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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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February 1989

B-232928.2, February 2, 1989

Procurement

Bid Protests
■ GAO procedures
■■ Interested parties

Where protester seeks cancellation and resolicitation of a procurement based on failure to receive a material amendment to the invitation for bids (IFB), protester is an interested party to challenge award under the IFB despite the fact that it submitted a late bid since, if the protest is sustained, protester will have an opportunity to compete under the new IFB.

Procurement

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

Where full and open competition and a reasonable price are obtained and the record does not show a deliberate attempt by the contracting agency to exclude the offeror from the competition, an offeror's nonreceipt of a solicitation amendment establishing a new bid opening date does not require cancellation and resolicitation of the procurement.

Matter of: Shemya Constructors

Shemya Constructors protests the proposed award of a contract to Blaze Construction under invitation for bids (IFB) No. F65501-88-B-0043, issued by the Air Force for maintenance and repair of airfield pavement at Elmendorf Air Force Base, Alaska. Shemya requests cancellation and resolicitation of the procurement because it did not receive two material amendments to the IFB and thus was prevented from submitting a timely bid.

We deny the protest.

Initially, the Air Force claims that the protest should be dismissed because Shemya is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). The Air Force states that even if its protest were upheld, Shemya would not be eligible for award because it submitted a late bid and is not the low bidder. We disagree. When a protester seeks resolicitation of a procurement, the protester is an interested party since, if it prevails, it will have an opportunity to compete under the new solicitation. *Big State Enterprises,* 64 Comp. Gen. 482 (1985), 85-1 CPD ¶ 459. Since there is no evidence that Shemya

would not be able to bid on a resolicitation of this procurement, it is an interested party.

Bid opening for the IFB initially was set for August 2, 1988. By amendment No. 2, dated July 28, the contracting agency notified the bidders that bid opening was postponed indefinitely. For the next month Shemya states that on every Monday it checked the Alaska AGC Bulletin, which regularly lists pending federal agency construction procurements, for the new bid opening date. On September 19, Shemya checked the bulletin and discovered that bid opening for the IFB was to take place that afternoon. Shemya called the contracting agency to confirm this, and learned that the contracting agency had issued two amendments to the IFB, amendment No. 3, dated September 1, setting bid opening for September 16, and amendment No. 4, dated September 7, extending the bid opening date to September 19. Shemya claims to have never received either amendment. According to Shemya, out of a total of 31 contractors solicited, 7 contractors, including itself, did not receive amendment Nos. 3 and 4. Shemya contends that its failure to receive the amendments caused its bid to be submitted late, and shows that the Air Force failed to comply with its duty to achieve full and open competition.

Generally the risk of nonreceipt of a solicitation amendment rests with the offeror. *Maryland Computer Services, Inc.,* B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187. The propriety of a particular procurement is determined on the basis of whether full and open competition was achieved and reasonable prices were obtained, and whether the agency made a conscious and deliberate effort to exclude an offeror from competing for the contract. *International Association of Fire Fighters,* B-220757, Jan. 13, 1986, 86-1 CPD ¶ 31.

In this case, the contracting agency has submitted records showing that Shemya was on the mailing list for the IFB and amendments. Date stamps on the mailing list show that the Air Force prepared amendment Nos. 3 and 4 for all solicited contractors, including Shemya, on September 3 and September 8. According to the agency's procedures, mailing lists are not date-stamped until after the material to be sent is in the appropriate envelope and mailing labels are affixed, after which the envelopes are metered and deposited with the Postal Service.

Shemya has presented no evidence, other than nonreceipt, that the Air Force failed in its duty to mail the amendments in a timely manner. Further, even excluding 7 of the 31 firms on the mailing list which did not receive amendment Nos. 3 and 4, the Air Force solicited 24 firms and received 2 bids. The record also shows that the Air Force obtained a reasonable price, since it awarded the contract to the low bidder whose price was 20 percent below the government estimate. In view of the number of firms solicited, the responses received and the award made, we think full and open competition was achieved.

The protester argues that our decision, *Andero Construction Inc.,* 61 Comp. Gen. 253, 82-1 CPD ¶ 133, supports its position in this case. We disagree. In *Andero,* we held that cancellation of an IFB and resolicitation were required where the

record did not establish that the contracting agency had made the required effort to achieve competition. Specifically, the agency failed to state affirmatively that the amendment at issue had been mailed to the protester; the agency had no routine business records showing the amendment had been sent; and three of the four bidders had not received the amendment. Here, in contrast, the agency maintains that the amendments were prepared and mailed in accordance with its usual procedures; the agency has produced the bidders' mailing list, a record maintained in the normal course of business, which supports the agency's position; and at least two bidders received the amendments.[1]

Given that the record shows that the agency followed its standard procedures; there is no evidence of a conscious and deliberate effort on the agency's part to exclude Shemya from the competition; and award was made at a reasonable price after full and open competition, we see no basis to disturb the procurement.

The protest is denied.

B-231107, February 3, 1989

Procurement

Payment/Discharge
■ Payment priority
■■ Bankrupt contractors
■■■ Tax liability

Order of priority for the payment of remaining contract proceeds held by EPA, the contracting federal agency, is first to the IRS for the tax debts owed by the contractor and the remaining funds to the trustee in bankruptcy.

Procurement

Payment/Discharge
■ Payment procedures
■■ Contracts
■■■ Assignment

Since the assignee of amounts retained by contracting agency did not render any financial assistance to specifically facilitate the performance of the government contract, the assignment is invalid against the government. Accordingly, the assignee is not entitled to any of the remaining contract proceeds held by a contracting federal agency.

[1] The protester's own survey of 28 firms on the mailing list shows that at least 1 other firm also received the amendments. In addition, while six of the firms included in its survey have stated that they did not receive the amendments, it is unclear how many, if any, of the remaining firms contacted also failed to receive them.

Procurement

Payment/Discharge

■ Payment procedures

■■ Bankrupt contractors

■■■ Set-off rights

■■■■ Statutory restrictions

The government's right of set-off is affected by the filing of a bankruptcy petition. Under the bankruptcy law, although a party's right to set-off is preserved, 11 U.S.C. § 553, the automatic stay provision does not allow the exercise of that right unless the creditor obtains relief from the bankruptcy court. 11 U.S.C. § 362(a)(7). Therefore, before the government can exercise its right of set-off against the remaining contract proceeds of a bankrupt contractor, it must apply to the bankruptcy court to have the automatic stay lifted.

Matter of: Environmental Protection Agency—Priority of Payment—Assignment of Claims

Pursuant to 31 U.S.C. § 3529, the Comptroller of the United States Environmental Protection Agency (EPA), has asked for our opinion concerning the order of priority of payments among three claimants of the remaining $35,978.22 proceeds of a contract between the EPA and ESEI, Inc. (EPA Contract No. 68-04-5017). The claimants are the Internal Revenue Service (IRS), the First of America Bank-Ann Arbor (Bank), as the contractor's assignee, and the trustee in bankruptcy. As explained below, we find the assignment to the Bank invalid as against the government. Therefore, the assignee Bank is not entitled to payment out of remaining proceeds of the contract. We also find that the tax debts asserted by IRS may be set off against the retained amount. We agree, however, with the IRS that before the offset is taken it needs to be approved by the bankruptcy court. *See, e.g., United States v. Reynolds,* 764 F.2d 1004 (4th Cir. 1985). After set-off is completed, the remaining contract funds should be paid to the trustee for the benefit of the contractor's creditors.

Background

On September 30, 1982, EPA's Chicago Regional Office awarded the contract for the preparation of environmental impact statements and studies to ESEI, Inc.[1] (ESEI/Delstar). It was a 1-year Fixed Rate-Indefinite-Quantity-Labor-Hour type contract which provided for delivery orders to be issued by EPA up to a maximum amount. Through contract modifications, the period of performance was extended through September 30, 1984. Delivery orders issued prior to that time could be extended 6 months beyond the date of contract expiration (March 31, 1985).

ESEI/Delster encountered financial difficulties during the course of the contract. One of its subcontractors, Limno-Tech, Inc. (LTI), refused to continue its performance on delivery order No. 20 unless ESEI/Delstar assured payment. To

[1] In April 1984, ESEI, Inc. merged with two other corporations to form Delstar, Inc.

satisfy LTI's demand, the contractor entered into an assignment agreement with the First of America Bank–Ann Arbor, the subcontractor's bank, on April 26, 1985. In addition, ESEI/Delstar requested, and EPA on March 29, 1985 agreed, to extend the period of performance for delivery order No. 20 until April 30, 1985. LTI completed performance and delivery order No. 20 was delivered the first week of May 1985, thereby completing contract performance.

On February 23, 1987, Delstar, Inc. filed a petition for relief under chapter 7 of the Bankruptcy Code. As of the bankruptcy petition date, IRS claimed three tax debts totaling $7,061.53 (including interest to that date).

Under the payment clause of the contract, EPA was authorized to retain up to $50,000.00 at the rate of 5 percent of each invoice. At the time of final audit, EPA had withheld $35,978.22. EPA has asked us to determine how this money should be disbursed.

Legal Discussion

The Assignee

The First of America Bank-Ann Arbor entered into an assignment agreement with Delstar, Inc., on April 26, 1985, covering "all retained percentages payable under the [EPA] contract." We conclude that this assignment is invalid against the government since the Bank did not render any financial assistance to specifically facilitate the performance of the government contract. The Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 3727, 41 U.S.C. § 15 (the Act), permits an assignment to a bank, trust company or other financial institution, of money due or to become due from the United States under a contract providing for payments aggregating $1,000 or more under certain conditions. The purpose of the 1940 Act was to facilitate the financing of individual government contracts by private capital. In this way, the contractor would be free to receive financial help in performing the government contract in reliance on the security of the expected government payments from that contract. *See First National City Bank v. United States,* 548 F.2d 928, 934–935 (Ct. Cl. 1977); *Chattanooga Wheelbarrow Co. v. United States of America,* Civil Action No. 4755 (E.D. Tenn. March 1, 1967).

Although the financial assistance from the bank does not have to pass directly from the assignee to the assignor, courts have held that for an assignment to be effective against the government, financial assistance actually has to have been rendered that facilitates the contractor's performance of the government contract. *First National City Bank v. United States, above; see also Coleman v. United States,* 158 Ct. Cl. 490 (1962). We have interpreted this to mean that the assignee must have a financial interest in the contractor's operations under the contract in question. Generally, this means that an assignment is valid only if it secures a loan which the assignee has made to the assignor to finance the as-

signor's performance. 65 Comp. Gen. 554, 555 (1986). Thus, blanket assignments usually do not meet the Act's requirements.

Delstar, Inc. entered into the assignment agreement with the First of America Bank-Ann Arbor in order to assure it's subcontractor, LTI, that LTI would be paid. LTI, a bank customer since 1980, had refused to continue its work on delivery order No. 20 until a payment schedule with Delstar, Inc. could be worked out. The contractor could not directly assign the proceeds of the contract to LTI since the subcontractor was not a qualified party under the Assignment of Claims Act, 31 U.S.C. § 3727. (As pertinent here, the Act only authorizes assignments to a bank, trust company, or other financial institution. *See Uniroyal, Inc. v. United States,* 454 F.2d 1394 (Ct. Cl. 1972) and cases cited therein). Instead, Delstar, Inc., assigned to LTI's bank the proceeds of the contract retained by EPA. In a separate agreement between LTI and its Bank, the Bank agreed to apply all proceeds from the Delstar assignment to LTI's outstanding loan balance on its line of credit.

The Bank did not provide direct funding to LTI to enable it to complete delivery order No 20. Rather, the Bank used the assignment to substantiate the Delstar receivable and thereby increase LTI's collateral base for its line of credit. LTI's line of credit was substantially increased in October 1985, when the Bank and LTI entered into a security agreement based, in part, on the Delstar assignment.

In *Chattanooga Wheelbarrow Co., supra.,* a case very similar to the one at issue here, the court concluded that an assignment of monies due on a government contract to an assignee bank acting as disbursing agent for a subcontractor did not constitute a valid assignment. The fact that the subcontractor subsequently granted the assignee bank a security interest in his account receivable to secure outstanding loans owing to the bank did not validate the assignment. The court stated that such action was:

> . . . insufficient to validate the assignment, so far as the Government is concerned. There is no showing of any financial assistance rendered by the Bank which facilitated the performance by [the contractor] of this particular contract with the Government. Rather, for all that appears, the only financial assistance rendered by the Bank was to the plaintiff [the subcontractor] for the general operation of its business. Under these circumstances the Court is of the opinion that the assignment is not valid insofar as the defendant [the government] is concerned. . . .

We recognize that LTI completed its work under the contract in anticipation that it would eventually receive the benefit of the assignment. The Bank, however, provided no financial assistance either to the contractor or to LTI to facilitate the performance of the contract. The only financial assistance rendered by the Bank was to support LTI's general business operations. Accordingly, the assignment is invalid against the government.

Finally, we note that even if the Bank had provided a direct loan to LTI, it is questionable whether it could have been used to facilitate contract performance due to the timing of the assignment. The assignment was not received and acknowledged by EPA until after LTI had performed and delivered the last re-

maining work product under the contract.[2] Under these circumstances, the assignment is invalid against the government and the assignee Bank is not entitled to any of the remaining contract funds under the assignment. LTI will have to look to the bankruptcy court for relief.

The IRS and the trustee in bankruptcy

It is well-settled that the government has the same right belonging to every creditor to apply undisbursed moneys owed to a debtor to fully or partially extinguish debts owed by the debtor to the government. *United States v. Munsey Trust Co.,* 332 U.S. 234, 239 (1947). Thus, absent a "no set-off" clause in a contract, the government may satisfy by set-off any tax claim it has against a contractor, notwithstanding that all or part of the tax claim does not pertain to the contract under which the parties are contesting payment. The EPA contract did not contain a "no set-off" clause. Accordingly, IRS is entitled to set off the tax debts of the contractor against the retained contract proceeds.

However, as the IRS has indicated, the government's right of set-off is affected by the contractor's filing of a bankruptcy petition. Although, under the bankruptcy law, a party's right to set-off is preserved, 11 U.S.C. § 553, section 362(a)(7) of title 11, United States Code automatically stays the exercise of that right unless the creditor obtains relief from the bankruptcy court. *See United States v. Reynolds,* 764 F.2d 1004 (4th Cir. 1985). Therefore, before set-off can be completed, IRS would need to have the automatic stay lifted. Any funds remaining after the set-off belong to the contractor. In view of the contractor's bankruptcy, however, once the setoff is completed, the remaining funds should be forwarded to the trustee in bankruptcy for the benefit of the contractor's creditors.

[2] LTI's attorney sent a notice of the assignment together with a copy of the assignment to EPA's contracting officer on May 2, 1985. No copies were sent to the contract's disbursing officer. EPA's contracting officer did not immediately acknowledge the assignment because she first had to substantiate that Delstar, Inc. had succeeded to the rights of ESEI, Inc. under the contract. LTI's attorney provided the necessary documentation on May 22, 1985, at which time the contracting officer acknowledged the assignment. Subsequently, the contracting officer forwarded a copy of the assignment and supporting corporate documents to the disbursing officer, where it was received on June 27, 1985. LTI made delivery of its work product during the first week of May. Clearly, performance and delivery occurred before the assignment was acknowledged by the contracting officer and prior to any notification to the disbursing officer being received. Under these circumstances, we are unable to discern how the assignment can be said to have facilitated performance. *See First National City Bank v. United States,* 548 F.2d 928 (Ct. Cl. 1977).

B-231205, February 3, 1989

Appropriations/Financial Management

Claims Against Government

■ **Interest**

Civilian Personnel

Compensation

■ **Retroactive compensation**

■■ **Interest**

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error because earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under the Back Pay Act, 5 U.S.C. § 5596.

Matter of: Agency Authority to Pay Lost Earnings on Contributions to Employee Thrift Savings Plan Accounts

Mr. William L. Carpenter, Acting Director of Financial Management, Department of the Interior, requests our opinion on whether his Department has authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error. We conclude that the Department does not have such authority.

The Thrift Savings Plan (TSP) was established under the Federal Employees' Retirement System (FERS), 5 U.S.C. §§ 8401-8479 (Supp. IV, 1986), for the purpose of providing federal employees with a form of capital accumulation plan similar to those found in private industry. *See* S. Rep. No. 166, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1405, 1417. Employee TSP accounts, consisting of employee contributions and matching agency contributions[1] for FERS covered employees, are pooled into the Thrift Savings Fund and are augmented by Fund earnings.[2] 5 U.S.C. §§ 8432(a), (c), 8437(b). All sums contributed to the Thrift Savings Fund by or on behalf of an employee as well as earnings on those contributions are held in trust for the employee in the Thrift Savings Fund. 5 U.S.C. § 8437(g).

