow employees to keep these payments. We also held that there was no double reimbursement and no conflict of interest.

Allowing the employee to retain these voluntary payments is subject to certain conditions, however. If the employee incurs additional travel expenses by voluntarily relinquishing his seat, these expenses would be offset against the payment received by the employee. Also, employees should not voluntarily give up their seats if it will interfere with the performance of their official duties. Finally, to the extent the employee's travel is delayed during official duty hours, the employee would be charged annual leave for the additional hours. *See Armer,* above.

The situation in this case, however, differs from the exception for employees who voluntarily relinquish their seats on an overbooked airplane. Here, the bonus lodging certificate was received by the employee as a penalty payment by

the hotel for failing to honor the employee's reservation, which was made incident to official travel. As such, it is a benefit or item of value received from a private source incident to the performance of official duty, in the same manner as the denied boarding compensation in *Currier,* above. Hence, it falls within the general rule requiring the benefit to be turned over to the government, since it is the government which stands to be damaged by the hotel's failure to honor the reservation. To allow the employee to retain and use the bonus certificate for personal travel would constitute double reimbursement to the employee since the government paid for the cost of her lodging at the substitute hotel that evening.

Accordingly, we conclude that the bonus lodging certificate issued as denied lodging compensation is the property of the government, and that Ms. Duplantier's voucher was properly reduced by the value of the certificate.

B-229927, March 10, 1988

Procurement

Socio-Economic Policies
■ Labor Surplus Set-Asides
■ ■ Geographic Restrictions
■ ■ ■ Contractors
■ ■ ■ ■ Eligibility

A bidder does not have to have its offices physically located in a labor surplus area (LSA) to qualify for award under a solicitation restricted to LSA concerns, since the restriction only requires substantial performance in an LSA.

Matter of: Singleton Contracting Corporation

Singleton Contracting Corporation protests the prospective award of a contract to Roy Larson Construction, Inc., the apparent low bidder under invitation for bids (IFB) No. GS-03P-88-DXC-0007, issued by the General Services Administration (GSA). The solicitation, a set-aside for small businesses agreeing to perform as labor surplus area (LSA) concerns, sought bids for the renovation of a courthouse in Norfolk, Virginia. Singleton asserts Larson's bid is nonresponsive since Larson is not located in an LSA.

We deny the protest. The LSA clause requires the bidder to agree to perform as an LSA concern—defined as a firm that will perform substantially in a geographical area designated by the Department of Labor as an area of labor surplus—or be considered nonresponsive and thus ineligible for award. *See* Federal Acquisition Regulation (FAR) § 52.219-5 (FAC 84-10). The clause thus does not require a firm to have its offices physically located in the LSA.

Moreover, we note, GSA states that after bid opening the contracting officer became aware that Norfolk, where contract performance necessarily will take

place, actually was not classified as an LSA. On the basis of this information, the contracting officer has decided to withdraw the LSA restriction because otherwise no bidder (including Singleton) would be able to comply with the terms of the solicitation. GSA intends to proceed with award to Larson since the firm's bid was responsive to the original solicitation and since the agency has concluded that the LSA requirement did not restrict competition under the IFB. In this respect, the announcement of the procurement in the *Commerce Business Daily* did not indicate that the procurement was so designated, and a survey by GSA of firms that did not bid indicates that the restriction was not relevant to their decisions. We see no reason to object to GSA's proposal in the circumstances.

The protest is denied.

B-229958, March 10, 1988

Appropriations/Financial Management

Budget Process

■ Permanent/Indefinite Appropriation

Miscellaneous Topics

Finance Industry

■ Financial Institutions

■■ Government Corporations

■■■ Funding

Statutory authority to fund the Commodity Credit Corporation for 1988 and subsequent fiscal years by means of a current indefinite appropriation is merely an authorization to make appropriations in that manner. It is not itself an appropriation act and cannot be construed to nullify or supersede line-item appropriations for fiscal year 1988.

Appropriations/Financial Management

Budget Process

■ Conflicting Statutes

■■ Statutory Interpretation

Appropriations/Financial Management

Budget Process

■ Continuing Resolutions

■■ Statutory Interpretation

■■■ Congressional Intent

When two statutes are enacted on the same day, even if there is evidence that one passed several hours after the other, we will not apply the general rule that the later passed statute represents the most recent expression of congressional will and therefore nullifies or supersedes the earlier statute, to the extent that they are inconsistent. Such close proximity in time is forceful evidence that Congress intended the two statutes to stand together.

Matter of: The Honorable Patrick J. Leahy, United States Senate

This is in response to your letter of January 5, 1988, requesting our opinion on the status of the Commodity Credit Corporation's (Corporation) fiscal year 1988 funding authority. In your letter, you asked us to advise you concerning the impact of section 1506 of the Omnibus Budget Reconciliation Act of 1987 (Reconciliation Act), Pub. L. No. 100-203, approved Dec. 22, 1987, 101 Stat. 1330 on the fiscal year 1988 line-item appropriations made by the Joint Resolution making further appropriations for the fiscal year 1988, and for other purposes (Continuing Resolution), Pub. L. No. 100-202, approved Dec. 22, 1987, 101 Stat. 1329. Specifically, you asked us to consider whether the line-item appropriations for fiscal year 1988 are nullified by the Reconciliation Act and whether the Reconciliation Act creates a current, indefinite appropriation for the fiscal year 1988. Because of your concern that farmers receive, without disruption, the payments owed to them by the Corporation, you asked whether, in our opinion, payments to farmers might be dependent upon supplemental appropriations in fiscal year 1988.

For the reasons given below, we conclude that the language in the Reconciliation Act which authorizes funding of the Corporation for 1988 and subsequent fiscal years by means of a current, indefinite appropriation does not nullify line-item appropriations in the Continuing Resolution and does not alter or expand the availability of those appropriations. Because the Reconciliation Act does not contain a specific direction to pay, it cannot itself be construed as an appropriation. Therefore, payments to farmers would have to be suspended if the Corporation exhausts its fiscal year 1988 budget authority available for payments to farmers and supplemental funds are not appropriated.

Background

The Corporation is a wholly owned government corporation and has an authorized capital stock of $100 million. 15 U.S.C. § 714e. In addition, the Corporation is authorized to borrow funds from the Treasury and other lenders. Effective in fiscal year 1988, the Continuing Resolution provided authority for the Corporation to increase its total borrowings from $25 billion to $30 billion. As you noted in your letter, Congress, in previous years, appropriated money in a lump-sum in order for the Corporation to pay its indebtedness to the Treasury. The Corporation used its borrowing authority to fund its upcoming activities for the year. However, in the Continuing Resolution, the Congress rejected this approach for fiscal year 1988 and funded the Corporation's programs and activities by means of direct, line-item appropriations from the Treasury for the Corporation's operating expenses under 17 major program accounts. *See* H.R. Rep. No. 100-498, 1108 (1987).

In section 1506(a) of the Reconciliation Act, the Congress amended 15 U.S.C. § 713a-11 to read as follows:

There is hereby authorized to be appropriated annually for each fiscal year, by means of a current, indefinite appropriation, out of any money in the Treasury not otherwise appropriated, an amount sufficient to reimburse Commodity Credit Corporation for its net realized loss incurred during such fiscal year, as reflected in its accounts and shown in its report of its financial condition as of the close of such fiscal year. Reimbursement of net realized loss shall be with appropriated funds, as provided herein, rather than through the cancellation of notes.

The Reconciliation Act also provided that beginning with fiscal year 1988, "No funds may be appropriated for operating expenses of the Commodity Credit Corporation except as authorized under section 2 of Public Law 87-155 [15 U.S.C. § 713a-11] to reimburse the Corporation for net realized losses." You asked our opinion as to whether this amended language creates a current indefinite appropriation which nullifies the line-item appropriations made by the Continuing Resolution for operating expenses of the Corporation. We conclude that it does not.

Discussion

By the terms of the phrase, "There is hereby authorized to be appropriated," section 1506 of the Reconciliation Act, provides only the *authority* for enactment of a current indefinite appropriation to reimburse the Corporation for its net realized loss. The provision does not, however, actually appropriate funds. You are correct in pointing out that a statute which contains a specific direction to pay and a designation of funds to be used creates an appropriation providing authority to incur obligations and to make payments out of the Treasury for specified purposes. B-160998, April 13, 1978. However, the language in section 1506 of the Reconciliation Act does not provide any specific direction to pay. "The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated." 16 Comp. Gen. 1007, 1008 (1937); *accord,* 35 Comp. Gen. 306, 307 (1955). It must be clear from the Act that money is being appropriated before obligations and expenditures are authorized. *See* 31 U.S.C. § 1301; 50 Comp. Gen. 863 (1971). Accordingly, section 1506 of the Reconciliation Act did not itself create a current indefinite appropriation; it merely authorized the Congress to make such an appropriation to fund the Corporation in fiscal year 1988. The Congress, however, is not bound to make its appropriation in the form specified in the authorization set forth in the Reconciliation Act. It chose instead to utilize a number of line-item appropriations for each program account, an arrangement which the Reconciliation Act, in the form enacted cannot nullify.[1]

You point out that the Reconciliation Act was enacted subsequent to the Continuing Resolution containing the line-item limitations in question. Normally, in cases of conflicting statutes, the latest expression of the Congress governs. However, where, as with the Reconciliation Act and the Continuing Resolution,

[1] The Department of Agriculture, responding to our request for the view of the Secretary, also concluded that "Section 1506(b) of the Reconciliation Act does not nullify the line-item appropriations for financing Corporation programs for fiscal year 1988."

the two acts were under consideration and enacted on the same day, we cannot conclude that Congress intended the Reconciliation Act to govern as its latest expression in order to nullify the Continuing Resolution. Such proximity in time of enactment is forceful evidence that Congress intended the two statutes to stand together. *Morf v. Bingaman,* 293 U.S. 407, 414 (1935).

It is true that the language in the Reconciliation Act authorizing funding of the Corporation by means of a current, indefinite appropriation, "beginning with fiscal year 1988," must be regarded as permanent authority which will have to be considered when the Congress considers making appropriations in subsequent years. For example, if it is again proposed to make line-item appropriations for each program account, the absence of authorization in law for such appropriations may well subject the funding proposal to a point of order if the issue is raised.[2] However, now that funds are appropriated for fiscal year 1988, they remain available by the terms of the Continuing Resolution (*see* B-175155, July 25, 1979).

In response to your final question of whether supplemental appropriations may be necessary in order to make payments to farmers in fiscal year 1988, it is our opinion that if the Corporation exhausts the line-item appropriations available for those payments made in the Continuing Resolution and also exhausts its available assets and remaining borrowing authority, payments to farmers would have to be suspended unless supplemental appropriations are made for fiscal year 1988.[3] Under subsection 4(i) of the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714b(i), as amended by the Continuing Resolution, the Corporation is authorized to borrow an aggregate amount not exceeding $30 billion. *See also* 15 U.S.C. § 713a-4. In addition, it is authorized to make such expenditures, within the limits of its available funds *and borrowing authority* and in accord with law, as may be necessary to carry out its authorized programs. 15 U.S.C. § 713a-10; 15 U.S.C. § 714f. If the Corporation exhausts all of these resources available to make payments for farmers in fiscal year 1988, payments will have to be suspended until supplemental appropriations are made.

Unless released by your office earlier, this opinion will be made publicly available 30 days from today.

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[2] *See* Rule XXI(2), Rules of the House of Representatives (H.R. Doc. No. 98-277, 98th Cong., 2d Sess., 564); Rule XVI, Standing Rules of the Senate (S. Doc. No. 97-2, 97th Cong., 1st Sess., 120).

[3] In responding to our request for the views of the Secretary of Agriculture, a representative expressed the opinion that "The funds made available for CCC by the line-item appropriations in the Continuing Resolution may only be used for the purposes specified and may be transferred between items as provided therein. CCC may also use its borrowing authority (15 U.S.C. 714b(i)), which was increased in the Continuing Resolution to $30,000,000,000, in carrying out its activities. The Corporation may also use, as provided in section 8 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714f), all its funds and other assets in the conduct of its business. The line-item appropriation provision specifically provides that the provisions thereof 'shall not interfere with the Commodity Credit Corporation's discharge of its corporate responsibilities'."

