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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 uses 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 that 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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Decisions of the Court

August 1989

B-231018, August 2, 1989

Civilian Personnel

Compensation
■ Overpayments
■ ■ Error detection
■ ■ ■ Debt collection
■ ■ ■ ■ Waiver

Due to administrative error, an employee received a within-grade increase 1 year before it was expected. In the absence of any mitigating factors, we conclude that the employee knew or should have known the correct waiting period, and we deny his request for waiver.

Matter of: Daniel J. Rendon—Waiver of Overpayment of Salary

This decision is in response to an appeal by Mr. Daniel J. Rendon, filed by his attorney, Mr. Glenn A. Buries, from our Claims Group settlement which denied his request for waiver of an overpayment of compensation in the gross amount of $946.67 under the provisions of 5 U.S.C. § 5584 (1982 and Supp. IV 1986).[1] For the following reasons, we affirm our Claims Group's action and deny his request.

Background

Mr. Rendon, an aircraft mechanic with the National Aeronautics and Space Administration (NASA), was promoted on August 10, 1980, from aircraft worker, WG-8, step 3, to a research aircraft mechanic, WG-10, step 2. Under the provisions of 5 U.S.C. § 5343(e)(2) (1982), he was not eligible for a within-grade increase until completion of a 78-week waiting period on February 7, 1982. However, due to an administrative error, he received a within-grade increase on February 7, 1981, and was overpaid at the WG-10, step 3 rate for 1 year in the amount of $946.67. The error was subsequently discovered and Mr. Rendon has paid back to NASA the proper amount due.

Mr. Rendon contends that our Claims Group erred by failing to consider his position, experience, knowledge and service history in denying his waiver request. He also notes that the NASA Inspector General's Report found that there was no fault on his part in its review of the case. The report from the NASA Administrator recommends against waiver on the grounds that Mr. Rendon should

[1] Z-2880543, Oct. 14, 1987.

have known the applicable periods for within-grade increases since he previously served such a waiting period in a lower grade level.

Opinion

The Comptroller General is authorized by 5 U.S.C. § 5584 (1982 and Supp. IV 1986) to waive claims for overpayments of compensation and allowances if collection would be against equity and good conscience and not in the best interests of the United States. Such authority may not be exercised if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. Since there is no indication of fraud, misrepresentation, or lack of good faith on the part of the employee in this case, our decision on the issue of waiver depends on whether Mr. Rendon is found to be at fault.

We consider "fault" to exist if, in light of all the circumstances, it is determined that the individual concerned knew or should have known that an error existed, but failed to take action to have it corrected. *Frederick D. Crawford,* 62 Comp. Gen. 608 (1983); 4 C.F.R. § 91.5 (1988). In this connection, we have long held that if an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, then the employee is not without fault and waiver will be denied. *See Herbert H. Frye,* B-195472, Feb. 1, 1980; *L. Mitchell Dick,* B-192283, Nov. 15, 1978.

Furthermore, employees generally are expected to be aware of the waiting periods between within-grade or "step" increases and to make inquiry about an increase not in accord with those waiting periods. *Dominick A. Galante,* B-198570, Nov. 19, 1980; *Frye, supra; Dick, supra.* In this case, Mr. Rendon received the official notice of his within-grade increase, and we believe that, based on his prior experience, he should have known the proper waiting period for within-grade increases. Therefore, we conclude that Mr. Rendon is not without fault in this overpayment.

In his submission, Mr. Rendon relies on *Joyce G. Cook,* B-222383, Oct. 10, 1986, for the proposition that an employee is generally not expected to have any specialized knowledge of the payroll system. *Cook* involved an employee who improperly received two promotions within 1 year. In that case we found that the desk audit of the employee's position and ambiguous notations on her personnel documents caused her to reasonably conclude that she was entitled to her promotion. No similar mitigating factors are present in Mr. Rendon's case.

Mr. Rendon also relies on *Michael A. Uhorchak,* B-223381, Apr. 28, 1987, in which an employee with 10 years of federal government service was granted a waiver. However, in *Uhorchak* we waived an overpayment of pay retention where the employee was erroneously informed by agency officials that he was entitled to "saved pay" and was not counseled as to the financial consequences

of his voluntarily requesting a reduction in grade. We believe our decision in *Uhorchak, supra,* is clearly distinguishable on its facts from Mr. Rendon's case.

Accordingly, we sustain the action of our Claims Group, and we deny Mr. Rendon's request for waiver.

B-235352, August 2, 1989

Procurement

Small Purchase Method

■ Quotations

■■ Late submission

Where request for quotations issued under small purchase procedures did not contain a late quotations provision but substantial activity had transpired in evaluating quotations prior to the buyer's receipt of the protester's late quotation, the contracting agency was not required to consider the late quotation.

Matter of: Adrian Supply Co.

Adrian Supply Co. protests the Defense Electronics Supply Center's (DESC) rejection of its quotation as late under request for quotations (RFQ) No. DLA900-89-T-H057 for the Resistor Assortment.[1]

We deny the protest.

The RFQ was issued under small purchase procedures on January 30, 1989, without a late quotations clause. Quotations were due on February 20, a federal holiday. On February 22, 2 days after the due date for quotes, the DESC buyer initiated the award process by evaluating the two quotations she had received in response to the RFQ and forwarding DESC Form 800 (a form used for preparing the actual purchase order) to the contracting officer for approval. The buyer had not yet received a quotation from Adrian at that time. Since both of the quotations received were competitive and the procurement history revealed that the quotations were comparable to the previous award prices for this item, the contracting officer concurred, on February 22, with the buyer's decision to issue a purchase order to the firm which had submitted the lower quotation, Whitehead. The purchase order was issued to Whitehead on March 2. On April 19, Adrian was notified that its quotation had not been received by the buyer in time for consideration for award. Adrian then protested DESC's failure to consider its quote to our Office.

Adrian claims that DESC's determination that its quotation was late, based on the buyer's receipt of it after she had prepared an award form rather than DESC's mailroom's receipt of it 1 day prior to the evaluation of quotations, is arbitrary and constitutes a deliberate effort on the part of DESC to disqualify timely offerors.

[1] The Resistor Assortment is a cabinet with 900 carbon composition resistors with 160 different resistance values.

The record reflects that DESC processes and awards approximately 140,000 small purchases per year, or more than 500 small purchases each working day. In order to handle this volume of purchases, DESC uses a computerized system to generate and maintain vendors lists for a multitude of items, as well as for issuing the initial RFQs and resulting purchase orders. DESC reports that there are a number of stages in each procurement, many of which are handled by clerical employees located in different sections of the purchasing activity, as well as by the buyer and the contracting officer. While Adrian's quotation was received in the mailroom on February 21, DESC reports that the quotation was not delivered to the buyer until February 22. By the time DESC's buyer received Adrian's quotation, the buyer had already examined the quotations she had received earlier, determined that Whitehead should receive award, and forwarded the DESC Form 800 to the contracting officer for approval. DESC points out that the envelope containing Adrian's quotation bears the buyer's handwritten notation of the purchase order assigned to the RFQ. According to DESC, the buyer would normally have marked the envelope in that manner to indicate that evaluation and award preparation had already begun prior to the buyer's receipt of Adrian's quotation.

We have consistently held that language requesting quotations by a certain day cannot be construed as establishing a firm closing date for the receipt of quotations, absent a late quotations provision expressly providing that quotations must be received by that date to be considered. *Instruments & Controls Serv. Co.,* 65 Comp. Gen. 685 (1986), 86-2 CPD ¶ 16. Rather, under those circumstances the contracting agency has merely indicated to offerors when the award is anticipated to be made, and therefore should consider any quotations received prior to award if no substantial activity has transpired in evaluating quotations. *See CMI Corp.,* B-211426, Oct. 12, 1983, 83-2 CPD ¶ 453.

Here, we find that DESC was not required to consider Adrian's quotation. The buyer had already begun the award process by the time she actually received Adrian's quotation. Specifically, the buyer had examined the quotations already received, prepared an abstract, decided that a purchase order should be issued to Whitehead, and forwarded DESC Form 800 to the contracting officer for approval. In our view, substantial activity in evaluating offers and processing award had already occurred before the buyer was even aware that a quotation had been submitted by Adrian; as a result DESC was not required to consider Adrian's quotation. *See CMI Corp.,* B-211426, *supra.*

Moreover, because DESC has so many small purchases to process on any given day, we believe it would be unnecessarily burdensome to require DESC buyers to retrieve procurement files that are already in the process of being awarded and to reconsider their award decisions whenever a quotation is received after the award process has been initiated. In our view, the general need for orderly and expeditious fulfillment of the agency's requirements precludes disturbing a small purchase award under the circumstances, absent a showing of a conscious or deliberate attempt by agency personnel to prevent selection of an offeror. *See*

R.E. White & Assocs., Inc., B-205489, Apr. 1, 1982, 82-1 CPD ¶ 294. No such showing has been made here.

Adrian argues that DESC should be required to consider its quotation since it was received in DESC's mailroom on February 21, the date the buyer began processing the award; any delay in delivering the quotation to the buyer at that point, Adrian contends, was due to the agency's actions, not its own.

The RFQ specifically notified potential vendors that their quotations were due by February 20 and that failure to submit a quotation by that date "may result in your quotation not being considered for award." We believe this language clearly warned vendors of the potential consequence of submitting a quotation after the due date. Further, we have consistently held that an offeror bears the responsibility for ensuring that its offer is received in time to be considered for award. *See General Atomic Co.*, B-202165, May 27, 1981, 81-1 CPD ¶ 415.

Here, Adrian waited until less than a week before the due date to mail its quotation. In addition, Adrian did not request that DESC either extend the due date beyond the holiday or inform the agency that its quotation had been mailed. Moreover, in view of the volume of mail handled by DESC's mailroom, we do not find unreasonable the 1-day delay between receipt of Adrian's quotation in the mailroom and delivery to the buyer. In these circumstances, we think that Adrian must bear the primary responsibility for receipt of its quotation by the buyer after substantial activity toward award had been accomplished.

Adrian also argues that DESC's procedure unfairly favors local vendors who can hand deliver quotations to the buyer, thus avoiding the delay attendant to delivery between the agency's mailroom and the buyer. As a preliminary matter, we note that out-of-town vendors like Adrian can use overnight messenger delivery services to accomplish hand delivery of quotations to the same extent as local vendors. Moreover, we see no basis to require the agency to delay processing the large number of awards made daily simply to accommodate different vendors' particular circumstances.

The protest is denied.

B-232619.3, August 3, 1989

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation errors
■■■ Evaluation criteria
■■■■ Application

Where technical evaluation scheme in request for proposals sets forth prior experience and performance under prior contracts as an evaluation factor and awardee referenced in its proposal its performance under a major, ongoing contract with the contracting agency, reevaluation of proposals—

undertaken after prior protest against award was sustained—was unreasonable where the agency ignored the problems encountered by the awardee in performing the contract since issuance of the prior decision sustaining the protest.

Matter of: G. Marine Diesel

G. Marine Diesel (GMD) protests the determination by the Naval Sea Systems Command (NAVSEA) that the proposal submitted by the Pennsylvania Shipbuilding Company (PSC) under request for proposals (RFP) No. N00024-88-R-8502, for the overhaul and repair of three ammunition supply ships, was the proposal most advantageous to the government and that an earlier award to PSC thus should remain in place. This determination was made after a reevaluation of proposals undertaken pursuant to our decision in *G. Marine Diesel; Phillyship,* B-232619, B-232619.2, Jan. 27, 1989, 89-1 CPD ¶ 90, in which we held that NAVSEA had not properly evaluated PSC before awarding that firm a contract.

We sustain the protest, but deny GMD's request that we recommend termination of PSC's contract. Instead, we recommend that the Navy not exercise any options under PSC's contract, and we find GMD entitled to recover both its proposal preparation costs and the costs of filing and pursuing the protest.

Background/Prior Decision

The solicitation listed the primary criteria for the evaluation of proposals, in descending order of importance, (1) management capability, (2) technical approach, (3) cost, including probable cost to the government, cost realism and supporting cost data, and (4) resource availability. Prior experience and past performance were subcriteria under all but the cost criterion. Cost was listed as only the third most important criterion, but the actual importance of cost in the evaluation scheme was increased by the listing of cost control and avoidance as a subcriterion under each of the other three primary criteria. Under NAVSEA's undisclosed evaluation plan, offerors could receive up to 1,650 points for cost considerations, approximately 33 percent of the 5,000 total available award points.

In its evaluation of best and final offers (BAFO), NAVSEA questioned several aspects of PSC's cost proposal. The agency gave PSC the lowest cost realism score of any offeror, and a lower score for supporting cost data than either GMD or Phillyship, the third of four offerors. In particular, the agency concluded that PSC had not complied with the solicitation requirement for a cost breakdown that clearly traced the cost of each work item through the appropriate subtotals to the total of proposed costs. Furthermore, while PSC proposed the lowest cost ($69,044,298) of any offeror, NAVSEA found the probable cost of award to PSC ($71,912,464) to be only the second lowest, lower than GMD ($74,876,867), but higher than Phillyship ($66,963,416).

Notwithstanding its concerns with respect to PSC's cost proposal, however, NAVSEA determined that PSC's overall proposal was most advantageous to the

government. The agency found that the proposal offered significant strengths in the areas of organizational approach, advance planning, planning and engineering manpower, prior technical and management experience, experience in providing necessary resources, and available facilities. In this regard, PSC received 532 of 625 evaluation points available under the experience and performance subcriteria, GMD received 423 points, and Phillyship received 352 points. As a result, PSC received a higher score overall (3,709 points) than either GMD (3,421 points) or Phillyship (3,407 points). Based upon this evaluation, NAVSEA made award to PSC on September 7, 1988.

After GMD and Phillyship protested the award, we reviewed the evaluation of proposals and found it inconsistent with the stated evaluation criteria and other requirements of the solicitation. In this regard, the RFP required offerors to summarize any prior experience and performance relevant to their ability to manage, control and perform the required overhaul and repair work and, in addition, to provide detailed information concerning manning, change orders, deficiency reports, and delays for each Navy contract completed during the last year and the last five Navy contracts over $3 million. The record indicates that in late 1987 PSC informed NAVSEA that it was experiencing financial difficulty, due to significant cost increases, in performing a fixed-price incentive contract with NAVSEA for the construction of four (two base and two option) fleet oilers; as a result, the cost of completion was expected to exceed both the target and ceiling prices. Concerned that PSC would be unable to continue operation and might file for protection under the bankruptcy statutes, NAVSEA suggested, and PSC agreed to the transfer of the two option ships to another builder; the assignment was effected after the closing date for submission of initial proposals under this solicitation, but prior to the receipt of BAFOs on July 20, 1988. While PSC cited the fleet oiler contract as relevant to consideration of its management and technical experience and the experience of its key personnel and noted that the contract was ongoing, the firm did not describe its performance under the prior contract and, specifically, did not discuss the serious financial performance problems it had encountered.

Nevertheless, given (1) the solicitation's emphasis on management capability, cost control and avoidance, and prior experience; (2) the relevance to these considerations of recent performance under a substantial, cost-type contract for related services; and (3) PSC's reference to, and the agency's familiarity with, the contract, we concluded in our decision that NAVSEA was required to consider in its technical evaluation PSC's performance under the fleet oiler contract, but apparently had failed to consider PSC's financial difficulties under that contract in rating the firm under the several evaluation categories that concerned prior performance. On the contrary, the record showed that agency evaluators had concluded without apparent reservation that PSC's management and technical experience represented a strength. In addition, we found that the agency had failed to score evaluated probable cost in accordance with the solicitation; this improper scoring accounted for 102 of PSC's 288-point scoring advantage relative to GMD. *G. Marine Diesel; Phillyship,* B-232619, B-232619.2, *supra.*

In considering the effect of these evaluation deficiencies, we took into consideration not only the fact that the prior experience subcriteria accounted for 625 (of the 5,000 total available) points, but also that PSC's fleet oiler experience could have additional relevance to an evaluation of the likely effectiveness of PSC's proposed approach to planning, management, and cost control and avoidance, and to an evaluation of the credentials of some key employees. Since we were unable to predict the scoring impact of the agency's failure to consider PSC's prior contract difficulties, and in view of PSC's remaining narrow, 186-point scoring advantage after recalculation of the probable cost scoring, we were unable to conclude that the source selection decision was a reasonable one. We therefore sustained GMD's protest and recommended that the agency reevaluate PSC's proposal with reference to the firm's fleet oiler contract experience.

Reevaluation

NAVSEA reports that after receiving our decision it reconvened the Contract Award Review Panel (CARP) to reevaluate PSC's performance experience, taking into account the financial performance problems encountered under the fleet oiler contract, as described in an agency memorandum provided to the panel. Although this reevaluation identified certain unspecified "weaknesses and risks," resulting in a 115-point reduction in PSC's technical score for the experience and performance subcriteria, the CARP nevertheless concluded that these weaknesses and risks would not significantly impact PSC's ability to successfully perform the contract and, furthermore, determined that PSC's proposal remained technically superior overall. Since PSC's total revised score (3,551 points) remained 71 points higher than GMD's (3,480 points), and PSC's probable cost was evaluated as nearly $3 million less, the CARP advised the cognizant agency Acquisition Manager on February 2, 1989, that PSC's proposal remained the one most advantageous to the government.

NAVSEA also reports, however, that after conclusion of the reevaluation by the CARP, the Acquisition Manager became aware of additional information concerning the continuing financial performance problems PSC had been encountering under the fleet oiler contract since issuance of our prior decision on January 27. According to the agency, while the Acquisition Manager determined that "this information was not relevant to the reevaluation," and that PSC's proposal therefore remained the one most advantageous to the government, he nevertheless concluded that the additional information was relevant to whether the options under the protested contract should be exercised. As a result, the Acquisition Manager and the contracting officer determined on March 24 to affirm the original award to PSC, but not to exercise any options under PSC's ammunition ship contract unless PSC's performance under the fleet oiler contract improved. Moreover, NAVSEA informs us that, subsequent to the March 24 determination, and prior to the agency filing its report on this protest on May 12, the Acquisition Manager undertook a further review of "PSC's continued poor financial performance on ship repair and new construction work in

PSC's yard" and that, as a result, the agency has determined not to exercise any options under the ammunition ship contract, and instead will compete all remaining program requirements.

Allegations

In its protest, GMD questions whether the agency conducted a thorough reevaluation, taking full account of the effect that PSC's fleet oiler performance problems would have on PSC's capacity to perform the ammunition ship contract. GMD challenges NAVSEA's account that the contracting officials here learned of significant, additional information concerning PSC's performance under the fleet oiler contract only after the CARP had finished its reevaluation; according to the protester, the extent of PSC's performance problems already was apparent prior to award of the contract in September 1988, let alone at the time of the reevaluation.

Analysis

We find that although NAVSEA was required under the solicitation evaluation scheme to consider in its technical evaluation PSC's performance under the fleet oiler contract, the agency, by its own account, failed to take into consideration the full extent of PSC's known, unsatisfactory financial performance when conducting the reevaluation. Again, according to NAVSEA, the Acquisition Manager and the contracting officer, who was designated the source selection official in the source selection plan, became aware of continuing deficiencies in PSC's performance, beyond those considered by the CARP, prior to the March 24 determination to reaffirm the award to PSC. The agency apparently considered this information concerning PSC's performance to be sufficiently serious that it called into question PSC's ability to perform; where the CARP had concluded that the weaknesses with respect to PSC's experience would not significantly impact PSC's ability to successfully perform the ammunition ship contract, the Acquisition Manager and the contracting officer determined that the exercise of options for additional work was then inappropriate in view of PSC's performance problems. Essentially, then, the agency determined that PSC properly had been awarded the contract but, at the same time, that it was not sufficiently qualified based on its prior performance for NAVSEA to even consider awarding PSC the options. We find these determinations incongruous.

NAVSEA argues that the Acquisition Manager reasonably considered the information on PSC's recent performance to be irrelevant to the reevaluation. We disagree. Federal Acquisition Regulation (FAR) § 1.602 requires contracting officers to safeguard the interests of the United States when entering into contractual relationships. We cannot conclude that it was in compliance with the mandate of FAR § 1.602 and reasonable under the solicitation evaluation scheme for the contracting officer, as the source selection official responsible for making the ultimate determination as to the relative merits of the proposals, not to take into consideration reasonably available information concerning PSC's con-

tinuing serious, financial performance problems under the fleet oiler contract, a substantial cost-type contract for related services. The fact that this information concerned PSC's most recent performance under the fleet oiler contract only enhanced its relevance, *see, generally, The Aeronetics Division of AAR Brooks & Perkins,* B-222516, B-222791, Aug. 5, 1986, 86-2 CPD ¶ 151 (recent unsatisfactory performance may call into question contractor's ability to perform); it certainly does not excuse the failure to consider relevant, reasonably available information.

Further, in this regard, it is not apparent from the record why the agency should not have already been aware of the significance of PSC's ongoing performance problems at the time of the reevaluation. Again, as early as late 1987, NAVSEA learned of PSC's serious financial performance problems, which ultimately led, in June 1988, to the assignment of PSC's contract for two of the fleet oilers. Moreover, both the assignment and the evaluation under this solicitation of PSC's fleet oiler performance subsequently became the subject of bid protests. *American Shipbuilding Co.,* 68 Comp. Gen. 53 (1988), 88-2 CPD ¶ 454. Presumably, therefore, NAVSEA continued to closely monitor PSC's fleet oiler performance; the agency's realization that the performance continued to be unsatisfactory was subsequently evidenced by the agency's determination first to reduce PSC's score under the reevaluation by 115 points, and by its subsequent determination not to exercise any options under the contract in question here. Although NAVSEA claims that the determination to compete the remaining requirements was based upon new, additional information received only after the CARP completed its reevaluation, the agency has neither specifically described the additional information nor explained how the essential character and significance of PSC's performance had changed and why the information in fact was new.

In these circumstances, we conclude that the reevaluation was not reasonable, and we sustain the protest on this basis.

Recommendation

The solicitation established as the base quantity of work essentially only the preparation for the initial period of maintenance and repair of the USS Suribachi, one of the three ammunition ships. The actual, initial maintenance and repair of that ship, the two subsequent periods of maintenance and repair of that ship, and the six periods of maintenance and repair of the two other ships were only options and not part of the base quantity of work. NAVSEA advises us that the initial maintenance and repair work on the USS Suribachi—that is, the first option—is almost completed and that no further options have been exercised.

GMD requests that we recommend that PSC's contract be terminated for the convenience of the government and that award then be made to GMD as the next highest ranked offeror (at 3,480 points). We decline to do so.

NAVSEA has informed our Office that it has determined that it is in the best interests of the government that the requirement be resolicited on the basis of either fixed-price contracts for the overhaul and repair of individual ships or under an otherwise restructured maintenance program. In this regard, the contracting officer has broad discretion in deciding whether to cancel a solicitation, and need only have a reasonable basis to do so, *see Gradwell Co.*, B-230986, July 7, 1988, 88-2 CPD ¶ 19; the need to revise the solicitation to be consistent with the agency's current needs may be a legitimate basis for cancellation. *Telesynetics Corp.*, B-228916.4, B-228916.5, Aug. 2, 1988, 88-2 CPD ¶ 106.

In the circumstances, therefore, we conclude that termination of PSC's contract is not appropriate. Instead, we recommend that, as proposed by NAVSEA, no further options be exercised and that the requirement instead be resolicited on a basis consistent with the agency's current needs. In addition, since the effect of NAVSEA's actions has been to unreasonably exclude GMD from competition, we find GMD entitled to recover its proposal preparation costs. *See, generally, Data Preparation, Inc.*, B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. We also find GMD to be entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1988); *see Sanford & Sons Co.*, 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266.