Pursuant to 5 U.S.C. §§ 8351(c) and 8474, the Federal Retirement Thrift Investment Board (Board), the TSP governing body, has promulgated regulations for the correction of administrative errors made in connection with contributions to employee TSP accounts. 5 C.F.R. § 1605 (1988). In May 1987, when the Board first promulgated those rules for comment, it included procedures for correcting insufficient agency contributions to employee TSP accounts, but provided that "[n]o earnings will be paid into an employee's Thrift Savings Plan account that

[1] The TSP was recently amended in part to require agencies to make matching contributions within 12 days after the end of each pay period. Pub. L. No. 100-238, § 121, 101 Stat. 1744, 1752 (1988). This change was intended to make the timing of agency and employee contributions more closely coincide, but did not address the issue of lost earnings due to delayed agency contributions. H.R. Rep. No. 374, 100th Cong., 1st Sess. 30 (1987).

[2] In this context "earnings" means "the amount of the gain realized or yield received from the investment of sums in such [Thrift Savings] Fund." 5 U.S.C. § 8401(10).

would have accrued to such account but for the error causing the underdeduction or failure to deduct." Error Correction Regulations, 52 Fed. Reg. 17919, 17921 (1987). Responding to comments, the Board deleted this prohibition, stating that although the Board was without authority to pay for lost earnings itself or to compel an agency to pay for lost earnings, an agency making retroactive contributions to an employee's TSP account could also pay lost earnings on those contributions if the agency decided that it had such authority. Error Correction Regulations, 52 Fed. Reg. 46314, 46315 (1987). In this regard, the current regulations provide at 5 C.F.R. § 1605.3(b)(7):

> No earnings will be paid by the Board into an employee's Thrift Savings Plan account that would have accrued to such account but for the error causing the insufficient contribution. However, an agency may make this type of deposit if it determines that it has the authority to spend its funds for this purpose.

Therefore, whether an agency has authority to pay into employee TSP accounts lost earnings on insufficient agency contributions resulting from administrative error depends on the availability of agency appropriations for this purpose. From the perspective of the agency, contributions made to an employee's TSP account are analogous to payments made directly to an employee. We have consistently held that a delay by the United States in making payment to one of its employees does not create an entitlement to interest in the absence of a contract or statute creating such entitlement. *See Charles Wener,* 65 Comp. Gen. 541 (1986) (no interest payable on an allotment check issued by the government to an Army employee even though the check was issued several months late); B-202039, May 7, 1982 (delay in paying Army employees for making cost-saving suggestions does not create an entitlement to interest); *Leland M. Wilson,* B-205373, Apr. 24, 1984 (employee not entitled to interest on payment of retirement contribution erroneously withheld by the government for 15 months).

A legal memorandum from the Interior Department Solicitor's Office which accompanied the submission to us in this case indicates that there is no language in current or recent Interior Department appropriations that would authorize payments for lost earnings relating to TSP contributions. While Interior appropriations thus are not available for such payments, one other statute, the Back Pay Act, is worth discussing in this context.

The Back Pay Act, 5 U.S.C. § 5596 (1982), authorizes the use of agency appropriations to, among other things, pay an employee who has been affected by an unjustified or unwarranted personnel action for "the pay, allowances or differentials" lost due to the personnel action. 5 U.S.C. § 5596(b)(1)(A)(i). The Office of Personnel Management, charged with prescribing regulations to carry out the Back Pay Act, 5 U.S.C. § 5596(c), has defined "pay, allowances, and differentials" to mean, "monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function." 5 C.F.R. § 550.803 (1988).

In our view, pay, allowances and differentials under the Back Pay Act do not include earnings on contributions to the Thrift Savings Fund. As noted above, earnings on contributions are the result of Thrift Savings Fund investments and

may vary without regard to an employee's "performance of a Federal function." Lost earnings on agency contributions are a form of consequential damages, and as such are not recoverable under the Back Pay Act. *Cf. John H. Kerr*, 61 Comp. Gen. 578 (1982).[3]

For the foregoing reasons we conclude that there is no statutory basis for agencies to pay into employee TSP accounts earnings lost due to agency's delay in making contributions to those accounts. At the same time we recognize that from the employee's perspective the TSP represents an obligation by the government that upon retirement or separation the sum of all contributions and whatever earnings should have accrued to those contributions will be paid. Therefore, from an equitable standpoint we would support legislation authorizing agencies to make payments into TSP accounts to cover earnings lost due to an agency's delay in making contributions.

B-231543, February 3, 1989

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Health services

Civilian Personnel

Compensation
■ Fringe benefits
■■ Health services

Under 5 U.S.C. § 7901, federal agencies have authority to establish smoking cessation programs for their employees and to use appropriated funds to pay the costs incurred by employees participating in these programs. However, before such programs can be implemented, the Office of Personnel Management would have to amend the Federal Personnel Manual to add smoking cessation as a prevention activity that agencies can include as part of the health services program they provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

Matter of: Smoking Cessation Program for Federal Employees

This decision is in response to a request from the Department of the Treasury, dated May 17, 1988, regarding the availability of appropriated funds "to pay for employees of the Internal Revenue Service (IRS) to attend smoking cessation programs." As recognized by the Treasury Department in its submission, we concluded in 64 Comp. Gen. 789 (1985) that any expenditures incurred on account of the participation by federal employees in a smokers rehabilitation pro-

[3] Congress recently amended the Back Pay Act to provide for interest on amounts recovered under it. *See* 5 U.S.C. § 5596(b)(2), added by Pub. L. No. 100-202, § 101(m), 101 Stat. 1329, 1329-428. Back Pay Act interest is awarded in connection with a recovery under that Act and computed at the rate or rates in effect under section 6621(a) of the Internal Revenue Code of 1986. We express no view on whether or when an agency's delay in making TSP contributions could constitute an unjustified or unwarranted personnel action leading to a recovery of interest under 5 U.S.C. § 5596(b)(2). However, any such recovery of interest would take the form of a payment to the affected employee. It would not result in a payment into the employee's TSP account.

gram would constitute a personal medical expense of the employees involved that could not be paid with appropriated funds. As requested by the Treasury Department, we have reconsidered our position on this issue, and conclude that 5 U.S.C. § 7901 authorizes agencies to use appropriated funds to pay the costs incurred by employees participating in smoking cessation programs. However, before the IRS may incur such costs, the Office of Personnel Management (OPM) should modify its regulations to include smoking cessation as a type of health service that agencies can provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

Background

In 64 Comp. Gen. 789 (1985), we addressed the question whether appropriated funds could be used "to pay for a smokers' rehabilitation program for all smoking employees who desire to 'kick the habit'." The submission characterized the proposed smoking cessation program as "medical treatment for smokers."[1] Viewing the question from that perspective, we responded as follows:

> . . . We have consistently held that medical care and treatment are personal expenses of an employee and their payment may not come from appropriated funds unless specifically authorized under a contract of employment or by statute or regulation. 63 Comp. Gen. 96, 97 (1983). *See also* 57 Comp. Gen. 62 (1977), 53 Comp. Gen 230, 231 (1973) and cases cited therein.
>
> * * * * *
>
> Accordingly, there is no legal basis for using appropriated funds to pay the personal medical expenses of Federal employees that would be incurred as a result of their participation in a smokers' rehabilitation program. It is important to note, however, that this conclusion does not impair the authority of agencies to conduct programs designed to promote and maintain employee mental and physical health short of treatment and rehabilitation. *See* 5 U.S.C. § 7901 . . . .

The IRS contends that 5 U.S.C. § 7901 "is sufficiently broad to include a smoking cessation program." That provision authorizes federal agencies to establish, within the limits of available appropriations, a health service program to promote and maintain the physical and mental fitness of their employees. 5 U.S.C. § 7901(a).

For purposes of section 7901, a health service program is limited to the following:

> (1) treatment of on-the-job illness and dental conditions requiring emergency attention;
>
> (2) preemployment and other examinations;
>
> (3) referral of employees to private physicians and dentists; and
>
> (4) *preventive programs relating to health.* 5 U.S.C. § 7901(c) (Italic added).

IRS maintains that its proposed smoking cessation programs are clearly "preventive" in nature. IRS reasons that "smoking" is not a disease per se; rather, as medical research has shown, smoking is a major contributing cause of such illnesses as cancer, coronary disease, and emphysema. Since smoking cessation

[1] In fact, the only use of appropriated funds at issue was a proposed expenditure to reimburse employees for the cost of nicotine gum prescribed by a doctor.

programs address the cause of significant adverse health effects, such programs, by definition, are "preventive programs" authorized by 5 U.S.C. § 7901(c)(4). We agree.

Analysis

As we held in 64 Comp. Gen. 789, the costs of medical care or treatment for civilian government employees are personal to the employees, and appropriated funds may not be used to pay them unless provided for by statute or in the contract of employment. *See also* B-226569, November 30, 1987. However, our decision in 64 Comp. Gen. 789 concerning smoking cessation programs accepted without question the characterization of such programs as medical care. Little, if any, consideration was given to viewing such programs as "preventive programs relating to health" authorized by 5 U.S.C. § 7901(c)(4).[2]

Overwhelming medical evidence exists that demonstrates the adverse health effects smoking has on smokers as well as non-smokers exposed to "passive" tobacco smoke in their environment. Although a lengthy discussion of the extensive medical research and numerous studies concerning the health effects of smoking is unnecessary, the following excerpt from the preface to a recent report of the Surgeon General of the United States[3] effectively summarizes the results of such research:

> Previous reports have reviewed the medical and scientific evidence establishing the health effects of cigarette smoking and other forms of tobacco use. Tens of thousands of studies have documented that smoking causes lung cancer, other cancers, chronic obstructive lung disease, heart disease, complications of pregnancy, and several other adverse health effects.
>
> Epidemiologic studies have shown that cigarette smoking is responsible for more than 300,000 deaths each year in the United States. As I stated in the Preface to the 1982 Surgeon General's Report, *smoking is the chief avoidable cause of death in our society.* (Italic added.)

In our view, programs designed to help employees avoid "the chief avoidable cause of death in our society" qualify as "preventive programs relating to health" as that phrase is used in 5 U.S.C. § 7901(c)(4). In addition, smoking cessation programs would have a beneficial impact on maintaining the health of non-smoking employees exposed to tobacco smoke in the workplace. The adverse effect of such passive smoking on the health of non-smokers has received considerable attention in recent years.[4] In December 1986, the General Services Administration (GSA) adopted regulations governing smoking in GSA-controlled buildings which recognized that "smoking adversely affects the health of those persons passively exposed to tobacco smoke." 51 Fed. Reg. 44259 (1986). The regulations adopted by GSA limit smoking "to an absolute minimum in areas

[2] Even if an employee's participation in a smoking cessation program is viewed as personal medical care or treatment, the use of appropriated funds to provide such medical treatment to an employee would not be prohibited if authorized by statute. Thus, the issue to be resolved would remain the same—does smoking cessation qualify as a preventive program relating to health that would be authorized by 5 U.S.C. § 7901(c)(4)?

[3] The Health Consequences of Smoking: NICOTINE ADDICTION, report of the Surgeon General for 1987, p. iii.

[4] For example, the 1986 report of the Surgeon General on the health consequences of smoking dealt specifically with the issue of passive or "involuntary smoking".

where there are non-smokers." *See* 41 C.F.R. § 101-20.109- 10(a)(1) (1987). Thus, apart from the direct benefit to smokers, the establishment of smoking cessation programs would help reduce the amount of tobacco smoke in the federal workplace and its adverse effect on the health of nonsmokers.[5]

Our interpretation of 5 U.S.C. § 7901(c)(4) is consistent with our prior interpretation of that provision. In 64 Comp. Gen. 835 (1985), a National Park Service certifying officer asked whether he could certify for payment several billings arising from the operation of a physical fitness program by the Park Service Alaska Regional Office. Relying on 5 U.S.C. § 7901(c)(2) and (4) and implementing regulations, we approved payment for the cost of comprehensive physical fitness evaluations and blood tests for employees. While we would not approve payment of bills from a private health club for employees' use of the club's exercise facilities, our conclusion was based on the restrictive nature of the regulations, not on the lack of statutory authority. We said that the statutory language was "sufficiently broad to encompass the physical fitness program operated by the Alaska Regional Office". While our holding in 64 Comp. Gen. 835 supports our position here, that decision highlights the need for OPM to revise its regulations to include smoking cessation as a health service agencies can provide their employees.[6]

Although OPM's regulations presently do not include smoking cessation as a permissible component of a disease prevention program, the Department of the Treasury provided us with a copy of a letter, dated February 5, 1988, from OPM to the Department, indicating OPM's willingness to amend the regulations based on a favorable opinion from our Office. That letter reads as follows:

> We are in the process of reviewing FPM Chapter 792 and its supplements and agree that our guidance on smoking cessation programs should be reexamined in light of recent developments in the employee health field. In addition, we are hopeful that your request to GAO to revisit the earlier opinion on smoking cessation programs will help clarify whether programs such as the one you are planning can be paid for with appropriated funds. *In this regard, OPM will make appropriate amendments to the FPM to reflect a revised GAO opinion.* (Italic added.)

Accordingly, it is our view that 5 U.S.C. § 7901(c)(4) authorizes the establishment of smoking cessation programs for federal employees. Therefore, if OPM amends the Federal Personnel Manual by adding smoking cessation to the list of disease prevention activities that agencies can provide their employees as part of their health service programs, we would not object to the IRS' use of its appropriated funds to pay the costs incurred by its employees who participate in a smoking cessation program. 64 Comp. Gen. 789 is modified accordingly.

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[5] We have previously approved the use of appropriated funds to purchase and install air purifiers where they will provide a benefit to all employees in a general area. 64 Comp. Gen. 789 (1985); 62 Comp. Gen. 653 (1983); B-215108, July 23, 1984.

[6] In response to our decision, OPM revised its regulations to include the establishment and operation of "physical fitness programs and facilities designed to promote and maintain employee health" in its list of appropriate preventive health services. *See* Federal Personnel Manual (FPM), ch. 792 (Inst. 261, Dec. 31, 1980), as amended by FPM letter 792-15 (April 14, 1986).

B-231627, February 3, 1989

Appropriations/Financial Management

Appropriation Availability

■ **Purpose availability**

■■ **Specific purpose restrictions**

■■■ **Entertainment/recreation**

A federal agency may not use operating appropriations to purchase or pay contractors for gifts, meals, or receptions for foreign and domestic participants in U.S. government-sponsored cooperative activities under international agreement. Official reception and representation funds are available for official entertainment but may not be used for entertainment in connection with an unauthorized activity.

Matter of: HUD Gifts, Meals, and Entertainment Expenses

The Inspector General of the Department of Housing and Urban Development (HUD) has requested our opinion concerning the availability of HUD appropriations to pay for food, entertainment, and gift items provided by contractors in support of Stroyindustriya 1987, an international trade show for construction equipment and technology mounted in the Soviet Union, under the purported auspices of the U.S./U.S.S.R. bilateral agreement on Cooperation in the Field of Housing and Other Construction. In testimony and a separate legal opinion, B-229732, Dec. 22, 1988, GAO has stated its opinion that, although HUD had authority to engage in general activities in support of the bilateral agreement, the Department had no authority specifically to undertake sponsorship of the international trade show. Accordingly operating appropriations may not be used to pay for meals, gifts, and entertainment provided in connection with these unauthorized activities. Moreover, as explained below, even if the trade show were authorized, HUD may not use operating appropriations to pay for these expenses. Furthermore, funds from HUD's official reception and representation account, which could normally have been charged for official entertainment expenses, were not available for entertainment in connection with the unauthorized Stroyindustriya show.

Background

The Secretary is authorized under 12 U.S.C. § 1701d-4 (1982) to participate in international conferences for the exchange of information beneficial to the mission of the Department. This section authorizes general activities in support of the bilateral Agreement on Housing and Other Construction (June 28, 1974, United States - Union of Soviet Socialist Republics, TIAS No. 7898). Related authority to conduct demonstration projects and other information generating activities is found in 12 U.S.C. § 1701z-1 (1982). However, GAO testified in August 1988 that, in our opinion, HUD lacked authority under the cited sections to undertake trade promotion activities such as the Stroyindustriya exhibit. *HUD Participation in the Moscow Trade Show, Hearings Before the Subcommittee on*

Employment and Housing of the House Committee on Government Operations, 100th Cong., 2d Sess., *passim* (1988) (Hearing).