B-228768, March 14, 1988

Civilian Personnel

Relocation

■ **Actual Expenses**

■■ **Eligibility**

■■■ **Distance Determination**

An employee claims entitlement to relocation expenses in connection with a short-distance transfer and argues that the preferred commuting route increases the commuting distance by 15 miles. Under the Federal Travel Regulations, para. 2-1.5b(1), the agency must determine whether relocation of an employee's residence is incident to a short-distance transfer before reimbursement is allowed. Ordinarily, the commuting distance must increase by at least 10 miles. The 10-mile criterion is not an inflexible benchmark which, when exceeded, entitles the employee to a determination that the move was made incident to a transfer. Since the agency involved considered various factors, including the distances of the commutes and the various routings used in determining that a change of residence would not be incident to the transfer, we cannot find that that determination was clearly erroneous, arbitrary, or an abuse of discretion.

Matter of: John W. Lacey—Relocation Expenses—Short Distance Transfer

Mr. John W. Lacey has appealed the action of our Claims Group dated June 26, 1987 (Z-2864095), which denied his request for entitlement to relocation expenses. He claims that his agency incorrectly determined that his transfer increased the commuting distance from his residence by less than 10 miles. Upon review, we find no basis to question the agency's determination to deny his relocation expenses for a short-distance transfer.

Background

Mr. Lacey, an employee of the Department of Energy (DOE), was assigned to permanent duty at the San Francisco Operations Office in Oakland, California, and was offered a position at a DOE project office located at the Lawrence Livermore National Laboratory in Livermore, California. The offer of employment authorized Mr. Lacey relocation expenses. However, during a subsequent review of the position offer, and before Mr. Lacey incurred any relocation expenses, the agency determined that relocation expenses should not have been part of the offer. The agency offered Mr. Lacey the option of returning to his original position.

Mr. Lacey's residence is located in Newark, California, which is approximately 25 miles by highway from the Oakland office and from 26 to 40 miles from the Livermore office (distance varies depending on the route taken), an increase in commuting of from 1 to 15 miles. Should Mr. Lacey relocate to Livermore, he estimates that it would be a 5-mile commute to his office.

Subsequent to his transfer, Mr. Lacey requested another determination of his eligibility for relocation expenses. In a memorandum dated March 13, 1985, Mr. Lacey's request for relocation expenses was denied based on a determination by

the San Francisco Operations Office of DOE that his proposed move from Newark to Livermore would not be incident to his transfer but rather for his own convenience. The agency indicated that the determination was based on an administrative review of all the circumstances in the case. As a result, the agency found that the commuting distance using usual or normal routes from his Newark residence to his new duty station did not meet the regulatory requirements for reimbursement of relocation expenses.

Our Claims Group affirmed the agency's denial of relocation expenses, and, in appealing from that determination, Mr. Lacey refers to two decisions of the Comptroller General he believes apply to his situation. He cites to our decision in *Rodney T. Metzger,* B-217916, Aug. 26, 1985, in which we held that it was not unreasonable for the agency to select routing using major interstate highways. Mr. Lacey notes that his preference is to use a major interstate highway rather than the backroads in his commute to the new duty station.

Mr. Lacey also cites to our decision in *Craig R. Sheely,* B-192142, Mar. 21, 1979, in which we stated that we did not believe the provisions of the Federal Travel Regulations at issue in that case were intended to require employees to travel the most direct route regardless of safety factors. Mr. Lacey emphasizes his contention that the backroads route from his Newark residence to the new duty station is hazardous due to rockslides and mudslides.

Opinion

The payment of travel, transportation, and relocation expenses of transferred government employees is authorized under 5 U.S.C. §§ 5724 and 5724a (1982), as implemented by the Federal Travel Regulations, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1986). The principles governing the short-distance relocations of transferred employees are contained in FTR para. 2-1.5b(1) (Supp. 4, Aug. 23, 1982). This section provides guidelines for agencies to follow in determining whether a transferred employee's short-distance relocation is incident to his change of duty station. In making this determination an agency is advised to consider various factors including the comparative commuting times and distances between the employee's old residence and old duty station, his old residence and new duty station, and his new residence and new duty station. This section further provides:

> . . . Ordinarily, a relocation of residence shall not be considered as incident to a change of official station unless the one-way commuting distance from the old residence to the new official station is at least 10 miles greater than from the old residence to the old official station. Even then, circumstances surrounding a particular case (e.g., relative commuting time) may suggest that the move of residence was not incident to the change of official station.

We have consistently held that in short-distance relocations, the applicable statutes and regulations give an agency broad discretion in determining whether an employee's move from one residence to another is incident to the change of official station. 51 Comp. Gen. 187 (1971); *Rodney T. Metzger,* B-217916, Aug. 26, 1985; *David E. Meisner,* B-187162, Feb. 9, 1977. Unless such a determination is

made by the agency, no basis for payment of the claim exists. 51 Comp. Gen. 187, *supra.* Generally, we will not overturn an agency's determination on this issue in the absence of a showing that it was clearly erroneous, arbitrary or capricious. *Rodney T. Metzger,* B-217916, *supra; Jack R. Valentine,* B-207175, Dec. 2, 1982.

For example, in *Metzger,* cited above, there was a dispute between the employee and the agency as to the routings by which the distance between the employee's residence and his old and new duty stations should be measured. We held in *Metzger* that the agency's selection of a routing using major interstate highways was not unreasonable based on the facts in that case. However, this holding should not be read broadly, as Mr. Lacey would have us do, to endorse the use of interstate highways as the preferred routings to measure distance under FTR para. 21.5b(1). We have consistently held that this regulation does not establish fixed rules to be applied in all cases involving transfers between official stations which are relatively close to each other. Rather, the regulation gives the agency broad authority to make determinations concerning commuting patterns since the agency is in the best position to assess the situation at each of its installations. *See Donald C. Cole,* B-186711, Oct. 7, 1976; *Stanley Jeffress Williams,* B-184029, Jan. 26, 1976.

In the present case, the agency has made a determination that a relocation by Mr. Lacey from Newark to Livermore would not be incident to Mr. Lacey's transfer but rather would be for his personal convenience. Mr. Lacey has taken exception to this determination due to his belief that it is based on the agency's use of a hazardous backroads route to measure commuting distance. Mr. Lacey believes that the distance is more reasonably measured by travel on the highway he prefers to use, which would mean an increase of 15 miles in his commute.

None of the agency documents in the record indicate that the agency determination was based solely upon the backroads route specified by Mr. Lacey. Rather, the agency states that the determination that reimbursement for relocation expenses would not be allowed was based on all the information Mr. Lacey provided. The record further indicates that this information included a map which shows that there are four different routings possible between Newark and Livermore.

Moreover, even when the 10-mile criterion is met, the agency has broad discretion to consider other circumstances surrounding a particular case to determine whether a move is incident to the change of official station. We do not view the precise difference between the distances of the old and new commutes as an inflexible benchmark which, when exceeding 10 miles, entitles the employee to a determination that the move was made incident to a transfer. Rather, it is one factor an agency should consider in making that determination. *See Pradeep Sinha,* B-219209, Apr. 29, 1986.

Therefore, we conclude that, in this situation, the agency involved has considered various factors, including the distances of the commutes, and has deter-

mined that a change of residence by Mr. Lacey would not be made incident to his transfer. On the record before us, we cannot say that the denial of Mr. Lacey's request for relocation expenses by the agency was clearly erroneous, arbitrary or an abuse of discretion. Our Claims Group's determination affirming that denial is sustained.

Regarding Mr. Lacey's reference to our decision in *Craig R. Sheely,* B-192142, *supra,* we note that the holding in that case is not relevant to the facts in Mr. Lacey's case. In *Sheely,* the employee was seeking reimbursement for mileage, transportation of household goods, and a temporary quarters expenses allowance under FTR paras. 2-2.1, 2-4.1c(4), and 2-5.2h in connection with a transfer which, over the usually traveled route, involved a distance of 106 miles. We held in that case that the employee was entitled to reimbursement for these expenses based on the distance between duty stations as measured by the usually traveled route, even though the direct route between duty stations was only 38 miles.

B-229549, March 17, 1988

Procurement

Sealed Bidding
■ Invitations for Bids
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

After only bid submitted under invitation for bids is determined to be unreasonable as to price and contracting officer reasonably determines that additional competition is needed, contracting officer cannot complete acquisition by conversion to negotiation and selectively soliciting another firm to compete. Rather, solicitation must be canceled and all potential offerors solicited.

Matter of: Harwell Construction Company, Inc.

Harwell Construction Company, Inc. protests the determination of the National Guard Bureau not to award it a contract for the construction of a record fire range. The National Guard Bureau initially issued an invitation for bids (IFB) and subsequently converted it to a request for proposals (RFP) after receiving only one bid, offering an unreasonable price, in response to the IFB. After inviting the protester to participate in negotiations for award of the contract and finding Harwell to be the apparent low responsible offeror, the agency notified the protester that it could not be awarded the contract since Harwell did not submit a bid under the original IFB.

We sustain the protest.

The National Guard Bureau issued the IFB, No. DAHA12-87-B-0004, to all interested bidders, including the protester, on March 6, 1987. Jud Construction Company, Inc. submitted the only bid. Jud's bid of $527,239, however, was deter-

mined to be unreasonable because it exceeded the independent government estimate by nearly 60 percent and substantially exceeded the available funding for the project. The agency then canceled the IFB in accordance with Federal Acquisition Regulation (FAR) § 14.404-1(c)(6) on the basis that the sole responsible bidder submitted a bid containing an unreasonable price, and converted it to a request for proposals, RFP No. DAHA12-87-R-0005.

The contracting officer, in an attempt to increase competition and obtain a lower price, invited Harwell, one of 17 firms on the original bidders' mailing list, to participate in this RFP. None of the other firms were invited to participate. Harwell submitted a proposal and was the low offeror. The contracting officer was prepared to award the contract to Harwell, but the National Guard Bureau's Office of the Legal Advisor determined that an award could not be made to Harwell because the protester had not submitted a bid in response to the IFB. The contracting officer now proposes that award be made to Jud at a higher price than Harwell offered.

Harwell first asserts that its offer can be considered because it submitted a proposal in response to a newly issued solicitation. It is clear from the record, however, that the RFP was only a converted solicitation to the canceled IFB, an approach permitted by FAR § 15.103 under specific conditions. In this respect, the agency did not take the procedural steps, such as publication of the procurement action in the *Commerce Business Daily* (CBD), which would ordinarily have occurred if this were a new acquisition rather than a conversion of a sealed bid procurement to a negotiated one.

Harwell next asserts that when a sealed bid acquisition is converted to a negotiated one, the FAR does not preclude the contracting officer, in an attempt to increase competition, from selectively soliciting additional sources such as Harwell, which did not submit bids under the original IFB. We cannot agree.

FAR § 15.103 mandates that when the agency properly determines that:

> use of negotiation is appropriate to complete the acquisition, the contracting officer may negotiate without using a new solicitation subject to the following conditions—
>
> (a) Prior notice of intention to negotiate and a reasonable opportunity to negotiate have been given by the contracting officer to each responsible bidder that submitted a bid in response to the invitation for bids;
>
> (b) The negotiated price is the lowest negotiated price offered by any responsible bidder; and
>
> (c) The negotiated price is lower than the lowest rejected bid price of a responsible bidder that submitted a bid in response to the invitation for bids.

Prior to enactment of the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-577, 98 Stat. 3066 (1984), the procurement statutes provided that a formally advertised (i.e. sealed bid) procurement could be completed through negotiations if certain conditions were met, one of which was that "the negotiated price is the lowest negotiated price offered by any responsible supplier." *See* 10 U.S.C. § 2304(a)(15)(C) (1982) and 41 U.S.C. § 252(c) (1982). These statutory provisions were implemented originally by Federal Procurement Regulations (FPR) § 1-3.214(b)(2) (1964 ed.) and Armed Services Procurement Regulation (ASPR) § 3-

215.2 (iii) (1976 ed.), and later by FAR § 15.214. *See* 48 C.F.R. § 15.214 (1984). This original FAR section, consistent with the predecessor FPR and ASPR sections, required that the negotiated price be the lowest offered "by any responsible supplier." However, when the FAR was revised to reflect CICA, the provision dealing with the use of negotiation after sealed bidding was moved to section 15.103 and the word "supplier" was changed to "bidder."