The protest is sustained.

B-206273.2, August 4, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Necessary expenses rule
■■■ Advertising

Due to the commercial nature of the commemorative coin program, GAO would not object to Treasury's use of coinage profit funds to host promotional functions and to give occasional coins at public events. *See* B-206273, Sept. 2, 1983. GAO also would not object to the giving of coins as goodwill gestures to customers whose orders have been mishandled. Based on our prior decisions, however, GAO would object to the printing of business cards for sales representatives. *See* Comptroller General decisions cited.

Matter of: Promotional and Business Expenditures in the Sale of Commemorative Coins

The Treasurer of the United States has asked that we review the authority of the United States Mint, Department of the Treasury, to use the Coinage Profit Fund to pay certain promotional and business expenses related to the sale of coins and medals to the public. The expenses are of four types—the hosting of media events and receptions, the giving of occasional coins at public events for promotional purposes, the giving of medals or coins to customers whose orders have been mishandled, and the printing of business cards for sales representa-

tives. For the following reasons, we have no objection to expenditures by the United States Mint for media events and receptions, the occasional giving away of coins for promotional purposes, and the giving away of inexpensive complimentary coins or medals as goodwill gestures to customers whose orders have been mishandled. However, we do object to expenditures on business cards for sales representatives.

Background

The Mint produces coins and medals under the authority of 31 U.S.C. § 5111(a). Prior to 1981, the Mint's numismatic program was limited to the sale of proof and uncirculated versions of its normal circulating coins to coin collectors on the Mint's mailing list. Since 1981, however, Congress has passed various commemorative coin acts, dramatically altering the mission of the Mint by directing the Treasury Department to perform the role of an entrepreneur in the marketplace by mass marketing coins to the general public. As a marketer of commemorative and bullion coins, Treasury competes directly with other countries with similar programs for a share of the market. The program has expanded steadily to the point that coin sales in 1987 amounted to $1.8 billion, with profits of $185 million. Under 31 U.S.C. § 5111(b), sales proceeds go into the Coinage Profit Fund and are used to pay the expenses of coin production and sale, with the balance going into the Treasury.

Discussion

We addressed a similar but more particularized request by the Mint in our decision, B-206273, September 2, 1983. There we concluded that the Mint could pay promotional expenses in connection with marketing of coins if (1) they are deemed necessary to fulfill the statutory responsibilities of the United States Treasury, (2) a reasonable nexus exists between each expense and a marketing benefit for the Coin Sales program, and (3) expenses are recovered from sales proceeds.

The first two categories of expenses under discussion here are similar to those we approved in B-206273, September 2, 1983. In that decision, we relied on the commercial nature of the Coin Sales program as the basis to allow the promotional expenditures as long as they met the above three tests. The Olympic Commemorative Coin Act, Pub. L. No. 97-220, 96 Stat. 222 (1982), which we analyzed in our 1983 decision, indicates that Congress intended the Treasury to market the coins as a private seller would in order to make a profit. The other coinage acts referred to by the Treasurer in her inquiry—the George Washington Commemorative Coin Act, Pub. L. No. 97-104, 95 Stat. 1491 (1981); the Statue of Liberty-Ellis Island Commemorative Coins Act, Pub. L. No. 99-61, 99 Stat. 113 (1985); the Bicentennial of the Constitution Coin Act, Pub. L. No. 99-582, 100 Stat. 3315 (1986); and the 1988 Olympic Commemorative Coin Act, Pub. L. No. 100-141, 101 Stat. 832 (1987), contain similar language. The commercial justification for promotional expenditures in the marketing of the 1982

Olympic coins applies equally to the other commemorative coins which Congress has since authorized. Accordingly, we have no objection to the Mint's use of the Coinage Profit Fund to defray the cost of hosting media events and receptions or the occasional giving of coins at public events for promotional purposes for these or other similar future programs as long as they meet the three tests enumerated above.

Unlike the first two categories of expenses, the use of public funds to give medals or coins as goodwill gestures to customers whose orders have been mishandled was not addressed in our previous decision. However, as in the first two categories, the question presented is whether the Coinage Profit Fund is available for this purpose. Under 31 U.S.C. § 1301(a), appropriated funds may be used only for the purpose for which they are appropriated. In applying this provision, our Office has consistently held that even though a particular expenditure may not be specifically provided for in the appropriation act, the expenditure "is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law." B-230062, Dec. 22, 1988; 66 Comp. Gen. 356 (1987).

Application of the "necessary expense" rule to the facts of this case leads us to the conclusion that the proposed expenditure is permissible. While the various commemorative coin acts do not specifically address whether the Mint may use the Coinage Profit Fund to give coins or medals as goodwill gestures, we see a direct connection between the purpose of the commemorative coins sales program and the coins and medals that would be given in order to placate disgruntled customers. In other words, applying the test from our previous decision B-206273, the giving away of complimentary coins or medals to customers whose orders have been mishandled, results in a definite marketing benefit for the Coin Sales program.

The Treasury's order processing facility processes millions of orders each year, probably making the mishandling of a certain number of orders unavoidable. The mishandling of a customer's order may result not only in the loss of that order but also in the loss of future orders because of bad publicity. The coins and medals given away are a reasonable means of attempting to mollify such customers. Thus, considering that Congress intended the Treasury to market the coins as a private seller would in order to maximize profit, and that the development of goodwill to maintain or increase market share is essential to any good marketing strategy, we conclude that the giving of the coins or medals would fulfill the specific mission for which the commemorative coin program was established. Therefore, the third category of expenses is allowable because (1) it is necessary to fulfill the statutory responsibilities of the United States Treasury, (2) a reasonable nexus exists between the expense and a marketing benefit for the Coin Sales program, and (3) expenses are recovered from sales proceeds.

In reaching this conclusion, we are mindful of the general rule against using appropriated funds for personal gifts or awards. *See* B-214833, Aug. 22, 1984. 57

Comp. Gen. 385 (1978); 55 Comp. Gen. 346 (1975). However, this rule is not applicable to the present situation. The common denominator in the cited cases, and others in which we applied the general prohibition, was the absence of any direct connection between the purpose for which the funds were appropriated and the gifts in question.

Here, however, we find a direct connection between the use of complimentary coins and medals as goodwill gestures when commemorative coin orders have been mishandled and the Treasury's mission to market and sell commemorative coins to the general public under the various commemorative coin acts. *Cf.* B-230062, Dec. 22, 1988 (Army may use its appropriations to give framed recruiting posters as prizes to potential recruits in order to fulfill its mission to conduct recruiting program). Accordingly, we would not object to the expenditure of coinage profit funds for this purpose.

Regarding the fourth category of expenses, the printing of business cards for sales representatives, we have held that the costs of calling or business cards constitute personal rather than official expenses of the persons using them. Therefore, these costs may not be paid with government funds in the absence of specific statutory authority to do so. *See, e.g.,* B-131611, Feb. 15, 1968, 12 Comp. Gen. 565 (1933). We have continued to apply this rule even when it was clear that the cards were being used only for official purposes. *See* B-231830, June 5, 1989, 68 Comp. Gen. 467; B-195036, July 11, 1979; 12 Comp. Gen. 565, 566 (1933).[1] Accordingly, the printing of cards for sales representatives at government expense is not allowable.

Conclusion

The expenses of hosting promotional functions and donating coins at public events are appropriate within the guidelines set out in B-206273, September 2, 1983. We also conclude, based upon special circumstances involved in the Treasury's Coin Sales program, that the giving of complimentary coins or medals as goodwill gestures when customers' orders have been mishandled is allowable. However, because of the long-standing prohibition, the printing of business cards is not an appropriate expenditure to be reimbursed from the Coinage Profit Fund.

[1] The rule is also recognized in the Joint Committee on Printing's Printing and Binding Regulations, which state: Printing or engraving of calling or printing cards is considered to be personal rather than official and shall not be done at Government expense. S. Pub. No. 5, 100th Cong., 1st Sess. 15 (1987).

B-232489, August 4, 1989

Civilian Personnel

Relocation

■ Overseas personnel

■■ Return travel

■■■ Eligibility

Employee transferred from Canada to Hawaii and served approximately 17 months with the agency in Hawaii, prior to his transfer to another government agency in Hawaii, where he remained for 2-1/2 years. He is entitled to his return travel and transportation expenses to the continental United States since he fulfilled his service agreement. Expenses should be paid by the agency to which the employee transferred, computed on a constructive cost basis.

Matter of: Neil G. Pfaff—Travel and Transportation Expenses—Completion of Service Agreement

This decision is in response to a request from an Accounting and Finance Officer, Defense Investigative Service (DIS), Washington, D.C., for an opinion as to whether a former employee of DIS in Hawaii may be reimbursed for certain travel and transportation expenses incurred incident to his return from Hawaii to the United States. For the reasons that follow, the former employee may be reimbursed for the travel and transportation expenses on a constructive cost basis.

Background

Mr. Neil G. Pfaff was employed by the United States Customs Service in Edmonton, Alberta, Canada, when he transferred in October 1981 to the Customs Office in Hawaii. Mr. Pfaff's travel order stated that he was transferred for the convenience of the government and authorized him to ship at government expense a privately-owned vehicle (POV) and 7,500 pounds of household goods.

Mr. Pfaff had been employed by Customs in Hawaii for approximately 17 months when in February 1983 he transferred to a similar position with DIS.

Mr. Pfaff applied to DIS for tour renewal agreement travel in 1983. His request was denied by DIS on the basis that he was a local hire and, therefore, not entitled to tour renewal agreement travel. The DIS also declined to initiate a new service agreement with Mr. Pfaff.

Mr. Pfaff worked for DIS until June 1985 when he experienced some medical problems and returned to the United States. He was placed on annual leave, sick leave or leave without pay from June 1985 until August 1986, at which time he resigned from DIS.

Mr. Pfaff filed a claim for travel expenses he incurred on June 24, 1985, when he traveled from Hawaii to the continental United States. Mr. Pfaff also claimed reimbursement for shipping a POV and for shipping his household goods by airfreight to Chicora, Pennsylvania, at a cost of $4,207.31.

Mr. Pfaff contends that he is entitled to reimbursement for his claimed expenses since he carried over his entitlement from Customs to DIS, and, in the alternative, he was entitled to tour renewal agreement travel which was never granted to him. The Finance Officer questions whether Mr. Pfaff is entitled to return travel and transportation at the expense of DIS since he transferred to DIS in Hawaii from another agency. In addition, the Finance Officer wishes to know what effect, if any, Mr. Pfaff's early return prior to his separation and without travel orders has on his entitlement.

Opinion

Under the provisions of 5 U.S.C. § 5724(d) (1982), when an employee transfers to a post of duty outside the continental United States, his expenses of travel and transportation to and from the post are allowed to the same extent and with the same limitations as prescribed for a new appointee under 5 U.S.C. § 5722 (1982). For this purpose, Hawaii is considered to be outside the continental United States. 5 U.S.C. § 5721(3) (1982). Thus, an agency may pay the employee's expenses when he returns from his post of duty outside the continental United States to the place of his actual residence prior to his overseas assignment upon completion by the employee of an agreed upon period of service. 5 U.S.C. § 5722(a)(2), (c)(2) (1982). The regulations implementing 5 U.S.C. § 5722 are contained in chapter 2 of the Federal Travel Regulations (FTR), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1985).

Although Mr. Pfaff's service agreement with Customs incident to his transfer to Hawaii is not part of the record, we note that Mr. Pfaff served with Customs in Hawaii for approximately 17 months, and we were informally advised by Customs that the normal tour of duty for Hawaii is 12 months. Therefore, Mr. Pfaff fulfilled his service agreement and became entitled to his return travel and transportation expenses from his overseas assignment prior to his transfer from Customs to DIS. *Estelle C. Maldonado,* 62 Comp. Gen. 545, at 550 (1983); *Johnny R. Dickey,* 60 Comp. Gen. 308 (1981). Therefore, Mr. Pfaff is entitled to his return travel and transportation expenses from his post in Hawaii. DIS as the agency for which he worked at the time of the return travel is obligated to pay the expenses authorized by sections 5722 and 5724. *See Johnny R. Dickey,* 60 Comp. Gen. 308, *supra.* In view of this entitlement, we need not discuss the issue of tour renewal agreement travel under the provisions of 5 U.S.C. § 5728 (1982).

Chicago, Illinois, was Mr. Pfaff's residence in the United States. Therefore, Mr. Pfaff is entitled to his travel and transportation expenses from Hawaii to Chicora, Pennsylvania, not to exceed the constructive costs of such expenses to Chicago, his designated actual place of residence. Mr. Pfaff's entitlement to ship his household goods is limited to the cost of a single shipment by the most economical route. 60 Comp. Gen. 30 (1980); FTR, para. 2-8.2d (Supp. 1, Nov. 1, 1981). Therefore, his reimbursement is limited to the constructive cost of shipment by surface on a government bill of lading (GBL). This cost information can be ob-

tained from the Military Traffic Management Command (MTMC), Personal Property Directorate. The MTMC can also provide information on the cost to ship Mr. Pfaff's POV to Chicago on a GBL.

Mr. Pfaff has also claimed $495 in airfare from Honolulu to San Francisco on June 24, 1985. While he has not furnished a receipt for this expense, since we are allowing his expenses on a constructive cost basis we do not believe that his lack of a receipt should cause the claim to be denied. However, the amount reimbursed should be limited to the government contract fare between Honolulu and Chicago then in effect. The Passenger Directorate, MTMC, would also have this information available. We also note that elsewhere in his claim Mr. Pfaff is claiming the mileage reimbursement at the rate of 22-1/2 cents per mile. The proper rate is 20-1/2 cents, the rate in effect in 1985.

Mr. Pfaff should be reimbursed in accordance with this opinion.

B-235208, August 9, 1989

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Cancellation
■■■ Justification
■■■■ Competition enhancement

An agency may cancel a negotiated procurement based on the potential for increased competition or cost savings.

Procurement

Bid Protests
■ GAO procedures
■■ Preparation costs

Procurement

Competitive Negotiation
■ Offers
■■ Preparation costs

Claim for proposal preparation and protest costs is denied where cancellation of solicitation was proper.

Matter of: G.K.S. Inc.

G.K.S. Inc. protests the Air Force's cancellation of request for proposals (RFP) No. F41608-88-R-5660 for transducers for jet engines and the agency's resolicitation of the requirement under RFP No. F41608-89-R-2640. G.K.S. alleges that the new solicitation is substantially the same as the original and therefore the

cancellation of the original solicitation was improper. It also claims its proposal preparation and protest costs.

We deny the protest and the claim.

The San Antonio Air Logistics Center issued RFP No. F41608-88-R-5660 on May 17, 1988, for 532 transducers PS3, applicable to the General Electric TF34-100A engine in support of the A-10 aircraft. This item transduces compressor air pressure into an electrical signal. The solicitation was limited to approved sources and in the schedule identified the item by two part numbers, one attributed to Schaevitz Engineering, the other to G.E. or G.K.S. The parties agree, however, that of these three firms, only Schaevitz manufactured the part: G.E., the prime contractor for the aircraft engine, would supply a Schaevitz-manufactured part as would G.K.S., a distributor. Two proposals, one from Schaevitz, and one from G.K.S., were received by the closing date.

The contracting officer subsequently learned that G.K.S., a non-manufacturing source, did not currently have the transducers on hand (such as surplus) but was buying them from Schaevitz. The contracting officer was concerned that the two offerors may not have arrived at their prices independently and that price competition did not exist. The agency requested additional information to clarify any interrelationship between the two sources. Because the contracting officer believed competition did not exist, other pricing procedures, including a Defense Contract Administration Services Management Area (DCASMA) field review and a Defense Contract Audit Agency (DCAA) audit on G.K.S., were initiated. Due to problems of verifying more than half of G.K.S.'s subcontractor's proposed costs, the DCAA issued a qualified report on the G.K.S. proposal in which DCAA advised the contracting officer of the items and types of documentation necessary to support the subcontractor costs. The report indicated that the pricing data submitted by G.K.S. was not adequate and that the proposal was not "acceptable as a basis for negotiation of a fair and reasonable price."

On March 8, 1989, before negotiations had been completed, an additional firm, Gulton Industries, Inc., was identified by the Air Force as an approved source for the item. The contracting officer then decided to cancel the solicitation and resolicit.

The protester argues that the solicitation should not have been canceled because the new solicitation is not substantially different from the original. G.K.S. argues that an agency cannot cancel a RFP solely for the purpose of allowing another party to have an opportunity to participate in a resolicitation with identical requirements. Further, G.K.S. alleges that there was a fair and reasonable price available under the original RFP since its proposed price was less than prices paid by the government in the previous 3 years and was 30 percent less than the government's estimated unit price. G.K.S. also says there was competition under the original RFP because three sources of supply were identified in the RFP and two of these sources submitted offers. Further, G.K.S. states the agency was fully aware of the relationship between G.K.S. and Schaevitz and had awarded three contracts for the transducers to one or the other of the firms

since 1985. G.K.S. also argues that it had ordered the transducers on July 15, 1988, and deliveries had been commenced prior to the contracting officer's assertion that G.K.S. did not have the transducers "on hand." The protester argues that the circumstances for the instant procurement are identical to previous buys where the agency determined there was competition.

In a negotiated procurement, such as this, the contracting officer has broad discretion in deciding whether to cancel a solicitation. The contracting officer need only have a reasonable basis to do so, as opposed to the cogent and compelling reason required for the cancellation of a solicitation after sealed bids have been opened. *Shiloh Forestry,* B-230582, June 21, 1988, 88-1 CPD ¶ 591.

Here, the Air Force, based on a DCAA report, could not determine if the G.K.S. proposal represented a fair and reasonable price, nor could it be certain that competition existed between the two offerors. Moreover, while the DCAA compiled its report and the agency tried to obtain the necessary documentation to support G.K.S.'s prices, another source for the item was approved. Under Federal Acquisition Regulation (FAR) § 15.608(b)(4), the procuring agency may reject all proposals where cancellation of the solicitation is clearly in the government's best interest. Pursuant to this regulation, a procuring agency may cancel a negotiated procurement based on the potential for increased competition or cost savings. *Bell Indus., Inc.,* B-233029, Jan. 25, 1989, 89-1 CPD ¶ 81; *Gradwell Co., Inc.,* B-230986, July 7, 1988, 88-2 CPD ¶ 19; *Dohrman Mach. Prod., Inc.,* B-223307, Aug. 25, 1986, 86-2 CPD ¶ 221. Thus, once the Air Force learned of the possibility of increased competition and cost savings because Gulton was now an approved source, it properly could cancel the RFP and resolicit for the requirement. *Bell Indus., Inc.,* B-233029, *supra.* Thus, while the Air Force may not have been required to cancel, we find that the Air Force did act reasonably under these circumstances in canceling the RFP.

We interpret G.K.S.'s statement in its comments that "the solicitation was cancelled due to the existence of a specific company—Gulton" to constitute an allegation of bad faith on the part of the contracting officer. There must be very strong proof that an agency has a malicious and specific intent to injure a protester before we may find bad faith. *J. Carver Enters.,* B-227359, Sept. 3, 1987, 87-2 CPD ¶ 220. In this protest, G.K.S. has offered little more than speculative comments suggesting that Air Force personnel have exercised bad faith. Therefore, there is no basis for finding this aspect of the protest meritorious.

The protest is denied.

G.K.S. requests reimbursement of its proposal preparation and protest costs. There is no basis for allowing recovery of such costs, however, where, as here, there is no indication that the agency acted improperly. *Systems-Analytics Group,* B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

B-235529, August 9, 1989

Procurement

Sealed Bidding
■ Contracting officers
■■ Bad faith
■■■ Allegation substantiation

Protest that contracting officer was improperly influenced in decision to waive awardee's insufficient bond and failure to acknowledge immaterial amendment is denied where the contracting officer acted in accordance with applicable procurement regulations and denies the alleged impropriety and there is no evidence corroborating the protest allegation.

Matter of: Faulk Mechanical Contractors

Faulk Mechanical Contractors protests the award of a contract to P.M.B.W., Inc., under invitation for bids (IFB) No. 83-115 issued by the Department of Veterans Affairs (VA) for the modernization of the boiler plant at the Tuskegee, Alabama Medical Center. Faulk asserts that the agency improperly waived the awardee's submission of an inadequate bond and its failure to acknowledge an amendment because of bias on the part of a contracting official.

We deny the protest.

At bid opening on April 6, 1989, the VA received four bids. P.M.B.W., Inc., was the low bidder with a price of $1,135,324 and Faulk was the second low bidder with a bid of $1,190,500. The contracting officer made an initial determination that P.M.B.W.'s bid was nonresponsive because it was accompanied by a bid bond for approximately 5 percent of the bid price instead of the 20 percent required by the IFB. The agency indicated to Faulk that it would receive award.

On April 24, the agency informed the protester that award would be made to P.M.B.W. because it had decided that the defect in the firm's bid bond could be waived pursuant to Federal Acquisition Regulation (FAR) § 28.101-4(b). That Regulation provides that noncompliance with a bid guarantee requirement should be waived when the amount of the bid guarantee submitted is less than required by the solicitation but is equal to or greater than the difference between the bid price and the next higher acceptable bid. P.M.B.W.'s bond for $57,000 was greater than the $55,176 difference between its bid and Faulk's so the agency determined that waiver was appropriate. In addition, the agency determined that the low bidder's failure to acknowledge IFB amendment No. 03 could be waived in accordance with FAR § 14.405(d)(2) because the amendment, which in substance deleted an Architect Engineer's note in the work statement suggesting additional work, did not impose any additional requirements on the bidders.

In its initial protest to our Office, Faulk argued that the contracting officer improperly waived the awardee's insufficient bond and its failure to acknowledge the amendment. The protester asserted that the contracting officer waived the requirements because the son of the contracting officer's supervisor works for an electrical subcontractor that the protester elected not to use. According to

the protester, the day before it was notified that P.M.B.W. would receive the award, it received a telephone call from the agency's chief of engineering services who asked which electrical subcontractor Faulk had chosen. Faulk states that the engineer indicated that the protester should have used a particular subcontractor and that he was very disappointed that it was choosing to use another. After receiving the agency's response to its protest, Faulk agreed with the agency that the contracting officer could properly waive P.M.B.W.'s deficient bond and its failure to acknowledge the amendment. Faulk, however, still contends that the waivers were improperly motivated. Faulk states that an investigation of prior procurements will substantiate its assertion that the contracting officer's supervisor used her position to direct contracts to a particular firm.

The contracting officer denies any knowledge of the alleged conversation or of which firms would receive subcontract work until the protest was received after the award. In view of this denial, and since the contracting officer was acting in accordance with the applicable procurement regulations in waiving the awardee's submission of an insufficient bond and its failure to acknowledge the amendment, in the absence of additional evidence of impropriety, we have no basis upon which to question the waivers.

With respect to the allegations of improper conduct, however, we have been informed by the agency that Faulk's allegations have been referred to the VA's Office of the Inspector General which has responsibility for investigations concerning alleged fraud, waste and abuse and violations of the agency's standard of conduct regulations.

The protest is denied.

B-235270, August 11, 1989

Procurement

Socio-Economic Policies
■ Small businesses
■■ Disadvantaged business set-asides
■■■ Eligibility
■■■■ Determination

Agency properly determined that joint venture protester did not qualify as a small disadvantaged business (SDB) where agency reasonably found that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the non-SDB member's provision of financial resources; greater obligation for losses and liabilities; provision of the project manager empowered to resolve disputes between the venturers; and other indicia of majority control.