Independent of the GAO testimony, and of our opinion that HUD's sponsorship of Stroyindustriya was unauthorized, the Department's Inspector General inquired about entertainment-type expenses claimed by three different contractors who provided trade promotion related services to HUD's Policy Development and Research division in fiscal years 1985, 1986 and 1987. The Inspector General's question was grounded in the well recognized rule of appropriations law that prohibits the use of appropriated funds for entertainment and gifts, unless specifically authorized. The Inspector General questioned expenses totalling $34,500. The expenses broke down as follows: $5,500 from one contractor in fiscal years 1986 and 1987 for lunches served at meetings with potential Stroyindustriya exhibitors; $4,000 from a second contractor in fiscal years 1985 and 1986 for food, entertainment, and gifts to Russian exhibit organizers and participants, and $25,000 from a third contractor for an American sponsored reception held in Moscow during the Stroyindustriya exhibit in May 1987.

Research And Technology Appropriation

HUD receives an annual appropriation for "contracts, grants, and necessary expenses of programs of research and studies relating to housing and urban problems, not otherwise provided for, as authorized by title V of the Housing and Urban Development Act of 1970, as amended (12 U.S.C. § 1701 *et seq.*). . . ."[1] Among other things, the Research and Technology appropriation is generally available for activities in support of the bilateral agreement.

Even if HUD were authorized to undertake sponsorship of the international trade show—and we have concluded it was not—the appropriation does not specifically authorize entertainment or permit the distribution of personal gifts to individuals. Previous decisions of this Office have consistently held that, absent specific authority, funds appropriated for government departments and agencies may not be used for such purposes. See, for example, 57 Comp. Gen. 385 (1978), 53 Comp. Gen. 770 (1974) (promotional items distributed as gifts at industry conferences), 57 Comp. Gen. 806 (1978) (meals for sequestered jurors), B-138081, Jan. 13, 1969 (breakfast served at Mexico City meeting between Chairman of the Securities Exchange Commission (SEC) and Canadian officials); and 5 Comp. Gen. 455 (1925) (entertainment of officials in foreign countries to facilitate arrangements for around the world flight), B-193661, Jan. 19, 1979 (reception for Hispanic leaders in connection with planning conference). Applying these principles to the instant case, HUD expenditures for gifts, meals, and entertainment in support of the bilateral agreement did not constitute a proper use of the Department's appropriation for Research and Technology.

[1] *See* Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1985, Pub. L. No. 98-371, 98 Stat. 1213, 1220 (1984); Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1986, Pub. L. No. 99-160, 99 Stat. 909, 913 (1985); Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1987, as enacted by Pub. L. No. 99-591, § 101 (g), 100 Stat. 3341, 3341-242 (1986).

The rationale underlying all of the above cases is that, although the government usually derives some indirect benefit from the expenditure for food, gifts, and entertainment, these expenses are essentially personal in nature. Ascertaining the residual value of the expense to the government typically would be impossible or at least very difficult. Even where this is possible, we are still of the opinion that the expense should not be allowed. First, we doubt that useful standards for permissible entertainment could be articulated for practical application. Moreover, because of the corollary personal benefit in allowing such expenditures, the probability of abuse is significantly higher than is acceptable.

There are some very limited exceptions to the personal expense rule. We have, on infrequent occasions, held that a particular gift or entertainment expense was so closely related to program activities that the personal expense rule did not apply. In B-193769, Jan. 24, 1979, we allowed the distribution of specimen lava rocks to national park visitors as a way of preventing defacement of the natural park setting. In B-199387, March 23, 1982, we approved providing small samples of ethnic food as a means of enhancing an agency's Equal Employment Opportunity (EEO) awareness program. Thus in these cases, the expenditure was essential to carrying out a legitimate program goal which would otherwise have been unfulfilled.

HUD asserts that the use of Research and Technology funds for the expenses in question was absolutely necessary to carry out the purposes for which the appropriation was made because there is an expected code of behavior in the conduct of international business and diplomacy that requires the extension of hospitality and the exchange of gifts. Hearing at 82. This assertion, however, unsupported by proof of the actual necessity, is insufficient to justify an exception to the personal expense rule. Moreover, in this case, the trade show was not an authorized program goal of the Department.

Appropriations For Official Reception And Representation Expenses

In addition to its Research and Technology appropriation, the Department also receives an appropriation for Management and Administration. This appropriation is available for "necessary administrative and nonadministrative expenses . . . not otherwise provided for. . . ." During fiscal years 1985, 1986 and 1987, this appropriation included an amount of "not to exceed $4,000 for official reception and representation expenses. . . ." Representation accounts provide the specific authority necessary to use government funds for entertainment and related expenses. 43 Comp. Gen. 305 (1963).

HUD argues that the official reception account is available only for domestic activities when the Secretary receives visitors, normally at HUD headquarters, in his capacity as Secretary and that it is not available for his participation as co-chairman of an international committee. Hearing at 82-83. The Secretary of HUD serves as Cochairman of the U.S./U.S.S.R. Joint Committee on Cooperation in the Field of Housing and Other Construction by virtue of his position as the Secretary of Housing and Urban Development, the United States agency re-

sponsible for implementation of the agreement. We have not found any previous decision of this Office or any other authority which limits the use of official reception and representation funds based upon a distinction between domestic and international activities. Accordingly, the allowance for official reception and representation expenses would ordinarily be available for entertainment in connection with authorized activities under the bilateral agreement. Stroyindustriya, however, was not authorized.

An agency head's custodianship of an official reception and representation account traditionally entails "a great deal of discretion" as to expenditures. 61 Comp. Gen. 261 (1982). This does not mean, however, that there are no limits on the proper expenditure of the fund. The appropriation act requires that entertainment be "official" in nature. In our view, entertainment cannot be "official" if its primary purpose is to further an unauthorized activity.

We stress that our decision here is based on the assumption that all of the expenditures were in direct furtherance of Stroyindustriya, an unauthorized activity. The decision might be different if the expenditures were in connection with an authorized activity, whether under the bilateral agreement or otherwise. In that case, the expenditures could be for "official" purposes and the limited reception and representation funds available could be applied to them. However, we do not have sufficient information to determine whether the expenditures involved here can be justified on some other "official" basis.

B-231718, February 3, 1989

Civilian Personnel

Compensation
■ Overtime
■■ Eligibility
■■■ Travel time

When an employee of the National Park Service is released from temporary duty assignment to return to his home park as soon as possible and be available for fire fighting duty or for backup duty resulting from forest fire emergency, the condition of immediate official necessity occasioned by an administratively uncontrollable event is properly met under 5 U.S.C. § 5542(b)(2)(B)(iv). His claim for overtime pay for traveltime on an off-duty day is allowed.

Matter of: Gary A. Pace—Overtime Pay—Emergency Traveltime

Gary A. Pace appeals the May 5, 1988, settlement of our Claims Group (Z-2864074) denying his request for overtime compensation while in travel status. For the reasons set forth below, we reverse the settlement of the Claims Group and allow his claim.

Background

Gary A. Pace, a North District Ranger (RM&VP) with the National Park Service (NPS), United States Department of the Interior, was assigned to temporary duty at Jefferson National Expansion Memorial, St. Louis, Missouri, on a Special Events Team (SET) assignment scheduled for July 3-8, 1985.[1] Mr. Pace states that his team was ordered to remain at Jefferson Memorial after July 8 to protect visitors and resources due to staff shortages and a threatened illegal encampment. Due to a fire emergency in the West, however, the SET team members were ordered to immediately return to their home parks on July 10, a scheduled day off. When he arrived at Cuyahoga Valley about 6 p.m. that day, he called the Chief Ranger and was told to prepare for immediate fire dispatch if needed, but also, as the only remaining qualified fire training instructor, to prepare to test and train other employees in basic firefighting so they could be sent to the West.

Mr. Pace remained at Cuyahoga Valley and worked 15 hours overtime on July 11, his second scheduled day off, and also worked double shifts on July 12 and 13, due to the fire emergency. He was paid for those overtime hours worked, but not for the 7 hours of traveltime on July 10.

The overtime claim is supported by the Chief Ranger at the Jefferson Memorial. He says that on July 10, 1988, he received orders from the Midwest Region to release the SET team immediately; their schedule and flight reservations were changed, and the team was immediately released and ordered to return to their home parks.

The team leader of Mr. Pace's Special Events Team also supports the overtime claim. He says he was informed on July 10 that the team was released because of fire conditions in the West with orders to return home on the first available flights and to prepare for dispatch to fire staging areas or to augment staff shortages at home created by earlier fire dispatches. He believes that overtime pay is justifiable because the fire situation was uncontrollable.

The NPS Midwest Region denied the claim, stating that although the Regional Law Enforcement Specialist released the SET team "as early as possible to return to their home parks . . ." because of the fire emergency, he "did not *order* them to return post haste." (Italic in original.) The Region maintains that only the team leader was specifically ordered back to his home park for immediate fire dispatch and that Mr. Pace was not so ordered, although his prompt return did make him available for fire dispatch or to provide park backup.

The NPS Central Payroll Office agreed with the Region and forwarded the claim to our Claims Group recommending disallowance. The Claims Group disallowed the claim, stating that we will not substitute our judgment for the agency's judgment that Mr. Pace's return travel was administratively controllable.

[1] Mr. Pace was a General Schedule employee (GS-9) stationed at the Cuyahoga Valley National Recreation Area, Brecksville, Ohio. His position was exempt under the Fair Labor Standards Act (FLSA).

Opinion

As a General Schedule employee, Mr. Pace's overtime entitlement is governed by 5 U.S.C. § 5542. Under section 5542(b)(2), time spent in a travel status is not hours of employment unless it occurs within regularly scheduled hours or, under subsection (B)(iv), "results from an event which could not be scheduled or controlled administratively, including travel by an employee to such an event and the return of such employee from such event to his or her official-duty station." (As amended by Pub. L. 98-473, Sec. 322, Oct. 12, 1984, 98 Stat. 1874.)

The above statutory authority has been interpreted to require the satisfaction of two conditions. First, the event requiring off-duty travel must indeed not be susceptible to administrative control. That is, there must be a "total lack of Government control" in the scheduling of the event.[2] Secondly, there must exist "an immediate official necessity" occasioned by the unscheduled and administratively uncontrollable event.[3]

It is clear that the claimant's sudden departure from St. Louis was administratively uncontrollable because his return travel was required by a forest fire emergency in the Western Region of the United States. As to the second condition, we find that the circumstances of the request for release of Mr. Pace from his travel assignment do satisfy the requirement of immediate official necessity. Although the NPS contends that Mr. Pace was not ordered to return immediately, the agency admits that the request passed through the chain of command was to release the SET team "as early as possible" in order to be available for potential fire duty or to serve as backup for those already dispatched to fires. The NPS also states that Mr. Pace's prompt return made him available for either fire dispatch or to provide backup as indeed he did. He was placed on emergency overtime duty the day after his evening return from St. Louis and worked overtime the following 2 days also. In view of this fact and the statements of the Chief Ranger at Jefferson Memorial and the SET team leader, we believe there is sufficient evidence to support our finding of immediate official necessity in connection with Mr. Pace's return travel on his off day.

Our resolution of the conflict over the circumstances surrounding the request for Mr. Pace's return is consistent with our decision in *Charles S. Price, et al.*, B-222163, Aug. 22, 1986. In that case, due to shortage of manpower, three investigators of the Food and Drug Administration in the Cincinnati District traveled during off-duty hours on an "as soon as possible" basis to San Francisco in order to assist in emergency investigations of food contamination and poisoning. We sustained their overtime claims in spite of the fact that other Cincinnati investigators traveled the following day and in spite of the agency's contentions that, in fact, there was no need to travel that same evening. Thus, in allowing the claims we looked to the actual necessity for immediate travel, and the sense of urgency stemming from the request that assistance be provided as soon as possible. Similarly, Mr. Pace's travel satisfies the requirement of immediate offi-

[2] *Dr. L. Friedman*, 65 Comp. Gen. 772 (1986), citing *Barth v. United States*, 568 F.2d 1329 (Ct. Cl. 1978).
[3] *Thomas G. Hickey*, B-207795, Feb. 6, 1985, citing *John B. Schepman, et al.*, 60 Comp. Gen. 681 (1981).

cial necessity in view of the NPS request that his team be released to return as soon as possible. Mr. Pace's as well as his immediate supervisor's impression of urgency very clearly stemmed from this agency request.[4]

Furthermore, the fact that Mr. Pace was requested to return to his home park to be available for potential as opposed to definite dispatch to a fire does not change the urgency of the circumstances of his travel. An emergency such as this is not confined to the fire itself, but extends to all duties relating to the event. The request for assistance on an "as soon as possible" basis was sufficient to satisfy the condition that there be an immediate official necessity for the travel in question, whether it resulted in actual dispatch to the fires or in serving as backup for those already dispatched.

In view of the fact that Mr. Pace's off-duty travel was required by an administratively uncontrollable event and there was immediate official necessity occasioned by the event, we reverse the settlement of our Claims Group and allow Mr. Pace's claim for overtime compensation.

B-233041, February 6, 1989

Procurement

Sealed Bidding
■ Low bids
■■ Error correction
■■■ Price adjustments
■■■■ Propriety

Low bid was properly corrected to include amount omitted due to an extension error in calculating home office overhead where clear and convincing evidence established both the existence of the mistake and the amount the bidder actually intended to include in its bid calculations for the overhead, and the bid will remain low by approximately 12.6 percent.

Matter of: Lash Corporation

Lash Corporation protests the determination by the United States Coast Guard to permit upward correction of the low bid submitted by Construction and Rigging, Inc. (CRI), in response to invitation for bids No. DTCG50-88-B-65023, for repair of a fuel pier at the Coast Guard Support Center in Kodiak, Alaska. Lash contends that there was insufficient evidence of the intended bid price to permit correction. Lash requests that the award to CRI be terminated and award made to Lash.

We deny the protest.

The Coast Guard received five bids at bid opening on August 11, 1988. CRI's bid of $3,484,435 was low; Lash submitted the second low bid of $4,369,750. The government estimate was $3,457,190. Shortly after bid opening, the contracting offi-

[4] *See Gerald Rowell and Marvin Griffin, Jr.*, B-186005, Aug. 13, 1976.

cer, suspecting a mistake in CRI's bid, requested the firm to review its worksheets and verify its bid. On August 15, CRI advised the agency that it had in fact made an extension mistake in calculating the amount of "home office overhead" (the cost of running its corporate offices) to include in its bid price. In the original worksheets CRI submitted to the agency as evidence of the mistake, the formula for calculating home office overhead is set forth as "10% x 3.7 million," but the extension of the calculation is stated to be only $37,000, that is, $333,000 less than the product when multiplied correctly, $370,000. In a sworn statement, CRI's chief estimator declared that he intended to include $370,000 in CRI's bid for home office overhead based upon an initial estimate that the final bid price would total approximately $3,700,000; although CRI subsequently reduced its bid price through several last-minute adjustments (as shown on the firm's worksheets), CRI has explained that it did not intend to reduce the allowance for home office overhead. CRI further claimed that an additional $43,523 should be added to its profit, $2,870 to its allowance for bond costs, and $1,000 to its allowance for liability insurance, to reflect the $333,000 increase in the base upon which these costs were calculated. CRI therefore requested an increase in its bid of $380,393, for a new total bid of $3,864,828, that is, $504,922 (approximately 11.6 percent) less than the second low bid.

After reviewing CRI's worksheets and the sworn statement of the chief estimator (who was responsible for preparing the bid), the Coast Guard determined that CRI had submitted clear and convincing evidence that a mistake had been made and that the firm had in fact intended a bid of $3,864,828. In reaching this conclusion, the agency took into consideration not only the evidence submitted by CRI and the fact that the corrected price would still be substantially less than the second low bid, but also the agency's own opinion that it was unreasonable to believe that a firm would include only 1 percent for overhead, which usually is 10 percent or more.