The National Guard Bureau's Office of the Legal Advisor believes that this change precludes award to the protester because the protester was not a bidder under the IFB. The agency states that "the term 'responsible bidder' [in FAR § 15.103(b)] limits the potential awardee to those who responded to the original invitation for bids." The agency states that this position is consistent with CICA since CICA, in the agency's view, does not allow an agency "in the midst of the procurement to choose additional vendors to participate . . . who had not responded to any fully competitive solicitation . . . [in the absence of a] justification and approval for other than full and open competition. . . ." We think the approach taken by the contracting officer to enhance competition was inappropriate here.

FAR permits completion of a procurement by negotiation where all bids submitted under the IFB are unreasonable as to price. FAR § 14.404-1(c)(6) and (e)(1). In our view, this provision generally contemplates that conversion to a negotiated acquisition be limited to those firms which submitted bids under the IFB. Here, however, given that only one bid was submitted which was unreasonable as to price, the contracting officer was faced with the possibility of holding negotiations with one firm which was aware of its sole-source status. In these circumstances, we think the contracting officer reasonably sought to obtain additional competition. Nevertheless, where, as here, the contracting officer reasonably determines that additional competition is warranted, the contracting officer must obtain such competition consistent with CICA requirements for full and open competition. *See Trans World Maintenance, Inc.*, 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

The record indicates that the contracting officer selectively solicited Harwell, but did not notify any other potential offerors that the requirement was being opened for competition to additional sources. Of 17 firms on the original bidders' mailing list, only Harwell, for unexplained reasons, was solicited and none of the other firms were afforded the opportunity to compete. We think it is fundamental that the selection of additional sources cannot be made on an arbitrary basis, but, rather, the mandate for full and open competition must be complied with. Thus, we agree with the agency that a contracting officer cannot "pick and choose" which firms should compete, and, in effect, thereby exclude others from the competition. To meet CICA's requirements for full and open competition here, we conclude that cancellation and resolicitation was required to provide all potential offerors notice of what was a new solicitation in view of the fact that the contracting officer had established a new field of competition. 10 U.S.C. § 2305 *et seq.* (Supp. III 1985); FAR § 5.201 *et seq.* (FAC 84-28).

Accordingly, Harwell's protest is sustained to the extent that the solicitation should be canceled and resolicited based on full and open competition. By letter of today to the Secretary of the Army, we are so recommending.

B-219235, March 23, 1988

Appropriations/Financial Management

Budget Process

■ Funds Transfer

■■ Amount Availability

■■■ Appropriation Restrictions

The Bureau of Indian Affairs (BIA) practice of disbursing to a proper payee before collecting amounts due from an erroneous payee, may result in an overdraft of an Individual Trust Account. Under these circumstances, BIA may avoid an overdraft by using funds from its Operation of Indian Programs appropriations to correct the erroneous payment from the Individual Trust Account.

Appropriations/Financial Management

Accountable Officers

■ Liability

■■ GAO Authority

A Bureau of Indian Affairs accountable officer is personally liable for making erroneous payments from an Individual Trust Account. Making a corrective payment from Operation of Indian Programs funds does not remove the liability for the original erroneous payment, but it does not create additional liability for the accountable officer making the corrective payment. The first accountable officer's liability for the erroneous payment can only be extinguished by recovering the amount paid out or by a grant of relief from the appropriate authority.

Matter of: Bureau of Indian Affairs Questions on Avoiding Trust Account Overdrafts

This decision responds to a request from the Bureau of Indian Affairs (BIA) concerning the propriety of certain suggested accounting practices in light of our recent holding in *Bureau of Indian Affairs Questions on Payments to Indians,* 65 Comp. Gen. 533 (1986). BIA also asks about the liability of, and need to request relief for, the accountable officers making erroneous and corrective payments. For the reasons explained below, we conclude (1) that the procedures suggested by BIA are proper, and (2) that relief is required for the officer making the original erroneous payment, but not for the officer making the corrective payment.

Background

The BIA wishes to contract with a private financial institution for "collection, accounting, investment, disbursement and custodial services for funds held in

trust for Indian individuals and tribes and others."[1] In so doing, the BIA seeks to avoid the possibility of a trust account being subject to overdraft through erroneous and corrective payments.

An individual trust account occasionally receives payments from the BIA to which it was not entitled. *See,* e.g., 65 Comp. Gen. 533, *supra,* involving a probate payment to the wrong beneficiary. If the amount of the erroneous payment has not been withdrawn at the time the error is discovered, the BIA can simply transfer the payment to the rightful recipient through an accounting adjustment. If the trust account beneficiary has withdrawn the amount of the erroneous payment before the error is discovered, however, there may be insufficient funds remaining in the account to make the corrective payment. The BIA is under a duty to make prompt corrective payments and cannot wait to obtain restitution from the wrongful recipient. This resulted in the past in an overdraft of the account—a practice which BIA says will be unacceptable to any private banking institution with which it may contract.

To avoid this prospect, the BIA wants to adopt a procedure under which it can shift funds from the Operation of Indian Programs (OIP) appropriation account to the appropriate individual Indian Service Special Disbursing Agency (ISSDA) account instead. We allowed a similar use of OIP funds in 65 Comp. Gen. 533, *supra.*

Discussion

In 65 Comp. Gen. 533, a BIA accountable officer sought to correct an earlier erroneous probate payment by making a corrective payment to the rightful beneficiary. Questions arose over the source of the funds to be used and the liability of the accountable officer for making the corrective payment. Specifically, we were asked whether the accountable officer was required to overdraw funds from the trust account that had received the original erroneous probate payments and whether doing so would mean that he was personally liable for the amount of the overdraft. We determined that the corrective payment should be made from funds currently available to the BIA from the OIP appropriation rather than to overdraw the trust fund. Further, we concluded that because OIP funds are an appropriate source to cover this type of shortfall in an individual ISSDA account, the corrective payment would not be improper and therefore there would be no need to obtain relief for the accountable officer making the payment.

The officer making the original erroneous payment is, however, personally liable for that error, unless relieved. We have described the liability of accountable officers as follows:

> An accountable officer is automatically liable at the moment . . . an erroneous payment is made. If . . . the erroneous payment cannot be recovered from the recipient thereof, consideration is given to

[1] BIA does not seek, nor do we extend at this time, an opinion on the propriety of turning over these functions to a private institution.

relief of the accountable officer upon proper administrative requests. Relief is granted by our Office unless it is determined that the accountable officer was negligent or guilty of bad faith or lack of due care, and that such negligence, bad faith, or lack of due care was the proximate cause of the physical loss or erroneous payment. *Personal Accountability of Accountable Officers,* 54 Comp. Gen. 112, 114 (1974).

These principles of liability in no way conflict with our holding in 65 Comp. Gen. 533. The actions of the accountable officer making the corrective payment and the accountable officer making the initial erroneous payment are distinct and separate transactions. The corrective payment only "corrects" the erroneous payment from the point of view of the recipient, not the government. The initial erroneous payment stands on its own and is treated in the same fashion as any other erroneous payment under the principles described in 54 Comp. Gen. 112.

Conclusion

The procedure suggested by the BIA to avoid trust account overdraft is satisfactory and consistent with 65 Comp. Gen. 533. While it is not possible to say that Operation of Indian Programs funds would be the proper source from which to make corrective payments in every case, it appears to be appropriate for most situations. The test for using any source of funds for corrective payments is whether those funds are available for the activity requiring the corrective payment at the time the government's liability for such payment becomes fixed.

The accountable officer making a corrective payment has no personal liability for that amount since that payment is not considered improper. However, personal liability attaches to the accountable officer making the initial erroneous payment. When appropriate, relief for that officer may be sought from this Office.

B-223184, March 23, 1988

Civilian Personnel

Compensation

■ **Severence Pay**

■■ **Amount Determination**

■■■ **Computation**

Upon voluntary separation from a permanent GS-13 position, employee was appointed without a break in service to a temporary GS-14 position with another agency. We affirm our prior decision holding that severance pay must be computed based upon the pay rate in effect at the time of employee's separation from last permanent appointment as required by 5 C.F.R. § 550.704(b)(4)(ii). This unambiguous regulatory provision is a valid exercise of administrative discretion by the Office of Personnel Management, the agency designated to issue regulations governing severance pay.

Matter of: Robert G. Joyce—Reconsideration—Severance Pay Computation

Upon reconsideration, we affirm our holding that the Office of Personnel Management (OPM) regulation at 5 C.F.R. § 550.704(b)(4)(ii) represents a valid exercise of administrative discretion by the agency designated to issue regulations governing the payment of severance pay.

Background

Robert G. Joyce requests reconsideration of our decision B-223184, December 19, 1986, 66 Comp. Gen. 164, in which we concluded that the amount of severance pay due him must be computed in accordance with the formula prescribed by OPM at 5 C.F.R. § 550.704(b)(4)(ii). In Mr. Joyce's situation of involuntary separation from a temporary appointment, this formula requires that severance pay under 5 U.S.C. § 5595(c) (1982) be based upon the employee's pay rate in effect at the time of his separation from his last permanent appointment, not the rate in effect at the time of separation from the temporary appointment.

The essential facts are set forth in our prior decision and are not disputed. In summary, Mr. Joyce was employed by OPM as a program analyst at the GS-13, step 4, level. On March 21, 1982, his position was downgraded to the GS-7 level, but Mr. Joyce was entitled to retain the grade of GS-13 for 2 years. On April 16, 1983, before that 2-year period expired, he resigned from OPM to accept a temporary appointment with the Department of Housing and Urban Development (HUD) at the GM-14 level. Finally, on February 28, 1986, he was involuntarily separated from that position because of budget cuts at HUD.

Initially, HUD determined that Mr. Joyce was entitled to severance pay based upon his $47,392 rate of pay in effect at the time he was involuntarily separated from the temporary appointment. However, OPM advised HUD that, although Mr. Joyce was entitled to severance pay as a result of his separation from his temporary appointment with HUD, the computation of Mr. Joyce's severance pay must be based upon the $38,422 rate of pay he was receiving when he resigned his permanent position at OPM.

We were asked by HUD to render an advance decision because HUD questioned the OPM determination. In our decision of December 19, 1986, we upheld OPM's determination based on the clear language of 5 C.F.R. § 550.704(b)(4)(ii) (1986).

In his request for reconsideration, Mr. Joyce contends that OPM's position has no support or foundation in the severance pay statute. Essentially, his position is that the amount of severance pay must be based upon the pay rate in effect at the time when he became entitled to receive severance pay, namely February 28, 1986. At that time he was being paid $47,392 by HUD, immediately before his separation. In other words, he challenges the application of 5 C.F.R. § 550.704(b)(4)(ii) to the circumstances of his severance pay claim. He maintains that OPM has impermissibly departed from the statutory intent of 5 U.S.C. § 5595(a)(2)(ii), the legislative history of which, according to Mr. Joyce, provides no

evidence "that Congress intended severance pay to be based on any pay level except the rate of base pay, including any premium pay received regularly, which the entitled employee was receiving upon being involuntarily separated."

Opinion

We have carefully considered Mr. Joyce's views, but have concluded that our prior determination in this matter must be sustained. Since Mr. Joyce continued to be covered by the severance pay provisions of 5 U.S.C. § 5595(a)(2)(ii) when he received the full-time temporary appointment within 3 days from the termination of his permanent employment, the time for determining his entitlement to severance pay was at the termination of his temporary appointment. *Donald E. Clark,* 56 Comp. Gen. 750, 753 (1977). However, with respect to the computation of severance pay, OPM's regulation at 5 C.F.R. § 550.704(b)(4)(ii) clearly applies and requires that the computation of severance pay be based upon the rate received immediately before the termination of the permanent appointment. The regulation is facially clear and controls Mr. Joyce's severance computation entitlement. Since it was issued by OPM pursuant to a statutory delegation of authority, this Office will not challenge the regulation in the absence of compelling evidence that it is arbitrary, capricious, or contrary to law. *See, e.g., Quern v. Mandley,* 436 U.S. 725, 738 (1978).

Once eligibility to receive severance pay has been found, as it has in this case, the amount of severance pay due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c). The statutory formula is that severance pay is based on the pay rate "received immediately before separation . . . ." For an employee, such as Mr. Joyce, who is separated from a temporary position following a permanent appointment and retains entitlement to severance pay under section 5595(a)(2)(ii) of title 5, the term "basic pay at the rate received immediately before separation" under section 5595(c) means the "basic rate received immediately before the termination of the appointment without time limitation." 5 C.F.R. § 550.704(b)(4)(ii).