Procurement

Socio-Economic Policies
■ Small businesses
■■ Contract awards
■■■ Size status
■■■■ Misrepresentation

In the absence of any evidence of bad faith, awardee's bid is responsive when listing only itself in the small disadvantaged business self-certification and as principal on the bid bond even though awardee's teaming agreement with another concern is interpreted by protester as creating a joint venture.

Procurement

Socio-Economic Policies
■ Small businesses
■■ Disadvantaged business set-asides
■■■ Eligibility
■■■■ Determination

Agency properly determined that awardee qualified as small disadvantaged business (SDB) where it reasonably found that awardee, though teamed with a non-disadvantaged small business, met the small size requirements; retained control of its management and daily business; was solely responsible for contract performance and all contacts with the agency; and would receive 100 percent of the contract profits.

Matter of: Washington-Structural Venture

Washington-Structural Venture (WSV) protests the award of a contract under invitation for bids (IFB) No. DACA51-89-B-0017 to Abrantes Construction Corporation. The IFB, issued by the Army Corps of Engineers, was a 100 percent small disadvantaged business (SDB) set-aside for construction of the Post Safety and Law Enforcement Building at Fort Drum, New York. WSV, a joint venture between F.J. Washington Construction, Inc., an SDB, and Structural Associates, Inc., a non-SDB, contends that it qualifies as the low SDB bidder and that Abrantes does not qualify as an SDB because of Abrantes's teaming agreement with a subcontractor, Northland Associates, Inc.

We deny the protest.

Four bids were opened on February 14, 1989, with WSV submitting the second low bid and Abrantes submitting the third low bid. By letter of February 16, WSV successfully challenged the low bidder as not qualifying as an SDB. The contracting officer then obtained and reviewed a copy of WSV's joint venture agreement. This review, as well as Washington's apparent lack of financial capability, raised questions of WSV's qualification as an SDB and led the contracting officer to refer the matter to the Small Business Administration (SBA), which has the general responsibility for determining the SDB status of a firm when that status is questioned. The contracting officer's referral did not question Washington's SDB status or Structural's size status, but detailed the Corps' rationale for finding that the joint venture did not qualify as an SDB.

By letter of March 24, 1989, the SBA declined to determine the joint venture's SDB status, explaining:

> In the instance of a Joint Venture, it is the policy of the [SBA] . . . that determination of SDB status will be limited to the SDB participant in the Joint Venture. In this regard, it is the responsibility of [DOD] . . . to determine the eligibility of Joint Venture organizations for SDB program participation.

In light of the SBA's response, the contracting officer again reviewed WSV's joint venture agreement. On April 12, 1989, he determined that WSV was not an SDB because its management and daily business would be controlled by the non-SDB member of the venture and rejected its bid as nonresponsive. Concurrent with his review of WSV, the contracting officer also reviewed the teaming agreement between the next low bidder, Abrantes, and Northland.

Even though the Abrantes/Northland teaming agreement disclaimed any relationship (*e.g.,* joint venture) between the firms, apart from that of contractor-subcontractor, the contracting officer reviewed the concerns' relationship to determine whether Abrantes qualified as an SDB. After observing that the concerns' combined earnings were within the appropriate size limits for an SDB and that under the terms of the agreement, Abrantes, the SDB, was not being controlled by Northland, the non-SDB, the contracting officer determined that Abrantes qualified as an SDB. By letter dated April 14, received April 19, WSV was notified of the award to Abrantes. Also on or about April 19, WSV learned of Abrantes's teaming agreement. On April 19, WSV protested the determination of its nonresponsiveness to the agency and filed the same protest with our Office on April 21. On April 27, WSV protested Abrantes's SDB status to the agency and our Office.

As a preliminary matter, the Corps urges us to dismiss the protest because WSV's bid expired prior to the filing of the protest with the agency and our Office. As such, WSV allegedly is not an interested party because it does not have a direct economic interest which would be affected by award or failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). We disagree. On April 10, 2 days prior to rejecting WSV's bid as nonresponsive, the Corps advised WSV that an award was not anticipated in the near future, but did not request an extension of its bid as Federal Acquisition Regulation (FAR) § 14.404-1(d) (FAC 84-5) suggests it should have done. The Corps rejected WSV's bid and awarded the contract to Abrantes on Friday, April 14, prior to the expiration of WSV's bid on Sunday, April 16. When WSV learned on April 17 that award had been made to Abrantes, it immediately expressed disagreement and filed a protest 2 days later. The essence of WSV's protest is that when award was made on April 14, it should have been made to WSV. Since the basis of WSV's protest, rejection of its bid and award to Abrantes, transpired prior to the expiration of its bid, and since WSV protested as soon as it learned of that basis, under the circumstances of this case we think WSV's conduct effectively served to extend its bid. *See Microtech, Inc.,* B-225892, Apr. 29, 1987, 87-1 CPD ¶ 453 (pursuit of award through bid protest is indicative of intent to extend bid).[1] Thus, we conclude that WSV is an interested party.

[1] WSV subsequently expressly extended its bid in writing.

On the merits, WSV first contends that it is entitled to the contract because it certified in its bid that it was an SDB and only the SBA can determine that it is not entitled to SDB status. WSV argues that since the SBA declined to make that determination and the Corps did not appeal the SBA's dismissal of the referral, WSV's self-certification as an SDB must be controlling.

The Corps and the awardee agree that the SBA has the authority to determine SDB status, but rely on the SBA's advice that it was the responsibility of the Department of Defense (DOD) to make the determination of eligibility as making the Corps' determination of WSV's status the final word on the subject. The SBA, whose views we solicited, maintains that since the SDB set-aside is administered under a statute pertaining to DOD (section 1207 of Pub. L. No. 99-661) it is DOD which must first determine whether (and if so, under what criteria) a joint venture may be eligible for SDB status before the SBA will render an official determination.

In general, both DOD's SDB preference regulations and more recent SBA regulations provide for the referral of SDB status questions to SBA for resolution. See DOD FAR Supplement (DFARS) § 219.302(5) (1988 ed.); 54 Fed. Reg. 10,271 at 10,273 (1989) effective March 13, 1989 (to be codified at 13 C.F.R. § 124.604). However, it is clear from the record in this case that there is some question between DOD and SBA with regard to the extent of SBA's role when a joint venture is involved. Further, it is clear that SBA has decided not be make any determination in this case and has left the matter in the hands of DOD (here, the Corps). Since the SDB set-aside program is a DOD program, we see nothing improper under these circumstances with the Corps' deciding whether the joint venture was eligible for an SDB set-aside award.[2] In this regard, we have recognized DOD's discretion in establishing regulations and procedures necessary to establish the objectives of the section 1207 SDB preference program, and that when it does so it is not locked into how other agencies such as the Department of Labor traditionally have administered such things as the regular dealer requirement of the Walsh-Healey Act. *See MIA Creative Foods, Inc.*, B-233940, Mar. 28, 1989, 89-1 CPD ¶ 318; *G&D Foods, Inc.*, B-233511 *et al.*, Feb. 7, 1989, 89-1 CPD ¶ 125.

With this in mind, we have reviewed the Corps' reasoning, and in the absence of specific regulations on the subject, we find that the Corps reasonably relied on existing authority in determining that WSV did not qualify as an SDB. The Corps looked primarily to the definition of an SDB in DFARS § 219.001: "a small business concern . . . owned and controlled by individuals who are both socially and economically disadvantaged . . . the majority of earnings of which directly accrue to such individuals," and to the definition of an SDB in section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(4)(A), (B) (1982): "51 percentum owned by . . . socially and economically disadvantaged individuals . . . [and

[2] Under the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 201(E), (F)(vii), one responsibility of a new SBA division is to decide protests regarding whether a concern is "disadvantaged" for purposes of programs which would include DOD's section 1207 SDB program. However, this law, effective August 15, 1989, was not in effect at the time SBA declined to make a determination of SDB status in this case.

whose] management and daily business operations . . . are controlled by one or more [of such individuals]." The Corps also reviewed the SBA's guidance on section 8(a) joint ventures, provided to WSV at a March 1988 meeting, for general principles.

The Corps relied upon a number of factors for determining that the SDB concern, Washington, did not control at least 51 percent of the joint venture. Notwithstanding WSV's arguments to the contrary, we find four factors most persuasive. First, Washington lacks the financial capability to obtain necessary payment and performance bonds, funds to handle the contract's financial commitments, and the experience to perform the contract. While we agree with WSV that the lack of bonding, financial, or technical resources may be valid reasons for creation of a joint venture under the SBA's section 8(a) guidelines, we cannot agree that the Corps was unreasonable in concluding that the apparent extent of Structural's provision of such resources indicated majority control over the joint venture by Structural.

Second, although Washington would receive 51 percent of the profits, its obligation to contribute capital is limited to $25,000, while Structural's obligation is open-ended. Further, with regard to losses and liabilities of the joint venture, Washington was responsible only for $25,000, with Structural responsible for any remainder. WSV disputes the Corps' apparent conclusion that Washington does not own 51 percent of the joint venture since, under New York law, there is no requirement for the sharing of losses in the same proportion as profits in order for there to be a valid joint venture. *See Mariani v. Summers,* 3 Misc. 2d 534, 52 N.Y.S. 2d 750 (Sup. Ct. 1944), *aff'd,* 269 App. Div. 840, 56 N.Y.S. 2d 537 (1945). While true, that decision also holds that there is a presumption of equally shared losses only in the absence of an agreement fixing a different ratio. *Id.* Where, as here, the venturers are liable for losses and liabilities up to their original 50–50 investment, and then the non-SDB member is liable for all losses and liabilities above that point, it was reasonable for the Corps to conclude that such an arrangement indicates more than 50 percent control in the non-SDB member.

Third, Structural would provide the project manager who would resolve any disagreement, deadlock, or dispute between the joint venturers as well as be responsible for various duties, indicating at least 51 percent control of the joint venture's business by Structural. The project manager's duties included coordination of contract work; handling of all payment requests to the government; establishing and operating the administrative functions of the joint venture including payroll; and the power to execute and deliver various agreements, subcontracts, etc., to obligate the joint venture as necessary to perform the contract. While WSV argues that Washington's provision of the project superintendent—empowered to generally direct and supervise construction, supervise the contract work, and handle labor matters including employment and discharge of employees—demonstrates its control of 51 percent of the daily management of the joint venture, we find reasonable the Corps' conclusion that

Structural would be more in control of the joint venture's business than would Washington.

Fourth, we agree that Structural's greater control is indicated by the maintenance of all accounting, payroll, general office procedures, books, and records in Structural's office, as well as Structural's option to subcontract up to 80 percent of the contract while Washington is required only to perform 10 percent of the contract with its own labor force. While WSV explains that Structural's offices are closer to Fort Drum than are Washington's, we note, as did the Corps, that the SBA section 8(a) guidelines call for the section 8(a) concern to maintain all administrative records in its offices and to perform a minimum of 15 percent of the contract with its own labor. Although these guidelines are not dispositive, they are indicative of SBA's views on control considerations in joint ventures.

Since the combination of the above factors indicate that Structural would control more than 51 percent of the joint venture, we agree that the Corps' exclusion of WSV as ineligible for SDB status was proper. WSV, however, contends that it was treated unfairly because it was not notified of the contracting officer's protest of its SDB status and, unlike Abrantes, it was not provided an opportunity to clarify or explain the terms of its joint venture agreement.

Although WSV did not have a formal opportunity to explain or clarify its joint venture agreement during the Corps' review, it has had the opportunity to make its arguments in conjunction with this bid protest. However, having been afforded the opportunity to clarify its agreement, WSV has failed to carry its burden to show the decision to reject its bid was incorrect. Our review of the record indicates that the Corps carefully and reasonably interpreted the agreement in determining which joint venturer exercised greater control. Thus, we do not believe WSV was prejudiced by the lack of notice.

Similarly, we do not find that WSV was prejudiced by the review process. WSV bases its claim on the contracting officer's consideration of certain clarifications by Abrantes of its teaming agreement. In a letter dated April 14, the award date, Abrantes made clear that as prime contractor it would provide the project manager; explained in more detail the workings of its joint bank account with Northland; and made plain that Abrantes was entitled to all profit under the contract. We have reviewed the agreement and the letter and find that the letter merely clarified matters already included in the agreement.

Although WSV argues that it should have been given the opportunity to explain or clarify its agreement as was Abrantes, it appears doubtful WSV would have submitted any such clarifications. Notwithstanding its awareness of those aspects of its agreement that the Corps considered weak or unacceptable, in availing itself of the opportunity to clarify its agreement here, WSV has not suggested any changes or clarifications. Instead, it contends that its agreement is sufficient on its face and the Corps has incorrectly applied the relevant standards. Under these circumstances we do not find that Abrantes obtained any unfair advantage by having the opportunity to clarify its agreement and thus we perceive no harm to WSV from the failure to obtain clarifications from it.

WSV also raises a number of reasons why Abrantes is not entitled to award of the contract. WSV first argues that Abrantes and Northland are a joint venture, notwithstanding their agreement's disclaimer to the contrary, and as such, the sole listing of Abrantes on the SDB self-certification constitutes a "substantive error" making the bid nonresponsive. Similarly, WSV urges that the listing of Abrantes on the bid bond is deficient because the "nominal bidder" is a joint venture. We disagree.

A small business self-certification relates only to a concern's status and eligibility for award and does not reflect on the bidder's commitment to provide the services required by the IFB. Thus, any error in a self-certification is not a matter of responsiveness. *Lioncrest Ltd., Inc.,* B-221026, Feb. 6, 1986, 86-1 CPD ¶ 139. Assuming, for the sake of argument, that Abrantes's agreement with Northland created a joint venture, Abrantes's self-certification appears to have been made in good faith. While Abrantes considers itself in a prime/subcontractor relationship with Northland, and thus certified itself alone, it is clear that Abrantes made no effort to hide its relationship with Northland, having submitted a copy of the teaming agreement with its bid. We find insufficient evidence in the record to show that Abrantes's certification, if mistaken, was made in other than good faith and find WSV's contentions insufficient as a basis for questioning the award. *Conversational Voice Technologies Corp.,* B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169.

With regard to Abrantes's listing of itself as the principal on the bid bond, we also find no basis to question the award. As WSV correctly notes, a bid bond which names a principal different from the nominal bidder is deficient and that defect may not be waived. *C.W.C. Assocs., Inc, and Chianelli Contracting Co.,* 68 Comp. Gen. 164 (1988), 88-2 CPD ¶ 612. However, here, the nominal bidder, Abrantes, also is the principal listed on the bid bond. The fact that WSV interprets Abrantes's and Northland's relationship as a joint venture does not make it one, or create a discrepancy between the bid and the bid bond.

WSV next claims that Abrantes improperly amended its bid by amending its teaming agreement. The substance of the amendment was contained in Abrantes's April 14 clarification letter and provides details on the operation of the concerns' joint bank account. The amendment, executed on April 14, was not solicited by the Corps and was not disclosed to it until after award. Thus, the amendment had no bearing on the award decision. We do not find this clarifying amendment to a business agreement between two concerns to have any effect on bid responsiveness. The amendment was consistent with the original agreement and did not change the concerns' relationship or the performance of the contract. Therefore, we find nothing objectionable in the concerns' amending their agreement.

Finally, WSV contends that as an alleged joint venture, Abrantes and Northland do not qualify as an SDB, because the teaming agreement does not comply with applicable regulations. We have reviewed the agreement between Abrantes and Northland and the Corps' analysis of the agreement and find that the

Corps reasonably found Abrantes retained majority control in its teaming with Northland.

The Corps first determined that even if Abrantes and Northland were considered affiliated, their combined annual earnings still would fall within the appropriate size standard. Next, the Corps found that under the express terms of the teaming agreement it was clear that the management and daily business of Abrantes would be controlled by Abrantes. Abrantes would execute the contract by itself and be solely responsible for contract performance, as well as responsible for all contacts and contract negotiations with the Corps. Also, Abrantes would provide the project manager who would be responsible solely to Abrantes, and any disputes between the concerns would be resolved by arbitration at Abrantes's offices.

Further, in accordance with section 8(a) guidelines, Abrantes and Northland would open a joint bank account, to which all contract earnings would be assigned. Northland would only receive funds in accordance with the amount of its subcontract while Abrantes, who would perform approximately 30 percent of the contract, would receive all remaining funds, including 100 percent of the project profits.

WSV argues that payments for Northland's subcontract work can be adjusted to what the parties believe is a fair share, thus, calling into question whether Abrantes would receive at least 51 percent of the profits. WSV further contends that provisions of the agreement establishing Abrantes's inability to obtain bonding by itself; requiring Abrantes to consult with and obtain Northland's concurrence on material modifications and contract changes; and that Northland countersign joint bank account checks, indicate that Northland is in control. We do not find that Northland's assistance in obtaining bonding or WSV's speculation on how Abrantes and Northland might operate under their agreement is sufficient to question the contracting officer's reasonable determination of Abrantes's control.

Accordingly, the protest is denied.

B-227202, August 14, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■ ■ Necessary expenses rule
■ ■ ■ Trust funds
■ ■ ■ ■ Reimbursement

Pursuant to the authority contained in 31 U.S.C. § 1552(a)(2), Department of Veterans Affairs (VA) may credit the Personal Funds of Patients Trust Account, Boston Medical Center, for a deficiency resulting from a 1979 erroneous payment from the unobligated balance of its 1979 expired appropriations because VA is liable for the loss and because under the circumstances we consider the covering of the loss a necessary expense of administering the trust account.

Matter of: Restoration of a Deficiency in a Department of Veterans Affairs Trust Account

The Department of Veterans Affairs (VA) has asked whether it may use the authority contained in 31 U.S.C. § 3530 to restore a $10,829.91 loss in the VA Boston Medical Center's Personal Funds of Patients Trust Account (hereafter referred to as "the trust account") with appropriated funds. Although section 3530 is not available to restore the trust account under the factual situation presented, the loss may be restored under other authority discussed below.

Background

The VA Boston Medical Center administers a Personal Funds of Patients Trust Account for the convenience of patients admitted to the Center. *See* 38 U.S.C. § 3204. Patients may deposit their funds in the account for safekeeping and withdrawal of funds as needed. A VA employee serves as agent cashier of the trust account.

In April 1979, Mr. Dennis Torris, a patient at the Center, fraudulently obtained a State of Illinois retirement check for $11,479.91, payable to Mr. Richard M. Peterson. Mr. Torris fraudulently endorsed the check as "Richard M. Peterson" and changed his Medical Center wristband identification to read "Richard M. Peterson." While impersonating Mr. Peterson and displaying his false wristband identification, Mr. Torris convinced Mr. Viega, the VA agent cashier of the trust account, to accept the check for deposit to the account of "Richard M. Peterson."

Five days later, on April 25, 1979, Mr. Torris returned to the cashier's office, again identifying himself as Mr. Peterson, and asked to withdraw the entire account balance. Mr. Viega explained that he could not withdraw the entire amount in cash, so Mr. Torris instead accepted $1,479.91 in cash and asked the cashier to issue a Treasury check for $10,000 to Dennis Torris, whom "Peterson" claimed was his brother-in-law. Mr. Viega issued the check, which Mr. Torris later negotiated.

After receiving notice that the retirement check had been fraudulently endorsed, the VA reviewed its records and discovered that during the period in question, the VA Boston Medical Center had not admitted a patient named "Richard M. Peterson." The VA's review of the Center's records for April 1979 indicated that Mr. Dennis Torris had been admitted and discharged during that period. Mr. Torris was soon arrested, and charged with fraudulently negotiating the retirement check. The federal district court found him guilty, placed him on probation for 3 years, and ordered him to make full restitution.

On January 23, 1980, the Department of the Treasury, after having refunded the drawee bank the amount of the fraudulently negotiated check, debited the trust account for the same amount, which left a deficiency in the trust account. Of the $11,479.91 it had lost, the VA recovered $650 during the 3 years Mr. Torris was on probation. The court discharged him from probation after this

period and ordered the balance of the restitution be forgiven. The court order did not discharge Mr. Torris's civil debt to the VA, but due to his lack of financial resources, the VA decided not to pursue the debt.

The VA conducted an investigation into the circumstances surrounding the improper payment from the trust fund. The investigation determined that Mr. Viega, as the accountable officer for the trust fund, was without fault or negligence in making the improper payment, because he followed established procedures in identifying the patient making the deposit and withdrawal. The investigation report did not address the adequacy of the procedures to preclude similar improper payments.

Discussion

The VA has a shortage in the trust account of $10,829.91 to restore. Apparently, on the assumption that 31 U.S.C. § 3530 contains the only available authority to restore the account, VA asks whether pursuant to 31 U.S.C. § 3530 it may adjust the trust account from available appropriations.

Although the money involved here was patient money, not government money, we have held that the loss of VA patient funds while in the custody of the United States constitutes a liability of the United States for which an accountable officer may be liable. B-215477, Nov. 5, 1984. Indeed we have treated officials charged with the custody and safekeeping of such funds as accountable officers for purposes of our account settlement authority, 31 U.S.C. § 3526, and our authority to relieve accountable officers, 31 U.S.C. § 3527. B-215477, *supra.*

Our authority to settle accounts, however, is limited by law to 3 years after the accounts are substantially complete. 31 U.S.C. § 3526(b); B-227538, July 8, 1987. Thus, although 31 U.S.C. § 3527(d) permits us to adjust the accounts of accountable officers that we have relieved of liability for losses resulting from nonnegligent payments, passage of time now precludes us from opening the accounts for purposes of settlement and relief.[1] Similarly, 31 U.S.C. § 3530 permits us to adjust accounts where among other things, the loss to the United States results from the fault or negligence of the accountable official. Here however, even apart from the 3 year limitation on our account settlement authority, the VA has determined that Mr. Viega, the accountable officer, was without fault or negligence. Accordingly, if we presume the correctness of VA's determination, 31 U.S.C. § 3530 would not be applicable authority to adjust the deficiency in Mr. Viega's account in any event.

Although sections 3530 and 3527(d) provide adequate authority to adjust accounts when requests for relief of an accountable officer are timely submitted, there is no indication from these provisions that they are necessarily the exclusive means of administratively adjusting accounts. Given the nature of the trust account in question in this case and the VA's liability for the erroneous pay-

[1] Although VA was aware of the deficiency in 1979, VA did not report it to us until 1987, well after the running of the 3 year settlement period.

ment, we are of the opinion that the VA is responsible for the shortage in the account. We understand that the VA recognizes this responsibility and considers the Department indebted to the trust fund for the loss. As explained below, we think the covering of the loss in the trust account can be considered a necessary expense of managing the trust fund chargeable to the appropriation account supporting the administration of the trust fund.

The VA established the trust account under the authority contained in 38 U.S.C. § 3204 governing the administration of VA trust funds. The VA as the trustee of the account has the duty to exercise reasonable care over the patients' funds in the account. Restatement (Second) of Trusts § 174 (1959). If the trustee commits a breach of trust by making an unauthorized or improper payment, the trustee is chargeable with any loss resulting from the breach of trust. *United States v. Mitchell*, 463 U.S. 206, 226 (1983). The fact that the accountable officer may be relieved or, as in this case, have his account settled by operation of law, does not affect the government's responsibility for erroneous payments from the trust account.