Lash, which has not been provided with a copy of CRI's workpapers, argues that there appears to be insufficient evidence of the intended bid to permit correction.[1]

Analysis

An agency may permit upward correction of a low bid before award, to an amount that still is less than the next low bid, where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR) § 14.406-3; *see Fortec Constructors,* B-203190.2, Sept. 29, 1981, 81-2 CPD ¶ 264. Whether the evidence meets the clear and convincing standard is a question of fact, and we will not question an

[1] Lash contends that the agency should have released the documents upon which the determination to permit correction was made. The Coast Guard withheld CRI's workpapers from the protester, however, on the basis that they contained proprietary information. The Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. IV 1986), does not require the disclosure of a firm's proprietary information. *See generally Varian Assos., Inc.—Request for Reconsideration,* B-229921.6, Sept. 27, 1988, 88-2 CPD ¶ 291. We note, however, that our Office examined all evidence relied upon by the agency in determining to permit correction.

agency's decision based on this evidence unless it lacks a reasonable basis. *Fortec Constructors,* B-203190.2, *supra.* In this respect, in considering upward correction of a low bid, worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. *Montgomery Construction Co., Inc.,* B-221317, Feb. 28, 1986, 86-1 CPD ¶ 210.

Overhead

Our examination of CRI's workpapers and the affidavits furnished by the firm provides no basis to question the Coast Guard's determination that CRI submitted clear and convincing evidence that it intended to include in its bid calculations an allowance of $370,000 for home office overhead, calculated as 10 percent of its initial estimate of $3.7 million, as set forth in its worksheets. Although CRI's overall proposed bid for the project was subsequently adjusted several times, ranging from the $3,484,435 actually bid to $3,762,433, the overall allowance in the worksheets for indirect costs, which included home office overhead, did not vary, thus confirming CRI's claim that it did not intend to adjust its home office allowance to reflect subsequent adjustments in its overall bid. The addition of $333,000 for home office overhead will still leave CRI's price 12.6 percent below the next low bid.

Bid Schedule

In its request for correction, CRI also advised the agency of an inconsistency in its bid schedule. Specifically, although the extensions of CRI's unit prices for the five subitems under item 3 (furnish 4,100 feet of steel piling, install 3,320 feet of steel piling, etc.) are arithmetically correct, the stated total ($1,682,235) of the extended prices as entered on the bid schedule is $83,000 more than the correct total of these subitems ($1,599,235). The stated total bid price ($3,484,435) for all five bid items, however, is based on the lower total for the subitems, and CRI claims that this stated total price (plus the additional overhead, profit, bonds and insurance claimed) was its intended bid price.

Lash argues that the $83,000 discrepancy between the correct total of the item 3 subitems and the item 3 total actually entered on the schedule calls into question the bid actually intended by CRI and, at the least, requires the agency to reduce any correction with respect to the understated overhead by $83,000.

We disagree. We find the Coast Guard reasonably determined that CRI intended to bid $1,599,235 not $1,682,235. Not only is this amount for item 3 the proper total of the extended subitem prices and consistent with the total bid but, in addition, it is supported by the entries on the worksheets. In this regard, the stated $1,682,235 total for item 3 is shown on the worksheets as being intended prior to the reduction of one of the subitem prices by $83,000; the $1,599,235 total is entered on the worksheets as the intended item 3 price after this reduction. It thus appears that this reduced item 3 total simply was not carried over to item 3 in the bid, although it was reflected in the total bid price. Further, we

consider it significant that CRI's explanation results in the lower of the two possible prices.

Conclusion

For the reasons set forth above, we deny Lash's protest against the correction of CRI's bid to include the additional $333,000 for home office overhead and to reflect the intended item 3 total. Since CRI's bid as properly corrected remains low, the award was proper.

We point out, however, that there appears to be insufficient evidence to include in the correction of CRI's bid the claimed $47,393 for profit, bond cost and insurance cost related to an increase in CRI's corrected base bid. We find no evidence in CRI's worksheets to corroborate CRI's assertion that the allowances for these items were based upon incremental formulas; no such formulas were set forth in the worksheets. Further, although CRI's overall proposed bid was adjusted several times (from $3,484,435 to $3,763,433), the allowances for these items either remained the same through all of the adjustments (in the case of profit and insurance), or were not adjusted using the claimed formula (in the case of bonds).

Accordingly, by separate letter to the Secretary of Transportation, we are recommending that CRI's contract price be modified to eliminate the unsubstantiated amount of $47,393.

The protest is denied.

B-233121.2, February 6, 1989

Procurement

Contract Management
■ Contract administration
■ ■ Convenience termination
■ ■ ■ Administrative determination
■ ■ ■ ■ GAO review

Where contracting agency determined that low bidder had erroneously been rejected as nonresponsible based on inaccurate information, and that award thus should not have been made to second low bidder, agency's subsequent correction of situation by terminating contract for convenience of the government and awarding contract to low bidder is unobjectionable; low bidder had no reason to believe, and was not required to assume, that contracting agency would not rely on correct responsibility information, and thus cannot be faulted for agency's initial erroneous nonresponsibility determination based on inaccurate information.

Matter of: Electro Methods, Inc.

Electro Methods, Inc. protests termination of its contract, and the award of a contract to Turbo Combustor Technology, Inc., under request for proposals

(RFP) No. DAAJ09-88-R-0035, issued by the Department of the Army for the purchase of 1,503 deflector assemblies, part of a turbine engine. We deny the protest.

Turbo's was the lowest-priced offer received by the February 15, 1988 closing date; Electro's was next low. On August 12, because of what it viewed as contract delinquencies, the Army determined that Turbo was not a responsible prospective contractor and proceeded with an award to Electro on August 18. Turbo protested to the Army on August 26, arguing that the nonresponsibility determination was improper. The Army reviewed the matter and, on September 7, again concluded that Turbo was nonresponsible.

Turbo then filed a protest with our Office, which we dismissed after the Army stated that it would perform a new survey on Turbo with a full, on-site evaluation, something it had not done in connection with the two previous nonresponsibility determinations. On November 22, based on this new survey, the contracting officer concluded that Turbo had in fact been responsible as of the August 18 award date, and that her earlier determinations of nonresponsibility had been erroneous. To correct the error, the Army terminated Electro's contract for the convenience of the government on December 15, and awarded a new contract to Turbo.

Electro contends that it was improper for the Army to terminate its contract based on a post-award survey finding Turbo responsible because Turbo did not make sure that the Army originally relied on correct information to determine its responsibility.

We find nothing unreasonable in the Army's actions here.[1] It is clear from the record that the award to Electro as the second low bidder occurred only as the result of a nonresponsibility determination of Turbo, the low bidder, a determination the Army subsequently concluded was erroneous. Electro does not dispute that the Army's nonresponsibility determination was erroneous, and does not contend that Turbo in fact is nonresponsible.

Electro's argument that Turbo was responsible for the original nonresponsibility determination is without legal merit. Under the circumstances here, we think Turbo could reasonably expect that the correct information would be considered by the Army; we are aware of nothing that requires an offeror to assume that incorrect or inaccurate information would be used against it when the agency is in possession of the correct information. Therefore, we fail to see how Turbo can be faulted for the Army's initial determinations, and we find the termination of Electro's contract to be unobjectionable.

The protest is denied.

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[1] Although the decision by an agency to terminate a contract for convenience generally is a matter of contract administration not reviewable by our Office, we will consider the reasonableness of such a termination where the agency determines that the initial award was improper and should be terminated to permit a proper award. *See Special Waste, Inc.*, 67 Comp. Gen. 429, 88-1 CPD ¶ 520.

B-211149, February 9, 1989

Appropriations/Financial Management

Budget Process
■ Funding
■■ Contracts
■■■ Gifts/donations

Miscellaneous Topics

Federal Administrative/Legislative Matters
■ Administrative regulations
■■ Gifts/donations
■■■ Investments

Letters to Representatives Fascell, Garcia and Morella conclude that the Christopher Columbus Quincentenary Jubilee Commission may invest donated funds in non-Treasury, interest-bearing accounts and is not required to comply with the Federal Property and Administrative Services Act or the Federal Acquisition Regulation for contracts financed with donated funds.

Matter of: The Honorable Constance A. Morella, House of Representatives

By letter dated October 14, 1988, you asked whether the Christopher Columbus Quincentenary Jubilee Commission (Commission) must comply with the Federal Property and Administrative Services Act of 1949 (FPASA) or the Federal Acquisition Regulation (FAR) when contracting with donated funds. You also asked whether the Commission may deposit donated funds in non-Treasury, interest bearing accounts.

For the reasons stated below, we conclude that the Commission is not required to comply with the FPASA and the FAR for contracts financed from private donations. We further conclude that donated funds may be deposited in non-Treasury interest bearing accounts.

We received similar requests from Representatives Dante B. Fascell and Robert Garcia and are providing identical responses to them.

Background

The Christopher Columbus Quincentenary Jubilee Act, Pub. L. No. 98-375, 98 Stat. 1257 (1984) (act) established the Christopher Columbus Quincentenary Jubilee Commission "to plan, encourage, coordinate, and conduct the commemoration of the voyages of discovery of Christopher Columbus."[1] Section 8(b)(3) of the act authorizes the Commission, under such rules and regulations as it adopts, to procure supplies, services, and property, make contracts, and expend the funds it receives in furtherance of the act.

[1] The act was amended by Pub. L. No. 100-94, 101 Stat. 700 (1987). The 1987 amendments added nonvoting participants to the Commission, increased the maximum donations allowed, and authorized the Commission to pay certain expenses, among other things.

To provide for the Commission's expenses, the act authorized to be appropriated $220,000 for each of the fiscal years beginning after September 30, 1983 and ending before October 1, 1992, and $20,000 for the period between October 1 and November 15, 1992. Total appropriations authorized for the purposes of the act were not to exceed $2,000,000.[2]

To help fulfill its statutory purpose, section 7 of the act authorizes the Commission to accept donations of money, property, or personal services. The aggregate amount of donations the Commission may accept annually may not exceed $250,000 from an individual or $1,000,000 from a foreign government, corporation, or partnership.[3]

Discussion

As a general rule, when a federal entity expends both appropriated and donated funds to accomplish a statutory purpose, the expenditures from both sources are viewed as appropriated fund expenditures subject to all statutes and regulations governing such expenditures. However, in a letter to the Honorable Sidney R. Yates, B-211149, December 12, 1985, we recognized that this rule is not without exceptions. In that letter, we concluded that the Holocaust Memorial Council (Council) need not comply with certain statutes and regulations generally applicable to the expenditure of appropriated funds by federal agencies.

Our conclusion in the case of the Council was based on two reasons equally applicable to the Commission. First, we noted that statutes, such as 31 U.S.C. § 3302(b), which require government officials to deposit funds in the Treasury, are intended to prevent the augmentation of direct appropriations with funds from outside sources resulting in a level of operation beyond that authorized by Congress. Since the Holocaust Memorial Council is an entity which carries out major, continuing functions using only donated funds, the concern with augmentation of appropriations that underlie statutes such as 31 U.S.C. § 3302(b) were not for application to an entity such as the Council. Second, we felt that the legislative history of the Holocaust Act supported the conclusion that Congress intended to allow the Council to expend donated funds subject only to the directives of its governing board, free of the strictures generally applicable to government funds. Accordingly, we concluded:

(1) The Council is free to invest the donated funds in interest-bearing securities to the extent not needed for immediate payments for construction of the museum and related costs.

(2) Federal procurement requirements such as those found in the Federal Property and Administrative Services Act of 1949, and its implementing regulations, the Federal Acquisition Regulation, as well as other procurement-related statutes do not apply to any Council procurements involving the expenditure of its donated funds.

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[2] Congress appropriated $220,000 for fiscal years 1984 and 1987 and $212,000 for fiscal years 1988 and 1989 for the Commission. The amounts appropriated remain available until November 15, 1992. No funds were appropriated for fiscal years 1985 and 1986.

[3] In recognition of the substantial expense of fund-raising activities and the limited contribution to this effort provided by appropriated funds, these amounts were enacted by Public Law 100-94 as an increase to the allowable amount of donations initially enacted by Public Law 98-375. H.R. Rep. No. 254, 100th Cong., 1st Sess. 4 (1987).

We believe these conclusions apply equally to the Commission. First, the Commission carries out its statutory purposes largely through the use of donated funds. Both the report of the House Committee on Post Office and Civil Service and the report of the Senate Committee on the Judiciary which considered the bills establishing the Commission state: "This bill is a modest proposal which provides for limited Federal funding. The Commission will have to look to private and corporate donations for the bulk of its funding if it is to operate successfully and fulfill its duties and obligations under the bill." H.R. Rep. No. 150, 98th Cong., 1st Sess. 3 (1983); S. Rep. No. 194, 98th Cong., 1st Sess. 5 (1983). In fact, Congress later realized that the statutory limits on the amount of donations the Commission could receive precluded the raising of sufficient funds and subsequently raised the limits on the amount of donations the Commission could accept. Pub. L. No. 100-94, 101 Stat. 700 (1987); H.R. Rep. No. 254, 100th Cong., 1st Sess. 4 (1987). In light of Congress' clear intent that the Commission's activities be financed primarily from sources other than federal funds, and for the reasons discussed above in connection with the Holocaust Memorial Council, we conclude that the Commission may invest donated funds in non-Treasury, interest-bearing accounts.

Second, section 8(b)(3) of the act states: "Subject to such rules and regulations as may be adopted by the Commission, the Commission may — . . . procure supplies, services, and property; make contracts; expend in furtherance of this act funds appropriated, donated, or received in pursuance of contracts hereunder . . . ." There is nothing in the act or its legislative history indicating that Congress intended the Commission's authority to issue procurement rules and regulations to be constrained by the requirements in the FPASA or the FAR. Like the Holocaust Memorial Council, we think that the Congress intended the Commission to expend donated funds free of the strictures generally applicable to government funds. There is little reason to believe that Congress, in creating a Commission which relies primarily on private sector donations and has a limited life to fulfill a limited purpose, intended that the Commission be required to comply with the formal procurement procedures contained in federal law, or be prohibited from obtaining goods and services by taking advantage of informal relationships developed as part of the private sector's participation in the Commission's activities. Accordingly, we conclude that the Commission is not required to comply with FPASA or the FAR when contracting with donated funds. As with the Holocaust Memorial Council, however, we recommend that the Commission use the body of federal procurement law and regulations as models in developing its own internal procurement policies.

Unless you publicly announce its contents earlier, we plan no further distribution until 30 days from the date of this opinion. At that time, we will make copies available to others on request.

B-227320, February 9, 1989

Military Personnel

Pay

■ Retired personnel

■ ■ Post-employment restrictions

A retired Regular Navy officer who was employed by a Department of Defense contractor did not violate 37 U.S.C. § 801(b) and implementing regulations, which prohibit a retired Regular officer from negotiating changes in specifications of a contract with the Department of Defense, when that officer worked with non-contracting Defense personnel as a technical expert for the purpose of coordinating the correction of the malfunctioning of an item that had previously been procured and delivered. This is so even though the technical solution proposed by the officer ultimately led to a modification of the contract.

Matter of: Captain Lloyd K. Rice, USN (Retired)—Selling to the Department of Defense

The question in this case is whether retired Navy Captain Lloyd K. Rice's activities as a civilian employee of a government contractor constituted "selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense" within the meaning of 37 U.S.C. § 801(b), so as to preclude payment of his retired pay.[1] In the particular circumstances presented, we conclude that Captain Rice's activities did not amount to "selling" supplies to the government under the terms of that statute.

Background

Captain Lloyd K. Rice retired from the United States Navy as a Regular officer on October 1, 1984. On August 12, 1985, he submitted to the Navy a DD Form 1357, Statement of Employment, which indicated that he was employed by a Department of Defense contractor in the position of a senior staff engineer/scientist and program manager for the contractor's OM-55 supply contract with the Navy. That contract supplied spread spectrum modems with antijam capabilities used for satellite communications. The Statement of Employment is a necessary component in the Navy's system of enforcing the prohibition in 37 U.S.C. § 801(b) against a retired Regular officer "selling" supplies or war materials to the Department of Defense. The Navy conducted an investigation to determine whether Captain Rice had been "selling" to the Navy on behalf of his employer, the defense contractor. The investigation was triggered by the brief description of Captain Rice's duties on the Statement of Employment.