We find this regulatory provision represents a valid exercise of administrative discretion by the agency designated to prescribe regulations for the payment of severance pay. It is true that OPM could have framed the regulation differently, but we do not find that it is arbitrary, capricious or contrary to the statute. As we pointed out in our prior decision, the regulation as written protects the employee who accepts a lower-paid temporary appointment following a permanent appointment. This would be the more likely sequence, especially in a reduction-in-force situation. The fact that Mr. Joyce was able to obtain a higher paying temporary job does not entitle him to greater severance pay.

Finally, Mr. Joyce argues that *Sullivan v. United States,* 4 Cl. Ct. 70 (1983), *aff'd,* 742 F.2d 628 (Fed. Cir. 1984), supports his position. Although the *Sullivan* decision is the basis upon which Mr. Joyce is entitled to receive severance pay, *Sullivan* does not address the issue of the computation of severance pay and

does not purport to interpret or restrict the plain language of 5 C.F.R. § 550.704(b)(4)(ii).

Accordingly, we affirm our decision herein of December 19, 1986, denying Mr. Joyce's claim for additional severance pay.

B-227427, March 23, 1988

Civilian Personnel

Travel
■ Travel Expenses
■■ Cancellation
■■■ Penalties
■■■■ Reimbursement

Employee may be reimbursed for a $200 penalty fee assessed by an airline when she cancelled her super-saver ticket, in spite of the fact that the ticket was originally purchased for personal reasons. An initial determination was made by the agency that utilization of a super-saver fare would result in economies to the government, and the charge was caused by the agency and not the employee when it cancelled the employee's temporary duty training assignment and rescheduled it for a later date.

Matter of: Nancy Getchel—Cancellation of Special Fare—Reimbursement for Penalty

This decision is in response to a request by an authorized certifying officer, Bureau of Land Management (BLM), United States Department of the Interior, for an opinion as to whether Ms. Nancy Getchel, a BLM employee, may be reimbursed the $200 penalty fee assessed to her by an airline because she cancelled her super-saver ticket. For the reasons that follow, we hold that Ms. Getchel may be reimbursed.

Background

Ms. Getchel is employed at BLM's Anchorage, Alaska District office. As part of Ms. Getchel's training needs, her supervisor determined that she should attend either of two training courses that were to be held in BLM's Training Center in Phoenix, Arizona. Subsequently, Ms. Getchel was nominated and approved to attend an Electric Systems Short Course to be held February 9-13, 1987. In addition, Ms. Getchel was placed on a waiting list for attendance at the Lands School to be held from February 19 to May 15, 1987. Her travel authorization to Phoenix to the Electric Systems short course was approved, and airline tickets were purchased by the agency. Subsequently, the BLM Assistant District Manager approved the purchase of a super-saver fare for Ms. Getchel so she could omplete personal business in Albuquerque, New Mexico, en route to the short course in Phoenix. Ms. Getchel then turned in her government airline ticket and purchased a super-saver ticket.

Several weeks later and prior to Ms. Getchel's temporary duty travel, the Anchorage office was notified of a vacancy in the Lands School. The agency decided to substitute another employee for Ms. Getchel and to send her to the Lands School. As a result, Ms. Getchel was charged a $200 penalty by the airline for cancelling her super-saver ticket.

Both Ms. Getchel's supervisor and the Anchorage BLM District Manager recommend that she be reimbursed for the penalty charge since she was prevented from using her super-saver as a result of a decision made by BLM management. The certifying officer recognizes that this Office has allowed reimbursement in similar circumstances citing to 41 Comp. Gen. 806 (1962). However, he questions whether reimbursement may be made in this case since the super-saver ticket was purchased for personal reasons.

Opinion

The General Services Administration (GSA) is charged with issuing regulations governing the travel of government employees on official business, and has done so in the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985). Thus, GSA has issued regulations which encourage the use of special lower fares when it can be determined before the start of a trip that this type of service is practical and economical to the government. *See* FTR para. 1-3.4b(1)(a) (Supp. 9, May 14, 1984). Further, this Office has held that prior versions of FTR para. 1-3.4b(1) not only permit the use of special reduced rates but actually require a traveler to use them for official travel when it can be determined in advance that it would be advantageous to the government. 54 Comp. Gen. 268 (1974).

The certifying officer is correct when he states that we have ruled on the reimbursement of penalty charges in the form of liquidated damages assessed by an airline against a federal employee who fails to use or cancel confirmed reserved space. We have held that such charges may be paid by the agency concerned if the charges were unavoidable in the conduct of official travel or were incurred for reasons beyond the traveler's control and acceptable to the agency concerned. 41 Comp. Gen. 806, *supra.*

In this case, the agency approved in advance Ms. Getchel's purchase of a super-saver ticket. Thus, an initial determination was made by responsible officials that Ms. Getchel's utilization of a super-saver fare would result in economies to the government. Further, the charge was unavoidable and was caused by the actions of the agency when it cancelled Ms. Getchel's temporary duty travel for attendance at the Electric Systems Short Course and rescheduled her for attendance at the Lands School. Thus, the cancellation of her reservation and the subsequent penalty would have occurred whether or not Ms. Getchel had purchased the super-saver ticket for personal reasons or solely to reduce the cost to the government.

The reasons for the cancellation are acceptable to the agency since both Ms. Getchel's supervisor and the BLM District Manager recommend that she be reimbursed. Accordingly, we conclude that Ms. Getchel may be reimbursed for the $200 penalty fee paid as liquidated damages to the airline.

B-227559, March 23, 1988

Appropriations/Financial Management

Appropriation Availability
■ Purpose Availability
■■ Necessary Expenses Rule
■■■ Awards/Honoraria

A voucher presented by the Defense Depot, Richmond, Virginia, for the purchase of telephones for use as career service or honorary awards may be certified for payment since such purchase is a proper expenditure of the agency's appropriated funds under provisions of the Government Employees' Incentive Awards Act, 5 U.S.C. § 4501-4506 (1982), as implemented by Department of Defense and Office of Personnel Management (OPM) instructions. However, approval of an incentive awards program for reduced usage of sick leave is the responsibility of OPM, and OPM has recommended against such approval.

Matter of: Awards—Telephones—Nonuse of Sick Leave

This decision is in response to a request by the Chief, Accounting and Finance Division, Office of Comptroller, Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia, for an opinion as to whether a voucher for the purchase of telephones may be certified for payment. In addition, the Depot has asked us if awards may be given for the nonuse of sick leave. For the reasons that follow, we hold that the voucher may be certified for payment; however, the sick leave program may not be implemented.

Background

The Defense Depot, Richmond, Virginia, established a sick leave incentive program by DGSC-T Letter 86-4A, February 19, 1986, for the purpose of reducing the use of sick leave. The program provided that any employee who minimized his or her use of sick leave would be eligible for an award in the form of a keychain, coffee mug, stickpin/tie pin, or telephone.

The Depot placed an order with Promotional Considerations, Richmond, Virginia, for 100 telephones at $26.90 each, for a total contract price of $2,719, in order to carry out its sick leave incentive program. Prior to receipt of the telephones, the Depot received a copy of a memorandum dated April 4, 1985, from an Assistant General Counsel, Office of Personnel Management (OPM), that incentive awards may not be paid for good sick leave records. Based on this memorandum, the Depot discontinued its sick leave incentive program. However, the telephones that were to be awarded under the program were received by the

Depot and to date the invoice has not been paid. Further, the contractor has refused to allow the return of the telephones since they have special markings. Thus, the voucher was forwarded to this Office for a determination as to the legality of using appropriated funds to pay a contractor for telephones which are to be given to employees for honorary recognition or as a substitution for cash awards.

Opinion

Agency awards programs operate by virtue of the authority provided in the Government Employees' Incentive Awards Act, 5 U.S.C. §§ 4501-4506 (1982). The Act authorizes an agency to pay a cash award to an employee who "by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of government operations or achieves a significant reduction in paperwork," or who "performs a special act or service in the public interest in connection with or related to his official employment." 5 U.S.C. § 4503 (1982). The Office of Personnel Management (OPM) is specifically authorized to prescribe regulations and instructions under which agency award programs are to be carried out. 5 U.S.C. § 4506 (1982). Thus, OPM has issued regulations and instructions in this area. *See* 5 C.F.R. Part 451 (1987) and Chapter 451 of the Federal Personnel Manual (FPM).

This Office has held that agencies have the authority to procure items at nominal cost to be used as honorary awards under provisions of the Government Employees' Incentive Awards Act, 5 U.S.C. §§ 4501-4506, *supra.* 55 Comp. Gen. 346 (1975); B-184306, Aug. 27, 1980. In fact, Department of Defense (DOD) Instruction 5120.16 (July 15, 1974), which implements DOD's Incentive Awards Program, specifically provides for such items as desk plaques, citations, or other appropriate symbols, for career service and other honorary awards. The OPM has also issued guidance in this area in FPM Chapter 451 and has suggested that agencies establish programs and award such items as lapel pins or buttons, charms, or tie tacks, in recognition of significant milestones in employees' careers. FPM, ch. 451, § 7-4.

We note that the telephones to be presented by the Depot as honorary awards are of nominal value (approximately $27). Further, this amount is within DOD's moderate value award scale of $25/50 for intangible benefits, that is, benefits produced by an employee that do not have measurable monetary value. *See* DOD Instruction 5120, Encl. 4. Therefore, we conclude that the purchase of the telephones for use as career service or honorary awards is a proper expenditure of the agency's appropriated funds under the provisions of the Government Employees' Incentive Awards Act, as implemented by DOD and OPM instructions.

Finally, with regard to the Defense Depot's proposal of incentive awards for good sick leave records, we note that the OPM has specifically recommended against implementation of an incentive awards program for nonuse of sick leave. Since OPM has been specifically charged with primary responsibility in this area of annual and sick leave, we decline to substitute our judgment for

that of OPM as to the propriety of establishing a sick leave incentive awards program. Moreover, we agree with OPM's rationale behind disapproval of such a plan; i.e., sick leave is a statutory entitlement available to all government employees in appropriate circumstances, and incentives for nonuse are inappropriate. Further, the use of sick leave by a government employee is, in many cases, fortuitous and has no relationship to the employee's superior performance as contemplated by the Incentive Awards Act.

Accordingly, the voucher is returned for payment.

B-227716, March 23, 1988

Civilian Personnel

Leaves Of Absence
■ Annual Leave
■■ Lump-Sum Payments
■■■ Computation

State Department Foreign Service officers who are receiving a special differential at the time of their separation may have such amount included in their lump-sum leave payment. The officers are receiving the pay under statutory authority, and the lump-sum leave payment is computed on the basis of the employee's rights at the time of separation. Furthermore, since the employee's rights vest at the time of separation, there is no authority to place a limitation occurring between the time of separation and the expiration of the period to be considered in determining the amount of the lump-sum leave payment.

Matter of: Foreign Service Officers—Inclusion of Special Differential in Lump-Sum Leave Payment

The Director of Position and Pay Management, Department of State, on behalf of the State Department and the United States Information Agency (USIA), has requested our decision on the issue of whether a special differential may be included in the computation of annual leave lump-sum payments for eligible Foreign Service officers. For the reasons that follow, we conclude that the special differential may be included in the computation.

The Secretary of State is authorized by statute to pay special differentials, in addition to other compensation, to Foreign Service officers who are required because of the nature of their assignments to perform additional work on a regular basis in substantial excess of normal requirements. 22 U.S.C. § 3972(a) (1982). Thus, the Secretary has promulgated regulations under this authority in Volume 3 of the Foreign Affairs Manual (3 FAM) providing for additional pay computed on a percentage of the basic compensation earned during the pay period for various categories of work. FAM § 238.7. The allowance is paid at a rate of 10, 13, or 18 percent of the basic compensation earned during the pay period.

The State Department and USIA both believe that the special differential should be included in lump-sum leave payments because of the similarities be-

tween this method of payment and the type of overtime discussed in our holding in 36 Comp. Gen. 18 (1956). In that decision we allowed premium compensation, which was paid on a percentage basis for administratively uncontrollable overtime, to be included in lump-sum leave payments since the employees were receiving such compensation at the time of their separation.