Costs associated with the VA's administration of patient trust accounts such as the loss at issue here can be viewed as a necessary expense of the function and may be paid out of the VA's regular appropriations covering this function. In an analogous situation involving a Bureau of Indian Affairs (BIA) trust fund, we authorized BIA to adjust deficiencies in the fund resulting from erroneous payments, through a charge to agency appropriations as an operating expense. 67 Comp. Gen. 342 (1988). Similarly we permitted the Drug Enforcement Administration to write off losses in funds used by undercover agents to buy drugs as a necessary investigative expense, when the funds were lost while being used for the investigation of sales of controlled substances, which is the purpose for which the funds were entrusted to the agents. 61 Comp. Gen. 313 (1982). Accordingly, under the circumstances presented, we consider the covering of the deficiency in these accounts as a necessary expense of providing the services authorized by 38 U.S.C. § 3204.

The VA may reimburse the $10,829.91 deficiency in the patients' funds trust account from the account used to manage it. Since the loss occurred in fiscal year 1979, the VA may liquidate the heretofore unrecorded obligation from VA's fiscal year 1979 expired appropriations pursuant to the authority contained in 31 U.S.C. § 1552(a)(2). B-201110, Dec. 30, 1980.

Finally, we recommend that the VA review procedures used by patient trust fund cashiers to identify patients making withdrawals from the fund to determine whether such procedures are adequate to prevent future erroneous payments.

B-230576, August 14, 1989

Appropriations/Financial Management

Appropriation Availability

■ Purpose availability

■ ■ Specific purpose restrictions

■ ■ ■ Meals

Civilian Personnel

Travel

■ Permanent duty stations

■ ■ Actual subsistence expenses

■ ■ ■ Prohibition

Customs Service may not pay for cost of catered meal provided federal employees attending Customs Service sponsored meeting of United States-Bahamas Working Group, an interagency task force. Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence at headquarters regardless of any unusual working conditions. *See* cases cited. *Gerald Goldberg, et al.,* B-198471, May 1, 1980 is not applicable to situations involving routine business meetings at headquarters.

Matter of: Meals For Attendees at Internal Government Meetings

This decision is in response to a request from the National Finance Center, United States Customs Service, Department of the Treasury, concerning the availability of appropriated funds to pay for meals of Customs Service and other federal employees attending a meeting of an interagency task force. For the reasons discussed below, we conclude that the Customs Service may not pay for the meals in question.

Background

On September 29, 1987, the Customs Service sponsored a quarterly meeting of the United States-Bahamas Working Group/Task Force. The interagency meeting was held in Miami, Florida, and was attended by 23 federal employees from the Customs Service and five other federal agencies. The day-long meeting lasted from 9 a.m. to 3 p.m., with a catered lunch served at midday.

According to the Customs Service, National Finance Center submission, "the meal was served during the meeting . . . to accommodate participants arriving from foreign locations on the same date." The Standard Form 1164 Claim for reimbursement (SF 1164) explains that the meetings concerned official agency functions within the purview of 5 U.S.C. § 4109 or 4110. The SF 1164 also states that the meals were incidental to the meeting and that attendance at the meals was necessary for full participation at the meeting.

The Southeast Regional Office of the Customs Service submitted a claim for reimbursement for the cost of the lunch ($242.75) that had been paid from a Customs Service imprest fund. After consulting with counsel, the Chief, Commercial Accounts, National Finance Center, denied the claim for reimbursement. At

the request of the Customs Service Regional Commissioner, Southeast Region, the National Finance Center asked us for a decision.

Discussion

As a preliminary matter, we note that 9 of the 23 employees at the meeting were not within their official duty stations. However, because all 9 incurred travel periods of 10 hours or less on the day of the meeting and did not begin travel before 6 a.m. or end travel after 8 p.m., none were entitled to per diem or actual subsistence expenses for attending the meeting. Federal Travel Regulations, para. 1-7.4(b), 1-7.6(b)(1) (1988), incorporated by reference 41 C.F.R. § 101-7.003 (1987). Accordingly, for purposes of this decision, we consider the 23 employees similarly situated and will treat them as a group.

We have long held that in the absence of specific statutory authority, the government may not pay subsistence expenses or per diem to civilian employees at their official duty stations, even though they may be working under unusual conditions. 42 Comp. Gen. 149 (1962); 38 Comp. Gen. 134 (1958).

We have recognized two limited exceptions to this general rule grounded upon 5 U.S.C. § 4110. [1] The first exception permits reimbursement of registration or attendance fees that include a nonseparable charge for the cost of a meal representing an incidental part of the meeting. 38 Comp. Gen. 134 (1958).

The second exception permits, in some circumstances, reimbursement under 5 U.S.C. § 4110 where the cost of the meals are not included in a registration or attendance fee, but instead a separate charge for meals is made. *Gerald Goldberg, et al.*, B-198741, May 1, 1980. In such cases, we apply the tests set forth in *Goldberg* to determine whether the meal is incidental to the meeting and whether the benefits of attendance would be lost if the employee missed the meals.

We think, however, that there is a clear distinction between the payment of meals incidental to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants and internal business or informational meetings primarily involving the day-to-day operations of government. With respect to the latter, 5 U.S.C. § 4110 has little bearing on such meetings. As we have previously observed,

> The legislative history of [5 U.S.C. § 4110] shows it was intended to dispense with the specific appropriation authorizations required by [5 U.S.C. § 5946] for the payment of expenses of Federal officers and employees in attending meetings "of members of any society or association." The provision has little or no bearing upon a purely internal conference or meeting sponsored by the Government. . . . 46 Comp. Gen. 135, 136-137 (1966). *See also* B-140912, Nov. 24, 1959.

[1] We have also authorized payment for the cost of food or meals where exigent circumstances present an imminent danger to human life or federal property. *See* 53 Comp. Gen. 71 (1973). This limited exception does not rely for its justification on 5 U.S.C. § 4110.

Accordingly, there is no basis to use appropriated funds to reimburse the imprest fund for the cost of the meals served employees attending the September 1987 meeting. Appropriate steps should be taken to recover the cost of the meals paid from the imprest fund.

B-230939, August 14, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Specific purpose restrictions
■■■ Meals

Civilian Personnel

Travel
■ Permanent duty stations
■■ Actual subsistence expenses
■■■ Prohibition

U.S. Army may not pay for meals provided to employees at internal Army meeting within employees' official duty station. Although 5 U.S.C. § 4110 authorizes the payment for cost of meals where cost of meals is included in registration or attendance fee, 38 Comp. Gen. 134 (1958), or, in limited circumstance, where the cost of meals is separately charged, *Gerald Goldberg, et al.*, B-198471, May 1, 1980, this provision has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. 46 Comp. Gen. 135 (1966).

Matter of: Meals for Attendees at Internal Government Meetings

The Western Region Finance and Accounting Office, United States Army, has asked for our decision concerning the propriety of paying a voucher for 160 meals served Army personnel at an internal meeting. The Chief, Western Region Finance Office, questions whether under our prior decisions he can pay for the meals. The meeting's sponsor, the Sacramento Army Depot, maintains that the meeting constituted official government training under the Government Employees Training Act (GETA), 5 U.S.C. § 4101. The Depot further maintains that the meeting in question satisfies the four conditions laid out in our prior decisions and thus the voucher may be paid.

For the reasons discussed below, we conclude that the voucher may not be paid. The Sacramento Army Depot should take appropriate steps to secure payment from the attendees.

Background

On September 24, 1987, the Sacramento Army Depot sponsored a "Quarterly Maintenance Supervisor's Meeting" for 160 of its employees at the Beverly Garland Hotel in Sacramento, California. The meeting apparently lasted from 4 to 6 hours. All 160 employees attending the meeting were within their official duty

station. The memorandum announcing the meeting described the theme of the meeting as "Development, Leadership, Values" and listed as agenda items "Smoking Policy clarification/discussion," "Maintenance reorganization," and "Administration of Leave." The memorandum provided an hour and a half for lunch with a guest speaker discussing "Statistical Process Control." The final two and a half hours of the agenda were reserved for an "Open Session."

On the date of the meeting, the Beverly Garland Hotel submitted a bill for $2,162.00 to the Sacramento Army Depot. The hotel's bill itemized the charges as covering rental of a room with overhead projector from 10:00 a.m. to 3:00 p.m. at $26.00 plus 160 meals at $13.35 each, totaling $2,136.00 for meals. On September 29, 1987, the Army contracting officer approved a purchase order to cover payment of the hotel's bill.

Before approving payment of an invoice based on this purchase order, the Chief, Western Region Finance Office, asked for our opinion. According to the Chief, the resolution of this matter turns on "the difference between formal training under [GETA] and working meetings of a vertical organization at which some training may be held." Although Sacramento Army Depot maintains that the September 1987 meeting constituted "training," the Chief Counsel to the Depot frames the issue as whether the Depot can furnish meals to civilian employees at their official duty station independently of the "training" issue.

Discussion

Although the point of demarcation between "training" under GETA and meetings in furtherance of the government's business is not always brightly marked, we have little difficulty concluding on the record before us that the September 1987 meeting does not qualify as "training."[1] *Cf.* B-187150, October 14, 1976 (meeting of agency managers dealing with new managerial functions, transfer of personnel, and functional realignment does not qualify as "training.") The Sacramento Depot argues that since the meeting featured a program of instruction (that is, the agenda topics), was planned in advance, and instructed Depot managers and supervisors in matters directly related and designed to improve performance of their official duties, the meeting qualified as "training." This, of course, establishes no more than that every scheduled and structured meeting of two or more managers discussing the application of office policy that holds the promise of improved job performance is "training." However, the mere fact that employees may become informed or learn about a subject as a result of a scheduled meeting does not necessarily qualify the meeting as a "program . . . of instruction or education," as that phrase is used in GETA's definition of "training."

[1] GETA defines "training" as "the process of providing for and making available to an employee . . . a planned, prepared, and coordinated program, course, curriculum, subject, system, or routine of instruction or education, in . . . fiscal, administrative or other fields which are . . . directly related to the performance by the employee of official duties for the government . . ." 5 U.S.C. § 4101(4).

The foregoing discussion does not, in any event, dispose of the central issue, namely, the availability of appropriated funds to furnish meals to government employees attending internal government business meetings at their official duty station. The general rule is well-established—absent specific statutory authority, the government may not pay subsistence expenses or furnish free meals to employees at their official duty station even where unusual working conditions are involved. 53 Comp. Gen. 457 (1974); *Sandra L. Fergerson, et al.,* B-210479, December 30, 1983; *J.D. MacWilliams,* B-200650, August 12, 1981.

We have recognized two limited exceptions to this general rule grounded upon 5 U.S.C. § 4110.[2] The first exception permits reimbursement of registration or attendance fees that include a nonseparable charge for the cost of a meal representing an incidental part of the meeting. 38 Comp. Gen. 134 (1958).

The second exception permits, in some circumstances, reimbursement under 5 U.S.C. § 4110 where the cost of the meals are not included in a registration or attendance fee, but instead a separate charge for meals is made. *Gerald Goldberg, et al.,* B-198741, May 1, 1980. In such cases, we apply the tests set forth in *Goldberg* to determine whether the meal is incidental to the meeting and whether the benefits of attendance would be lost if the employee missed the meals.

We think, however, that there is a clear distinction between the payment of meals incidental to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants, and internal business or informational meetings primarily involving the day-to-day operations of government. With respect to the latter, 5 U.S.C. § 4110 has little bearing on such meetings. As we have previously observed,

> The legislative history of [5 U.S.C. § 4110] shows it was intended to dispense with the specific appropriation authorizations required by [5 U.S.C. § 5946] for the payment of expenses of Federal officers and employees in attending meetings "of members of any society or association." The provision has little or no bearing upon a purely internal conference or meeting sponsored by the Government. . . . 46 Comp. Gen. 135, 136-137 (1966). *See also* B-140912, November 24, 1959.

The Sacramento Army Depot relies on our decision in *J.D. MacWilliams* (MacWilliams II), 65 Comp. Gen. 508 (1986), to support its position that the meals furnished at the September 1987 meeting may be paid for with appropriated funds. That case involved a claim by a Forest Supervisor for the cost of a meal served during a four hour Forest Service meeting with timber associations and firms. The purpose of the meeting was to update representatives of timber associations and firms on Forest Service activities in the Mt. Baker-Snoqualmie National Forest and to hear their concerns. Instead of disposing of the claim on the basis of the general rule as we had done in a prior case involving an almost identical Forest Service meeting, *see J.D. MacWilliams* (MacWilliams I), B-200650, August 12, 1981, we analyzed the case using the tests developed in

[2] We have also authorized payment for the cost of food or meals where exigent circumstances present an imminent danger to human life or federal property. *See* 53 Comp. Gen. 71 (1973). This limited exception does not rely for its justification on 5 U.S.C. § 4110.

Gerald Goldberg, et al., B-198471, May 1, 1980 and *Randall R. Pope and James L. Ryan* (Pope), 64 Comp. Gen. 406 (1985). Our discussion in *MacWilliams II,* particularly the first paragraph on page 510, 65 Comp. Gen., can be construed to suggest that application of the *Goldberg* tests is appropriate "for meals taken during the course of routine meetings held at headquarters."

Factually, the only apparent difference between *MacWilliams II* and *MacWilliams I* is that the working meals in *MacWilliams II* included Forest Service *and* industry personnel, not just Forest Service personnel as in *MacWilliams I.* This distinction does not justify the application of the more elaborate analysis laid out in *Goldberg* and *Pope* which should be limited to situations involving formal conferences and meetings, not routine business meetings primarily involving day-to-day agency operations and concerns. Thus, the claim in *MacWilliams II* should have been summarily rejected based on the application of the general rule.

We recognize that the meeting at issue here featured a guest speaker discussing a topic of interest to the Depot managers and supervisors in attendance. However, sandwiching such a speech between two segments of a general business meeting does not provide an adequate basis to treat the meeting as other than an internal government business meeting. Accordingly, the analysis used in *Goldberg* and *Pope* is not for application here, and the case is controlled by the general rule prohibiting the furnishing of free meals to government employees at their official duty stations.

B-234166, August 14, 1989

Appropriations/Financial Management

Claims By Government
■ Debt collection
■■ Agency officials
■■■ Authority
■■■■ Waiver

The Department of Agriculture, Soil Conservation Service, may not terminate collection of a debt arising from underpayment of the Department's proportionate share of a settlement payment made to a grant recipient by its contractor's surety company. Under the Federal Claims Collection Standards, collection action may be terminated if there is no legal basis for recovery by the United States. Because the Department of Agriculture has a significant basis for recovery, it must proceed with collection action.

Matter of: Soil Conservation Service—Termination of Collection Action

The Department of Agriculture, Soil Conservation Service (SCS), has submitted a claim against the Batavia Kill Watershed District (District) for resolution and instructions under 4 C.F.R. § 105.1(c) prior to referral by SCS to the U.S. Department of Justice. As will be explained below, there exists no law or regulation

which would authorize SCS to terminate collection action and, therefore, the debt should be collected.

Background

According to the submission, in 1973, under a watershed workplan agreement and a project agreement, the District contracted for construction of a multipurpose structure. The federal cost share of the structure was 96.12 percent. The contractor failed to diligently pursue the work and the District terminated its right to proceed. The contractor's surety refused to take over the contract and, consequently, the District reprocured the work at an additional cost of $574,678.27, with the federal government paying 96.12 percent ($552,380). After protracted litigation between the District and the surety, the surety paid the District $600,000 in settlement of the District's claim. Out of this amount, the District paid $110,000 as legal fees to the attorney who represented it in the court actions against the surety. The SCS received 96.12 percent of the remainder of the settlement ($470,988).

SCS claims that under the terms of the 1973 project agreement it should have received 96.12 percent of the gross settlement amount of $600,000, or $576,720. The difference in the amount that SCS actually received and the amount that SCS claims it should have received under the terms of the project agreement, $105,732, is the amount SCS is trying to collect from the District.

According to SCS, the following provision of the project agreement entered into by SCS and the District provides the legal basis for recovery of the debt:

> In the event of default, any additional funds required to assure completion of the job will be provided in the same ratio as construction funds are contributed by the parties under the terms of this agreement; and *any excess costs collected from the defaulting contractor, or his surety,* will be prorated between the Contracting Local Organization and the Service in the same ratio as construction funds are contributed under the terms of the agreement. (Italic added).

In another provision, which reads in part as follows, the District agreed to be responsible for lawsuits involving the construction contract:

> (The Contracting Local Organization) will take necessary legal action, including bringing suit, to collect from the contractor any monies due in connection with the contract . . .

SCS has submitted this case for determination as to whether it may terminate collection action. For the following reasons we find no legal basis to terminate collection.

Discussion

Collection Criteria

Under 31 U.S.C. § 3711(a)(1) (1982), the head of an executive agency generally is required to collect a claim of the United States government for money arising out of activities of the agency. In so doing, the agency head must follow certain

standards promulgated jointly by the Attorney General and the Comptroller General. 31 U.S.C. § 3711(e)(2). These standards are set out in 4 C.F.R. §§ 101.1-105 (1988).

Under the standards, neither the head of an agency nor the General Accounting Office has the authority to terminate collection action with respect to a debt owed to the agency if the amount involved exceeds $20,000. Such authority is solely within the discretion of the Department of Justice.[1] *See* 31 U.S.C. § 3711(a), and (b) as implemented by 4 C.F.R. § 104.1(b). However, this matter is properly before us because there is doubt as to the merits of suspending or terminating collection. *See* 4 C.F.R. § 105.1(c).

Under the Claims Collection Standards, collection action may be suspended or terminated for any of the following reasons: (1) inability to collect any substantial amounts; (2) inability to locate the debtor; (3) the cost of collection will exceed the amount of recovery; (4) the government's claim is legally without merit; and (5) the government's claim cannot be substantiated by evidence. Only the fourth reason could apply to this case.

A claim is legally without merit only if there is no legal basis for recovery by the United States. In other words, if the United States were to sue on such a claim, the United States would be unsuccessful.

The Merits

The acceptance of a grant of federal funds that is subject to conditions which must be met by the grantee creates a valid contract between the United States and the grantee. 50 Comp. Gen. 470, 472 (1970). The terms of the "contract" are contained in the grant agreement and applicable statutes and regulations.

In this case, the grant agreement provides that "any excess costs" recovered from a defaulting contractor or its surety are to be prorated between SCS and the District in the same ratio as construction funds were contributed. There is no indication in the agreement that legal costs are to be deducted before prorating the amount recovered. Further, the grant agreement provides that the District is responsible for litigation needed to collect funds owed by the contractor.

Based on the grant agreement, the parties apparently intended that in the case of default the District would bear all costs of litigation, and that SCS would receive its prorated share of the total amount recovered. The fact that the legal fees actually incurred by the District in collecting the reprocurement costs were greater than the parties might have anticipated does not alter the application of the terms of the agreement.

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[1] Under 4 C.F.R. § 104.1(b) an agency head can terminate a claim, regardless of the amount involved, and without need for Department of Justice concurrence, if the claim is plainly erroneous or "clearly" without legal merit. In referring to this exception to the $20,000 limit, the "Supplementary Information" accompanying the publication of the Standards said, "[t]his exception is intended to apply only in cases of clear error. If there is room for reasonable disagreement, Justice Department concurrence should be sought." 49 Fed. Reg. 8895 (1984).

Therefore, there is a significant legal basis for SCS' claim and we cannot conclude that if the United States were to sue on this claim it would be unsuccessful. Collection action cannot be suspended or terminated. Since the SCS indicates that all administrative collection procedures have been exhausted, this matter must be promptly referred to the Department of Justice for litigation, using the Claims Collection Litigation Report. *See* 4 C.F.R. § 105.2(b).

B-235081, August 14, 1989

Procurement

Contractor Qualification
■ Approved sources
■ ■ Government delays

Procurement

Noncompetitive Negotiation
■ Contract awards
■ ■ Sole sources
■ ■ ■ Propriety

Protest against exclusion due to urgency is sustained where agency approved protester as source but unduly delayed determination regarding need for first article testing.

Matter of: Arrow Gear Company

Arrow Gear Company protests the award of a contract to Precision Gear, Inc., under request for proposals (RFP) No. N00383-88-R-3951, issued by the Navy Aviation Supply Office for quantities of 36 spur gears and 118 spur gears, either separately or combined (154 spur gears). Arrow challenges the Navy's determination that only Precision, which has previously manufactured the spur gears, could satisfy the agency's requirement for 118 of the spur gears, the quantity determined to be urgent.

We sustain the protest.

Background

The solicited item is a spur gear, a component of the General Electric T-64 engine, that powers the Sikorsky H-53E helicopter. The item is considered flight critical and can only be procured from approved sources. The gear diverts power from the engine to run certain accessory systems such as the tachometer; according to the agency, without this part the aircraft will be grounded, and if the gear fails in flight, it could possibly result in loss of the aircraft. Precision Gear is one known approved source and long-time supplier of the spur gear to General Electric. In addition, Arrow was granted source approval by the Navy on April 24, 1987, pending successful completion of first article testing, more than 2 years after it had applied to become an approved source.

On April 27, however, the Navy issued a solicitation for 36 gears (RFP No. N00383-87-R-3777) to Precision Gear based on a Justification and Approval (J&A) for other than full and open competition, finding that firm the only known approved source. Upon learning of Arrow's approval, contracting officials also solicited that firm, but Arrow advised it would not compete. As of the closing date, on May 27, proposals were received from Precision Gear and a second firm, Equitable Engineering Company; after reviewing Equitable's qualifications for source approval, however, the Navy notified Equitable in December 1988 that its gear would need to pass an engine test, and that the agency lacked the resources to perform the test.

In the meantime, the Navy concluded that the need for the spur gears had become urgent and, on May 24, 1988, executed a J&A for procuring from Precision Gear, described in the justification as the only approved source, an additional 118 spur gears on a sole source basis, premised on unusual and compelling urgency. Although the statement in the J&A that Precision Gear was the only approved source was incorrect, the agency reports that "it was determined that Arrow Gear would have had to undergo first article approval" because it had not previously produced the gear for the Navy. Pursuant to the J&A, RFP No. N00383-88-R-3951 was issued on July 12 to Precision Gear. Shortly after the July 26 closing date for the new solicitation, however, Arrow requested a copy of the solicitation, objected to having been denied an opportunity to compete, and submitted a proposal under the solicitation.

According to the Navy, as a result of Arrow's interest in the procurement and in order to procure gears at the lowest possible price, it decided in August to combine RFPs -3777 and -3951. In addition, the agency reportedly began a review to determine whether first article testing or production lot testing would be required. In March 1989, a determination was made that Arrow would need to meet both first article and production lot requirements because, although it was an approved source, it had never produced the item for the Navy; since Precision Gear, on the other hand, had produced the item previously, it was decided that first article testing could be waived for it and only production lot tests would be required.

On March 8, the Navy amended RFP -3951 to incorporate the quantity previously solicited under RFP -3777; the amendment established stepladder quantities of 36, 118, and 154 gears. The amendment also requested offerors to provide their best possible delivery and price; it advised that the government required the earliest possible delivery and set out desired delivery schedule, calling for delivery of first article test samples, if any, within 180 days after contract award, and the production quantity within 345 days if no first article was required and within 510 days if first article was required. The amendment, however, did not advise that first article testing would be required of Arrow, but not of Precision Gear.