The investigation produced findings that Captain Rice and his employer were familiar with the restrictions of 37 U.S.C. § 801(b), and that he had deliberately been excluded from activities relating to pricing and other aspects of contract

[1] Mr. R. H. Conn, Comptroller of the Navy, submitted this question for a decision, which was assigned No. SS-N-1474 by the Department of Defense Military Pay and Allowance Committee.

negotiations to assure compliance with that statute. One aspect of Captain Rice's duties concerning the OM-55 modems, however, caused Navy officials to suspect that he may have contravened 37 U.S.C. § 801(b). This involved his role in resolving a problem that the power supply units in the modems were experiencing in the field. Although the OM-55 modems had been sold to the Navy in 1982, several years before Captain Rice began working for the contractor, it was only at the time of his employment in 1985 and later that contract administration problems surfaced. He participated in conversations with naval personnel, attended several program reviews of the OM-55 modems called by the Navy, and corresponded with naval personnel as part of the contractor's effort to find a solution to the power unit failure. The Navy correctly characterizes Captain Rice as the contractor's technical expert who coordinated a mutually satisfactory solution that eventually resulted in an ECP (engineering change proposal) submitted by the contractor to the Navy, which is incorporated as a change to the existing contract. The Navy also believes, however, that this coordination activity may have amounted to "selling" to the government.

Analysis And Conclusion

A retired Regular officer may not be paid military retired pay for 3 years after retirement ". . . who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense . . . ." 37 U.S.C. § 801(b).

Implementing regulations contained in Enclosure 2 to Department of Defense Directive 5500.7, January 15, 1977, define "selling" for the purposes of that section as including:

> . . . negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract. . . .

The directive also states that neither the statute nor the directive "preclude a retired Regular officer from accepting employment with private industry solely because his employer is a contractor with the Government."

We have held that the employment of retired Regular officers in nonsales, executive, or administrative positions which require agency contacts by the retired officers in their capacities as noncontracting technical specialists, which involve no sales activities, are outside the purview of the statute and the implementing regulations. *See* 52 Comp. Gen. 3, 6 (1972); 42 Comp. Gen. 87 and 236 (1962). Conversely, where a retired officer actually participates in some phase of the procurement process, we have held that those activities bring him within the purview of the definition of "selling" as defined in the DOD directive. 42 Comp. Gen. 236, *supra.* The Navy is aware of our decision which states:

> . . . we do not believe that retired officers whose duties concern only the technical background operations of assembling, analyzing, preparing and reporting necessary information, material, correspondence and documents for use by others are to be regarded as engaged in selling within the contemplation of the statutes. Nor do we believe that an officer who occasionally accompanies other members of his firm as technical adviser to meetings with Department of Defense personnel to dis-

cuss performance or progress or similar matters under awarded contracts may reasonably be viewed as being engaged in selling, etc., for purposes of the statutory provisions. 42 Comp. Gen. 87, *supra*, at 93.

However, the Navy suggests that Captain Rice may have been engaging in the procurement process, or violating the regulatory prohibition of "discussing changes in specifications of a contract," by coordinating a mutually satisfactory solution to the power supply unit of the OM-55 modem.

In our view, working on technical solutions to a contract problem is several steps removed from discussing changes in specifications of a contract. It is not until the retired officer discusses a proposed ECP or other concrete proposed specification change in some kind of procurement framework that we believe he is negotiating changes in the specifications of a contract.

In the present case, we view as significant the testimony by several Navy personnel that Captain Rice was aware of restrictions on his employment activities, and that he terminated conversations when it appeared that it was turning into a contracting or negotiating phase. We find it also significant that the Navy program manager and his deputy who had frequent contact with Captain Rice concerning the OM-55 modem agreed that all of the contacts concerning the supply contract were solicited by the Navy, were confined to the exploration of technical issues, and were outside of the procurement or contracting process.[2] The contractor here was a large corporation which had a contracting staff that did in fact negotiate and discuss the ECP that finally resulted from Captain Rice's technical solution, and it appears that the contractor endeavored to insulate Captain Rice from this contracting activity. We believe in this case the record supports a conclusion that Captain Rice was not selling to the government or discussing changes in the specifications of a contract within the purview of 37 U.S.C. § 801(b). Therefore, his retired pay should not be disturbed.

B-229436, February 9, 1989

Civilian Personnel

Travel

■ Handicapped personnel

■■ Baggage

■■■ Handling costs

Under the Rehabilitation Act of 1973 an employee confined to a wheelchair may be reimbursed baggage handling fees he incurred at airports on temporary duty travel, but only to the extent that these fees were incurred as the result of his disability and were higher than those that would be incurred by a nondisabled person.

[2] *Compare* 42 Comp. Gen. 87, *supra*, at page 91, concerning contacts which are initiated by the government rather than the retiree, and which do not appear to involve contract negotiations or disputes.

Matter of: Alyan R. Hill—Travel—Baggage Handling Fees—Handicapped Employee

In this decision, we hold that to the extent a handicapped employee traveling on official business incurs higher fees for personal baggage handling as a result of his disability than would a nondisabled person, he may be reimbursed for the difference under the authority of the Rehabilitation Act of 1973.[1]

Mr. Alyan R. Hill is a handicapped employee confined to a wheelchair. While on temporary duty travel during March 23-27, 1987, he incurred personal baggage handling fees totaling $12 at airports in Albuquerque and New Orleans because his handicap prevented him from carrying his baggage to and from the airports to awaiting vehicles.[2]

The employing office denied reimbursement, since personal baggage handling tips and fees are reimbursed to an employee as part of his per diem or actual subsistence expenses without any additional allowance. *See* Federal Travel Regulations (FTR), paras. 1-7.1b and 1-8.2b (Supp. 1, November 1, 1981), *incorp. by ref.*, 41 C.F.R. 101-7.003 (1986); *Johnston E. Luton*, B-182853, Jan. 30, 1976. The agency, however, states that because a person in a wheelchair is unable to carry baggage to and from a car some assistance should be available for additional needed expenses.

We have held that under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, an agency may expend appropriated funds to reasonably accommodate the physical limitations of handicapped employees even if such expenditures could not be authorized for a nonhandicapped employee. *See e.g.*, 63 Comp. Gen. 115 (1983); *Alex Zazow*, 59 Comp. Gen. 461 (1980). Such expenditures must not impose an undue hardship on the operation of the agency's programs and must be directly related to the nature of the employee's handicap. *See Norma Depoyan*, 64 Comp. Gen. 30 (1984). The agency expenditure must be directed at ameliorating an impediment to the handicapped employee's performance of duty; the handicapped employee should not be reimbursed costs necessarily incurred by all employees regardless of disability. *See* 63 Comp. Gen. 270 (1984).

Under the provisions of the FTR, baggage fees and tips incurred by an employee for handling his or her personal baggage are reimbursed as part of per diem or actual subsistence allowances. Therefore, Mr. Hill already has received a reimbursement which is considered to include an amount for the ordinary cost of baggage handling at an airport. If, however, Mr. Hill incurred baggage handling expenses of an unusual nature as a direct result of his handicap, then under the authority of the Rehabilitation Act of 1973, we would not object to his receiving the difference between the ordinary baggage handling fee and what he was required to pay. *See* 63 Comp. Gen. at 274.

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[1] Mr. Roger M. Sargent, Director, Financial Management Division, Department of Energy, Albuquerque Operations Office, requested our decision.

[2] Apparently, he paid $3 each time his baggage was carried for him.

B-233111, February 13, 1989

Procurement

Sealed Bidding

■ Bids

■ ■ Responsiveness

■ ■ ■ Determination criteria

Rejection of bid that was inordinately low based on bidder's mistaken interpretation of specifications was proper despite bidder's assertion that no error was made, where bid was substantially below the government estimate and agency properly determined that the bidder's proposed method of performance did not conform to the solicitation specifications.

Procurement

Specifications

■ Ambiguity allegation

■ ■ Specification interpretation

Specification language requiring that cables be concealed in walls "where practicable" and that conduits be similarly concealed "wherever possible" clearly indicates that agency desired concealment, with reasonable exceptions; protester's interpretation that contractor had discretion to decide that none of the cable or conduit would be concealed is unreasonable since it gives no effect to agency's clear intent.

Matter of: HEC Electrical Construction

HEC Electrical Construction protests the rejection of its bid, and award of a contract to Albert Electric Co., under invitation for bids (IFB) No. N62474-88-B-8274, issued by the Department of the Navy for replacement of electrical panels and cables in housing series 1100, 1200 and 1300, at the Treasure Island Naval Station in San Francisco, California.

Bids were opened on September 9, 1988, and HEC submitted the apparent low bid of $329,360. Because HEC's bid was approximately 55 percent below the government estimate of $711,637, the Navy contacted HEC and requested verification of its bid, which was received on September 20. On September 23, the Navy again requested that HEC verify the accuracy of its bid, this time by meeting with the Engineer-In-Charge. A meeting was held on September 23, at which an issue arose as to HEC's interpretation of paragraphs 3.1.5 and 3.2 of section 16402 of the solicitation, regarding installation of the electrical cables and conduits. Paragraph 3.1.5 provided:

Nonmetallic Sheathed Cable Installation: Install cables concealed behind ceiling or wall finish *where practicable* (Italic added). Thread cables through holes bored on the approximate centerline of wood members; notching of end surfaces will not be permitted. Provide sleeves through concrete or masonry for threading cables. Install exposed cables parallel or at right angles to walls or structural members. Protect exposed nonmetallic sheathed cables less than four feet above floors from mechanical injury by installation in conduit or tubing. When cable is used in metal stud construction, insert plastic stud grommets in the studs at each point through which the cable passes.

Paragraph 3.2 provided:

CONDUIT: Provide rigid metal PVC coated conduit. Install PVC conduit only where specifically indicated. Conceal conduit within finished walls, ceilings and floors *wherever possible* (Italic added). Install exposed conduit and conduit above suspended ceilings with removable panels, parallel with or at right angles to the building structural members. Provide an equipment grounding conductor within all runs containing PVC or any flexible conduit.

HEC advised the Navy engineer it planned to mount the cable and conduit on the outside of the wall in the 1100 and 1200 series as opposed to concealing them in the walls. HEC stated that it felt it was not practical to try to conceal the cables and conduits in structural walls when no details were known as to how the walls were constructed or as to whether it was structurally safe to cut a hole in the framing. Furthermore, HEC claimed it was concerned about the practicality of trying to bring a cable down inside the same wall as the one in which the wires from the subpanel might be running. HEC planned to install the exposed conduits in a closet to satisfy the concealment requirements in paragraph 3.2.

It was the Navy's position that the IFB generally required concealment and that the cited paragraphs allowed for deviations only in limited instances. The Navy specifically determined that the walls in question generally were not structural, and could be used to conceal cables, and also noted that the closet in which HEC proposed to conceal the conduit did not exist. On September 30, the contracting officer determined that HEC had erroneously interpreted the concealment requirements of the solicitation, and that its bid, which did not include labor or materials for wall restoration or repair, therefore should be rejected in fairness to both HEC and other bidders. By letter of October 7, HEC was notified of the award to Albert in the amount of $598,600.

HEC claims that its proposed method of installation satisfies its reading of specification paragraph 3.1.5 as requiring concealment of cables "where practicable." HEC claims that it carefully considered the placement of cable, and that its conclusion that concealment was impracticable was reasonable based on the arguments previously made to the Navy engineer, and its view that: (1) external wall installation would be safer because, in case of an electrical fire, detection and extinguishment would be simpler; and (2) external wall installation would avoid the possible problem of asbestos in the wall, which HEC claims is a constant problem in military installations. HEC concedes that the "wherever possible" language in paragraph 3.2 does tend to support the Navy's view that concealment generally was required, but argues that since the term still is indefinite and the Navy used the broader "practicable" language in paragraph 3.1.5, it reasonably concluded that its reading of "practicable" should be the standard for all of the work. HEC concludes that its low bid based on this interpretation should have been accepted for award.

While we would agree that the IFB could have more clearly indicated what the Navy meant by requiring concealment of cable and conduit in walls "where practicable" and "wherever possible," we think the Navy's intent was sufficiently clear, and do not agree with HEC that its interpretation of the language as giving the contractor the option of running all cable and conduit outside the walls was reasonable; the two terms may indeed be susceptible of somewhat

varied interpretations, as HEC contends, but in the context of this solicitation we see no basis for HEC's interpretation.

In this regard, contrary to HEC's broad interpretation, we think a solicitation statement that work should be performed in a certain way if practicable, feasible, or possible reasonably can mean only that there is a desire by the contracting agency that the work be performed in that way, with reasonable exceptions based on such considerations as custom and professional standards. It follows that we think the plain import of the specifications here, read as a whole, was that the Navy generally preferred the cable and conduit to be run inside, rather than outside the walls; even if it was not clear precisely where the Navy did not consider concealment feasible, it should have been clear to HEC that the Navy did not want the contractor automatically to install all of the cable and conduit on the outside of the walls. This is particularly the case considering that the buildings here were residences; although HEC claims to have performed a similar job for the Army where the cable and conduit were installed on the outside of the walls, we find merit in the view that concealment is more customary in these circumstances.

HEC's interpretation that the specification language allowed the contractor to decide on its own that concealment was not a good idea in light of safety and other concerns gave absolutely no effect to the Navy's obvious intent, and would have the effect of eliminating any common basis the Navy would have for comparing bids. Thus, while, again, the IFB might have been more specific, HEC's interpretation was unwarranted, and therefore was not a reasonable reading of the IFB.

To the extent HEC is arguing that its interpretation was necessitated by a lack of detail in the IFB as to exactly where the Navy considered concealment practicable or possible, the protest is untimely; our Bid Protest Regulations provide that such alleged solicitation deficiencies must be protested prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1988). We note, furthermore, that the IFB provided for a site visit to allow bidders to examine the premises, and also contained specific instructions for seeking clarification of the requirements. There thus was no apparent reason for HEC to rely on its unsubstantiated assumptions in interpreting the IFB.

In the alternative, HEC argues that if it has in fact misinterpreted the concealment requirements, the specifications were ambiguous, and the solicitation should be canceled and the procurement resolicited so it will have an opportunity to bid as the Navy intended. HEC also argues alternatively that if its reading of the specifications was in fact erroneous it should be allowed to correct its bid based on the Navy's interpretation. HEC asserts that it stands ready to perform the contract as interpreted by the Navy for $568,486, still $30,114 below the award price.

HEC's alternative arguments are without merit. First, an ambiguity exists in specifications only if they are subject to more than one reasonable interpretation. *Malkin Electronics International, Ltd.,* B-228886, Dec. 14, 1987, 87-2 CPD

¶ 586. As we have found that the only reasonable interpretation here was that the Navy did not intend that all cable and conduit be exposed, and that HEC's interpretation was not reasonable, the specifications were not fatally ambiguous. Similarly, bid correction is not available where a bidder bases its bid on an erroneous interpretation of the specifications. *Central Builders, Inc.,* B—229744, Feb. 25, 1988, 88-1 CPD ¶ 195. This was the case here.

HEC has requested reimbursement of its protest and bid preparation costs. However, as we have found the protest to be without merit, there is no basis to allow recovery of these costs. 4 C.F.R. § 21.6(d) (1988); *American Technical Communications,* B-230827, July 15, 1988, 88-2 CPD ¶ 56.

The protest is denied.

B-208871.2, February 9, 1989

Procurement

Payment/Discharge

■ **Costs**

■ ■ **Substitution**

A contracting officer is required to pay all allowable costs under a grant or contract up to the maximum amounts authorized and allocated for the contract. If additional amounts become available as a result of some audited cost disallowances, the contracting officer must apply them to any excess costs that are otherwise allowable but which could not previously be paid because they exceeded the cost ceiling.

Matter of: Department of Labor—Refusal of Contracting Officer to Consider Claims Made by Contractor Against Funds Available Due to Disallowance

By letter of December 29, 1987, the Department of Labor (DOL) Associate Solicitor for Employment and Training Legal Services has asked whether a contracting officer or grant official may, at his discretion, refuse to allow valid costs submitted as substitute costs for previously disallowed costs as long as the total amount allocated to the contract is not exceeded. Further, if it is our opinion that allowing such costs is discretionary, the Associate Solicitor wants to know what conditions, if any, may be imposed upon acceptance of such costs. For the reasons explained below, we conclude that where funds remain available under a grant or contract as a result of disallowed costs, a grantee or contractor may submit other grant or contract costs as substitutes and these costs should be paid if otherwise allowable, up to the maximum amount authorized by the contract or grant.