Opinion

An employee who is separated from the service is entitled by statute to receive a lump-sum leave payment for accumulated and current accrued annual leave. 5 U.S.C. § 5551 (1982). As the agency points out in its submission, Foreign Service officers are precluded by statute from receiving premium pay. 5 U.S.C. § 5541(a)(xiv) (1982). However, they are included in the definition of employee in 5 U.S.C. § 2105 (1982), so as to bring them within the purview of section 5551 to authorize them payment for their accrued leave upon separation. *See* 3 FAM § 492.1.

This Office has held that the lump-sum leave payment is to be computed on the basis of the employee's rights at the time of separation under all applicable laws and regulations existing at that time which would have affected his compensation had he remained in the service for the period covered by his leave. 38 Comp. Gen. 161 (1958); 36 Comp. Gen. 18, *supra.* Thus, in addition to administratively uncontrollable overtime, we have considered claims for inclusion of a post differential in a lump-sum leave payment if, in fact, the employee was entitled to payment of that differential at the time of his separation. *Philip A. Whiting,* B-200854, Mar. 18, 1981; *William E. Pope, Jr.,* B-186046, Nov. 9, 1976.

Accordingly, we see no bar to payment of the special differential as part of a lump-sum leave payment to Foreign Service officers who are receiving it at their time of separation. The special differential is specifically authorized by 22 U.S.C. § 3972(a) and applicable regulations in 3 FAM, and, assuming that the employee is receiving such compensation at his time of separation, the amount should be included in his lump-sum leave payment.

However, we disagree with the proposal of the State Department and USIA to limit the payment of the special differential to 21 calendar days after separation because of the provision in 3 FAM § 238.10h which suspends the allowance when a Foreign Service officer is on leave for more than 21 calendar days. As previously stated, the employee's rights under 5 U.S.C. § 5551 to a lump-sum payment vest at the time of separation. The employee is entitled to have any allowances, differentials, or premium pay included in this lump-sum payment to the extent the employee would have received such pay if the employee had remained in the service for the period covered by the lump-sum payment.

There is no reason to presume as a general rule that the employee, instead of separating from the service, would have taken more than 21 days of leave and thereby would have lost entitlement to this special differential. Furthermore, an agency may not treat the lump-sum period as annual leave for the purposes

of suspending this allowance since, by the terms of 5 U.S.C. § 5551, the lump-sum payment is considered to be pay for taxation purposes only and does not constitute creditable service. *James L. Davis, Jr.*, 59 Comp. Gen. 15 (1979).

Accordingly, Foreign Service officers who are receiving the special differential at the time of their separation may have such amount included in their lump-sum leave payment.

B-229631, March 23, 1988

Appropriations/Financial Management

Budget Process
■ Funds
■■ Deposit
■■■ Miscellaneous Revenues

Internal Revenue Service's short-term undercover operations may be treated as single transactions, and the amount of money that must be deposited into the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b), may be determined at the end of the operation.

Appropriations/Financial Management

Budget Process
■ Funds
■■ Deposit
■■■ Miscellaneous Revenues

The Internal Revenue Service needs specific legislation to carry out long-term business-type undercover operations that regularly offset income against expenditures. Absent this legislation, the failure to deposit receipts into the general fund of the Treasury would conflict with 31 U.S.C. § 3302(b). B-201751, February 17, 1981, clarified.

Matter of: Requirement to Deposit Receipts from IRS Undercover Operations into the Treasury

The Internal Revenue Service (IRS) of the Department of the Treasury asks whether our decision B-201751, February 17, 1981, permits its undercover operations to be treated as single transactions in determining the amount of money that must be deposited into the Treasury as miscellaneous receipts, as generally required by 31 U.S.C. § 3302(b). In this regard, it wants to know whether money received by an investigator during an undercover operation may be used to offset money properly spent during the same undercover operation.

For the reasons given below, we find that the IRS may regard each short-term undercover operation as a single transaction, and it may wait until the end of the operation to determine the amount of receipts required to be deposited in the general fund of the Treasury. When the transaction is completed, the monies on hand that exceed monies originally appropriated for the operation must be deposited into the Treasury as miscellaneous receipts.

On the other hand, if the IRS is engaged in a long-term undercover investigation, such as a business operation that regularly involves offsetting of income against expenditures, specific authorizing legislation would be necessary to retain receipts in its own account until the long-term enterprise is concluded.

Background

In B-201751, February 17, 1981, the Treasury Department had requested our concurrence that monies received in an ongoing undercover operation conducted by the IRS did not have to be deposited as miscellaneous receipts in the Treasury under 31 U.S.C. § 3302(b) until the operation was concluded and the money was no longer needed as evidence of a crime. The Treasury Department mentioned, as examples of such operations, gambling winnings from bets placed by an IRS agent, or income generated by an undercover business established to detect tax law violators. Essentially, we agreed with Treasury's position and concluded that "requiring deposits of money accrued during an undercover operation as soon as it is received may not be practicable within the meaning of 31 U.S.C. § 484 [1] in that it may jeopardize the success of the investigation."

Soon after our decision, the IRS implemented guidelines allowing income from an undercover operation to offset expenses of the same operation. Internal Revenue Manual, para. 9383.244 (May 18, 1984). Subsequently, the Justice Department informed the IRS Chief Counsel that the guidelines were inconsistent with the Justice Department's position, as expressed in a memorandum of its Office of Legal Counsel, dated July 27, 1978.

In that memorandum, the Justice Department concluded that section 3302(b) of title 31 required that all monies received by the Federal Bureau of Investigation (FBI) during undercover activities be paid into the Treasury. The memorandum suggested that this requirement meant that each hand in a card game constitutes a single transaction, for purposes of the deposit requirement of section 3302(b). Thus, the memorandum suggested that without specific statutory authority permitting the offsetting, these kinds of undercover operations were improper.

The Department of Justice relied on the legislative history of section 3302(b), showing that the provision was enacted to curb executive discretion in the handling of public monies and to ensure that all expenditures would be authorized by the Congress consistent with article 1, section 9, clause 7 of the United States Constitution. Clause 7 provides the Congress with the sole authority to authorize the expenditure of public funds. The legislative history also demonstrated that section 3302 was intended to encompass revenue from "all miscellaneous sources."

The Department concluded that the FBI's broad statutory mandate to "detect and prosecute crimes against the United States," 28 U.S.C. § 533(1), was not sufficient authority to imply an exception to section 3302 for the various ways in

[1] Section 484 of title 31 subsequently became section 3302(b).

which the FBI was using income to offset expenses in its undercover operations.[2] Subsequently, the Congress enacted legislation specifically authorizing the FBI and Drug Enforcement Administration (DEA) to, among other things, use proceeds from undercover operations to offset necessary and reasonable expenses incurred in such operations, without regard to section 3302 of title 31. Pub. L. No. 95-624, 92 Stat. 3459, 3465 (1978).

Consistent with its memorandum, Justice requested the IRS to revise Internal Revenue Manual, para. 9383.244, to eliminate the apparent authorization permitting offset of expenses against income in undercover operations. The IRS subsequently withdrew the guideline. However, IRS is not sure whether the Justice Department's position is correct and asks for our views.

The IRS is particularly concerned about wagering and money exchange operations. For example, if an undercover agent is given $1,000 to enter a poker game, the IRS asks whether the entire poker game is one transaction for purposes of section 3302(b) or whether each bet must be considered as a separate transaction. Similarly, in a money exchange operation, if an undercover agent were given $100,000 and the operation consisted of four separate exchanges, the IRS asks whether the entire operation, or each of the four separate exchanges, is one transaction for the purposes of section 3302(b).

Legal Discussion

Article 1, section 9, clause 7 of United States Constitution provides: "No money shall be drawn from the Treasury but in consequence of appropriations made by law." Section 3302(b) of title 31 requires that all money received from whatever source for use of the United States be paid into the Treasury of the United States "as soon as practicable." The effect of section 3302(b) is to ensure that the Congress retains control of the public purse consistent with the Congress' constitutional authority to appropriate monies. *See* 51 Comp. Gen. 506, 507 (1972). As pointed out by the Justice Department, the legislative history of section 3302(b) supports this conclusion. We have frequently held that under section 3302(b), monies collected for the use of the United States must be covered into the Treasury as miscellaneous receipts, absent express statutory authority to the contrary. 39 Comp. Gen. 647, 649 (1960).

In B-201751, February 17, 1981, we held that money received during ongoing undercover operations need not be deposited into the Treasury as miscellaneous receipts until the operation is concluded or the money is no longer needed for use as evidence of a crime. *Accord,* 5 Comp. Gen. 289, 290 (1925) (money used to purchase evidence of violations of the narcotics and prohibition acts had to be deposited as miscellaneous receipts only after it had served its purpose as evidence in court). Although we did not specifically consider each type of undercover operation in B-201751, *supra,* we cited, as examples, gambling winnings from

[2] The Department specifically mentioned undercover businesses to investigate certain sorts of white collar and organized crime, and undercover gambling operations which involved frequent averaging of gains and losses.

bets placed by an IRS agent to obtain evidence of violations of the wagering excise tax laws and income generated by an undercover business established by the agency to detect tax law violators. The emphasis in our decision was on the time at which monies had to be deposited into the general fund of the Treasury. We did not deal with the propriety of offsetting receipts against expenditures.

We agree with the Justice Department that the IRS is not authorized to carry out ongoing undercover operations that regularly offset expenses against income. The IRS does not have specific statutory authority to carry out these kinds of operations, as does the FBI and DEA as provided in recent legislation. Its criminal investigation authority is quite general. It is authorized to detect and bring to trial and punishment persons guilty of violating the Internal Revenue laws, 26 U.S.C. § 7623.

Conducting long-term business-type undercover operations that regularly offset expenses against income would conflict with the Congress' authority over public expenditures. By virtue of their scope and duration, these operations could not be viewed as single transactions after which deposit of revenues that exceed expenditures into the general fund of the Treasury would conform with section 3302(b)'s deposit requirement. This type of situation was not specifically presented to us in the submission that led to our decision in B-201751, February 17, 1981.

On the other hand, we think that short-term operations may be considered single transactions for purposes of section 3302(b)'s deposit requirement. Examples might be card games, dice games or short-term money exchange operations which are not intended to be ongoing business enterprises. As these operations take many forms, we do not think it prudent to set forth more specific guidelines on what operations would and would not conform with section 3302. We leave that to the administrative discretion of the IRS.

For this kind of short-term, rapid fire operation, we would be inclined to take a "snapshot" of the amount of revenues received (over and above the amounts drawn from the agency's appropriation precisely for the undercover operation), at the end of the evening of gambling or the short-term money exchange enterprise, to determine the amounts required to be deposited. From this point of view, we do not believe the amounts won at each roll of the dice, regardless of whether subsequently lost on the next roll, must be included in determining the amount of funds to be deposited into miscellaneous receipts.

Consistent with our interpretation, deposit of net gains into miscellaneous receipts at the end of short-term undercover operations would not conflict with the requirement of 31 U.S.C. § 3302.

B-228396.3, B-229608, March 28, 1988

Procurement

Socio-Economic Policies

■ Disadvantaged Business Set-Asides

■■ Use

■■■ Procedures

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged businesses and specifically allows the use of less than full and open competitive procedures to meet that goal.

Procurement

Socio-Economic Policies

■ Disadvantaged Business Set-Asides

■■ Use

■■■ Procedures

Department of Defense (DOD) contracting activities making contract awards under DOD set-aside program for small disadvantaged businesses are not required to comply with justification and approval requirements of Competition in Contracting Act of 1984 (CICA) since set-aside program, which implements the procedures in section 1207(e) of the DOD Authorization Act, falls within the statutory exception to the procedural requirements of CICA, including the justification and approval requirement of 10 U.S.C. § 2304(f).

Procurement

Bid Protests

■ Constitutional Rights

■■ GAO Review

Agency decision to delay publication of initial regulatory flexibility analysis required by Regulatory Flexibility Act until after effective date of interim rule is not subject to review by General Accounting Office where agency determined under emergency provision of the Act that publication of the rule without prior public comment was necessary to meet statutory goal and, under the Act, that determination is not subject to judicial review.