Proposals were then received from Arrow and Precision Gear. Precision Gear proposed to meet the suggested delivery schedule in the solicitation of 345 days if no first article was required. Arrow, however, submitted the lowest price for

each stepladder quantity, and proposed to deliver all production quantities in 345 days if it had to comply with first article test requirements, by manufacturing its production quantities concurrently with the manufacture of its first article sample. However, in view of the possibility that Arrow might fail first article, and therefore need to remanufacture all production quantities, the Navy evaluated Arrow's proposal based on the assumption that Arrow could not reasonably deliver production articles sooner than 510 days after contract. Further, the contracting officer determined that the Navy's requirement for 118 of the gears was sufficiently urgent that the agency could not accept the assumed 165-day delay in delivery— based on the additional time required for first article— that would result from award to Arrow; he therefore did not consider Arrow for award of the stepladder quantities for 118 and 154 gears. Instead, proposals were evaluated by comparing the cost of a split award ($61,784.24) of the 36-gear non-urgent requirement to Arrow and the 118-gear urgent requirement to Precision Gear, with the cost of one award ($55,749) of 154 gears to Precision Gear; as the single award represented the lower cost to the government, award was made on March 29 to Precision Gear for the 154-gear quantity. Arrow thereupon filed this protest with our Office. Contract performance has not been stayed due to a finding that urgent and compelling circumstances significantly affecting the interests of the United States require continued contract performance. 31 U.S.C. § 3553(d) (Supp. IV 1986).

Arrow claims that the award to Precision Gear is improper because its price, with or without first article, was lower than the award price. It argues that any "urgency" that may now exist is only the result of the Navy's having mismanaged the procurement. Moreover, in this regard, Arrow has stated its willingness to undergo first article testing according to the schedule it submitted with its proposal, which was within the Navy's desired delivery schedule. It maintains that the Navy's lack of confidence in the quality of its spur gear is unreasonable since it has been providing aircraft gears to a number of major aircraft manufacturers, including General Electric, and to military services other than the Navy for 25 years.

Analysis

The record supports, and Arrow does not dispute, the Navy's position that there is a substantial backlog of orders for these parts. The Navy reports that it has no spare gears in inventory and that 56 gears are on backorder, 22 of which are needed for 22 engines that are awaiting repair. In addition, according to the agency, the number of backorders will increase at a rate of 7.75 per quarter and will total approximately 87 in the 345 days allowed for delivery under Precision Gear's contract and proposed by Arrow; the number of engines awaiting repair will increase to approximately 52 during this interval. Arrow also does not dispute that the unavailability of a gear will result in the grounding of an aircraft and that failure of the gear in flight may result in loss of the aircraft. These factors support a determination of unusual and compelling urgency for a sufficient number of gears to resupply the agency's depleted stocks. In these circum-

stances, and in view of the fact that Arrow has not previously manufactured this part for the Navy, we do not believe that the agency was required to waive first article testing for Arrow, *see Discount Machinery & Equipment, Inc.*, B-231068.2, Jan. 25, 1989, 89-1 CPD ¶ 73, nor obligated to take the risk that Arrow might fail the first article test and therefore be forced to remanufacture the production quantities. *See Howmet Corp.*, B-232421, Nov. 28, 1988, 88-2 CPD ¶ 520.

The record, however, also indicates that the current urgency is largely the result of the Navy's dilatory conduct of this procurement. Award was not made until more than 2 years after issuance of the 1987 solicitation for 36 gears and the granting of source approval to Arrow. In particular, the Navy has not explained why it delayed the procurement for approximately 7 months while assessing the necessity for first article testing when, the record indicates, the agency had already decided twice before—when granting source approval to Arrow and again when issuing RFP -3951 on a sole-source basis to Precision Gear—to require of Arrow a first article test. The consequent delay was significantly greater than the 165-day delay that the agency assumed would have resulted from award to Arrow, and is incompatible with the urgency determination. Had the agency simply followed through on its prior determinations to require first article testing of Arrow and promptly evaluated proposals on that basis, it appears that the agency would have been able to take advantage of Arrow's low cost proposal.

Under the Competition in Contracting Act of 1984, an agency may use noncompetitive procedures to procure goods or services where the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). Even under such circumstances, however, the agency is required to seek offers from as many potential sources as is practicable. *See IMR Systems Corp.*, B-222465, July 7, 1986, 86-2 CPD ¶ 36. Here, while the Navy did provide Arrow an opportunity to submit a proposal, the agency's dilatory conduct deprived Arrow of a meaningful opportunity to compete for the full quantity of 154 gears. Since this is inconsistent with the agency's obligation when proceeding under the urgency exception to maximize competition to the extent practicable under the circumstances, we sustain the protest. *See Data Based Decision, Inc.*, B-232663, B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87; *Honeycomb Co. of America*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209.

Recommendations

Although Arrow has been deprived of a meaningful opportunity to compete, and the government has been deprived of the benefit of the low cost proposal, we recognize that the agency currently has an urgent requirement for spur gears. Nevertheless, it is far from clear that the urgency encompasses the entire quantity of 154 gears awarded to Precision Gear. Rather, it appears that the agency

may be able to break out for competition as many as 67 gears; according to the agency, the backorders for the gears will increase to approximately only 87 during the time allowed for delivery under Precision Gear's contract and Arrow's proposal. In this regard, an urgency justification does not support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement. *See Honeycomb Co. of America,* B-227070, *supra.*

Accordingly, we recommend that the agency review this procurement, determine the number of spur gears for which it actually has a current, urgent requirement, execute a proper J&A for this number, and recompete its requirement as to those gears not urgently needed.

In addition, since the effect of the Navy's actions has been to unreasonably exclude Arrow for consideration for award of the urgent quantity, we find Arrow to be entitled to recover its proposal preparation costs. *See generally Data Preparation, Inc.,* B-233569, Mar. 24, 1989, 89-1 CPD ¶ 300. We also find Arrow to be entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1988); *see Sanford & Sons Co.,* 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266.

The protest is sustained.

B-235202, August 14, 1989

Procurement

Competitive Negotiation
■ Suspended/debarred contractors
■■ Offers
■■■ Rejection
■■■■ Propriety

General Accounting Office denies protest challenging propriety of proposed award to offeror whose proposal relied on a subcontractor suspended from federal government contracting after evaluation of best and final offers, but who was reinstated before award; agency was not precluded by regulation from further consideration of the offeror's proposal once the intended subcontractor was suspended, and award is proper where suspension is not in effect at time of award.

Matter of: Casde Corporation

Casde Corporation protests the propriety of a proposed contract award to ROH, Inc., under request for proposals (RFP) No. N00024-89-R-6006(Q), issued by the Department of the Navy for engineering and analytical technical support for the Navy's Gas Turbine Surface Combatant Program. The protester contends that the proposed award is improper because ROH's proposal relied on a subcontractor, Unisys Corporation, Shipboard and Ground Systems Group, that during the pendency of the procurement was suspended from federal government contracting. Unisys's suspension was later terminated and the agency now intends to proceed with award to ROH. We deny the protest.

On March 16, 1989, after discussions had been held and best and final offers (BAFOs) evaluated, the Navy suspended Unisys's Shipboard and Ground Systems Group, among other divisions of the firm, based upon evidence of widespread misconduct. On March 17, ROH notified the Navy of its intent to transfer the proposed Unisys effort to another subcontractor in the event the suspension was not lifted by the time of contract award.

In considering the effect of the Unisys suspension, the evaluation panel determined that the proposed Unisys effort, which amounted to only 2.59 percent of the overall proposed level of effort, made a *de minimis* contribution to ROH's BAFO, and that a change in subcontractors would not significantly impact ROH's technical score or the relative ranking of offerors. ROH received the highest technical score and offered the lowest projected cost of any firm in the competitive range; the agency reports that the difference in the technical scores of ROH and the next highest scored offeror was such that only a drastic change in ROH's technical score would have altered the ranking of offerors. Further, the panel concluded that reopening discussions concerning any replacement of Unisys as a subcontractor was unnecessary and not in the government's best interest, since a provision in the RFP requiring government approval for the substitution of key personnel would protect the agency's interest in procuring the same caliber of personnel as identified in the ROH proposal and, moreover, only 1 of the 26 individuals ROH proposed as key personnel was from Unisys. Based on these considerations, the evaluation panel, on March 22, recommended award to ROH, finding that its proposal represented the greatest value to the government. Subsequently, on June 23, Unisys's suspension was lifted.[1] According to the agency, no award has yet been made.

Casde argues that under the procurement regulations prohibiting award to a suspended contractor, once Unisys was suspended, ROH's proposal, relying on an effort by a suspended subcontractor, properly could no longer be considered for award in the absence of a written determination of a compelling reason to make an exception. Casde maintains that the lifting of the suspension could not restore ROH's eligibility.

As pointed out by the protester, Federal Acquisition Regulation (FAR) § 9.405, in pertinent part, provides that "suspended contractors are excluded from receiving contracts" unless the agency determines in writing that there is a compelling reason for approval of such action; also, the Department of Defense FAR Supplement § 209.405 prohibits the evaluation of an offer received from a suspended "contractor," as well as its inclusion in the competitive range or the conduct of discussions with such an offeror, unless the agency determines in writing that there is a compelling reason to make an exception. However, these provisions are not applicable here. First, Unisys was not suspended during the specified stages of the procurement; since its suspension commenced after the evaluation of BAFOs and was lifted prior to the award of any contract, the cited

[1] Termination of the Unisys suspension was based on an agreement with the firm that it would undertake corrective action, including removal of individuals found to be responsible for misconduct and maintenance of an effective ethics program, and that it would reimburse the government for the costs associated with the agreement.

regulations on their face do not apply. In this regard, we have previously indicated that where an offeror is suspended during the course of a negotiated procurement, but the suspension is subsequently lifted, the agency has the discretion to include the offeror in the procurement. *See PRC Kentron, Inc.*, B-230212, June 7, 1988, 88-1 CPD ¶ 537.

More significantly, the cited provisions clearly apply only to suspensions of prime contractors. Although, as pointed out by the protester, the FAR definition of "contractor" in FAR, part 9, includes entities that may be expected to be awarded subcontracts, FAR § 9.405, § 9.405-2 establish specific rules for awards' of subcontracts to suspended firms (*i.e.*, requiring government consent to any award of a subcontract to a suspended "contractor"). This suggests that these are the only provisions intended to establish rules applicable to the award of subcontracts. *See generally* 55 Comp. Gen. 1077 (1976).

The protest is denied.

B-227682.2, August 16, 1989

Procurement

Payment/Discharge
■ Utility services
■■ Payment procedures
■■■ Administrative policies
■■■■ Revision

The General Accounting Office has no objection to a General Services Administration (GSA) modified proposal to combine elements of fast pay procedures and statistical sampling techniques to pay and audit utility invoices. GSA's modified proposal is a valid sampling plan because it is designed and documented to provide for effective monitoring, a sampling of those invoices not subject to complete audit coverage, audit emphasis commensurate with the risk to the government, and a basis for the certification of payments.

Matter of: General Services Administration's Modified Proposal for Post-Payment Examination of Utility Invoices by Statistical Sampling

This advance decision to the General Services Administration (GSA) responds to a request from Raymond A. Fontaine, GSA Comptroller, for our approval under 31 U.S.C. § 3521 (1982) of a modified proposal to combine elements of fast pay procedures and statistical sampling techniques to pay and audit utility invoices. In 67 Comp. Gen. 194 (1987), we did not approve an earlier proposal submitted by GSA because the sampling plan then under consideration did not meet certain requirements for our approving such a plan. Our decision discussed alternative modifications to GSA's proposal which could result in a valid statistical sampling program and invited GSA to submit a modified proposal for our further consideration. 67 Comp. Gen. 194, 200-201. For the reasons discussed below, we have no objections to GSA's modified proposal.

Background

As an alternative to the current post-payment examination of all invoices, GSA initially proposed to audit only invoices which exceeded GSA's estimates of utility costs for the corresponding month. GSA further proposed to establish monthly estimates that are derived from historical data accumulated over the last 2 years in conjunction with estimates of current usage (accruals). To help protect against the estimate being overstated, GSA proposed a monthly sampling of 1 percent of payments made to the vendors on record for the prior 3 months. However, this sample only was for the purpose of determining the accuracy of GSA's estimating of billings, not to determine whether the invoices themselves were accurate. If GSA's estimate exceeded the invoices by 15 percent it would then make adjustments to its future estimates of billings. Other procedures also were proposed to supplement this plan. 67 Comp. Gen. at 196.

We did not approve the plan initially proposed by GSA. Several factors contributed to our view that the proposed plan did not provide adequate controls to reasonably assure that losses occurring from potential overbillings would not exceed the savings from the proposed sampling plan, and therefore did not adequately protect the interests of the government. First, the proposed plan did not provide for a sampling of all invoices since it excluded from the sample all invoices falling below GSA's estimate. 67 Comp. Gen. at 199–200. Second, GSA did not identify the specific savings that would be effected through use of the proposed plan. 67 Comp. Gen. at 199, n. 10. Finally, it did not provide monitoring to assure that all audit results are captured and analyzed in a way that reaffirms the reliability of, or identifies and corrects problems with, the sample audit approach or estimating procedures. 67 Comp. Gen. at 201.

GSA's Modified Proposal

The modified proposal submitted by GSA proposes to establish the accrual process described in GSA's original request. However, as a means of monitoring the effectiveness of GSA's accruing of utility charges, GSA plans to audit all invoices that fall outside a 15 percent tolerance of that accrual. Further, it also proposes a monthly random sample audit of 3 percent of the remaining paid invoices.

To assist it in determining the appropriate meaningful sample, GSA's Office of Finance employed the services of a professional statistician and forwarded a copy of the statistician's report entitled "Random Sample Size for Utility Bill Audits" for our review. The report indicates that initially the net savings due to employment of the 3 percent monthly random sample of utility invoices should be about $97,000.[1] Also, there is a high probability that all vendor's billing will

[1] This is based on an initial assumption of a 5 percent error rate in billings. Once data is gathered through sampling of invoices, GSA can determine whether its assumptions are correct and whether it is necessary to adjust the sample to protect the government's interest, or to revert to a postpayment audit of all vouchers because statistical sampling proves not to be cost effective.

be selected within a reasonable period of time as part of the 3 percent sample. GSA will monitor the effectiveness of the sample size on an annual basis to determine if adjustments are required.

Added review and analysis for utility bills will be forthcoming upon completion of Public Building Service (PBS), National Energy Usage Analysis System Center (NEUASC) located adjacent to the National Payment Center in Fort Worth, Texas. The NEUASC will consolidate certain PBS utilities and fuels activities into one location. Functions of the NEUASC will include: ensuring the integrity of utility invoices by evaluating charges levied; checking invoices against forecasted building usage and cost; and identifying and resolving discrepancies in invoices and GSA estimates.

GSA also proposes to establish internal controls to effectively monitor errors detected within the post certification sampling process to insure undetected billing errors are minimized. The primary control will be to audit all bills paid in the past 12 months for an account whose sampled bill is proven erroneous. Additionally, the vendor number of the utility, along with the amount and type of error, will be kept on file for 5 years for annual review by GSA's Accounts Payable to insure no pattern of abuse is being established. If a vendor has established a pattern of abuse, all payments to that vendor will receive verification.

Finally, the vendors involved are utilities with which GSA maintains a continuing business relationship barring some unforeseen unusual occurrence. Thus, once overbillings are discovered, GSA will have ample opportunity to recover these amounts by setoff against future billings. This is an important consideration when assessing the overall risk to the government under GSA's proposal.

Analysis

Prepayment audits are generally required by *GAO, Policy and Procedures Manual for Guidance of Federal Agencies,* tit. 7, Sec. 19 (TS 7-41 Jan. 18, 1985). In order for this Office to find that an agency's proposal to combine elements of fast pay procedures and post-payment statistical sampling techniques may be used in lieu of the standard prepayment audit (including statistical sampling), the agency's proposal must adequately protect the interests of the government.[2] Therefore, the agency's proposal should at a minimum provide for:[3]

1. A statistical sampling of all invoices not subjected to complete audit coverage.

2. A commitment to monitor and modify the sampling program on the basis of results of the actual operation of the plan and other related developments, and

[2] We address only whether GSA's proposal complies with our standards. Compliance with our standards does not relieve an agency from the need to satisfy any other applicable requirements, such as those established by the Office of Management and Budget or the Federal Acquisition Regulation.

[3] As we stated in our previous decision, we are willing to entertain alternatives to our prepayment or 100 percent post-payment audit requirement in appropriate circumstances. 67 Comp. Gen. at 198-199. However, when such alternatives are approved, the agency should periodically evaluate whether advances in communications technology as well as other electronic systems capabilities afford the agency the opportunity to conduct prepayment or post-payment audits of invoices and assure timely payments to vendors in an economically feasible manner.

to take responsive action when weaknesses or errors are detected by the sampling process.

3. A probable net saving due to the use of the statistical sampling technique.

GSA's modified proposal, unlike its initial proposal, provides for a sample of those invoices not subject to complete audit coverage based on assumptions set forth in the report prepared by GSA's statistician. GSA proposes a monthly random sample of 3 percent of the paid invoices. In addition, it proposes to audit all invoices that fall outside a 15 percent tolerance of GSA's accruals. Thus, the proposed plan provides for limited audit coverage of paid invoices falling within the 15 percent tolerance and complete audit coverage of all invoices that fall outside the tolerance. This seems reasonable, at least initially, based on the 5 percent error rate assumed for establishing the plan.

The modified proposal also includes monitoring of the proposed sampling plan to determine its effectiveness and to permit GSA to make timely modifications to the sampling plan to correct any deficiencies identified through its actual operation. The other reviews and analysis to be performed by GSA will provide additional safeguards to assist GSA in monitoring the effectiveness of its sampling plan and to identify problem utilities requiring special attention.

The materials GSA provided also identify the net savings to the government expected initially from use of the sampling plan. While admittedly these savings are based on certain assumptions (for example that the error rate will not exceed 5 percent), they provide a basis for making an initial determination as to whether to implement the plan. For example, based on past history, GSA expects error rates to run closer to 3 percent. Furthermore, the assumption recognizes possible costs through losses in overbillings and compares them to potential savings resulting from decreased audits. While the cost of collecting overpayments in some situations also must be factored into this equation, it is not important to GSA's modified proposal. The vendors involved here are utilities with whom GSA maintains a continuing business relationship. Therefore, once overbillings are discovered, GSA will have ample opportunity to recover these amounts by setoff against future billings without incurring additional costs.

For the reasons stated above, GSA's proposal provides for a meaningful, valid statistical sampling of invoices, an adequate monitoring program, and probable savings to the government. Therefore, we have no objection to GSA's modified proposal to combine elements of fast pay and procedures statistical sampling techniques to pay and audit utility invoices since, if implemented properly, it should adequately protect the interests of the government.

B-235261, August 21, 1989

Procurement

Sealed Bidding
■ Contract awards
■ ■ Propriety
■ ■ ■ Invitations for bids
■ ■ ■ ■ Defects

Contracting officer's failure to check a box on the "solicitation, offer, and award" form, indicating whether contract is a negotiated agreement or is an award under sealed bidding procedures, does not affect the validity of contract award, because the form otherwise clearly indicates the existence of an enforceable contract.

Procurement

Sealed Bidding
■ Bid guarantees
■ ■ Post-acceptance periods
■ ■ ■ Submission

Where invitation specifically states that payment and performance bonds may be furnished after contract award, awardee's failure to furnish such bonds prior to award does not nullify contract.

Procurement

Socio-Economic Policies
■ Small business set-asides
■ ■ Use
■ ■ ■ Resolicitation

Where reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. Thus, where the original solicitation was restricted to small businesses, the contracting officer was not required to conduct a similarly restricted procurement when reprocuring because Federal Acquisition Regulation authorizes contracting officers to use any appropriate method or procedure.

Matter of: Bud Mahas Construction, Inc.

Bud Mahas Construction, Inc., protests the proposed award of a contract to C.E. Wylie Construction Co., a large business, for completion of a defaulted contract that was awarded to Continental Construction Co., Inc., a small business, under invitation for bids (IFB) No. N62474-86-B-0638. The solicitation was originally issued as a small business set-aside by the Naval Facilities Engineering Command for construction of bachelor enlisted quarters at the Marine Corps Air Station, Tustin, California. Mahas contends that it should have been awarded the contract under the first solicitation after the two lowest bidders were rejected. Mahas also contends that the reprocurement should have been set aside for small businesses, and that the Navy is improperly proposing to award the contract to Wylie, a large business.

We deny the protest.

The IFB required prices for a base item and two additive items and advised that award would be based on price and price-related factors specified in the solicitation. The IFB required that a bid guarantee in the amount of 20 percent of the bid price be submitted with the bid and required submission of performance and payment bonds within 10 days of contract award.

Seven bidders responded by the January 17, 1989, bid opening date. Wylie's low bid of $7,371,845 was rejected because the competition was restricted to small businesses. Continental's bid of $7,529,000 was the second lowest, and Mahas's $7,990,000 bid was third lowest. After a favorable responsibility determination, Continental was awarded the contract on February 6.

The notice of award informed Continental that its offer had been accepted and that performance and payment bonds had to be submitted to the Navy within 10 days of the February 6 contract award date. However, Continental did not furnish the required bonds within the prescribed time, and, after Continental failed to respond to the Navy's "cure" notice requesting compliance within 10 days, its contract was terminated for default on April 13.

The Navy offered the project to Wylie at its low bid price of $7,371,845. After Wylie stated that it would not be able to perform the contract at that price, the Navy decided to reprocure on a negotiated basis. Offers then were solicited by phone from the original bidders.

Five companies submitted prices by the closing date. Wylie was lowest at $7,450,000; Bodell Construction was second lowest at $7,784,000; Baldi Bros. Construction was third lowest at $7,832,367; Mahas was fourth lowest at $7,890,000; and Kardan Construction submitted an $8,069,040 price.

Mahas contends that it should have been awarded a contract under the first solicitation because it was next in line for award after the first two bidders, Wylie and Continental, were disqualified. Mahas contends that no contract was effectively awarded to Continental under the first solicitation, and, therefore, termination of the contract for default and reprocurement were not required. Specifically, the protester alleges that there was no contract because Continental failed to acknowledge receipt of the notice of award and also because the Navy failed to complete the "solicitation, offer, and award" form, Standard Form (SF) 1442.

Under the Federal Acquisition Regulation (FAR), the contract award is the agency's acceptance of the bid; the bid and award together constitute the contract. FAR § 14.407-1(c)(5). The agency generally awards the contract by completing the "award" portion of the "solicitation, offer, and award" form, in this case block 29 of SF 1442. *See* FAR § 14.407-1(d)(1).

Here, the contracting officer accepted Continental's low, responsive offer by signing and dating the SF 1442. The contracting officer, in so doing, failed to check the box in either block 28 or 29, as instructed by the SF 1442. Block 28 is captioned "Negotiated Agreement" and requires the contractor to sign the document and return copies of it to the agency. Block 29 is captioned "Award" and

requires nothing further from the contractor. This failure to check a block did not affect the validity of the award because the SF 1442 otherwise contained the essential elements of a contract. Specifically, the SF 1442 included Continental's offer to perform the required work at the specified bid prices and was signed by the firm's president, while the contracting officer's signature on the SF 1442 evidenced the government's acceptance of the offer. Thus, an enforceable contract was effected at that point. Moreover, there is no basis for Mahas's contention that award of the contract was contingent upon Continental's acknowledgment of receipt of the notice of award. Although the Navy requested acknowledgment of the notice, once the contracting officer accepted Continental's offer by signing the SF 1442, no further acknowledgment from Continental was necessary.

Mahas also alleges that Continental's failure to provide a performance bond in a timely manner nullified the award of the contract because providing the bond was a condition precedent to contract award. We disagree. The February 6 notice of contract award required that performance and payment bonds be provided before commencement of work under the contract. However, the notice did not state, as Mahas has alleged, that the bonds were a condition precedent to contract award. In fact, the IFB specifically stated that bonds were to be provided within 10 days after contract award, and the notice merely reflected that requirement.