Background

The Associate Solicitor has asked whether, as a general matter, DOL should pay a contractor or a grantee for allowable costs submitted as substitute claims for disallowed costs. As illustrations of this question, the Associate Solicitor cites two cost-plus-fixed-fee contracts. Both of these contracts had limitations on the total charges authorized to be paid. An audit of these contracts found that the total costs submitted exceeded the total amount authorized and paid. However, the contracting officer disallowed certain costs, but did not consider whether the contractor could apply previously determined excess costs against funds freed up by the disallowances. These contracts are currently before the DOL Board of Contract Appeals on the question of the propriety of the cost disallowances. The Associate Solicitor thinks that the contracting officer or grant official is without discretion and must honor allowable costs up to the amount of any contract cost limitation.

In contrast, the Deputy Assistant Secretary of Labor for the Employment and Training Administration thinks that DOL has no legal obligation to accept as substitute costs amounts voluntarily expended in excess of the authorized maximum amount for costs properly disallowed. He further asserts that the acceptance of added costs after disallowance should be viewed as a matter of debt management with the contracting officer or grant official having discretion to accept or reject substitute costs. If the contracting officer or grant official has discretion, the Associate Solicitor wants to know the extent of this discretion.

Discussion

As a general rule, funds which become available due to a disallowance of certain costs should be treated as funds never expended or claimed. A contractor is responsible for returning to the government any payments it receives for disallowed costs. However, since disallowed costs are to be regarded as never expended or claimed, the contractor is entitled to substitute other allowable costs for those disallowed and, to the extent allowable costs are available, does not need to repay the government.[1] Therefore, unless otherwise stipulated in the contract, a contracting officer or grant official is without discretion to refuse to authorize payment of allowable costs from funds that become available because of the disallowance. Of course, care must be taken to assure that the newly claimed costs are, in fact, allowable. (*See also* OMB Circular No. A-122, "Cost principles for non-profit organizations.")

This result is consistent with prior decisions of this Office. For example, in B-137343, August 12, 1964, we indicated that the amount a contractor accepted as administrative disallowances would remain available as funds to be used for payments under the contract. In that case, the contractor requested that he be paid for additional, unforeseeable overhead expenses that he had incurred while

[1] Although many of the GAO cases cited in the submission in support of this position concerned assistance relationships, we see no reason to reach a different result in the case of procurement contracts.

performing work under the contract. These costs exceeded those designated by the provisional overhead rates in the contract. While we declined to determine whether the contractor's request should be granted on the merits, we pointed out that legally, if the contractor was correct about the amounts of previous disallowances, $15,310.04 would still remain available for contract payments as a result of disallowances.

The issue that we have here is not one of debt collection. The substitute costs must be viewed as part of the totality of allowed and disallowed costs, which occurs at the audit resolution stage before a collectible debt is established. Concerning the two contracts described by the Associate Solicitor to illustrate his question, the contractor could charge part or all of the contract costs incurred in excess of the maximum authorized amount against cost disallowances to the extent that the contracting officer determines that the costs are properly allowable and allocable to the contract. This is, of course, subject to the disallowances being sustained by the DOL Board of Contract Appeals and not further appealed.

B-233100, February 15, 1989

Procurement

Competitive Negotiation
■ Contract awards
■■ Administrative discretion
■■■ Cost/technical tradeoffs
■■■■ Technical superiority

Contracting agency acted reasonably in selecting for award an offeror proposing a superior document handling approach over an offeror proposing a less expensive system where the solicitation provided technical factors would be worth 70 percent in the evaluation.

Procurement

Specifications
■ Minimum needs standards
■■ Competitive restrictions
■■■ Performance specifications
■■■■ Justification

Contracting agency may state its minimum needs in terms of performance, rather than design, specifications requiring offerors to use their own inventiveness or ingenuity in devising approaches that will meet the government's requirements; the agency need not specify in the solicitation the manner in which offerors are to fulfill the performance requirements, or advise a technically acceptable offeror during discussions that another approach is superior.

Matter of: Pitney Bowes, Inc.

Pitney Bowes, Inc., protests the award of a contract to Bell & Howell Company under request for proposals No. IRS-88-021, issued by the Internal Revenue

Service (IRS), for multifunctional document handling systems. Pitney Bowes disputes the evaluation of proposals and alleges that the agency failed to conduct meaningful discussions.

We deny the protest.

The solicitation requested proposals for document handling systems capable of (1) separating the individual pages of continuous form, fan-fold computer output, (2) collating both the individual pages produced above and other precut single pages of input into notice sets of up to seven pages, (3) folding the notice sets, (4) diverting and retaining for in-house use copies of certain notice sets, (5) inserting the notice sets, plus up to 10 additional inserts, into envelopes with the mailing address visible in the envelope window, (6) sealing the envelopes, and (7) sorting the envelopes by mailing weight. The solicitation noted that the IRS was required to mail a large volume of notices within very short periods of time; the solicitation therefore required that each system be capable of processing a minimum of 3,500 multiple-page sets or 6,000 single-page sets per hour, and of operating continuously without mechanical failure for 2 shifts per day for periods of 3 to 5 days.

The solicitation provided that in the evaluation of proposals up to 30 points would be available for price and 70 points for technical factors. Although the precise weight assigned to each technical factor was not specified in the solicitation, the factors were listed, in descending order of importance, as (1) meeting performance requirements (53.5 available points), (2) technical support (8 points), (3) ease of use (6.5 points), and (4) warranty (2 points).

Timely proposals were received from Pitney Bowes and Bell & Howell. After conducting written discussions with both offerors and viewing on-site demonstrations of their installed machines, the IRS requested the submission of best and final offers (BAFOs). Based upon its evaluation of BAFOs, the agency concluded that one of two designs proposed by Bell & Howell offered superior performance and ease of use. Although Pitney Bowes offered a technically acceptable system at a lower price ($9,719,840) than Bell & Howell's system ($12,196,565), given the greater weight accorded technical factors under the solicitation, the technical superiority of the Bell & Howell system (62.65 points versus 51.17 points for Pitney Bowes) resulted in Bell & Howell receiving an overall higher evaluation score (86.56 points) than Pitney Bowes (81.17 points). Upon learning of the resulting award to Bell & Howell, Pitney Bowes filed this protest with our Office.

Technical Evaluation

Pitney Bowes contends that several aspects of the technical evaluation were unreasonable and inconsistent with the evaluation criteria. In reviewing Pitney Bowes' arguments, we will not make an independent determination of the merits of technical proposals; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria

and applicable statutes and regulations. This standard reflects our view that the evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. The protester bears the burden of showing that the evaluation was unreasonable, and the fact that it disagrees with the agency does not render the evaluation unreasonable. *Aydin Vector Division of Aydin Corp.*, B-229659, Mar. 11, 1988, 88-1 CPD ¶ 253.

Ease of Conversion

As indicated above, the IRS determined that the proposed Bell & Howell document handling system offered superior performance and ease of use. For example, the solicitation required that the system allow for "ease of conversion" from processing one type of form to processing another type; it specified that the conversion be made without the need for major mechanical adjustments, defined as adjustments requiring 10 minutes or more. While Bell & Howell proposed to incorporate both continuous-form and cut-sheet feeders into its system, alternating between types of input merely by pressing a single key on the operator's computer keyboard, Pitney Bowes proposed to convert from one form of input to another by manually disconnecting the currently attached feeder module, rolling it away, rolling the other feeder module up to the system, and connecting it. Although the IRS did not challenge Pitney Bowes' assertion in its proposal that this conversion could be accomplished within 10 minutes as required by the solicitation, the agency found that the more rapid conversion possible under the Bell & Howell approach would enhance productivity by reducing system downtime, and thus rated this a relative strength for Bell & Howell.

Pitney Bowes contends that there is little likelihood that the IRS will need to alternate frequently between cut-sheet and continuous-form input and that emphasizing this in the evaluation thus was unwarranted. According to the protester, the majority of the current input comes from cut-sheet printers and the trend is towards the increasing use of laser printers processing cut-sheet material. The agency estimates, however, that 4 to 6 conversions from one form of input to another will occur in each 8-hour shift. It therefore appears that the time saved because of the more rapid conversion possible with the Bell & Howell system may in fact be significant. In any case, since the solicitation specifically required that the document handling system be capable of processing both forms of input and be designed for ease of conversion between the two, we think it was reasonable for the agency to consider the greater ease of use and operational flexibility of the Bell & Howell system in this regard to be a definite strength.

Page Sequence

The solicitation also required that the document handling system have the capability to read computer codes on the documents, recognizing the first, inter-

vening, and last pages of a notice set, and to assemble automatically a complete notice set in numerical order.

Pitney Bowes proposed an approach where the documents would be fed into the system face-up from the bottom of the stack; the last page of the last notice set in a stack would enter first and a stack of sets would enter in reverse, Zto-A order. Under the proposed Bell & Howell approach, on the other hand, documents would be fed into the system facedown, beginning with the first page of the top notice set, and would be processed in A-to-Z order. Although the Pitney Bowes approach complied with the solicitation requirements, the IRS considered it to be less efficient than the Bell & Howell approach. According to the IRS, a stack of computer generated notices is often delivered to the document handling system with the last notice in the stack incomplete because the printer ran out of paper in the middle of the notice; the operator of the Pitney Bowes system would need to check the bottom of each stack for partial notices, diverting him from maintaining production, in order to assure proper processing of the partial notices. In addition, the agency notes that the Pitney Bowes approach would make it more difficult to keep the retained in-house copies in sequential order (for example, in a job of notices divided into 3 stacks, the in-house copies will be deposited in the hopper in a 3-2-1-6-5-4-9-8-7 order).

Pitney Bowes argues that the system it proposed can in fact feed all materials face-down in A-to-Z order; it notes that commercial literature included in its proposal indicated that its feeder can feed cut-sheets face-up or face-down, and that it demonstrated at one installation a system capable of feeding cut-sheets face-down in A-to-Z order.

Our review of Pitney Bowes' proposal supports the IRS' determination that Pitney Bowes proposed to meet the overall performance requirements of the solicitation by feeding input face-up, from the bottom of the stack, in Z-to-A order; Pitney Bowes described its approach as using equipment that "feeds face-up, this means we would feed from the bottom of the stack." We find its express choice of a face-up approach in its proposal to be especially significant in view of the fact that the face-down cut-sheet feeder it demonstrated "kept jamming," in the words of the IRS observers; this would suggest that Pitney Bowes opted for the face-up approach to avoid these difficulties. In any case, neither in its proposal nor at the demonstration did Pitney Bowes document a capability to feed continuous-form material face-down in A-to-Z order.

The burden of preparing an adequate proposal rests with the offeror, *see Supreme Automation Corp., et al.,* B-224158, B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83; where the offeror explicitly proposes one approach to satisfy the solicitation requirements, we do not believe the contracting agency is required to speculate as to whether the offeror or the proposed system is also capable of meeting the requirements—including those for reliability and production—through another approach. Accordingly, we find no basis to question the IRS' determination that Pitney Bowes' proposed approach to feeding input into the system, although satisfactory, nevertheless was less desirable than the Bell & Howell approach.

Page Cutting

The solicitation as issued further required that continuous-form, fan-fold input be separated into individual pages by cutting. The solicitation was subsequently amended to convert this design specification into the more general performance requirement that the pages be separated by a means that does not cause the detachable stub portion of any page to become detached. Although the IRS did not view as unacceptable Pitney Bowes' proposal to separate pages by bursting the pages apart along perforations between the pages, it concluded that Bell & Howell's approach of separating pages by cutting was less likely to detach the detachable stubs.

Pitney Bowes maintains that separation by bursting is faster and more efficient than separation by cutting, and does not result in separation of the stubs. In any case, Pitney Bowes alleges that it also manufactures equipment that separates sheets by cutting and was prepared to demonstrate such equipment at one of the demonstrations of installed systems had the agency not limited that demonstration to 1 day.

Based on the record before us, we cannot conclude that the agency lacked a reasonable basis for finding separation by cutting to be superior because it is less likely to result in the unwanted detachment of stubs in the notices. Although Pitney Bowes disagrees, the IRS' position does not seem unreasonable on its face; pulling pages apart along a perforation seems more likely to also pull off the stub than cutting the pages with no pulling. In any case, Pitney Bowes has presented no clear evidence that the agency's position is incorrect and the protester's mere disagreement with the IRS does not render this aspect of the evaluation unreasonable. *See Aydin Vector Division of Aydin Corp.*, B-229659, *supra.* With respect to the demonstration for which only 1 day was allowed, if Pitney Bowes believed that the agency had allowed insufficient time for the demonstration, it was required to take issue with the IRS at that time; the protester cannot wait to complain until months after the source selection decision has been made, when the alleged deficiency no longer can be readily corrected. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2)(1988).

Stacking

The solicitation required the document handling system to sort the sealed envelopes by weight, and then stack them compactly and with a common orientation so as to permit easy removal. The agency found that, as shown in an on-site demonstration, Pitney Bowes' approach of stacking envelopes flat, or horizontally ("shingled" stacking), results in a less compact stack than Bell & Howell's approach of stacking envelopes vertically, on-edge; according to the agency, stacking envelopes flat also is more likely to result in misalignment of the envelopes and consequent additional work for the system operator.

Pitney Bowes argues that its stacker is superior because, as a result of using two levels of stacking, the stacks are shorter than most on-edge stacks and

therefore easier to unload; Bell & Howell maintains that its on-edge stacking allows for easier unloading than Pitney Bowes' multiple tier stacking.

Whether or not Pitney Bowes is correct on this point, Pitney Bowes has not refuted the agency's determination that an on-edge stacker is superior because it is more likely to orient the envelopes uniformly as required by the solicitation. We thus have no reason to question the IRS' conclusion regarding this requirement.

Ruggedness

Based on observation of the on-site demonstrations, the agency found the system proposed by Pitney Bowes to be of light-weight construction, and less rugged in design and materials than the Bell & Howell system. For example, the Pitney Bowes system uses rubber rollers rather than the steel rollers used in the Bell & Howell system to fold documents; the agency reports that its prior experience with both rubber and steel rollers shows that rubber rollers need to be replaced three times more often than steel rollers, are often damaged by staples in the documents, and tend to harden because of exposure to chemicals in the printing ink. Although Pitney Bowes contends that rubber rollers are preferable because they do not need to be adjusted for different thicknesses of paper (as a result of the resiliency of rubber), the protester has not attempted to explain why the agency's concerns with respect to the maintainability of rubber rollers were unreasonable. Moreover, Pitney Bowes does not refute the agency's overall observation that Bell & Howell proposed a more rugged design. In view of the importance the solicitation placed upon reliable operation, the IRS reasonably preferred the approach requiring less maintenance.

Evaluation Under Incorrect Factor

Pitney Bowes argues that the perceived inferiority of its approach to conversion between cut-sheet and continuous-form material, face-up feeding, and envelope stacking concerns the operational flexibility of the document handling system, and therefore should have been evaluated under the less important ease-of-use evaluation factor rather than under the meeting-performance-requirements factor.

Although we agree that the proposed approaches to performing these required functions affect ease of use, we do not believe that the agency was thereby precluded from also considering these factors under the evaluation criterion for meeting performance requirements. We find reasonable the agency's position that since a system's ability to minimize the delay in changing input modes, eliminate the need to check incoming stacks for partial notices, and stack envelopes with a common orientation, all affect the number of production interruptions, these factors reasonably can be considered related to ensuring an offeror's ability to meet the performance requirements. *See Iroquois Research Institute,* 55 Comp. Gen. 787 (1976), 76-1 CPD ¶ 123 (not improper to penalize an offeror in

each evaluation category affected by a particular proposal deficiency); *Burns and Roe Tennessee, Inc.*, B-189462, Aug. 3, 1979, 79-2 CPD ¶ 77.

Mandatory Requirements—Bell & Howell's Compliance

Pitney Bowes, which has not been provided access to Bell & Howell's proposal, argues that currently available Bell & Howell equipment cannot comply with all of the mandatory solicitation requirements. Moreover, to the extent that Bell & Howell may have proposed equipment not currently available, the protester contends that this would violate the solicitation requirement that components of the proposed system be "off-the-shelf," that is, equipment that "has been manufactured, offered to the public, and used in the marketplace, thus demonstrating it as a 'proven' technology."

After reviewing Pitney Bowes' allegations in this regard, we find no basis upon which to disturb the IRS' determination that Bell & Howell submitted information sufficient to establish the technical acceptability of its proposal. *See generally Everpure, Inc.*, B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235 (determination of technical acceptability will not be disturbed unless shown to be unreasonable).