Matter of: Techplan Corporation; American Maintenance Company

Techplan Corporation protests the terms of request for proposals (RFP) No. N00024-87-R-4414(Q), issued by the Navy for engineering and technical support services for the Navy's fleet modernization program management information system. American Maintenance Company (AMC) protests similar terms in RFP No. F08650-87-R-0020, issued by the Air Force for custodial services. The protesters, both nondisadvantaged small businesses, argue that the solicitations, which were issued as 100 percent small disadvantaged business set-asides, should be amended to allow competition by all small businesses since, in the past year,

both firms successfully performed under small business set-aside contracts for these same requirements.[1] We deny the protests.

Background

Both solicitations were issued as total set-asides for small disadvantaged businesses (SDBs) pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of five percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988 and 1989. Section 1207(e) directs the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to attain the five percent goal and permits the use of less than full and open competitive procedures to do so, provided that contract prices do not exceed fair market value by more than ten percent.

To implement this statutory mandate, DOD's Defense Acquisition Regulatory (DAR) Council drafted an interim rule which amended various DFARS provisions and established the procedures for conducting SDB procurements. Specifically, the interim rule established a "rule of two" regarding set-asides for SDB concerns. This first interim rule provides that whenever a contracting officer determines that competition can be expected to result between two or more SDB concerns and that there is a reasonable expectation that the award price will not exceed the fair market price by more than ten percent, the contracting officer is to reserve the acquisition for exclusive competition among SDB firms. The interim rule further provides that no separate justification or determination is required to set aside a solicitation for SDBs.

The interim rule was published on May 4, 1987, and was made effective for all DOD solicitations issued on or after June 1. 52 Fed. Reg. 16,263. The Federal Register notice solicited public comments on the rule, which were required to be submitted on or before August 3. DOD explained that the rule was made effective without prior public comment because existing procurement procedures were inadequate to meet the mandated five percent goal. 52 Fed. Reg. 16,264.

After issuing the interim rule and reviewing public comments, the DAR Council prepared draft revisions to the rule. On October 29, at a hearing before the House Armed Services Committee's Acquisition Policy Panel, the Deputy Secretary of Defense indicated that, among other changes, the proposed revisions would "address a need for some protection for the non-small disadvantaged business by proposing to exempt what are known as 'repetitive set-asides' from the SDB procedures," but would still provide a ten percent bidding preference for

[1] Although the protests were filed by different firms and involve solicitations issued by different agencies, we have considered them in a single decision since they raise essentially the same issues.

SDBs. At the request of the House Panel, DOD officials agreed not to issue revisions to the interim rule until Congress had commented.

Subsequently, after the protests were filed and after receiving comments from the House Panel, on February 19, 1988, the DAR Council published a second interim rule. See 53 Fed. Reg. 5,114 (1988). This rule became effective on March 21, and carries a 30-day comment period. Among other changes, the February 19 rule provides that SDB set-asides will not be conducted when a product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

Protesters' Position

The protesters object to the inclusion of the subject solicitations within the SBD set-aside program as embodied in the initial SDB set-aside rule. While the protesters concede that the initial rule was in effect when the solicitations were issued, they argue that initial program was invalid and that the solicitations should be canceled and the requirements resolicited under the second interim rule.

In this regard, the protesters argue that DOD's SDB set-aside program as set forth in the initial rule was inconsistent with the intent of Congress as expressed in section 1207 of the 1987 Authorization Act, and in the Small Business Act, because it prevents them, as small businesses which had previously fulfilled the government's requirements represented by these solicitations, from competing. The protesters note that section 1207(g)(4)(C) of the Authorization Act requires that DOD analyze and report to Congress on the impact of the five percent SDB goal on "the ability of business concerns not owned and controlled by socially and economically disadvantaged individuals to compete for contracts" with DOD. Further, the protesters note that section 15 of the Small Business Act, 15 U.S.C. § 644, as amended by section 921 of the 1987 Authorization Act, states that the heads of federal agencies should make efforts to expand participation by all small business concerns. The protesters also argue that not allowing competition by nondisadvantaged small businesses who have participated in prior small business set-asides for these requirements is contrary to FAR § 19.501(g). The protesters argue that by amending the original interim rule to exclude from SDB set-asides solicitations for products or services which have been previously acquired on the basis of a standard small business set-aside, DOD expressly recognized and corrected the defect in that rule. According to the protesters, the Navy and Air Force could and should follow the new rule but have simply chosen not to do so.

Analysis

In our view, there is nothing in section 1207 of the 1987 Authorization Act to prevent DOD from using an SDB set-aside program to meet the five percent

goal. Section 1207(e) specifically allows the use of less than full and open competitive procedures to meet that goal. Thus, it is clear in our view that DOD has authority to conduct a set-aside program to meet the five percent goal. *See Agency for International Development, Developing Countries Information Research Services—Reconsideration,* B-218622.2 *et al.,* Sept. 25, 1985, 85-2 CPD ¶ 336.

Further, although the protesters strongly object to DOD's initial May 4, 1987 rule which does not contain an exclusion for procurements which have been previously set aside for small business, we reject the protesters' contention that the May 4 SDB set-aside scheme conflicts with provisions of the Small Business Act and the FAR.

First, while as the protesters argue there are several references in the 1987 Authorization Act to the effect that DOD is to expand and report on the opportunities for increased participation for nondisadvantaged small business, there is nothing in the Authorization Act which either directs or prohibits DOD from implementing a particular type of program to meet the five percent SDB goal. The most specific instruction is that the Secretary of Defense *may* use less than full and open competitive procedures for the benefit of SDBs. It was left to the Secretary to "exercise his utmost authority, resourcefulness and diligence" to develop a program that would meet the rather difficult-to-reconcile goals of increasing SDB participation while also presumably increasing overall small business participation.

Second, although the protesters argue that the SDB set-aside program is contrary to the repeat set-aside rule in FAR § 19.501(g), under that regulation a requirement is to be set aside exclusively for small business only "if required by agency regulations." In this case, the agency regulations, the DFARS, required SDB set-asides, whenever the SDB rule of two was satisfied, regardless of how the commodity or service had been procured in the past. DFARS §§ 219.501-70, 219.502-72. In sum, it is our view that the SDB set-aside program as contained in the initial May 4 interim rule was, at the time it was issued, a legally permissible implementation of the 1987 Authorization Act requirements.

The protesters nevertheless argue that Congress has expressed its dissatisfaction with DOD's initial SDB program in section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, §§ 806, 806(a), (b)(7), 101 Stat. 1019, (1987), which states that DOD shall to the "maximum extent practicable" maintain current levels in number and dollar value of contracts awarded under the section 8(a) program and the section 15(a) small business set-aside program of the Small Business Act, in addition to providing new opportunities for SDBs in order to meet the goal of the 1987 Authorization Act. According to the protesters, this language shows that Congress disapproved of DOD's initial rule and dictates that the solicitations in this case, which will use 1988 funds, be competed under the more current SDB regulations.

We do not agree that section 806 of the 1988 and 1989 Authorization Act requires that the acquisitions in question here remain open for competition by

nondisadvantaged small businesses. As the protesters point out, section 806 directs DOD to issue regulations which, "to the maximum extent practicable," maintain current levels of contracts under the section 8(a) and 15(a) programs, while also providing new opportunities for SDBs. There is nothing in the Authorization Act, however, that requires DOD to maintain particular requirements as set-asides for nondisadvantaged small businesses.

Moreover, even assuming that the newer February 19 rule is a more appropriate implementation of the 1987 Authorization Act's SDB goal, we do not agree with the protesters' contention that the Air Force and Navy are required to follow the new rule here. The February 19 Federal Register notice indicates that the new rule was to be effective on March 21. Although Techplan argues that the new rule supersedes application of the original rule for solicitations issued before that date, such as those at issue here, the February 19 Federal Register notice did not specifically require application of the new rule to previously issued solicitations, and in our view, the reasonable interpretation of the rule is that it applies only to solicitations issued on or after March 21. Consistent with this view, in a February 17 memorandum submitted to our Office by the Navy, the DAR Council indicated that the February 19 rule was effective only for solicitations issued on or after March 21.[2]

The protesters also argue that, in drafting the interim rule, DOD failed to comply with its duty under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (Supp. III 1985), to issue a written justification for its decision to use less than full and open competitive procedures. Although the interim rule states that no separate justification or determination is required to set aside a solicitation for SDBs, the protesters argue that section 1207 does not authorize DOD to waive the justification and approval process under CICA. According to the protesters, DOD does not have absolute authority under section 1207 to use less than full and open competition; rather, that authority is limited by the 1987 Authorization Act "[t]o the extent practicable and when necessary to facilitate achievement of the five percent goal."

We do not agree with the protesters that a justification and approval under CICA, 10 U.S.C. § 2304(f), is required to set aside a requirement for exclusive SDB participation. In relevant part, 10 U.S.C. § 2304(a(1)(A) states that the requirements of CICA, including the justification and approval procedures in 10 U.S.C. § 2304(f), apply "except in the case of procurement procedures otherwise expressly authorized by statute." Section 1207(e) of the 1987 Authorization Act expressly authorizes DOD to enter into contracts using less than full and open

[2] Although AMC argues that the Air Force solicitation should not have been set aside under the terms of the first interim rule, we note that the contracting officer determined, as required by DFARS § 219.502-72(a), that there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns and that award would be made at a price not exceeding the fair market value by more than ten percent. Moreover, the Air Force received inquiries from eight SDB firms in response to a *Commerce Business Daily* synopsis of the RFP. Under DFARS § 219.501(b), the determination to set aside a particular requirement for SDBs is in the discretion of the contracting officer. This Office will not disturb a contracting officer's set-aside determination unless there has been a clear showing of an abuse of that discretion. *Litton Electron Devices*, B-225012, Feb. 13, 1987, 66 Comp. Gen. 257, 87-1 CPD ¶ 164. There has been no such showing here.

competitive procedures as long as the contract price does not exceed fair market cost by more than ten percent. In our view, the procedure set out by section 1207(e), as implemented by DOD in the DFARS, falls within the above-stated statutory exception, including the justification and approval requirement in section 2304(f). In this respect, awards under section 1207(e) are similar to awards under sections 8 and 15 of the Small Business Act (15 U.S.C. §§ 637, 644) under which a justification and approval also is not required. *See* 10 U.S.C. § 2304(b)(3).

The protesters also argue that the first interim rule is defective since it was published and made effective by DOD without an analysis of the effect of that rule on small business as required by the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601 *et seq.* (1982). Under the Act, agencies are required to prepare an initial regulatory flexibility analysis of proposed rules that have significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 603, 605(b). An agency may, however, waive or delay the required analysis by publishing in the Federal Register a written finding that the rule is being promulgated in response to an emergency that makes timely compliance with the requirement of section 603 impracticable. 5 U.S.C. § 608(a). Further, under section 611(a), determinations by an agency concerning the applicability of any provisions of the Act to any actions of the agency are not subject to judicial review.

Here, as permitted by 5 U.S.C. § 608(a), DOD decided to delay the initial regulatory flexibility analysis required by 5 U.S.C. § 603. The May 4, 1987, Federal Register announcement of the first interim rule stated that preparation of the required analysis was delayed until issuance of the second interim rule so that the impact of both rules could be considered together. The Federal Register announcement also stated that publication of the interim rule without prior public comment was necessary to achieve the five percent goal since present procedures were inadequate to meet that goal. 52 Fed. Reg. 16,264. Since, under section 611(a), the agency's determination is not subject to judicial review, it is also not subject to review by our Office. *Crowley Towing & Transportation Co.,* B-218427.2, May 15, 1985, 85-1 CPD ¶ 552.

Finally, AMC argues, without citing any legal support, that DOD's implementation of the May 4 interim rule without prior public comment violated the firm's right to due process under the Constitution. In the absence of a clear judicial precedent on this issue, we decline to consider AMC's challenge to DOD's action on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. *See DePaul Hospital and The Catholic Health Association of the United States,* B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173.

The protests are denied.

B-230002, March 29, 1988

Procurement

Bid Protests
■ Federal Procurement Regulations/Laws
■■ Applicability
■■■ GAO Authority

Procurement

Sealed Bidding
■ Bids
■■ Late Submission
■■■ Accceptance Criteria
■■■■ Government Mishandling

The Government Printing Office (GPO), a legislative branch agency, is not subject to the Federal Acquisition Regulation but is governed by its own Printing Procurement Regulation as to the acceptance of late bids. GAO does not find unreasonable GPO's determination that a late bid sent by express mail may be accepted where the Postal Service states that the majority of such express mail is delivered prior to bid opening time as GPO found this to show the bid was mailed in sufficient time to arrive in the normal course of the mails.