Further, when Continental failed to furnish the required bonds after contract award, and its contract was terminated for default, the Navy was not required to make award to Mahas at a higher price merely because that firm was next in line for award under the original solicitation. *See Arrow, Inc.,* B-231001, July 13, 1988, 88-2 CPD ¶ 44. On the contrary, under FAR § 49.402-6(b), the contracting officer is required to obtain competition to the maximum extent practicable when reprocuring against a defaulting contractor's account, and the contracting officer's decision to conduct a new negotiated procurement was consistent with that requirement. *United Technologies, Elliot Support Services Division,* B-224887, Oct. 10, 1986, 86-2 CPD ¶ 425.

Mahas also alleges that the Navy violated procurement regulations by conducting the reprocurement on an unrestricted basis because the original solicitation was set aside for small businesses, and thus that it would be improper to award the contract to Wylie, a large business.

Generally, the applicable regulations require that a procurement be set aside for small business where the item or service being procured has been previously acquired successfully by the contracting office on the basis of a small business set-aside. FAR § 19.501(g) and Department of Defense FAR Supplement § 219.501(g). However, where, as in this case, a reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. *DCX, Inc.,* B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55. Accordingly, the FAR provision regarding repetitive small business set-asides does not apply here. Instead, in arranging for completion of work under a defaulted contract, the contracting officer is authorized to use sealed

bidding or any other appropriate method or procedure, but must use the same plans and specifications and exercise reasonable diligence to obtain the lowest price available. FAR § 49.405. We will review a reprocurement to determine whether the contracting agency's actions were reasonable under the circumstances, *DCX, Inc.*, B-232692, *supra*, and consistent with its duty to mitigate damages. *See Hemet Valley Flying Service, Inc.*, 57 Comp. Gen. 703 (1978), 78-2 CPD ¶ 117.

Here, in view of the FAR requirement to maximize competition and to obtain the lowest available price in order to mitigate damages, the contracting officer acted reasonably in not restricting the reprocurement to small businesses. In this regard, we agree with the Navy that including Wylie, which had submitted the lowest bid in the original procurement, was in the best interests of the government, the defaulted contractor and the sureties to reprocure the project for "zero damages."

Moreover, the record shows that the Navy conducted the reprocurement in a reasonable manner. The agency ensured adequate competition by soliciting prices from the seven original bidders and actually obtained prices from five firms. The Navy also obtained a quoted price of $7,450,000 from Wylie which is lower than Continental's $7,529,000 price under the defaulted contract, and $440,000 lower than Mahas's bid under the original solicitation, thus meeting the FAR requirement to obtain the lowest price available.

The protest is denied.

B-232547, August 22, 1989

Civilian Personnel

Compensation
■ Claim settlement
■■ Labor disputes
■■■ GAO authority

A labor organization, on behalf of a Federal Aviation Administration (FAA) employee, requests that the Comptroller General vacate our Claims Group's denial of the employee's claim for additional temporary quarters subsistence expenses on the ground that a formal grievance had been filed at the time of the GAO settlement. Since the claim was properly submitted to GAO by the agency at the employee's request and settled, according to law, without the Claims Group being advised of the grievance, the settlement is valid and will not be vacated.

Civilian Personnel

Relocation

■ **Temporary quarters**

■ ■ **Actual subsistence expenses**

■ ■ ■ **Reimbursement**

■ ■ ■ ■ **Amount determination**

An employee's claim for additional temporary quarters subsistence expenses was denied by our Claims Group which sustained the agency's determination as to reasonable amounts for meals. The employee appeals that settlement on the basis of the collective bargaining agreement between the agency and a union which he argues makes inapplicable an agency guideline of 46 percent of per diem as being a reasonable rate for meals. Even if the guideline is not applicable, however, the agency was required by law and regulations to limit reimbursement to an amount it determined as "reasonable." The agency determined a reasonable amount to be 55 percent in this case, and that determination will not be disturbed since there is no showing it is clearly erroneous, arbitrary, or capricious.

Matter of: James R. Slattery—Relocation—Temporary Quarters Subsistence Expenses—Meal Costs

The National Association of Air Traffic Specialists, Western-Pacific Region, on behalf of James R. Slattery, an employee of the Federal Aviation Administration (FAA), appeals our Claims Group's denial of his claim for reimbursement of meal expenses in excess of 55 percent of the maximum daily rate, the amount allowed by the FAA. Our Claims Group's settlement is sustained for the reasons explained below.

Background

Mr. Slattery presented a claim to the FAA for subsistence expenses he incurred while occupying temporary quarters incident to a change of official station in July and August 1986. The FAA originally disallowed that part of the claim for meals that exceeded 46 percent of the maximum daily allowance, in accordance with subparagraph c of paragraph 4-0308, DOT Order 1500.6A (FAA 1500.14A), Travel Manual, and decisions of this Office, which suggested the issuance of such guidelines as a standard of reasonableness for the reimbursement of subsistence expenses.[1] The FAA subsequently adjusted reimbursement for meals upward to 55 percent of the maximum daily allowance upon additional justification submitted by Mr. Slattery. However, Mr. Slattery felt he was entitled to the full amount claimed and asked that his claim be forwarded to our Office.

Upon Mr. Slattery's request, the FAA properly forwarded the claim to our Office with an administrative report, in accordance with our procedures found in 4 C.F.R. Part 31 (1987). Our Claims Group denied the claim for additional reimbursement in settlement Z-2865195, October 13, 1987, and the union appeals the action on behalf of Mr. Slattery, requesting that we vacate the settlement because Mr. Slattery had filed a formal grievance regarding the matter.

[1] *See Harvey P. Wiley*, 65 Comp. Gen. 409 (1986), and *Clyde G. Cobb*, B-198093, Nov. 10, 1980.

The union also requests that if we do not vacate the settlement, we reconsider the denial based on provisions in the 1984 negotiated labor-management agreement between the FAA and the union which pertain to reimbursement for permanent change-of-station expenses.[2]

Opinion

The claim was properly submitted to the GAO through an administrative agency, and it was settled in accordance with the basic entitlements provided by law and regulation. When the Claims Group's settlement was issued, there was nothing in the record to indicate that the matter was the subject of a formal grievance proceeding at the FAA. Since our Claims Group had no knowledge of the grievance filed under a collective bargaining agreement, this was a proper exercise of our authority to settle claims against the government under 31 U.S.C. § 3702 (1982). *See generally, Samuel R. Jones,* 61 Comp. Gen. 20 (1981). Therefore, the Claims Group's settlement was valid and will not be vacated.

Regarding the union's alternative request that we review the settlement in light of provisions contained in the collective bargaining agreement, the union highlights several articles of the agreement which it interprets to require reimbursement of the full amount of Mr. Slattery's claim.

The union refers to Article 46, which specifically deals with "moving expenses." Section 2 thereof provides:

> Employees shall be reimbursed for subsistence costs while occupying temporary quarters up to the maximum period prescribed by law or regulation. The amount of such subsistence allowance payable for temporary quarters is prescribed in agency directives.

The union states that at the time the collective bargaining agreement was entered into, the agency regulations did not include the 46 percent guideline initially used by the FAA in questioning the reasonableness of Mr. Slattery's subsistence expenses. It then points to Article 66, which provides that any provision of the agreement shall be a valid exception to and shall supersede any existing FAA rules, regulations and practices; and Article 72 under which the parties agree to consult prior to implementing changes in personnel policies, practices and matters affecting working conditions that are within the scope of the employer's authority. The union argues that the agency did not consult with it prior to implementing the 46 percent guideline and, therefore, the rule does not apply to the union's members; instead, the union argues, the maximum rate is applicable since that was the situation when the agreement was negotiated and it stands as an exception to the 46 percent guideline under Article 66.

The FAA states that the 46 percent guideline is no longer used for claims submitted by bargaining unit employees because of the union's position that the guideline was a change in working conditions which was not coordinated with

[2] Although this request for review was not submitted to us under the procedure published in 4 C.F.R. Part 22 (1988), concerning matters of mutual concern to agencies and labor organizations, both the union and the agency have submitted comments concerning the merits of the case.

the union. However, the agency says it still reviews claims of this type for reasonableness, as required by the Federal Travel Regulations and decisions of our Office. The FAA states further that Mr. Slattery's claim was reviewed for reasonableness, and when he submitted additional justification to support his claim, he was allowed an amount equal to 55 percent of the maximum daily allowance for meals. Therefore, his claim was not settled based on the 46 percent guideline.

The statutory authority to pay temporary quarters subsistence expenses for transferred employees and their families is found in 5 U.S.C. § 5724a(a)(3), which provides for reimbursement of such expenses, under prescribed regulations, not in excess of the maximum per diem prescribed for the locality. Implementing regulations are found in the Federal Travel Regulations (FTR), FPMR 101-7 (Sept. 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984). Under FTR, paragraph 2-5.4, reimbursement is allowed only for actual subsistence expenses provided they are incident to occupancy of temporary quarters and are "reasonable" as to amount. These provisions are restated in the FAA regulations.

Under the FTR a determination must be made on an individual basis as to whether the amounts an employee claims are "reasonable," and that is the responsibility of the employing agency in the first instance. *See Harvey P. Wiley*, 65 Comp. Gen. 409 (1986), and cases cited therein. We have suggested that agencies issue written guidelines as a basis for review of an employee's expenses and have approved as a reasonable guideline for meals and miscellaneous expenses 46 percent of the statutory maximum, provided that it does not operate as an absolute bar to payment of additional amounts when justified by the employee because of unusual circumstances. *Harry G. Bayne*, 61 Comp. Gen. 123 (1981). Apparently this was the type of guideline the FAA sought to establish.

Whether or not the FAA was required to consult with the union in establishing the 46 percent guideline to aid in making the reasonableness determinations required by the FTR and restated in the FAA regulations, it is clear that the agency was required by the regulations to make such determinations on an individual basis whether or not it had a specific guideline in effect. This it did in Mr. Slattery's case, eventually allowing him 55 percent based on its evaluation of his circumstances.

Contrary to the union's contentions, the agency was not required to reimburse Mr. Slattery the maximum amount payable, unless of course it determined such amount to be reasonable under the circumstances, which it did not do. In our view the agency's actions do not conflict with Article 46 of the Agreement which merely provides that the amount of the subsistence allowance "is prescribed in agency directives." As is indicated above, the FTR provision, and its restatement in the FAA regulations, limit the amount payable to that which is "reasonable."

The agency has made its determination as to what was a reasonable amount in this case, and we will not substitute our judgment for that of the agency, in the absence of evidence that the agency's determination was clearly erroneous, arbi-

trary or capricious. *Harvey P. Wiley, supra.* There has been no such showing in this case.

Accordingly, our Claims Group's settlement, denying additional reimbursement, is sustained.

B-231926, August 23, 1989

Civilian Personnel

Compensation
■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Waiver of collection of salary overpayments resulting from premature within-grade increase is granted in the case of a foreign national who had been hired overseas with no prior federal experience and had only 2 years of federal service at the time the erroneous action occurred. As a general rule, federal employees are expected to know the appropriate waiting periods for within-grade increases and to make inquiry about increases which do not conform to those waiting periods. However, in the present case, the employee's limited exposure to the federal personnel system warrants an exception to this general rule.

Matter of: Richard G. Anderegg—Waiver of Salary Overpayment—Premature Within-Grade Increase

Mr. Anderegg, an employee of the United States Information Agency (USIA), appeals a settlement by our Claims Group (Z-2880785, Oct. 14, 1987) which denied his request for waiver under 5 U.S.C. § 5584 of the government's claim against him for $812.52 he received in salary overpayments as a result of an erroneous withingrade increase. For the reasons stated hereafter, we overrule the settlement and grant Mr. Anderegg's request for waiver.

Mr. Anderegg, a Swiss national, was hired by USIA on December 27, 1983, as a GS-11 International Radio Broadcaster for the Voice of America. Effective October 27, 1985, he was promoted to GS-12, step 1, making the correct date for his next within-grade increase (WGI) October 26, 1986. However, Mr. Anderegg was erroneously granted a WGI effective January 5, 1986, which would have been the correct date had he not been promoted. The error was not discovered until March 1987, resulting in salary overpayments to him of $812.52.

The Comptroller General is authorized by 5 U.S.C. § 5584 to waive claims for erroneous salary payments if collection "would be against equity and good conscience and not in the best interest of the United States." These statutory criteria generally will be met by a finding that "there is no indication of fraud, misrepresentation, fault or lack of good faith" on the part of the employee seeking waiver. 4 C.F.R. § 91.5(c). Since there is no indication of fraud, misrepresentation or lack of good faith on the part of Mr. Anderegg, the issue of waiver turns on whether he was at "fault" with respect to the erroneous overpayment. We

consider fault to exist if, in light of all the circumstances, the employee knew or should have known that an error existed but took no action to have it corrected. *Frederick D. Crawford,* 62 Comp. Gen. 608 (1983).

The USIA and the Claims Group denied Mr. Anderegg's request for waiver on the basis that, as an employee with several years of government experience, he should have been aware of the appropriate waiting periods for WGIs and should therefore have questioned the premature WGI. In his appeal, Mr. Anderegg counters that he did not know and, based on his limited experience, had no reason to suspect that his WGI was erroneous.

We agree with Mr. Anderegg. It is true that our decisions establish the general rule that federal employees should be aware of the waiting periods between WGIs and should inquire about an increase not in accord with the appropriate waiting period. *See, e.g., Daniel J. Rendon,* B-231018, Aug. 2, 1989, 68 Comp. Gen. 573, *Dominick A. Galante,* B-198570, Nov. 19, 1980. On the other hand, as discussed in *Galante,* these decisions involved employees who had many years of federal service, who held positions requiring specialized knowledge about the federal pay structure, who had prior experience with erroneous WGIs, or who had some specific knowledge or reason to know that a particular WGI was erroneous. Thus, the general rule charging employees with knowledge of WGI waiting periods depends on the circumstances and its applicability must be determined on a case-by-case basis.

We conclude that there are sufficient mitigating factors in Mr. Anderegg's case—primarily his relatively brief federal service—to warrant an exception to the general rule holding employees accountable for recognizing erroneous WGIs. Accordingly, we grant his request for waiver.

B-234596, August 23, 1989

Civilian Personnel

Leaves of Absence

■ Annual leave

■ ■ Forfeiture

■ ■ ■ Restoration

Some employees of the Norfolk Naval Shipyard, on approved leave for the remainder of the 1987 leave year ending January 2, 1988, forfeited up to 4 hours of annual leave as a result of the President declaring the last half (4 hours) of the scheduled workday on December 24, 1987, as a half-day closing. As a result, the employees' annual leave accounts exceeded the maximum carryover of 240 hours. There is no authority to restore the forfeited annual leave in excess of statutory limit of 240 hours for carryover into the next leave year.

Matter of: Norfolk Naval Shipyard—Restoration of Forfeited Annual Leave

This decision is in response to a joint request for decision pursuant to labor-management relations procedures set forth in 4 C.F.R. Part 22 from the Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, and the American Federation of Government Employees (AFGE), Local 4015. The parties request a decision as to whether approximately 40 employees who forfeited up to 4 hours annual leave because of the issuance by the President of Executive Order 12619, excusing all federal employees from duty for the last half of the scheduled workday on December 24, 1987, are entitled to the restoration of the forfeited annual leave under the facts set forth below. We hold that, in the circumstances presented here, the employees are not entitled to leave restoration.

Background

The Norfolk Naval Shipyard has established a curtailment policy, stopping all but essential operations for 4 to 8 workdays between Christmas through New Year's Day. On July 31, 1987, the activity issued a notice which set out the period of curtailment for 1987-1988, which was from 7:40 a.m. on December 24, 1987, until 7:20 a.m. on January 4, 1988.

By Executive Order 12619, issued December 22, 1987, the President excused all federal employees from duty for the last half of the scheduled workday on December 24, 1987. As a result, certain employees who were scheduled to and did take annual leave during the full curtailment period forfeited between 0.1 and 4.0 hours of annual leave.[1] Approximately 40 employees were affected.

AFGE Argument For Restoration

Employees scheduled "use or lose" annual leave for the period beginning on December 24, 1987, and ending January 4, 1988, because the Shipyard was in an official shutdown period and their services were not required. The union argues that had there been no official shutdown on December 24, 1987, and had these employees been working, they would have been excused from duty without loss of pay or charge to leave for the last 4 hours of the workday of December 24, 1987. In that case, assuming they had used their excess leave earlier in the year, they would not have forfeited the annual leave. Employees in the unit planned their leave judiciously as required by the Shipyard Commander in preparation for the shutdown which began December 24, 1987, and ended January 4, 1988. Therefore, these employees were penalized for following the Shipyard Commander's instructions. Employees in the bargaining unit were not notified that they had been excused from duty for the last half of the scheduled

[1] The Shipyard grants annual leave in tenths of an hour increments.

workday on December 24, 1987, until they returned to work on January 4, 1988, when the Shipyard was reopened for business.

Agency Argument For Denying Restoration

The agency relies on decisions of our Office in support of its position that the "lost" leave is not subject to restoration, that the employees are not entitled to additional pay, and that advance notice of the December 24 excusal under Executive Order is not required. The agency cites our decision *Joseph A. Seymour,* B-182549, Aug. 22, 1975. In *Seymour* we stated that where an employee takes annual leave for the remainder of the leave year (13 days) but is charged for only 11 days because 2 additional holidays were declared by Executive Order during that period, there is no authority to restore 6 hours of annual leave that was forfeited in excess of the statutory limit of 240 hours. The agency also cites our decision *William M. Gualtieri,* B-207139, Sept. 29, 1982, in which an employee whose annual leave account exceeded the maximum carryover of 240 hours, and who was on approved leave for the remainder of the 1981 leave year, forfeited 4 hours of annual leave as a result of the President encouraging agency heads to excuse employees from work for the last half of the workday on December 24, 1981. We held that the failure of the employee's agency to counsel the employee of our holding in *Joseph A. Seymour, supra,* did not constitute administrative error within the meaning of 5 U.S.C. § 6304(d)(1)(A), and that no authority existed for the restoration of the forfeited annual leave.

Opinion

At the end of the leave year, employees must forfeit annual leave in excess of the maximum carryover allowed unless the forfeiture was caused by administrative error when the error causes a loss of annual leave otherwise accruable, exigencies of the public business when the annual leave was scheduled in advance, or sickness of the employee when the leave was scheduled in advance. 5 U.S.C. § 6304 (1982). In interpreting this law, we have held that there is no authority to permit the crediting or use of the excess leave which is forfeited because a closing of federal offices was declared by the President on a day that annual leave was scheduled to be used. *Joseph A. Seymour, supra,* and *William M. Gualtieri, supra.* The forfeited annual leave in such situations is not within the scope of the statute's provisions which permit restoration of forfeited annual leave. *See also Priscilla Cooke,* B-231759, Jan. 4, 1989.

As indicated above, by Executive Order 12619, issued December 22, 1987, the President excused all federal employees from duty for the last half of the scheduled workday on December 24, 1987. Section 3 of Executive Order 12619 provides that Thursday, December 24, 1987, shall be considered as falling within the scope of Executive Order No. 11582, February 13, 1971 (observance of holidays), and of 5 U.S.C. §§ 5546 (premium pay for holiday work) and 6103(b) (pay and leave of employees with respect to a holiday declared by Executive Order).

This leave in question was forfeited because of the rule that an employee on previously authorized leave is not charged leave for a day or part day on which federal offices are closed by Executive Order. *See* 43 Comp. Gen. 501 (1964) (Executive Order 11128, Nov. 23, 1963, closing federal offices as a mark of respect on the death of President Kennedy). That decision is predicated on section 205(a) of the Annual and Sick Leave Act of 1951, codified at 5 U.S.C. § 6302(a) (1982), which defines days of leave as "days on which an employee would otherwise work and receive pay . . . exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order." Thus, an employee on previously authorized leave on the day that federal offices are closed is not to be charged leave for that day. *See* B-153196, Jan. 27, 1964.

In this case there is no authority to restore the hours of forfeited annual leave since the employees had previously scheduled the use of annual leave in accordance with the agency's instructions and the declaration of the last half of the scheduled workday on December 24, 1987, as a halfday closing by the President does not constitute an administrative error or otherwise trigger any of the premises for restoration in 5 U.S.C. § 6304(d)(1).

B-235495, August 23, 1989

Civilian Personnel

Travel

■ Overseas travel

■ ■ Travel modes

■ ■ ■ Terrorist threats

Where the Drug Enforcement Administration follows its proposed procedure in granting authority to employees, threatened by terrorists acts, to travel on foreign flag air carriers to avoid the threats, the Comptroller General will not question the agency's determinations that the use of a foreign carrier is necessary to protect the employees' safety. In these circumstances use of the foreign carrier is considered a necessity as provided under the guidelines implementing the Fly America Act.

Matter of: Drug Enforcement Administration Employees—Use of Foreign Air Carriers to Avoid Terrorist Threats

The Drug Enforcement Administration (DEA) asks whether the agency may approve travel abroad by its employees on foreign flag air carriers in lieu of U.S. flag air carriers in certain circumstances to avoid terrorist threats.[1] We conclude that DEA may do so under its proposed procedures, and this Office will not disallow expenditures for such travel on foreign flag carriers.

[1] The matter was presented to us by the Assistant Administrator for Operational Support, DEA.

Background

The DEA, based on concern for the safety of its employees traveling abroad, asks whether the agency may approve travel on foreign flag carriers to or through certain areas abroad which have "high profiles" of risks of terrorist attack, without violating the so-called Fly America Act, 49 U.S.C. App. § 1517 (1982), which generally requires the use of U.S. flag carriers for government-financed transportation when such carriers are available. DEA states that its employees spend a large amount of time traveling on business that cannot be postponed, and this puts them at greater risk than the general public. Thus, DEA contends that the exception from the mandatory use of U.S. flag carriers provided in the guidelines implementing the act, as published in the Federal Travel Regulations (FTR), para. 1-3.6b(3), *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1988),[2] covers its employees' situation since safety is a critical component of the agency's transportation needs.

Under the agency's proposed procedure the use of foreign flag carriers would be strictly controlled at the highest level in the agency where requests would be considered on a case-by-case basis; no blanket or multiple person requests would be considered. U.S. flag carriers would be required to be used for departure from the United States. Approval of travel on foreign flag carriers would be granted only upon consideration by the DEA Administrator of individual written requests that are supported by evidence of threats to specific DEA personnel and accompanied by the latest Department of State security threat analysis. Also, cost would be considered in selecting foreign flag carriers.

Discussion

Generally, the Fly America Act, 49 U.S.C. App. § 1517, requires the use of service provided by U.S. flag air carriers for government-financed transportation to the extent such service is "available." *See Fly America Act,* B-207637, Nov. 10, 1982. The guidelines implementing the act restate the requirement to use U.S. flag carriers unless travel by a foreign-flag carrier is a matter of "necessity," which is defined to be:

> if a U.S. flag air carrier otherwise available cannot provide the air transportation needed, or use of U.S. flag air carrier service will not accomplish the agency's mission.[3]

We have recognized that agencies have broad authority to determine whether U.S. flag service otherwise available can provide the air transportation needed to accomplish the agency's mission, and we have recognized that the term "available," within the meaning of the act, includes the assumption that the service will be provided without unreasonable risk to the traveler's safety. 57 Comp. Gen. 519 (1978). *See also Richard H. Howarth,* B-193290, Feb. 15, 1979.

[2] The guidelines in the FTR are a restatement of the Comptroller General's Revised Guidelines for Implementation of the Fly America Act, B-138942, March 31, 1981.
[3] FTR, para. 1-3.6b(2) and (3).