For example, Pitney Bowes questions whether the proposed Bell & Howell system will meet the solicitation production requirements (3,500 multiple-page sets or 6,000 single-page sets); Pitney Bowes claims that the actual production rate of Bell & Howell inserters is only 75 percent of the rated cycling speed and thus is likely to be less than Pitney Bowes' speed, which is in excess of 6,000 insertions per hour. In fact, however, Bell & Howell proposed to meet the solicitation production requirements and submitted descriptive literature in support of a claimed cycling speed of 10,000 insertions per hour.

Pitney Bowes also questions the compliance of the Bell & Howell system with safety requirements. In this regard, the solicitation required that the system be designed so that the operator is protected from moving parts; in particular, it required that interlock devices be incorporated on doors and covers and that emergency off switches be provided. Bell & Howell, however, proposed not only the required interlock devices and emergency stop switches, but also a light curtain of photoelectric light beams to protect the operator from moving parts by automatically turning the system off if a beam is penetrated.

In addition, Pitney Bowes questions whether Bell & Howell met the solicitation requirement that the noise level near the document handling system not exceed 80 decibels when the system is in operation. Bell & Howell, however, proposed to comply with this limit and described in its proposal how it would reduce noise levels through use of a heavy cast iron frame to "absorb" vibrations, a quieter drive motor, and a quieter belt-driven folder.

Pitney Bowes alleges that any required adjustment to the position of the Bell & Howell sensor for reading computer codes on the documents will take longer than the 10 minutes permitted by the solicitation because the Bell & Howell sensor is not normally adjustable up and down by the operator without the use

of a special tool. Bell & Howell, however, proposed to accomplish any required adjustments within 2 to 3 minutes by aligning the sensor vertically through use of a thumbwheel, and horizontally by use of a thumbscrew.

Pitney Bowes questions whether Bell & Howell met the solicitation requirement that the system be capable of detecting and alerting the operator to misfeeds or other conditions that could result in the intermixing of notices. Bell & Howell, however, proposed a system equipped with sensors that detect misfeeds and jams, stop the system before mutilation of forms occurs, and reports these problems by means of indicator lights and notices on the operator's computer screen.

Bell & Howell proposed to meet these and the other solicitation requirements by using "off-the-shelf" components that have been "manufactured, offered, sold and installed in the marketplace . . . and [are] being used at numerous customer sites," and submitted literature describing the system it proposed to supply. We thus find no basis for Pitney Bowes' assertion that Bell & Howell's proposed system cannot satisfy mandatory requirements or the "off-the-shelf" requirement.

Although the discussion above encompasses only a few of the many objections raised by Pitney Bowes with respect to the evaluation of proposals, we have reviewed all of the allegations and discussed the most significant points of contention. Based upon the record before us, we cannot conclude that the IRS acted unreasonably in finding the Bell & Howell proposal to be technically superior.

Notice Of Superior Approach

Pitney Bowes alleges that the IRS conducted the evaluation pursuant to unstated, restrictive evaluation guidelines that are inconsistent with the stated evaluation criteria. In this regard, Pitney Bowes complains that the source selection plan, which was not disclosed to offerors, favors the Bell & Howell approach. For example, the protester notes that the internal evaluation guidelines express a preference for separation by cutting because of the agency's concern that separation by bursting may result in the unwanted detaching of stubs, and a preference for stackers that retain envelopes on-edge, so as to permit their expeditious removal, over stackers in which the envelopes are placed loosely on conveyor belts. The guidelines also indicate a preference for a "rugged design," equipment that reads computer codes on the first page of a set, and for A-to-Z processing of notices. Pitney Bowes alleges that the agency failed to advise offerors of these views during discussions and that this constituted a failure to conduct meaningful discussions. According to the protester, had it known of the agency's views, it could have offered the preferred equipment.

In order to ensure that specifications are stated in terms that will permit the broadest field of competition to meet the minimum needs of the government, agencies properly may state requirements in terms of performance rather than design specifications, requiring offerors to use their own inventiveness and ingenuity in devising approaches that will best meet the government's performance

requirements. *See Imperial Schrade Corp.,* 66 Comp. Gen. 307 (1987), 87-1 CPD ¶ 254. The specifications here were primarily stated in terms of performance requirements, and the evaluation guidelines did not establish unstated minimum requirements in addition to these requirements; Pitney Bowes' proposal was not found to be technically unacceptable because of its system's departure from certain of the guidelines. Rather, the guidelines merely reflected what the agency, based on prior experience, reasonably viewed to be superior technical approaches to satisfying certain performance requirements; it was left to any offeror to put together an integrated cost and technical approach that, as a whole, would be superior to another system meeting one or more of the guideline preferences. Based on what we have found to be a reasonable, independent evaluation of proposals, Pitney Bowes' system simply was found to be less effective in meeting the solicitation performance requirements.

We see no reason why the IRS should have been required to disclose the evaluation guidelines instead of requiring offerors to use their own inventiveness and ingenuity in devising approaches that will meet the government's requirements. *See generally Mark Dunning Industries, Inc.,* B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364. Again, where a solicitation allows for alternative approaches to meeting a performance requirement, the manner in which offerors are to fulfill the requirement need not be specified in the solicitation, *see Personnel Decision Research Institute,* B-225357.2, Mar. 10, 1987, 87-1 CPD ¶ 270, nor must the agency advise a technically acceptable offeror during discussions that another approach is superior. *See generally Loral Terracom, et al.,* 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182.

Conclusion

Notwithstanding the substantially lower price proposed by Pitney Bowes, we find that the IRS had a reasonable basis for selecting Bell & Howell's document handling system. As it made clear in the solicitation, the agency needs a machine capable of operating continuously without mechanical failure to process a large volume of mail within very short periods of time; the agency accordingly advised potential offerors that price would be worth only 30 percent in the evaluation of proposals. Consistent with its need for the system most capable of meeting the challenging demands periodically placed on the agency, the IRS selected a system (Bell & Howell's) which offered the reliability of a more rugged design than the relatively lightweight construction of its competitor, one in which the expected 4 to 6 conversions from one form of input to another in each 8-hour shift could be accomplished rapidly, apparently in seconds rather than in minutes, and one in which production interruptions are further limited by eliminating the need to check incoming stacks for partial notices and by facilitating the removal of finished envelopes. It is clear from our review of the record that the choice of Bell & Howell resulted not from an abstract preference for a particular system, but instead reflected the agency's need for the most productive, efficient and reliable system available. This selection was consistent

with the emphasis in the evaluation criteria on technical merit and therefore is unobjectionable.

The protest is denied.

B-230448, February 17, 1989

Civilian Personnel

Relocation
■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

Since no prohibition is found in the authorizing statute or its legislative history, the Federal Travel Regulations may be revised to authorize the transportation of an employee's privately owned vehicle (POV) from overseas at government expense, even though no POV was transported overseas initially, provided the employee was assigned or transferred to a post of duty overseas for other than temporary duty, a determination was made that use of a POV at the overseas station was in the government's interest, and the employee actually used the POV at the overseas station.

Civilian Personnel

Relocation
■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

The Federal Travel Regulations may not be revised to authorize transportation of POVs of employees recruited in Hawaii and Puerto Rico to their first permanent duty station in the continental United States. The statute authorizing transportation of POVs to, from and between posts of duty outside the continental United States provides such authority only where the POV is to be used at a duty station outside the continental United States.

Matter of: Transportation of Privately Owned Vehicles from Overseas

The Chairman of the Per Diem, Travel and Transportation Allowance Committee requests a decision as to whether regulations implementing 5 U.S.C. § 5727 (1982) may be revised to authorize employees, incident to a permanent change of station, to ship their privately owned vehicles (POVs) from posts of duty overseas at government expense even though they did not ship POVs to the overseas stations initially.[1] The General Services Administration (GSA), the agency delegated the authority to prescribe regulations implementing the statute, provided us with its opinion that the law is sufficiently broad to allow the return transportation at government expense and asked for our views on a related proposal, presented to GSA by the Federal Bureau of Investigation (FBI), involving em-

[1] The Committee assigned the request PDTATAC Control No. 88-1.

ployees who are hired in Hawaii or Puerto Rico and assigned to a post of duty in the continental United States.

We agree that the regulations may be revised to authorize the shipment of an employee's POV at government expense from overseas even though a POV was not shipped there initially, provided the statutory prerequisites are met, namely, that the employee was assigned to an overseas post of duty for other than temporary duty, and that the employee's agency determined that it was in the interest of the United States for the employee to have the use of a motor vehicle at the overseas post of duty.

We find, however, that the statute does not provide authority for shipping the POV of an employee who is hired overseas for duty in the continental United States since the statute applies only where the POV is needed at a post of duty outside the continental United States.

Background

The Committee cites two of our decisions for the rule that a POV may not be shipped from an overseas duty station unless a POV was shipped overseas at government expense, *Wilfredo O. Tungol,* B-208695, Nov. 30, 1982, and *Walter M. Mangiacotti,* B-199185, Sept. 17, 1980. *See also Michael J. Patnode,* B-214942, Oct. 5, 1984, to the same effect. To the Committee, it appears that the determinations in the cited decisions were based on specific provisions in the regulations and the prohibition is not necessarily required by the law, 5 U.S.C. § 5727.

The Committee explains that under the rule, employees who are authorized to ship a POV to an overseas duty station lose the entitlement to return a POV by not shipping one overseas initially, and that some employees probably ship older high-mileage POVs overseas at government expense merely to preserve the return entitlement.

GSA states its view that neither the law's language nor its legislative history indicates an intent to prohibit revising the regulations to accomplish the objectives of the Department of Defense. It also suggests that the law should be liberally construed to accommodate the FBI's proposal to authorize shipment of the POVs of employees hired in Hawaii and Puerto Rico who are assigned to duty stations in the continental United States.

Discussion

The statute involved, 5 U.S.C. § 5727(b), provides that under such regulations as the President may prescribe, an employee's POV may be transported at government expense "to, from, and between the continental United States and a post of duty outside the continental United States, or between posts of duty outside the continental United States, when—

(1) the employee is assigned to the post of duty for other than temporary duty; and

(2) the head of the agency concerned determines that it is in the interest of the Government for the employee to have the use of a motor vehicle at the post of duty.

The statute originally was enacted in section 321 of the Overseas Differentials Allowances Act, Pub. L. No. 86-707, 74 Stat. 792, 797 (1960), legislation which was concerned, generally, with compensation of officers and employees assigned to overseas posts of duty. With respect to the specific authority for transportation of POVs, the legislative history shows that it is for the purpose of transporting the POV of "employees assigned to duty outside the United States," where it is in the interest of the government for the employee to have the use of a POV "at his post of duty." Concern was shown for abuse and costs to the government, and the intent was expressed that the authority be strictly administered to insure it is used only where it is clear that the POV will contribute to the employee's performance of official duties and is in the interest of the government. H.R. Rep. No. 902, 86th Cong., 1st Sess., 23-24 (1959).

The statute is implemented by regulations included in the Federal Travel Regulations (FTR), Chapter 2, Part 10. These regulations currently provide authority to return an employee's POV to the conterminous United States only when it or a replacement vehicle was shipped overseas at government expense. As the Committee indicated, our decisions denying transportation expenses for employees' POVs which do not meet this criterion were based primarily on these regulations rather than the statute they implement since the statutory language does not specifically prohibit return of a POV that was not shipped overseas at government expense. Therefore, it is our view that the statute does not prohibit the changes in the regulations the Committee seeks so long as the appropriate determination has been made as prescribed by FTR, para. 2-10.2c, that it was in the interest of the government that the employee have the use of the POV at the post of duty outside the continental United States.

As to whether the suggested changes are desirable from a policy standpoint, that is a matter for GSA, which has been delegated the authority to prescribe the regulations.[2] We do note, however, that the regulations currently require that, with limited exceptions, the POV to be shipped must be of United States manufacture. FTR, para. 2-10.2c(6). This requirement would appear to be of particular note in the case of an employee's POV being returned from outside the United States when the POV was not shipped there but was procured locally.

Concerning the FBI proposal, the FBI states in part as follows:

An individual recruited to be a Special Agent for the FBI will be assigned to the FBI Academy, Quantico, Virginia, for 13 weeks of training. Upon completion of this training the new Special Agent is then assigned to any field division office throughout CONUS, Alaska, Hawaii, and Puerto Rico. Under regulations governing new hires, a new Agent upon graduation from the FBI Academy, being assigned from CONUS to Hawaii or Puerto Rico, would be entitled to ship a POV, at Government expense, as the agency head has certified the POV is necessary at the post of duty. On the other hand, a local hire from Hawaii or Puerto Rico, who upon graduation from the FBI Academy is assigned to a CONUS field division, is not entitled to shipment of a POV at Government expense.

[2] GSA indicates that prior to making the proposed change in the regulations, it will be necessary to coordinate the matter with the Department of the Treasury and the Office of Management and Budget in view of possible balance of payments impacts.

The fact that these local hires are not eligible to ship a POV to the new post of assignment causes a financial hardship. They either have to sell the POV locally, sometimes at a loss, or they must pay to have the POV shipped to the new post of assignment.

As is indicated above, the statute, 5 U.S.C. § 5727(b), was enacted to provide authority to ship POVs when they are necessary at posts of duty outside the continental United States. This is clear from the statutory language and the legislative history discussed above. Accordingly, it is our view that a change in the regulations to permit transportation of a POV from a place outside the continental United States which was not a post of duty is not authorized by 5 U.S.C. § 5727(b). Therefore, implementation of the FBI proposal would require additional legislation.

B-233197, February 22, 1989

Procurement

Special Procurement Methods/Categories

■ Architect/engineering services

■■ Contract awards

■■■ Administrative discretion

The Architect of the Capitol acted reasonably in selecting the most highly qualified firm for negotiations leading to award, at a fair and reasonable price, of a contract for the conservation of murals at the Library of Congress; the agency was not required to base its ranking of interested firms on price, and acted properly in evaluating qualifications based on responses to qualifications questionnaires sent the firms and recommendations from listed references.

Matter of: Kennedy & Associates Art Conservation

Kennedy & Associates Art Conservation protests the Architect of the Capitol's selection of Perry Huston and Associates for negotiation of a contract, under request for proposals (RFP) No. 8853, for the conservation of murals at the Library of Congress. Kennedy protests the failure to use competitive bidding to fill the requirement, and the evaluation of qualifications.

We deny the protest.

As part of the on-going renovation and restoration of the Library, the Architect determined that more than 100 murals painted between 1895 and 1897 on canvas or plaster are in various states of deterioration, including severe flaking and fading of pigments and crumbling of the surface, and require restoration in order to conserve them. In view of the importance of the murals, and since the work must be undertaken in coordination with the renovation of the surrounding areas in the Library, the Architect concluded that the required conservation must be conducted by a single contractor using a team of highly qualified conservators who are accustomed to working as one part of a larger project. An initial 1986 survey of conservation authorities at educational institutions and museums—including the National Gallery of Art—indicated that Perry Huston and one other conservator were most highly qualified to satisfy the Library's

requirements; only Mr. Huston was available, and the Architect initially contemplated making a sole-source award to him. The overall renovation and restoration program, however, was delayed and a contract was not then awarded to Huston.

In early 1988, in view of the extent of the delay in the program following the initial sole-source determination, and in order to ensure that maximum practicable competition was obtained, the Architect offered other conservation firms an opportunity to demonstrate their qualifications. The Architect contacted the 23 firms thought most capable of performing the required work, and described the deteriorating condition of the murals and the nature of the necessary conservation measures. The agency cautioned the firms that the project would involve a highly concentrated work effort under very tight time constraints, therefore necessitating a large and well-trained staff. Those interested were requested to contact the agency for qualifications questionnaires concerning RFP No. 8853.

The qualifications questionnaire requested information concerning prior experience in the conservation of murals, technical and aesthetic approach to performing and documenting conservation (including a proposal for and the reports from a prior project), quality of past performance, proposed employees, any proposed local office, and financial capability. In addition, the questionnaire requested the submission of the names, current positions, addresses, and telephone numbers of three curators or art historians and three conservators familiar with the firm's work.

Twelve firms returned the qualifications questionnaires by the May 20 due date. Based upon the Architect's initial evaluation of the responses, the Architect selected four firms, including Kennedy (which proposed a joint venture with the Washington Conservation Studio (WCS)) and Huston, whose references would be contacted. One firm was subsequently eliminated due to the departure of its director. After contacting three of the listed references for each of the remaining firms, the agency concluded that Huston, which received all 120 available points, was most qualified, and in fact was "uniquely qualified," to satisfy the agency's needs; Kennedy ranked second with 86 points. The Architect then entered into negotiations with Huston to reach agreement on a satisfactory contract at a fair and reasonable price. Upon learning that it had not been selected for negotiations, Kennedy filed this protest with our Office.