Matter of: Custom Printing Company

Custom Printing Company protests the award of a contract to Gateway Press, Inc., under invitation for bids (IFB) No. J195-613, issued by the Government Printing Office (GPO) for 1,104,700 copies of a 536 page publication. Custom contends that Gateway's bid was received by GPO after the time set for bid opening and should have been rejected as a late bid. Custom contends GPO improperly opened and considered Gateway's bid prior to determining whether the bid had been mailed in sufficient time to have been delivered by the scheduled bid opening.

The protest is denied.

Bid opening was at 11 a.m., on December 29, 1987. Custom's bid of $931,767 was the only bid present at the opening. After bid opening, at 12:11 p.m., a bid from Gateway was received at GPO via the United States Postal Service's major market network express mail service. Later that day, Gateway's president called GPO and was informed that Gateway's bid was considered late. On December 30, at Gateway's request, GPO and Gateway representatives met to discuss Gateway's late bid. Gateway argued that its bid was mailed from Louisville, Kentucky, in sufficient time to arrive at GPO prior to bid opening and produced a letter from the Postal Service's Louisville express mail coordinator to this effect. Gateway contended that its bid should therefore be accepted in accordance with GPO's regulations. GPO states that although Gateway's bid had not been opened at that time, Gateway told GPO at the meeting that its bid was $80,000 to $90,000 less than Custom's bid.

On December 31, the cognizant GPO official spoke with the Postal Service's express mail manager for the District of Columbia who informed GPO that 91 per-

cent of mail sent from Louisville was delivered in Washington prior to noon and 90 percent of that number, or over 80 percent of the total, was delivered by 11 a.m. Based upon this evidence GPO determined that Gateway's bid was mailed in sufficient time to have been delivered to GPO prior to bid opening. Gateway's bid was opened and award made to it at $851,484. In a subsequent letter to GPO memorializing the conversation, the express mail manager stated that express mail from Gateway's zip code in Kentucky to Washington, D.C., was "approximately 90.9 percent on time for Label B, Post Office to Addressee. Of this amount approximately 80 percent is delivered in the A.M. hours." The express mail manager in an even later letter revised this statement by declaring that "approximately 90.9 percent [of express mail was] on time for Label B, Post Office to Addressee [and] is delivered during the A.M. Of this amount, I would say that approximately 80 percent is delivered by 11 a.m."

Initially, Custom and GPO dispute the applicability of the Federal Acquisition Regulation (FAR) to this case. Custom argues that in the past we have applied the FAR to GPO specifically. Custom also cites decisions of this Office interpreting the late bid rules as set out in the FAR to the effect that a late bid sent via the Postal Service's express mail may not be accepted when it arrives late due to the Postal Service, not the procuring agency's, mishandling. *See Triumph United Corp.*, B-216546, Oct. 18, 1984, 84-2 CPD ¶ 419. Custom argues that this rule should govern and Gateway's late bid be rejected.

Although we may have looked to the FAR for guidance in protests involving GPO, we have recognized that GPO, as a legislative branch agency, is not subject to the FAR. *Capitol Hill Blueprint Co.*, B-220354, Nov. 13, 1985, 85-2 CPD ¶ 550. Therefore, since GPO's late bid regulations differ from the FAR, GPO's own regulations govern.

The GPO Printing Procurement Regulation concerning late bids states:

1. General. Bids received after the exact time set for opening of bids are late bids and shall not be considered for award except as authorized in this Section . . . .

2. Metered Mail. Bids transmitted via metered mail, unless metered by the Post Office (Letters P and O shown in the metered stamp), will not be considered for award if received after time set for opening of bids. .....

5. Consideration of Late Bids. Late bids, modifications-of-bids, or withdrawals, which are delivered by mail . . . prior to award, shall be considered if the Contracting Officer determines that the bid was properly addressed and was mailed in sufficient time to have been delivered, in the normal course of the mails, by the date and hour scheduled for opening. The determination shall be made by use of the Post Office cancellation stamp indicating the date and hour (or a.m./p.m.) of mailing. Information concerning the normal time for mail delivery shall be obtained from the post-master, superintendent of mails, or a duly authorized representative for that purpose, of the post office serving the procurement office. When time permits, such information shall be obtained in writing.

Printing Procurement Regulation, chapter 5, section 5.

Custom contends that since the Postal Service's express mail guarantee is only to deliver express mail by 3 p.m. the next day, Gateway did not provide sufficient time for its bid to arrive for the 11 a.m. bid opening. Further, Custom argues that the Postal Service's express mail manager did not provide any data

as to what portion of the express mail from Louisville to Washington, D.C., arrives prior to 11 a.m. but rather only supplied her personal guess. As to the on time figures the express mail manager did provide in writing, Custom states that these show only 73 percent of the express mail is delivered by 11 a.m. (80 percent of the 91 percent on time mail). Further, Custom contends that this figure relates to delivery to an address, not to the specific bid opening room and GPO does not state how long Gateway's bid took to get to the bid opening room.

Our decisions applying the FAR's late bid provisions are inapplicable here in view of GPO's specific late bid regulation. We note that under the FAR, Gateway's bid could not have been accepted as it was mailed in less than 5 days prior to bid opening. FAR § 14.304-1(a)(1) (FAC 84-5). However, GPO's regulation does not limit the acceptance of late bids to those sent 5 days prior to bid opening by registered or certified mail as does the FAR. Rather, under GPO's regulations, a late bid sent by the Postal Service's express mail, which was transmitted by mail metered by the post office and which was delivered prior to award, as here, shall be considered if the contracting officer determines that the bid was properly addressed and was mailed in sufficient time to have been delivered, in the normal course of the mails, by the date and hour scheduled for opening. Printing Procurement Regulation chapter III section 5, paragraph 5. The only question here, therefore, is whether GPO abused its discretion in finding that Gateway's late bid was mailed in sufficient time to have been delivered, in the normal course of the mails, by the date and hour scheduled for opening.

GPO followed its own regulation in obtaining information from the Postal Service as to the normal time for mail delivery and we find GPO's determination that Custom's bid was mailed in sufficient time to be reasonable. GPO considered Gateway's contention that it had similarly mailed other bids to GPO by express mail and they had all arrived on time for 11 a.m. bid openings. Moreover, a Postal Service official provided her best estimate to GPO as to the delivery time of express mail (73 percent by 11 a.m.) and we are in no position to question that estimate by the postal official. We do not think that the fact GPO was earlier orally informed that the delivery rate was over 80 percent, which differs from later written advice that the rate was 73 percent, is significant. Nor can we say that a 73 percent express mail delivery by 11 a.m., from Louisville to Washington, is not a high enough percentage for GPO to find a bid so mailed would arrive in sufficient time in the normal course of the mails.

The protest is denied.

Procurement

Bid Protests
■ GAO Procedures
■■ Interested Parties

Procurement

Bid Protests
■ Non-Prejudicial Allegation
■■ GAO Review

Where party requesting reconsideration was placed on notice by the contracting agency of original protest proceedings at General Accounting Office (GAO) and had actual knowledge of issues raised, failure of the agency to provide that party with a copy of the original letter of protest is a minor procedural irregularity. Consequently, the party's argument that it was not afforded an opportunity to participate in the original protest is without merit and the party is not an interested party entitled to seek reconsideration.

Matter of: J.W. Cook, Inc.—Request for Reconsideration

J.W. Cook, Inc. requests that we reconsider our decision in *C Construction Co., Inc.*, B-228038, Dec. 2, 1987, 67 Comp. Gen. 107, 87-2 CPD ¶ 534. In that decision, we sustained the protest by C Construction Company, Inc. against the award of a contract to Cook under invitation for bids (IFB) No. N62470-87-B-7107, issued by the Naval Facilities Engineering Command for the construction of a high school for military dependents at Camp LeJeune, North Carolina. Specifically, Cook did not acknowledge an amendment and its bid contained no indication of an extended bid opening date or of any other material terms of the amendment. However, Cook did submit its bid on the extended bid opening date. We held that where a material amendment to a solicitation, among other things, extends the bid opening date, the mere submission of a bid on the extended bid opening date, without more, was insufficient to show that the bidder was aware of and agreed to be bound by the additional terms of the amendment. That decision also expressly overruled certain of our previous decisions which stood for the proposition that the mere submission of a bid on an extended bid opening date could be sufficient to constitute constructive acknowledgment of a material amendment.

In its request for reconsideration, Cook argues that it was not afforded an opportunity to participate in the original protest proceedings, that the terms of the amendment which it failed to acknowledge were not material and that the new rule which we stated in our previous decision should not be applied to this case. Cook also specifically requests award of its "out of pocket" costs incurred in connection with the preparation of its bid and the filing of its protest as well as its "lost opportunity" costs arising as a result of the firm ultimately not receiving award of the contract.

We dismiss the request for reconsideration.

In its request for reconsideration, Cook first argues that it was not afforded an opportunity to participate in the original protest proceedings. The record shows that by letter dated August 10, 1987, the Navy informed Cook "that a formal protest has been filed with the General Accounting Office by C Construction Company against [the] award of the referenced contract to your firm." The Navy also stated that it would forward a copy of the protest when received. Cook now states that, although it received this notice of the protest, it was never provided a copy of C Construction's letter of protest by the contracting agency as required under our Bid Protest Regulation, 4 C.F.R. § 21.3(a) (1987). Cook also argues that it was never apprised of the fact that it could submit its views to our Office during the pendency of the first protest.

Our Bid Protest Regulations permit an interested party who participated in the original protest to request reconsideration of a decision on that protest. 4 C.F.R. § 21.12(a) (1987). Moreover, we note that our decisions hold that, where a party has received notice of a protest, that party's failure to participate in the original proceedings precludes it from requesting reconsideration. *See California Stevedore and Ballast Co.—Request for Reconsideration,* B-221335.2, May 30, 1986, 86-1 CPD ¶ 504; *Jervis B. Webb Co.; Eaton Kenway, Inc.—Request for Reconsideration,* B-218110.2, Feb. 11, 1985, 85-1 CPD ¶ 181. In this case, Cook does not assert that it did not receive the required notice but rather argues that the notice provided was not sufficient because it did not contain a copy of the letter of protest or apprise the firm that it could submit comments to our Office. We disagree.

The sole rationale for providing a copy of the protest to an interested party is to ensure that the party is apprised of the bases of the original protest. In this connection, we note that the record contains conclusive evidence that Cook was fully aware of the only basis of C Construction's protest during the pendency of the original proceedings. Specifically, the record contains a copy of a letter from Cook dated August 24 (17 days after the initial filing of C Construction's protest), to Cook's Congressional representative, addressing with particularity the sole issue raised in C Construction's protest. Thus, we do not believe that Cook should now be afforded an opportunity to raise issues which it could have raised during the pendency of the original protest since our decisions clearly preclude a piecemeal presentation of evidence, information or analyses. *Sovereign Electric Co.—Request for Reconsideration,* B-214699.2, Feb. 12, 1985, 85-1 CPD ¶ 183.

We do not view the agency's failure to provide Cook with a copy of C Construction's letter of protest as a sufficient basis upon which to entertain Cook's reconsideration request for the following reasons. First, as noted above, Cook was fully aware of the sole ground of protest alleged by C Construction at the time of our original consideration of the protest. Second, a protester is generally required to diligently pursue information which would form the basis of its protest. *Greishaber Manufacturing Co., Inc.,* B-222435, Apr. 4, 1986, 86-1 CPD ¶ 330. Because Cook was aware of the protest as well as the issue involved, we believe that the failure of that firm to contact either the contracting activity or our Office in an effort to obtain a copy of C Construction's letter of protest must be

viewed as a failure on the part of Cook to diligently pursue information which it now alleges forms the basis of its complaint. Finally, our Bid Protest Regulations are published in the Federal Register and, thus, Cook may be charged with constructive notice that it had an opportunity to participate in the original protest proceedings. *International Development Institute,* 64 Comp. Gen. 259 (1985), 85-1 CPD ¶ 159. Simply, we do not believe that the failure of the agency to provide Cook with a copy of C Construction's letter of protest deprived Cook of the opportunity to participate in the original protest proceedings.