Evidence of terrorist threats to DEA employees traveling abroad could provide a justification for determining that travel by a U.S. flag carrier in the circumstances DEA describes would be an unreasonable risk to the employees' safety. DEA has broad authority to make such a determination, which would provide the basis for concluding that U.S. flag carriers were not "available" within the meaning of the Fly America Act. Where the determination is made under the procedures DEA describes, we would not question the use of the foreign carrier. The employees' vouchers, however, should be accompanied by the certificate required by FTR, para. 1-3.6c(3).

B-235562, August 23, 1989

Procurement

Bid Protests

■ **Subcontracts**

■ ■ **GAO review**

The General Accounting Office will not consider a bid protest of a subcontractor selection by an Environmental Protection Agency (EPA) emergency response clean-up contractor, even assuming EPA effectively directed the subcontractor selection, since the EPA involvement was not so pervasive that the contractor would be considered a mere conduit for an EPA acquisition.

Matter of: ToxCo, Inc.

ToxCo, Inc., protests the award of a subcontract under request for proposals (RFP) No. RES-89-9783A by Riedel Environmental Services, Inc., to Qualtec, Inc., for cement fixation of lead contaminated soils at the Norco Battery Superfund site under Riedel's contract No. 68-01-7334 with the Environmental Protection Agency (EPA) for emergency response cleanup service.

We dismiss the protest, since this subcontractor protest is not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1988).

Riedel has a combined fixed-price/cost-reimbursement contract with EPA, under which Riedel responds to delivery orders to conduct removals of oil and hazardous substances under the Superfund program. Riedel can either provide these services itself or by subcontract. However, these services are required to be in accordance with the directions of the federal On-Scene Coordinator (OSC) or other designated federal official. The subcontractor RFP in question here was issued pursuant to a delivery order issued by the EPA's Norco OSC, which required Riedel to issue an RFP for a cement fixation subcontractor and to provide certain other services related to the cleanup of on-site contaminated soils and battery debris at the Norco site. The RFP requested technical and price proposals.

Three offerors responded to Riedel's RFP, but only ToxCo and Qualtec were included in the competitive range. After several rounds of discussions, Riedel awarded Qualtec a technical score of 85 points on a 100 point scale and ToxCo

65 points. ToxCo's $695,344 price was lower than Qualtec's $1,054,978 price. After consulting with EPA, Riedel selected Qualtec for award as the highest technically ranked offeror.

ToxCo claims that its offer should have been selected since it submitted the best and lowest priced proposal and because Qualtec does not possess the necessary state licenses or local experience. ToxCo also claims that the selection was actually made by the EPA OSC, who overruled the Riedel evaluation that ToxCo was technically superior, which resulted in a noncompetitive award to Qualtec.

EPA asserts that the selection was reasonable and denies that the OSC controlled the selection. EPA also claims that ToxCo's protest should be dismissed since it is a subcontract protest over which our Office has no jurisdiction. ToxCo responds that its protest is appropriate for consideration under our Bid Protest Regulations, 4 C.F.R. Part 21 (1988), and advances a number of alternative theories to support this contention.

We agree with EPA that this subcontract protest is not for consideration under our Bid Protest Regulations. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. IV 1986), our Office has jurisdiction to decide protests involving contract solicitations and awards by federal agencies. We have interpreted this provision as authorizing us to decide protests of subcontract solicitations and awards only when the subcontract is "by or for the government." 4 C.F.R. § 21.3(m)(10).[1] Basically, a subcontract is considered to be "by or for the government" where the prime contractor principally provides large-scale management services to the government and, as a result, generally has on-going purchasing responsibility. In effect, the prime contractor acts as a middleman or a conduit between the government and the subcontractor. *American Nuclear Corp.*, B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503. Such circumstances may exist where the prime contractor operates and manages a government facility, *Westinghouse Elec. Corp.*, B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145, otherwise provides large-scale management services, *Union Natural Gas Co.*, B-224607, Jan. 9, 1987, 87-1 CPD ¶ 44, serves as an agency's construction manager, *C-E Air Preheater Co., Inc.*, B-194119, Sept. 14, 1979, 79-2 CPD ¶ 197, or functions primarily to handle the administrative procedures of subcontracting with vendors effectively selected by the agency. *University of Mich., et al.*, 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. Except in these limited circumstances in which the prime contractor is basically acting as the government's agent, a subcontract awarded by a government contractor in the course of performing a prime contract generally is not considered "by or for the government." *Barshfield Inc.*, B-233575, July 11, 1989, 89-2 CPD ¶ 34.

ToxCo alternatively characterizes Riedel's contract with EPA as one to provide large-scale management services or construction management services and, thus, subject to our bid protest jurisdiction. However, our review of the contract

[1] Since our jurisdiction over subcontract protests is defined by CICA, we cannot, as is suggested by ToxCo, assume jurisdiction over this protest on the basis of the significant dollar value and congressional interest in Superfund subcontracting activities in general.

between EPA and Riedel indicates that Riedel is to provide much of the cleanup services with its own forces.[2] The management, including construction management, responsibilities included in Riedel's contract are incidental to Riedel's primary function to cleanup Superfund sites. *See American Nuclear Corp.*, B-228028, *supra; Edison Chouest Offshore, Inc., et al.*, B-230121.2 *et al.*, May 19, 1988, 88-1 CPD ¶ 477. In any case, since this Superfund site is not on government property, it cannot be said that Riedel is operating and maintaining a government facility. *Id.* Therefore, we do not find that the nature of the contract between EPA and Riedel indicates that this subcontract procurement is "by or for the government."

ToxCo also argues that the degree of control exercised by EPA and the OSC in this case made Riedel a "mere conduit" for EPA to acquire these services on a sole-source basis. In this regard, as provided in the Riedel contract, the OSC issued a delivery order to accomplish the cleanup of the Norco Battery site, which specifically required Riedel to subcontract for the cement fixation portion of the project, because the OSC and Riedel recognized that Riedel was not sufficiently experienced or qualified to perform the cement fixation.

The OSC is stated to be an expert in the "new and innovative emerging technology" of cement fixation. In his affidavit, the OSC states that he drafted technical documents used by Riedel in the RFP and identified potentially acceptable sources to be solicited by Riedel. The OSC also states that he reviewed the proposals, and discussed their merits, as well as the administrative aspects of the procurement, with Riedel personnel on a daily basis. He states that he had input into the evaluation of the proposals and conduct of discussions and when Riedel "indicated an inclination to select ToxCo" for award because of its "low price and technical acceptability," he expressed his opinion that ToxCo "was not technically acceptable" and he "recommended award of the subcontract to Qualtec." When Riedel then selected Qualtec for award, the OSC consented to the award pursuant to the subcontract clause in Riedel's contract.

On the other hand, the EPA and OSC assert that Riedel— not EPA—was contractually responsible for selecting the subcontractor. In this regard, the OSC indicates that Riedel "independently" weighed the technical merits of the proposals and "independently assigned the proposals technical scores," and that he "was not involved in the scoring process."[3]

We do not find that EPA's involvement in this subcontractor procurement indicates this case is appropriate for consideration under our Bid Protest Regulations. Even assuming the OSC's conduct here amounted to effectively directing the subcontractor selection, this alone does not indicate the prime contractor is acting "by or for the government," that is, as the government's agent for this procurement, which the only basis upon which we will review the subcontract award. *Barshfield Inc.*, B-235575, *supra*, at 2; *Rohde & Schwarz-Polarad, Inc.*—

[2] Indeed, fixed rates for various labor categories are specified in the contract.
[3] ToxCo alleges that Riedel actually rated it technically superior to Qualtec and the OSC "directed" the evaluation be changed and award made to Qualtec. However, not only has ToxCo provided no evidence to support this speculation, the record contradicts ToxCo's allegation.

Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. We will only assume jurisdiction where the government's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. See, for example, *University of Mich., et al.*, 66 Comp. Gen. 538, *supra*, where the award selection was made by a government employee evaluation team. While the OSC obviously was actively involved in the procurement process and may even have effectively controlled the selection, we do not regard Riedel's involvement as that of a "mere conduit" for an acquisition by the government. Specifically, the record indicates that Riedel—not EPA—was responsible for the solicitation of offers as well as the evaluation and award selection process, and that the OSC consented to this selection.[4]

In view of the foregoing, we do not regard this subcontract protest as falling within the limited circumstances where we will consider such protest.

B-235916, August 23, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■ ■ Representational funds
■ ■ ■ Foreign service personnel
■ ■ ■ ■ Personal expenses/furnishings

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■ ■ Specific purpose restrictions
■ ■ ■ Personal expenses/furnishings

The State Department may use representation funds to reimburse costs incurred by Embassy officers in renting formal evening dress required of staff accompanying Ambassador in presenting his credentials to the Queen.

Matter of: United States Embassy, London—Use of Representation Funds for Reimbursement of Rental of Ceremonial Dress

An authorized certifying officer of the Department of State, stationed at the American Embassy in London, has asked whether the Ambassador, as chief of mission of the Embassy, may use representation funds appropriated to the State Department and allotted to the Embassy to reimburse six Embassy officers the cost of renting ceremonial dress. Protocol required the officers to wear formal

[4] While ToxCo complains that the evaluation criteria and specifications contained in the RFP were manipulated by the OSC with the view of effecting a sole-source award to Qualtec, this contention is an untimely protest against an apparent solicitation defect, not for consideration under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), even assuming the OSC did exercise the control alleged by ToxCo over this RFP.

evening dress when they accompanied the Ambassador in presenting his credentials to the Queen, the head of state of the United Kingdom.

As explained below, we conclude that the Ambassador may reimburse such costs from representation funds.

Background

On May 17, 1989, the newly appointed United States Ambassador to the United Kingdom presented his credentials to the Queen as required by protocol. At the Ambassador's direction, the Embassy's eight most senior officers accompanied him. According to the certifying officer, the officers could not decline to attend the ceremony.

The officers wore formal evening dress in accordance with instructions of the Marshal of the Diplomatic Corps, Ambassadors Court, St. James Palace. The six male officers were obliged to rent their attire. The certifying officer notes that occasions requiring such attire are rare in the modern diplomatic world, and that most Foreign Service officers can have a long career without ever attending one.

The Congress appropriated about $4.6 million to the State Department for "representation allowances" for fiscal year 1989. Pub. L. No. 100-459, 102 Stat. 2204 (1988). These funds are available to pay the expenses of the Department in providing proper representation of the United States and its interests. 22 U.S.C. § 4085.

Under Department regulations, the appropriation for representation allowances is apportioned annually to embassies and other missions, and the chief of mission at each location is authorized to use his allotment, at his discretion, for any expenditure not specifically prohibited by law or regulation. *See generally* 3 Foreign Affairs Manual 340.

The Ambassador, as chief of mission of the Embassy in London, has instructed the certifying officer, subject to our approval, to certify payment from the Embassy's allotment of the costs incurred by the six Embassy officers in renting their evening dress.

Discussion

As a general rule, we consider most items of apparel as the personal responsibility of the employee; they are not provided at public expense, even when worn in the course of public business. *See* 67 Comp. Gen. 592, 593 (1988). However, in this instance, the State Department's appropriation for representation allowances provides the statutory authority for reimbursement of the apparel rental charges incurred by the six Embassy officials.

The purpose of a representation appropriation is to permit certain expenditures that the law may not otherwise allow. B-223678, June 5, 1989. That is not to

say, however, that it is available to pay for the normal social obligations of individual officers and employees that, like other personal expenses, must be borne by the officer or employee. *Cf.* B-232165, June 14, 1989; B-223678, June 5, 1989. Rather, the Secretary of State may authorize the use of the Department's representation appropriation to pay only those expenses incurred in providing proper representation of the United States and its interests. 22 U.S.C. § 4085.

Palace protocol required that those attending the credentials ceremony, an official diplomatic ceremony, wear formal evening attire. Appearing in other dress would, undoubtedly, have affronted the host country's etiquette, resulting in considerable embarrassment to the Ambassador and the United States. Consequently, we conclude that the costs of renting the evening attire is an appropriate use of State Department representation funds.

B-232576, August 24, 1989

Civilian Personnel

Travel
■ Temporary duty
■ ■ Travel expenses
■ ■ ■ Additional expenses
■ ■ ■ ■ Excursion rates

An employee, who had purchased a Super Saver ticket in order to combine personal travel with temporary duty travel, was required by the government to return early to his duty station. As a result, the employee was unable to meet the prescheduling conditions of the Super Saver ticket and he could not use it for his return trip. Since the government may reimburse only those travel expenses that would have been incurred for direct official travel, there is no authority to compensate the employee for his loss on the Super Saver ticket.

Matter of: Paul J. Castleberry—Indirect Travel—Reimbursement Limitation

This decision is in response to a request from a Finance and Accounting Officer, Defense Nuclear Agency, concerning the claim of an employee to be reimbursed certain airfare expenses incident to the performance of temporary duty travel in June 1988.[1] We conclude that the employee may not be reimbursed, for the following reasons.

Background

Dr. Paul J. Castleberry, an employee of the Defense Nuclear Agency, was directed to perform temporary duty travel from Washington, D.C., to Los Angeles, California, and return. For personal reasons, he elected not to purchase his air-

[1] The submission has been assigned Control No. 88-13 by the Per Diem, Travel and Transportation Allowance Committee.

fare ticket through use of a Government Transportation Request (GTR). He was authorized by the agency to purchase his own round-trip ticket at a cost of $476, with the understanding that his round-trip airfare reimbursement would be limited to the cost of direct travel to Los Angeles and return at the GTR rate of $376. He purchased a Super Saver ticket which permitted him to combine personal travel to other locations with his official travel. However, that ticket was restricted to use on prescheduled dates. Dr. Castleberry used the Super Saver ticket for his trip to Los Angeles, but he was required by his agency to return to Washington a day earlier than expected. As a result, he could not use the return trip portion of the Super Saver ticket. The agency furnished him with a return trip ticket purchased with a GBL at a cost of $188.

The agency limited Dr. Castleberry's reimbursement to $188, representing the cost to the government for the direct flight to Los Angeles. Dr. Castleberry contends that he also should receive the additional $188 which the government would have reimbursed him had he been able to use the Super Saver ticket for his return to Washington as originally planned. He points out that the only reason he could not comply with the scheduling conditions of the Super Saver ticket and use it for the trip back to Washington was because the government required his early return.

Opinion

Paragraph 1-1.3b of the Federal Travel Regulations (FTR)[2] limits reimbursement for travel expenses to those expenses essential to the transaction of official business. In addition, paragraph 1-2.5 provides in part:

1-2.5 *Routing of Travel*

a. *Official Necessity.* All travel shall be by a usually traveled route. . . .

b. *Indirect-route or interrupted travel.* When a person for his/her own convenience travels by an indirect route or interrupts travel by direct route, the extra expense shall be borne by him/her. . . .

These provisions clearly limit allowable travel expenses to those which the government would have incurred had the employee traveled by the usual traveled route and by the mode of travel authorized. Thus, in the case of indirect or interrupted travel, reimbursement cannot exceed the constructive cost of direct routing or the actual cost of travel, whichever is less. *John P. Butt,* 65 Comp. Gen. 47 (1985); *Irwin M. Lieberman,* B-221760, Aug. 11, 1986; *Alan G. Bolton, Jr.,* B-200027, Aug. 24, 1981. In the present case, the agency paid the expenses that Dr. Castleberry would have incurred for direct official travel, reimbursing him $188 for his trip to Los Angeles and providing for his return trip by a GTR. There is no authority to reimburse Dr. Castleberry for the loss that resulted from his inability to use the Super Saver ticket for his return trip.

Accordingly, Dr. Castleberry's claim cannot be allowed.

[2] *Incorp. by ref.* 41 C.F.R. § 101-7.003 (1988)

B-233740.3, August 24, 1989

Procurement

Specifications

■ Ambiguity allegation

■■ Specification interpretation

Solicitation which requires bidders to determine for themselves applicable sections of directives, instructions and regulations incorporated by reference in their entirety into solicitation does not impose an undue burden on bidders, and does not constitute a solicitation defect, where all documents are made available to bidders for their examination and there is no evidence that bidders cannot readily discern the applicable sections by reviewing the cited materials.

Procurement

Bid Protests

■ GAO procedures

■■ Preparation costs

Claim for protest costs on basis that agency took corrective action remedying alleged solicitation defects in response to protest is denied, since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

Matter of: Service Ventures, Inc.

Service Ventures, Inc., protests the terms of invitation for bids (IFB) No. N62474-88-B-6167, issued by the Naval Facilities Engineering Command for physical security services at two government facilities. Service Ventures principally contends that the solicitation unreasonably requires bidders to determine the applicability of certain military directives, instructions and regulations to this procurement. Service Ventures also seeks reimbursement of its costs incurred in filing and pursuing this protest. We deny the protest and the claim.

The solicitation specifies that the contractor is to become familiar with governing Department of Defense, Secretary of the Navy, Chief of Naval Operations, and other directives, instructions and regulations incorporated by reference into the solicitation to ensure the contractor's compliance with all applicable military requirements concerning the performance of security preventive services. The solicitation initially listed 51 such directives, instructions and regulations. Subsequently, after the filing of Service Ventures's protest, the Navy amended the IFB by reducing the number of governing directives to 27, and also informed prospective bidders that copies of the applicable materials would be available for review at the contracting facility.

Service Ventures argues that the corrective measures taken by the Navy were inadequate in that the IFB still incorporates by reference literally thousands of pages of irrelevant directives, instructions and regulations, thereby requiring the bidders to decide which, if any, of the sections of these cited documents are applicable to this procurement. Service Ventures maintains that it is unreasonable to place this burden on bidders, and that by doing so the contracting activi-

ty is virtually ensuring that different bidders will reach different conclusions as to the actual requirements of the contract.

We disagree. As the protester correctly notes, the contracting activity bears the burden of identifying and describing the government's minimum needs by citing applicable specifications and standards. Federal Acquisition Regulation (FAR) § 10.004. Only in this manner can the contracting activity ensure that bidders are apprised in clear and unambiguous terms what is required of them so that they can compete on a common basis. *See Newport News Shipbuilding and Dry Dock Co.*, B-221888, July 2, 1986, 86-2 CPD ¶ 23. However, the contracting activity need not draft a solicitation with such detail and precision so as to eliminate all performance uncertainties or to address every possible eventuality. *See Ameriko Maintenance Co.*, B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686. Rather, incorporation of substantive terms and conditions into a contract by reference to other documents generally is a proper method of contract drafting. *Uffner Textile Corp.*, B-215991, Nov. 30, 1984, 84-2 CPD ¶ 591.

Here, although bidders are required to ascertain for themselves those sections of the referenced governing directives specifically applicable to this procurement, we do not think that this fact alone precludes the conduct of a fair and equal competition or otherwise renders the solicitation defective. While it appears that many of the approximately 3,500 pages of referenced materials are either irrelevant or redundant, the contracting activity has afforded prospective bidders the opportunity to examine each of the referenced directives at the facility, and Service Ventures has not alleged, and the record does not suggest, that bidders cannot readily discern the sections applicable to the procurement from a review of the cited directives. In this regard, we note that the IFB contains a detailed description of the required services; we agree with the Navy that, based on this description, bidders should be able to determine which sections of the referenced directives apply. Indeed, Service Ventures's protest submissions indicate that it has been able to determine which sections of the directives are applicable, and which are redundant or irrelevant. The IFB is not deficient merely because it requires bidders to undertake an effort Service Ventures considers burdensome. *See PTI Servs., Inc.*, B-225712, May 1, 1987, 87-1 CPD ¶ 459.

Service Ventures also argues that since the Navy amended the IFB to delete 24 of the originally listed governing directives in response to its protest, it should be reimbursed its costs of filing and pursuing this protest. As recognized by Service Ventures, however, we have held that the awarding of such costs is contingent upon our issuing a decision on the merits holding that the contracting activity violated a statute or regulation in the conduct of a procurement. *See, e.g., Monarch Painting Corp.*, B-220666.3, Apr. 23, 1986, 86-1 CPD ¶ 396. As we have found no such violation here, and find no basis for reversing our position in this area, Service Ventures is not entitled to reimbursement of its protest costs.

The protest and claim are denied.

B-229221, August 29, 1989

Military Personnel

Travel

■ Temporary duty

■■ Travel expenses

■■■ Reimbursement

■■■■ Amount determination

Military Personnel

Travel

■ Travel expenses

■■ Foreign currencies

■■■ Exchange rates

■■■■ Credit cards

A military member on temporary duty in Germany used his personal credit card to charge the cost of renting automobiles for official business on three occasions. He received invoices stating the cost in Deutsche Marks and U.S. dollars and was reimbursed the dollar amounts stated. His credit card company billed him more than the dollar amounts on the invoices because it used a different exchange rate than did the automobile rental company. Since the member incurred the rental costs in Deutsche Marks, he should be reimbursed consistent with the general practice for reimbursing a traveler on official duty overseas for charge transactions. Under the general practice, reimbursement is based on the accepted exchange rate, usually the New York foreign exchange selling rate (New York exchange rate) as of the dates of the charge transactions.

Matter of: Master Sergeant Larry A. Mickelsen—Credit Card Purchases Overseas—Exchange Rate

A Department of the Army disbursing officer requests an advance decision regarding whether Master Sergeant Larry A. Mickelsen is entitled to be reimbursed $403.71 in additional expenses he incurred for rental of automobiles while on temporary duty in West Germany when his credit card company billed him on the basis of a different exchange rate than that used by the automobile rental company.[1] As will be explained below, Sergeant Mickelsen should be reimbursed on the basis of the New York exchange rate for the date of the charge transaction, regardless of the exchange rate used by the rental car company or credit card company.

Background

In November 1986, March 1987, and May 1987, Sergeant Mickelsen performed temporary duty in West Germany under appropriately issued travel orders which included authority to use a rental car. He received a travel advance for each of the three periods of temporary duty. Sergeant Mickelsen rented motor vehicles from a rental car company during each of the three periods of tempo-

[1] The request was originated by Major H. S. Peoples, Finance and Accounting Officer, Headquarters, U.S. Army Engineer Center and Fort Belvoir, Ref. ATZA-CMA (340a). It was forwarded to us by the Per Diem, Travel and Transportation Allowance Committee, which assigned it Control Number 87-19.

rary duty and used his personal American Express card to charge the costs of the motor vehicles.

When Sergeant Mickelsen sought reimbursement for his travel expenses, he submitted copies of his invoices and charge slips for the automobiles he rented. Each bill stated the cost in both Deutsche Marks and United States dollars based on a stated conversion rate. He was reimbursed the dollar amounts stated on each bill.

When he later received his American Express statements for each of the rentals, he was billed for dollar amounts in excess of those stated on his charge slips from the automobile rental company. The American Express statements were higher because American Express used a different exchange rate in converting Deutsche Marks to dollars than did the automobile rental company. For example, the automobile rental company converted the March 1987 rental cost of 980.71 Deutsche Marks to United States dollars on the basis of an exchange rate of 2.01 Deutsche Marks per dollar. American Express used an exchange rate of 1.80 Deutsche Marks per dollar.

For March and May 1987 Sergeant Mickelsen was billed an additional $190.01. The November 1986 American Express statement was for $213.70 more than the automobile company invoice; however, only $11.07 was due to the different exchange rate used by American Express.[2]

Opinion

The Army Finance Office suggests that the present case is analogous to cases in which employees converted travel advances to a foreign currency and, upon reconversion to U.S. dollars, suffered a loss due to a change in the conversion rate of that foreign currency. As a general rule, the risk of incurring a loss (or realizing a gain) due to fluctuating currency exchange rates falls on the individual assigned to temporary duty in a foreign country. *See* 23 Comp. Gen. 212 (1943); *Chester M. Purdy,* 63 Comp. Gen. 554 (1984).

The cases regarding currency conversions are inapplicable here. Sergeant Mickelsen did not convert any funds when he charged the costs for renting the automobiles. Merely because this automobile rental company stated an exchange rate and dollar equivalent which, we presume, it would have used had payment been made in cash, we do not find that Sergeant Mickelsen's reimbursement should be limited to that exchange rate or its dollar equivalent because he chose to use his credit card. He should be reimbursed in accordance with the usual practice based on the exchange rate for the day the charge was incurred. According to an official of the Per Diem, Travel and Transportation Allowance Committee, the usual practice is to reimburse a traveler who charges his ex-

[2] The balance was due to American Express charging the claimant for 372.82 more Deutsche Marks than were stated on the invoice given him by the car rental company. Since the record does not describe what those additional charges represented, we are limiting our consideration of this claim to $11.07.

penses by converting the foreign currency charges on the basis of the New York exchange rate for the date of the transaction.

Accordingly, Sergeant Mickelsen's claim should be settled based on the published exchange rates applicable on the dates of the charge transactions.

B-235429, August 29, 1989

Procurement

Competitive Negotiation
■ Competitive restrictions
■■ Preferred products/services
■■■ Domestic sources

Procurement

Competitive Negotiation
■ Requests for proposals
■■ Competitive restrictions
■■■ Justification
■■■■ Statutory interpretation

Protest that agency improperly restricted procurement for launch vehicle services to domestic sources is denied where the agency reasonably interpreted statute to give it the authority to include such a restriction.

Matter of: Space Commerce Corporation

Space Commerce Corporation (SCC) protests the terms of request for proposals (RFP) No. RFP5-65922/352, issued by the National Aeronautics and Space Administration (NASA) for space launch services. SCC contends that the RFP is ambiguous and unduly restrictive of competition.

We deny the protest.

The RFP, issued on March 7, 1989, requires the successful contractor to deliver medium-class payloads into designated orbits. Specifically, the RFP calls for the contractor to provide all necessary personnel, equipment and services to "design, develop, produce, integrate, test, and launch expendable launch vehicles" to carry designated payloads into orbit. Pursuant to the National Aeronautics and Space Administration Authorization Act of 1988, Pub. L. No. 100-147, § 311(a), 101 Stat. 860, 867 (1987), NASA restricted competition under the solicitation to the "United States launch vehicle industry." Under the restriction, only domestic firms that could either produce launch vehicles for the purpose of providing launch services or subcontract directly with a United States launch vehicle industry source to produce the vehicle were eligible for award; in effect, the use of foreign-made launch vehicles was prohibited.

The relevant provision of Pub. L. No. 100-147, entitled "Contracts Regarding Expendable Launch Vehicles," provides as follows:

Sec. 311. (a) The Administrator [of NASA] may enter into contracts for expendable launch vehicle services that are for periods in excess of the period for which funds are otherwise available for obligation, provide for the payment for contingent liability which may accrue in excess of available appropriations in the event the Government for its convenience terminates such contracts, and provide for advance payments reasonably related to launch vehicle and related equipment, fabrication, and acquisition costs, if any such contract limits the amount of the payments that the Federal Government is allowed to make under such contract to amounts provided in advance in appropriation Acts. *Such contracts may be limited to sources within the United States when the Administrator determines that such limitation is in the public interest.* (Italic added.)

Pursuant to section 311(a), the Administrator of NASA executed a general determination and findings to limit competition for launch services to domestic sources in order to enhance the development of the domestic commercial launch industry. With regard to the present procurement, NASA then issued a justification to procure the launch services using other than full and open competition.

SCC is a Texas corporation that desires to submit a proposal to perform the space launch services using a vehicle manufactured in the Soviet Union. SCC asserts that insofar as the RFP prohibits a domestic firm from using a foreign-made launch vehicle it is unduly restrictive of competition. SCC also complains that the solicitation is ambiguous because it does not define the term "United States launch vehicle industry." Finally, SCC protests that because this is a service contract certain clauses contained in the RFP which are applicable to supply contracts are unnecessary and cause the solicitation to be ambiguous and, in some cases, restrictive of competition.

It is NASA's position that the Authorization Act gives it the authority to restrict both the provider of the launch services and the provider of the launch vehicle to domestic sources. In this regard, NASA asserts that, as indicated by the Senate Report on the legislation, the intent of the statutory provision is to give NASA the authority to promote and encourage the growth of the infant commercial expendable launch vehicle industry in this country. *See* S. Rep. No. 87, 100th Cong., 1st Sess. 102 (1987). NASA argues that the growth of the domestic industry would not be encouraged if the funds for the launch vehicle, which represent a substantial portion of the cost of the launch services contract, go to foreign sources.

NASA further asserts that the statute recognizes that launch vehicles are integral to launch services contracts since it authorizes advance payments under such contracts for costs "reasonably related to launch vehicles and related equipment, fabrication and acquisition costs." It is NASA's position that the contracts which the statute refers to in its concluding sentence as those which may be limited to sources within the United States include those contracts for which advance payments may be made, that is, those related to launch vehicles. Finally, NASA asserts that its interpretation is consistent with the revised National Space Policy as enunciated by the January 5, 1988, Presidential Directive on National Space Policy, which is to enhance development of the domestic commercial launch industry.

SCC argues that the statute gives NASA authority to restrict competition for launch services to domestic sources, but makes no mention of launch vehicle manufacturers. SCC reasons that since the manufacture of launch vehicles is a separate and distinct component of the launch industry, NASA has no authority to prohibit a domestic firm from providing the services with a foreign-manufactured vehicle and that this limitation is thus an improper restriction on competition. SCC also argues that its interpretation of the statute is consistent with the purpose of the statute, that is, to promote the domestic launch industry. Specifically, SCC argues that its interpretation will encourage the development of companies that provide launch services; in comparison, argues SCC, NASA's interpretation will not foster growth of the industry because it eliminates companies that will provide space launch services but do not manufacture space launch vehicles.

The legislative history of the statute makes clear, and both parties agree, that the purpose of the provision is to permit NASA to encourage the growth of the United States commercial launch industry. Neither the statute nor the legislative history, however, specifically addresses whether Congress considered that industry to include manufacturers of launch vehicles, as well as providers of launch services. Based on our review of the record, we conclude that NASA reasonably interpreted the statute to encompass the authority to require that the launch vehicle be manufactured by a domestic source.

As a preliminary matter, it is clear that Congress had launch vehicles in mind when it enacted the provision. In this regard, the provision is entitled, "Contracts Regarding Expendable Launch Vehicles." In addition, the provision specifically states that launch vehicle services contracts may ". . . provide for advance payments reasonably related to launch vehicle and related equipment, fabrication and acquisition costs." Thus, as NASA argues, the contracts which the last sentence of the provision allows to be limited to domestic sources clearly include providing launch vehicles.

Most importantly, even if, as SCC argues, launch services and launch vehicle manufacturers can be considered separate parts of the launch industry, NASA's broad interpretation of the act as giving it authority to restrict to domestic sources the providers of both is entirely consistent with Congress's intention in enacting the legislation—to foster growth of the domestic launch industry. Rather than focusing narrowly on one component of the domestic launch industry, NASA's interpretation fosters development of the entire industry, both the providers of launch services and the providers of launch vehicles. Moreover, since the launch vehicle represents a substantial portion of the cost of a launch services contract, extending the domestic restriction to manufacture of the launch vehicle clearly enhances development of the entire domestic commercial launch industry. Accordingly, we find that NASA's interpretation is reasonable and consistent with the purpose of the statute, and we deny this basis of protest. *See Gumsur Ltd.*, B-231630, Oct. 6, 1988, 88-2 CPD ¶ 329; *Urdan Industries, Ltd.*, B-210843, July 6, 1983, 83-2 CPD ¶ 62.

Concerning the other issues raised by SCC—whether the supply clauses were properly included in the RFP and whether the solicitation is ambiguous—at the administrative conference held in our Office SCC agreed that if NASA properly could require the use of a domestic launch vehicle, SCC would not compete for this procurement. Consequently, SCC is not an interested party to have us address these remaining issues. *See G.S. Link and Assocs.,* B-229604; B-229606, Jan. 25, 1988, 88-1 CPD ¶ 70.

The protest is denied. Accordingly, SCC is not entitled to recover its protest costs. *Gumsur Ltd.,* B-231630, *supra.*

B-233089, August 31, 1989

Military Personnel

Pay
■ Retirement pay
■ ■ Amount determination
■ ■ ■ Computation
■ ■ ■ ■ Effective dates

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

Military Personnel

Pay
■ Retirement pay
■ ■ Amount determination
■ ■ ■ Computation
■ ■ ■ ■ Effective dates

Members of the armed services, whether officer or enlisted, who have not met the requirements prescribed by statute and regulation of time-in-grade for retirement in a certain grade may not have their retired pay computed on the basis of the higher grade through operation of 10 U.S.C. § 1401a(f) unless a waiver of that requirement has been granted pursuant to proper authority.

Military Personnel

Pay
■ Retirement pay
■ ■ Amount determination
■ ■ ■ Computation
■ ■ ■ ■ Effective dates

Time-in-grade restrictions must be satisfied by a service member in the establishment of the hypothetical retirement date to be used for purposes of the alternate computation of military retired pay authorized under 10 U.S.C. § 1401a(f).

Military Personnel

Pay
■ Retirement pay
■ ■ Amount determination
■ ■ ■ Computation
■ ■ ■ ■ Effective dates

Ordinarily, an original interpretation of a statute must be applied back to the time of enactment of the law. However, prospective application may be given to a decision which is inconsistent with a reasonable administrative determination which would result in collection action against retired members for erroneous payments of retired pay. The computation of retired pay for those members affected should be adjusted for future payments.

Matter of: Chief Master Sergeant Gerald E. Ohr, USAF

This action is in response to questions submitted by the Principal Deputy Assistant Secretary of Defense (Comptroller) with comments and analysis provided in Department of Defense Military Pay and Allowance Committee Action No. 563 concerning the application of 10 U.S.C. § 1401a(f). One question involves a member who is reduced in grade after he has met the statutory requirements for retirement in a higher grade, but has not met the administrative time-in-grade requirements to retire at the higher grade. We are also asked whether 10 U.S.C. § 1401a(f) would affect an officer who retires while serving in a particular grade but who has not met the statutory time-in-grade requirements. Finally, we are asked if the application of 10 U.S.C. § 1401a(f) does not permit the member who was reduced in grade to compute his retirement on the basis of the higher grade, should that determination be applied retroactively to those members whose retired pay is being computed on the basis of a higher grade in which they served but did not meet the time-in-grade requirements for retirement. For the following reasons it is our view that 10 U.S.C. § 1401a(f) applies only in cases where a member has met the statutory and administrative time-in-grade requirements for retirement in that grade. It is also our view that this decision should have prospective effect only.

Background

Gerald E. Ohr was, immediately prior to November 17, 1986, serving in the grade of chief master sergeant (E–9). At the time of his promotion to E–9, he incurred an obligation to remain on active duty for 2 years. Effective November 17, 1986, Sergeant Ohr was reduced in grade to E–8. At that time he had not served in the E–9 grade for the required 2 years. He was retired in the grade of E–8 under 10 U.S.C. § 8914. His retired pay, however, is presently being computed based on the higher grade of chief master sergeant under the provisions of 10 U.S.C. § 1401a(f). That section provides in pertinent part as follows:

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

this section. In computing the amount of retired pay to which such a member would have been entitled on that earlier date, the computation shall be based on his grade, length of service, and the rate of basic pay applicable to him at that time. . . .

The purpose of the above quoted provision, which is commonly referred to as the Tower Amendment, was to remove the pay inversion problem that had existed because upward cost of living adjustments of retired pay had for several years been in greater amounts and at greater frequency than increases in active duty basic pay. As a result, many members who remained on active duty after becoming eligible for retirement were losing considerable retired pay. The Tower Amendment was designed to alleviate this problem. Thus, where the member's retired pay based on the actual date of retirement is less than the retired pay would be based on an earlier retirement date, the member's retired pay may be calculated based on the earlier date, as adjusted by cost of living increases to which the member would have been entitled.

We have held that the Tower Amendment authorizes computation of retired pay on the basis of a higher grade where a member has been reduced in grade for substandard performance of duty or because of non-judicial punishment and retired in the lower grade. *See* 56 Comp. Gen. 740 (1977). The same result was reached in the case of a member reduced in grade by sentence of a court-martial. *See* 66 Comp. Gen. 425 (1987). The law was amended subsequent to that decision to preclude application in cases where a reduction in grade was ordered by a courtmartial. *See* Pub. L. No. 100–456, § 622, Sept. 29, 1988, 102 Stat. 1921, 1983.

On the basis of our decision at 56 Comp. Gen. 740 the Air Force has been applying the Tower Amendment in cases involving a reduction in grade to compute the member's retired pay on the basis of the higher grade he held prior to the reduction in grade. The Tower Amendment has been applied even if the member has not met the administrative requirements for time-in-grade in order to be eligible to retire.

In our earlier Tower Amendment decisions, the issue of whether the members had met the administrative requirements for retirement was not raised. However, in those cases we assumed that the members were eligible to receive retired or retainer pay and had met all the requirements.

In this regard, as discussed below, we think it is clear that the statute only contemplates situations where a member has met all the requirements necessary to become entitled to retired pay at an earlier date but chose not to retire and to remain on active duty.

Retirement of enlisted members of the Air Force with more than 20 years of service but less than 30 years is governed by 10 U.S.C. § 8914. That section provides in part as follows:

Under regulations to be prescribed by the Secretary of the Air Force, an enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may upon his request be retired. . . .

Regulations promulgated pursuant to this statutory authority are contained in AFR 35-7, entitled "Service Retirements." Paragraph 3-1 of the regulation provides that to be eligible for voluntary retirement in an officer or enlisted status, a member must have completed at least 20 years of active military service. In addition, unless a waiver is granted or the member is entitled to retire in a higher grade, the time-in-grade requirements must be met. The time-in-grade requirements for retirement are based on active duty service agreements entered into to by the member when he is promoted. Under AFR 39-18 an enlisted member who accepts a promotion to E-7, E-8, or E-9 must enter into an active duty service agreement of 2 years. Waiver of this requirement is authorized for hardship or where it would be in the best interests of the Air Force.

It is settled that regulations promulgated pursuant to statutory authority have the force and effect of law. *See* 53 Comp. Gen. 364, 366 (1973). Thus, an enlisted member who does not meet the requirements of the regulations promulgated under 10 U.S.C. § 8914 or other similar time-in-grade regulations has not met the requirements to become entitled to retired pay in a certain grade. To conclude otherwise would render the words of the statute "under regulations" meaningless. Accordingly, a member may not be considered as entitled to retired pay at an earlier date pursuant to 10 U.S.C. § 1401a(f) unless he has met both statutory and regulatory entitlement requirements. Sergeant Ohr, therefore, is not entitled to have his retired pay computed on the basis of grade E-9 because he did not serve for 2 years in that grade.

We are also asked whether a commissioned officer who has not met the statutory time-in-grade requirements for retirement in a certain higher grade is entitled to compute his retired pay on that higher grade under 10 U.S.C. § 1401a(f). It is noted in the committee action that 10 U.S.C. § 1370(a)(2) provides that an officer in the grade of 0-5 through 0-8 must have served on active duty in that grade for at least 3 years in order to be eligible to voluntarily retire in that grade. The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.

As we stated earlier, we think that the Tower Amendment contemplates situations where a member has met all the requirements necessary to become entitled to retired pay at an earlier date but chose not to retire and to remain on active duty. In the example listed above, an officer could not be retired voluntarily in a grade that he had not served in for at least 3 years. Therefore, he would not be entitled to retired pay at an earlier date in a certain grade under 10 U.S.C. § 1401a(f) unless he had met the statutory time-in-grade requirement.

The questions presented here with regard to 10 U.S.C. § 1401a(f) have not been previously considered by this Office. Ordinarily, an original construction of a statute applies retroactively to the date that the statute first went into effect. 63 Comp. Gen. 301 (1984). However, exceptions to this rule have been made and we have given prospective effect to some decisions when the results have been contrary to longstanding administrative decisions by those responsible for implementing a statute. The purpose for prospective application of these decisions was to preclude collection action against individuals who had received payments

from the government on the basis of the determinations inconsistent with the decision. 54 Comp. Gen. 890 (1950); 24 Comp. Gen. 688 (1945) and *Matter of Kornreich,* B-170589, Aug. 8, 1974.

In this case we view the Air Force's interpretation as reasonable, and therefore collection action against individuals who received payments in accordance with the Air Force interpretation need not be taken. However, recomputation of the retired pay of those members affected should be made for the future.

Appropriations/Financial Management

Civilian Personnel

Compensation
■ Claim settlement
■■ Labor disputes
■■■ GAO authority

A labor organization, on behalf of a Federal Aviation Administration (FAA) employee, requests that the Comptroller General vacate our Claims Group's denial of the employee's claim for additional temporary quarters subsistence expenses on the ground that a formal grievance had been filed at the time of the GAO settlement. Since the claim was properly submitted to GAO by the agency at the employee's request and settled, according to law, without the Claims Group being advised of the grievance, the settlement is valid and will not be vacated.

625

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Due to administrative error, an employee received a within-grade increase 1 year before it was expected. In the absence of any mitigating factors, we conclude that the employee knew or should have known the correct waiting period, and we deny his request for waiver.

573

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Waiver of collection of salary overpayments resulting from premature within-grade increase is granted in the case of a foreign national who had been hired overseas with no prior federal experience and had only 2 years of federal service at the time the erroneous action occurred. As a general rule, federal employees are expected to know the appropriate waiting periods for within-grade increases and to make inquiry about increases which do not conform to those waiting periods. However, in the present case, the employee's limited exposure to the federal personnel system warrants an exception to this general rule.

629

Leaves of Absence
■ Annual leave
■■ Forfeiture
■■■ Restoration

Some employees of the Norfolk Naval Shipyard, on approved leave for the remainder of the 1987 leave year ending January 2, 1988, forfeited up to 4 hours of annual leave as a result of the President declaring the last half (4 hours) of the scheduled workday on December 24, 1987, as a half-day closing. As a result, the employees' annual leave accounts exceeded the maximum carryover of 240

hours. There is no authority to restore the forfeited annual leave in excess of statutory limit of 240 hours for carryover into the next leave year.

630

Relocation
■ Overseas personnel
■■ Return travel
■■■ Eligibility

Employee transferred from Canada to Hawaii and served approximately 17 months with the agency in Hawaii, prior to his transfer to another government agency in Hawaii, where he remained for 2-1/2 years. He is entitled to his return travel and transportation expenses to the continental United States since he fulfilled his service agreement. Expenses should be paid by the agency to which the employee transferred, computed on a constructive cost basis.

587

■ Temporary quarters
■■ Actual subsistence expenses
■■■ Reimbursement
■■■■ Amount determination

An employee's claim for additional temporary quarters subsistence expenses was denied by our Claims Group which sustained the agency's determination as to reasonable amounts for meals. The employee appeals that settlement on the basis of the collective bargaining agreement between the agency and a union which he argues makes inapplicable an agency guideline of 46 percent of per diem as being a reasonable rate for meals. Even if the guideline is not applicable, however, the agency was required by law and regulations to limit reimbursement to an amount it determined as "reasonable." The agency determined a reasonable amount to be 55 percent in this case, and that determination will not be disturbed since there is no showing it is clearly erroneous, arbitrary, or capricious.

626

Travel
■ Overseas travel
■■ Travel modes
■■■ Terrorist threats

Where the Drug Enforcement Administration follows its proposed procedure in granting authority to employees, threatened by terrorists acts, to travel on foreign flag air carriers to avoid the threats, the Comptroller General will not question the agency's determinations that the use of a foreign carrier is necessary to protect the employees' safety. In these circumstances use of the foreign carrier is considered a necessity as provided under the guidelines implementing the Fly America Act.

633

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

Customs Service may not pay for cost of catered meal provided federal employees attending Customs Service sponsored meeting of United States-Bahamas Working Group, an interagency task force. Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence at headquarters regardless of any unusual working conditions. *See* cases cited. *Gerald Goldberg, et al.,* B-198471, May 1, 1980 is not applicable to situations involving routine business meetings at headquarters.

604

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

U.S. Army may not pay for meals provided to employees at internal Army meeting within employees' official duty station. Although 5 U.S.C. § 4110 authorizes the payment for cost of meals where cost of meals is included in registration or attendance fee, 38 Comp. Gen. 134 (1958), or, in limited circumstance, where the cost of meals is separately charged, *Gerald Goldberg, et al.,* B-198471, May 1, 1980, this provision has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. 46 Comp. Gen. 135 (1966).

606

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Additional expenses**
■■■■ **Excursion rates**

An employee, who had purchased a Super Saver ticket in order to combine personal travel with temporary duty travel, was required by the government to return early to his duty station. As a result, the employee was unable to meet the prescheduling conditions of the Super Saver ticket and he could not use it for his return trip. Since the government may reimburse only those travel expenses that would have been incurred for direct official travel, there is no authority to compensate the employee for his loss on the Super Saver ticket.

640

Military Personnel

Pay
■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

Members of the armed services, whether officer or enlisted, who have not met the requirements prescribed by statute and regulation of time-in-grade for retirement in a certain grade may not have their retired pay computed on the basis of the higher grade through operation of 10 U.S.C. § 1401a(f) unless a waiver of that requirement has been granted pursuant to proper authority.

649

■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

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

649

■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

Ordinarily, an original interpretation of a statute must be applied back to the time of enactment of the law. However, prospective application may be given to a decision which is inconsistent with a reasonable administrative determination which would result in collection action against retired members for erroneous payments of retired pay. The computation of retired pay for those members affected should be adjusted for future payments.

650

■ Retirement pay
■■ Amount determination
■■■ Computation
■■■■ Effective dates

Time-in-grade restrictions must be satisfied by a service member in the establishment of the hypothetical retirement date to be used for purposes of the alternate computation of military retired pay authorized under 10 U.S.C. § 1401a(f).

649

Procurement

Payment/Discharge
■ Utility services
■ ■ Payment procedures
■ ■ ■ Administrative policies
■ ■ ■ ■ Revision

The General Accounting Office has no objection to a General Services Administration (GSA) modified proposal to combine elements of fast pay procedures and statistical sampling techniques to pay and audit utility invoices. GSA's modified proposal is a valid sampling plan because it is designed and documented to provide for effective monitoring, a sampling of those invoices not subject to complete audit coverage, audit emphasis commensurate with the risk to the government, and a basis for the certification of payments.

618

Sealed Bidding
■ Bid guarantees
■ ■ Post-acceptance periods
■ ■ ■ Submission

Where invitation specifically states that payment and performance bonds may be furnished after contract award, awardee's failure to furnish such bonds prior to award does not nullify contract.

622

■ Contract awards
■ ■ Propriety
■ ■ ■ Invitations for bids
■ ■ ■ ■ Defects

Contracting officer's failure to check a box on the "solicitation, offer, and award" form, indicating whether contract is a negotiated agreement or is an award under sealed bidding procedures, does not affect the validity of contract award, because the form otherwise clearly indicates the existence of an enforceable contract.

622

■ Contracting officers
■ ■ Bad faith
■ ■ ■ Allegation substantiation

Protest that contracting officer was improperly influenced in decision to waive awardee's insufficient bond and failure to acknowledge immaterial amendment is denied where the contracting officer acted in accordance with applicable procurement regulations and denies the alleged impropriety and there is no evidence corroborating the protest allegation.

592

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