In short, our Bid Protest Regulations, 4 C.F.R. § 21.12(a), permits the protester and "any interested party who participated in the protest" to request reconsideration. This provision restricts those parties who are eligible to request reconsideration of a decision of this Office, in line with our belief that to the maximum extent possible our decisions should be final, thereby insuring the prompt resolution of protests and minimal disruption of the procurement process. *See Tandem Computers, Inc.— Request for Reconsideration,* B-221333.2, *et al.,* Sept. 18, 1986, 86-2 CPD ¶ 315.

For the above-stated reasons, we dismiss Cook's request for reconsideration. Accordingly, we need not consider Cook's claim for costs. *See California Stevedore and Ballast Co.—Request for Reconsideration,* B-218110.2, *supra.*

The request for reconsideration is dismissed.

B-230027.4, March 30, 1988

Procurement

Bid Protests

■ GAO Procedures

■ ■ Interested Parties

Bidder which, as of the date of bid opening, has been found to be other than small by the Small Business Administration is not an interested party within meaning of Bid Protest Regulations for purposes of protesting alleged improprieties in solicitation set aside for small business concerns, since it is not eligible to receive award.

Matter of: Comet Cleaners, Inc.—Reconsideration

Comet Cleaners, Inc. (Comet), requests that we reconsider our February 8, 1988, dismissal of its protest concerning the accuracy of government estimates in invitation for bids (IFB) No. DABT23-88-B-0002, issued by the Department of the Army, Fort Knox, Kentucky, for laundry and dry cleaning services. We affirm the dismissal.

The IFB was issued as a total small business set-aside. On October 5, 1987, in response to a small business size status protest under another solicitation, the Small Business Administration (SBA) determined that Comet was other than a small business, based primarily on Comet's failure to provide SBA with information required to render a valid size determination. Because there was no in-

dication that Comet had been recertified as a small business under the IFB's size standard, and therefore would be ineligible to compete under the IFB, we found that Comet was not an "interested party" under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1987), and dismissed its protest.

In its request for reconsideration, Comet contends that information it had sent to SBA for recertification was apparently lost in the mail, that it sent an extra packet to SBA "to clear up this matter," and that it is a small business. However, the SBA reports that as of March 21, 1988, it had not received a request for recertification from Comet. Therefore, advises SBA, Comet was other than a small business on the IFB's bid opening date of February 19, 1988.

To be considered an interested party having standing to protest a federal procurement, a party must be an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a); *AAR Brooks & Perkins,* B-220026, Sept. 30, 1985, 85-2 CPD ¶ 358. A protester is not an interested party if it would not be in line for award if its protest were upheld. *Dragon Services, Inc.,* B-228912, Oct. 7, 1987, 87-2 CPD ¶ 344. Since Comet did not have small business status at the time of bid opening, it was ineligible for award. *See Propper International Inc., et al.,* 55 Comp. Gen. 1188 (1976), 76-1 CPD ¶ 400. Therefore, it was not an interested party and its protest was properly dismissed.

Appropriations/Financial Management

Accountable Officers
■ Liability
■■ GAO Authority

A Bureau of Indian Affairs accountable officer is personally liable for making erroneous payments from an Individual Trust Account. Making a corrective payment from Operation of Indian Programs funds does not remove the liability for the original erroneous payment, but it does not create additional liability for the accountable officer making the corrective payment. The first accountable officer's liability for the erroneous payment can only be extinguished by recovering the amount paid out or by a grant of relief from the appropriate authority.

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■ Purpose Availability
■■ Necessary Expenses Rule
■■■ Awards/Honoraria

A voucher presented by the Defense Depot, Richmond, Virginia, for the purchase of telephones for use as career service or honorary awards may be certified for payment since such purchase is a proper expenditure of the agency's appropriated funds under provisions of the Government Employees' Incentive Awards Act, 5 U.S.C. § 4501-4506 (1982), as implemented by Department of Defense and Office of Personnel Management (OPM) instructions. However, approval of an incentive awards program for reduced usage of sick leave is the responsibility of OPM, and OPM has recommended against such approval.

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Budget Process
■ Conflicting Statutes
■■ Statutory Interpretation

■ Continuing Resolutions
■■ Statutory Interpretation
■■■ Congressional Intent

When two statutes are enacted on the same day, even if there is evidence that one passed several hours after the other, we will not apply the general rule that the later passed statute represents the most recent expression of congressional will and therefore nullifies or supersedes the earlier statute, to the extent that they are inconsistent. Such close proximity in time is forceful evidence that Congress intended the two statutes to stand together.

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Civilian Personnel

Compensation
■ Severance Pay
■■ Eligibility
■■■ Involuntary Separation
■■■■ Determination

An employee sought and received a transfer from a permanent career service position in ACTION to a time-limited appointment for 5 years in the Peace Corps, which could not be extended except for extraordinary reasons. For purposes of the severance pay statute, 5 U.S.C. § 5595 (1982), we find that she was an "employee" and that she was involuntarily separated, *i.e.*, her separation from her position in the Peace Corps was against her will and without her consent. Therefore, the employee is entitled to severance pay.

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■ Severence Pay
■■ Amount Determination
■■■ Computation

Upon voluntary separation from a permanent GS-13 position, employee was appointed without a break in service to a temporary GS-14 position with another agency. We affirm our prior decision holding that severance pay must be computed based upon the pay rate in effect at the time of employee's separation from last permanent appointment as required by 5 C.F.R. § 550.704(b)(4)(ii). This unambiguous regulatory provision is a valid exercise of administrative discretion by the Office of Personnel Management, the agency designated to issue regulations governing severance pay.

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Leaves Of Absence
■ Annual Leave
■■ Lump-Sum Payments
■■■ Computation

State Department Foreign Service officers who are receiving a special differential at the time of their separation may have such amount included in their lump-sum leave payment. The officers are receiving the pay under statutory authority, and the lump-sum leave payment is computed on the basis of the employee's rights at the time of separation. Furthermore, since the employee's rights vest at the time of separation, there is no authority to place a limitation occurring between the time of separation and the expiration of the period to be considered in determining the amount of the lump-sum leave payment.

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Relocation
■ Actual Expenses
■■ Eligibility
■■■ Distance Determination

An employee claims entitlement to relocation expenses in connection with a short-distance transfer and argues that the preferred commuting route increases the commuting distance by 15 miles. Under the Federal Travel Regulations, para. 2-1.5b(1), the agency must determine whether relocation of an employee's residence is incident to a short-distance transfer before reimbursement is allowed. Ordinarily, the commuting distance must increase by at least 10 miles. The 10-mile criterion is not an inflexible benchmark which, when exceeded, entitles the employee to a determination that the move was made incident to a transfer. Since the agency involved considered various factors, including the distances of the commutes and the various routings used in determining that a change of residence would not be incident to the transfer, we cannot find that that determination was clearly erroneous, arbitrary, or an abuse of discretion.

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■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service Breaks

An employee, as the consequence of an on-the-job injury, was separated from federal employment and carried on the rolls of the Office of Workers' Compensation Programs. Upon reemployment 5 U.S.C. § 8151 mandates that he be treated as though he had never left federal employment for the purpose of benefits based on length of service. Where he is reemployed at a different geographical location from his duty station at the date of separation he, therefore, is entitled to relocation expenses under 5 U.S.C. §§ 5724 and 5724a to the same extent as if he had been transferred to the new duty station without a break in service.

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■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service Breaks

Where an individual is reemployed at his former duty station following a period of separation during which he was carried on the rolls of the Office of Workers' Compensation Programs, he is not entitled to reimbursement for expenses he incurs in relocating his residence back to that same duty station incident to the reemployment action. The individual's handicap resulting from an on-the-job injury does not justify an exception to the rule that one reappointed to federal employment following a break in service must bear the costs of traveling to his first duty station. These costs are common to all individuals appointed or reappointed to positions at locations distant from their places of residence; therefore, reimbursement for such costs cannot be viewed as ameliorating access-to-work impediments that arise as the result of a handicapping condition. However, because

of equitable considerations, a report is being submitted to the Congress recommending that it authorize relocation expenses as a meritorious claim under 31 U.S.C. § 3702(d).

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

When transferred federal employees can demonstrate a reasonable need, temporary quarters subsistence expenses (TQSE) may be paid for periods prior to the moving day at the old permanent residence and after the delivery day of household goods at the new permanent residence. Hence, an employee of the National Security Agency who was transferred from Ottawa, Canada, to Fort Meade, Maryland, may be allowed TQSE for his use of a hotel in Ottawa prior to the time his household goods were picked up at his old residence there, if he can demonstrate that the residence was unavoidably rendered uninhabitable prior to that time because of the packing of his furniture. The employee was also properly allowed TQSE for an additional night's temporary lodgings following the delivery of his household goods in Maryland because the delivery was made late in the day and without advance notice, and in those circumstances the employee could neither move into his new residence immediately nor avoid being charged for staying an additional night at his hotel.

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Travel
■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**

An employee, while traveling on official business, was denied lodging the first night at the selected hotel due to their overbooking. The hotel issued a bonus lodging certificate to the employee for one night of free lodging. Such a certificate is the property of the government and not the employee since the general rule is that a federal employee is obligated to account for any gift, gratuity or benefit received from private sources incident to the performance of official duty. Also, allowing the employee to retain the certificate would result in double reimbursement to the employee since the government paid for lodging at a substitute hotel that evening.

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■ **Travel Expenses**
■■ **Cancellation**
■■■ **Penalties**
■■■■ **Reimbursement**

Employee may be reimbursed for a $200 penalty fee assessed by an airline when she cancelled her super-saver ticket, in spite of the fact that the ticket was originally purchased for personal reasons. An initial determination was made by the agency that utilization of a super-saver fare would result

in economies to the government, and the charge was caused by the agency and not the employee when it cancelled the employee's temporary duty training assignment and rescheduled it for a later date.
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Miscellaneous Topics

Finance Industry
■ Financial Institutions
■■ Government Corporations
■■■ Funding

Statutory authority to fund the Commodity Credit Corporation for 1988 and subsequent fiscal years by means of a current indefinite appropriation is merely an authorization to make appropriations in that manner. It is not itself an appropriation act and cannot be construed to nullify or supersede line-item appropriations for fiscal year 1988.

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Procurement

Sealed Bidding
■ Bids
■■ Late Submission
■■■ Accceptance Criteria
■■■■ Government Mishandling

The Government Printing Office (GPO), a legislative branch agency, is not subject to the Federal Acquisition Regulation but is governed by its own Printing Procurement Regulation as to the acceptance of late bids. GAO does not find unreasonable GPO's determination that a late bid sent by express mail may be accepted where the Postal Service states that the majority of such express mail is delivered prior to bid opening time as GPO found this to show the bid was mailed in sufficient time to arrive in the normal course of the mails.

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■ Invitations for Bids
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

After only bid submitted under invitation for bids is determined to be unreasonable as to price and contracting officer reasonably determines that additional competition is needed, contracting officer cannot complete acquisition by conversion to negotiation and selectively soliciting another firm to compete. Rather, solicitation must be canceled and all potential offerors solicited.

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Socio-Economic Policies
■ Disadvantaged Business Set-Asides
■■ Use
■■■ Procedures

Department of Defense (DOD) contracting activities making contract awards under DOD set-aside program for small disadvantaged businesses are not required to comply with justification and approval requirements of Competition in Contracting Act of 1984 (CICA) since set-aside program, which implements the procedures in section 1207(e) of the DOD Authorization Act, falls within the statutory exception to the procedural requirements of CICA, including the justification and approval requirement of 10 U.S.C. § 2304(f).

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■ Disadvantaged Business Set-Asides
■■ Use
■■■ Procedures

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged busi-

nesses and specifically allows the use of less than full and open competitive procedures to meet that goal.

Socio-Economic Policies

■ Preferred Products/Services

■■ Handicapped Persons

Decision by Committee for Purchase from the Blind and Other Severely Handicapped to include item on list of commodities and services to be procured from workshops for blind or severely handicapped individuals is not subject to review by General Accounting Office in light of exclusive authority vested in the Committee under the Wagner-O'Day Act to establish and maintain the procurement list in accordance with the overall purpose of the act.

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