As a preliminary matter, neither the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 471 *et seq.* (1982), nor the Competition in Contracting Act of 1984, 41 U.S.C. § 252 *et seq.* (Supp. IV 1986), which amends the FPASA, governs the procurements of the Architect. *See* 40 U.S.C. § 474 (1982); 41 U.S.C. § 252 (1982); *HSQ Technology,* B-227054, July 23, 1987, 87-2 CPD ¶ 77. Further, the Architect is authorized to contract for renovation of the Library without regard to the requirement for advertising in 41 U.S.C. § 5 (Supp. IV 1986). Act of Aug. 22, 1984, Pub. L. No. 98-396, 98 Stat. 1369, 1398. In such a case, where the basic procurement statutes are not applicable to a protested procurement, we review the actions taken by the agency to determine

whether they were reasonable. *Superior Reporting Services, Inc.*, B-230585, June 16, 1988, 88-1 CPD ¶ 576.

Kennedy first disputes the Architect's determination that Huston is "uniquely qualified" to satisfy the agency's minimum needs; according to the protester, a number of conservators are qualified to conserve the murals. Kennedy argues therefore that either a contract should be awarded on the basis of competitive bidding by qualified firms or the requirement should be divided among qualified firms.

We find nothing objectionable in the Architect's procurement method here. We think the Architect reasonably determined that selection of the single, most qualified conservation firm was necessary to assure coordination with the overall renovation of the Library and, ultimately, the proper conservation of important works of art. This being the case, we do not believe it was improper for the Architect to subordinate price and select the most competent firm based on technical considerations. It follows that we reject the argument that the agency should have divided the requirement among several firms, which would have resulted in some of the work being performed by less qualified firms. The Architect's approach here was not based on normal sealed bid or negotiated procurement procedures, but it was similar to the procedures used to procure architect-engineering services, *see* 40 U.S.C. §§ 541-544 (1982), which also are designed to permit the selection of the most highly qualified firm. We think it was reasonable to use similar procedures under the circumstances here.

Kennedy also questions the evaluation of its qualifications. Huston received a higher evaluation score than Kennedy and was found to be the most highly qualified firm to perform the required conservation work based on responses to a number of qualifications questions. However, the single most important factors in the evaluation were the recommendations of the references contacted by the agency. The three references contacted on behalf of Huston, including a conservator at the National Gallery of Art, all gave the firm's president, Perry Huston, a very high recommendation. As documented in the agency records, these references reported of Perry Huston, a past president of the American Institute for Conservation of Historic and Artistic Works, that: "there is no one higher in quality"; the quality of his work is as "good or better than [that of] anyone in the country"; he displays "great sensitivity" for the work of art as a whole; he is up-to-date on new materials and techniques; he expects and is "very receptive" to input from curators; and he is "unique in his qualifications to manage a big enterprise," having run a large shop of 10 to 12 conservators and displayed an ability to manage, schedule and meet deadlines (notwithstanding the thoroughness of his work).

On the other hand, while Ellen Kennedy, the co-owner of Kennedy & Associates, received from one of her references a "sound recommendation" as a conservator "knowledgeable" about large-scale murals, that reference stated that he lacked knowledge of her recent work, and the other two references contacted on behalf of the firm were less positive. Agency records indicate that one curator listed by Kennedy as a reference reported only limited experience with

Ellen Kennedy's work and of having received advice "not to use her on anything but minor projects." Another reference reported that while her work was "structurally O.K.," he had "reservations" about its aesthetic quality.

Kennedy claims that the curator contacted by the Architect has orally denied stating that he had been advised not to use the firm on anything but minor projects; according to the protester, the curator's experience with the firm is limited only by the scarcity of conservation funds and not by any concern with respect to quality. We note, however, that while Kennedy states that the curator is prepared to make a written denial of the agency's version, no such written statement by the curator has been received by our Office. In any case, Kennedy does not claim that the curator provided a positive recommendation to the agency. An offeror receiving only one somewhat favorable recommendation and at least one unfavorable recommendation cannot expect to be evaluated as highly as an offeror receiving three very favorable recommendations. Accordingly, Kennedy has not demonstrated that the Architect's evaluation in this regard was unreasonable.

Kennedy questions other aspects of the evaluation. For example, Kennedy was also downgraded because its qualifications questionnaire indicated neither that Kennedy had previously conserved works in which oil was painted directly on plaster (estimated to account for 20 percent of the murals in the Library), nor that Kennedy had previously worked with its proposed joint venturer, WCS. Kennedy claims that in fact it has previously conserved murals of oil painted on plaster and once before worked with WCS; further, it argues that the agency never asked for information about prior work with any proposed joint-venturer.

These assertions, even if correct, would not change our conclusion that the evaluation was proper. Kennedy does not argue, and our review does not suggest, that Kennedy otherwise possesses qualifications superior to Huston's. Again, the Architect reasonably determined that it needed to use the most highly qualified firm in order to assure the sound, aesthetically-pleasing conservation of important art. On the basis of the recommendations alone, the agency reasonably could find Huston to be significantly better qualified to perform this particular project; it was not required instead to contract for specialized, highlydemanding work with a conservator receiving less favorable recommendations.

We conclude that under the circumstances, where the Architect clearly must obtain the very highest expertise available at a fair and reasonable price for the conservation of important works of art, the agency acted reasonably in selecting Huston for negotiations leading to award.

The protest is denied.

B-233251, February 22, 1989

Procurement

Competitive Negotiation

■ **Offers**

■ ■ **Evaluation**

■ ■ ■ **Technical acceptability**

Mandatory requirement that computed tomography scanner possess an operator console capable of displaying images is not met by proposed scanner which can only meet requirement when operated in conjunction with equipment already possessed by the government, and proposal was therefore properly deemed technically unacceptable.

Procurement

Competitive Negotiation

■ **Discussion reopening**

■ ■ **Propriety**

Where offeror responds to notice of proposal deficiency by taking explicit exception to mandatory requirement with alternate approach in its best and final offer, the agency need not again raise the deficiency and request a second round of best and final offers to allow offeror another opportunity to respond.

Matter of: Picker International, Inc.

Picker International, Inc., protests the rejection of its proposal as technically unacceptable, and the award of a contract to Siemens Medical Systems, Inc., under request for proposals (RFP) No. DADA15-88-R-0050, issued by the Walter Reed Army Medical Center, Department of the Army, for upgrading or replacing an existing computed tomography (CT) scanner (a diagnostic X-ray instrument that converts data by computer into a picture of the interior of a patient's body).

We deny the protest.

Six proposals were received in response to the solicitation; the radiology department at Walter Reed evaluated the proposals and found those submitted by Picker, Siemens, and a third offeror, General Electric Company (GE), for replacement of the existing scanner to be within the competitive range in that they either met the specifications or were judged capable of being made acceptable through negotiations. On September 1, 1988, letters were sent to each offeror, pointing out deficiencies and requesting clarifications of the proposals. Responses to the letters were received from all three offerors by September 15 and were sent to the evaluators in radiology for final evaluation. Because questions remained as to the responses of GE and Picker, the Army decided to hold another round of negotiations. Based on the best and final offers (BAFOs) received on September 26, the Army determined that Picker's proposal was technically unacceptable because it did not conform to paragraph C.3.12.5 of the specifications.

The solicitation required the CT scanner system to include both (1) an operator console, that provides the operator with the "capability to control the acquisition [by scanning], processing, display and manipulation of all data" from the X-ray beam, and (2) a diagnostic or viewer's console, that provides the "capacity to independently access, manipulate and perform all functions . . . except scanning, separate from the operator's console." RFP paragraph C.3.12.5 provided that "both the operator's and diagnostic consoles shall be capable of viewing a displayed image and perform[ing] . . . function[s] without interruption to, or by, any system function including X-ray data acquisition."

The radiology department at Walter Reed found, and Picker has subsequently conceded, that the system Picker proposed to supply cannot meet the paragraph C.3.12.5 requirement unassisted because its operator console cannot display images independently. In its September 1 letter to Picker, after asking whether Picker's proposed diagnostic console could be independently operated, the Army pointed out that, "C.3.12.5 requires [the] operator console also to be capable of displaying images." Picker responded that it was offering a "split Operator Console System," consisting of "an Operator's Console for scanning and a Viewer's Console for viewing;" it proposed to comply with specification C.3.12.5 by instead using a stand-alone viewing system (SAVS) currently installed at, and already owned by, Walter Reed. Although it considered Picker's response unsatisfactory, the Army did not again raise the issue when requesting BAFOs.

Upon learning of the subsequent award to Siemens, Picker filed this protest with our Office. Picker contends that its proposed use of the SAVS was fully responsive to the RFP requirements, and hence that its proposal was improperly found technically unacceptable. Further, to the extent its proposal may have contained deficiencies, Picker claims that meaningful discussions were not held to advise the firm of any alleged deficiency and to afford the firm a chance to remedy it. Picker also asserts that there were numerous deficiencies in Siemens' proposal that improperly were not reflected in the evaluation.

We find that the Army properly rejected Picker's proposal as technically unacceptable. In a negotiated procurement, a proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and therefore may not form the basis for award. *Coopervision, Inc.,* B-231745, July 1, 1988, 88-2 CPD ¶ 3. The Army reports that the inability of Picker's operator console to display and manipulate images is a material serious deficiency because it would in many instances prevent the independent use of the operator console, thereby resulting in decreased patient throughput, a significant consideration in a large, busy hospital.

We reject as unreasonable Picker's argument that the operator console need not be capable of operating independently, and its alternative suggestion that a hook-up with Walter Reed's SAVS system would serve this purpose. Again, the specification expressly required that "both the operator's and diagnostic consoles shall be capable of viewing a displayed image," and nowhere indicated that government equipment could be proposed as a means of enabling the offered scanner to meet this explicit requirement. In this regard, we note that the

Army reports Picker's suggestion would necessitate time-sharing with the existing SAVS system, which obviously would interfere with Walter Reed's other needs, and thus was never an intended alternative.

Moreover, if Picker believed the SAVS alternative was a viable one that should have been provided for in the RFP, it should have challenged the RFP on this ground prior to the initial closing date for receipt of proposals. *See* Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988).

Nor do we find merit in Picker's argument that the Army failed to conduct meaningful discussions with the firm. Notwithstanding the clear solicitation requirement that the operator console be capable of viewing displayed images, Picker offered a console without this capability. Where an offeror takes exception (here, in the form of proposing a noncompliant item) in its proposal to a clear solicitation requirement, this does not represent a deficiency that must be addressed through discussions. Rather, it is our view that an offeror should know, without confirmation from the agency, that its action in taking exception to the requirement likely may have a decided negative impact upon the acceptability of its proposal. *Computervision Corp.,* B-224198, Nov. 28, 1986, 86-2 CPD ¶ 617.

While the failure to propose a system with a console having the required viewing capacity therefore was not a deficiency the Army was required to bring to Picker's attention, the Army's letter of September 1 nevertheless should have been sufficient to lead Picker into the area of this deficiency based on its reference to the requirement that the operator console be capable of displaying images. Indeed, Picker's response proposing to use the SAVS system to meet this requirement clearly demonstrated that the firm was aware of the perceived deficiency. Again, the Army was not required to advise Picker in another round of discussions that this proposed alternative, which was not consistent with the RFP requirements, constituted a deficiency. *Computervision Corp.,* B-224198, *supra.*

In view of the technical unacceptability of Picker's proposal and the fact that one other proposal (GE's) besides that of Siemens was found technically acceptable, Picker would not be in line for award if its protest of the evaluation of Siemens' proposal were sustained. Picker therefore is not an interested party to protest the award to Siemens. 4 C.F.R. § 21.0; *see Armament Engineering Co.,* B-230204, May 27, 1988, 88-1 CPD ¶ 505.

The protest is denied.

B-232406, February 23, 1989

Civilian Personnel

Leaves Of Absence
■ Annual leave
■■ Eligibility
■■■ Temporary quarters
■■■■ Actual subsistence expenses

Civilian Personnel

Relocation
■ Temporary quarters
■■ Actual subsistence expenses
■■■ Eligibility
■■■■ Annual leave

A transferred employee, who occupied temporary quarters at his new duty station, took 6 days personal leave to return to his old duty station for the closing on the sale of his old residence. His claim for the cost of the 6 days as part of his temporary quarters lodging expense is allowed since his taking of leave did not cause an unwarranted extension of the temporary quarters period.

Matter of: Donald J. Douin—Temporary Quarters—Absence on Annual Leave

This decision is in response to a request from the Director, Office of Budget and Finance (Controller), Veterans Administration (VA). It concerns the entitlement of a transferred employee to receive temporary quarters subsistence expense allowance (TQSE) while on annual leave during the period that he occupied temporary quarters. In the circumstances of the case, we conclude that the employee may be reimbursed.

Background

Mr. Donald J. Douin, an employee of the VA, was transferred from Washington, D.C. to Togus, Maine. He was authorized temporary quarters for 60 days, plus an additional 60 days from February 2 to May 31, 1988. During the period April 13–18, 1988, Mr. Douin returned to his old duty station on personal leave to close on the sale of his residence.

Because of his extended period of residing in temporary quarters in Togus, Maine, he rented quarters there on a monthly basis. Mr. Douin claimed reimbursement for lodging for the full 30 days during April, but meals and miscellaneous expenses for only 24 days. The agency denied that portion of the voucher which represented lodging for the 6-day personal leave period.

Opinion

Under the provisions of 5 U.S.C. § 5724a(a)(3), an employee may be reimbursed subsistence expenses for himself and his immediate family while occupying tem-

porary quarters. The implementing regulations contained in the Federal Travel Regulations (FTR),[1] provide that the period of temporary quarters should be reduced or avoided if the employee has had adequate opportunity to complete arrangements for permanent quarters (FTR, para. 2-5.1). Temporary quarters are to be viewed as an expedient to be used only until the employee can move into permanent residence quarters (FTR, para. 2-5.2d).

We have held that an employee need not continually occupy temporary quarters in order to be reimbursed for such expenses. An employee is entitled to reimbursement even while on annual leave if the employee's annual leave and travel away from his new duty station did not cause an unwarranted extension of the period of temporary quarters or a delay in occupying permanent quarters. *Jon C. Wade,* 61 Comp. Gen. 46 (1981), and decisions cited.

The record before us indicates that at the time he requested an extension beyond the first 60 days of temporary quarters, Mr. Douin had already purchased a new residence with a June completion date. Clearly, the period of personal leave taken did not extend the period of temporary quarters or delay his entry into permanent quarters. Therefore, Mr. Douin may be reimbursed for the lodgings portion of temporary quarters for each of the 6 days he was on leave.

B-229235.2, February 27, 1989

Procurement

Payment/Discharge

■ **Payment priority**

■■ **Sureties/Government**

Order of priority for remaining contract funds held by the contracting agencies and Small Business Administration (SBA) is to the Army for any liquidated damages under its contract, the Surety on its performance bonds, the SBA and Internal Revenue Service (IRS) for debts owed by the contractor, and the Surety on its payment bonds.

Procurement

Payment/Discharge

■ **Payment priority**

■■ **Sureties/Government**

In making advance payments to subcontractors, SBA's status is that of a government agency and not a contractor's assignee. Therefore, because the United States' right of set-off extends to debts owed as a result of loans by SBA to 8(a) subcontractors, SBA's claim to remaining contract proceeds is superior to that of a payment bond surety.

[1] Supp. 4, Aug. 23, 1982, *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1987).

Matter of: Priority of Payment under Small Business Administration 8(a) Subcontract

We have been asked to determine the order of priority of payment among several claimants to the remaining proceeds of two Small Business Administration (SBA) subcontracts and other contract funds held by SBA. The requestors are: SBA, St. Paul Insurance Company (Surety), as surety on performance and payment bonds on two SBA subcontracts, and Wallace L. Bodlt, General Contractor, Inc., the Surety's guarantor.

The contracts were entered into between the SBA and the Department of the Army (Contract No. DACA63-86-C-0018), and between the SBA and the Department of the Navy (Contract No. N62467-81-C-0807). SBA subcontracted both contracts under its 8(a) program to Cal-Tom Construction Co., Inc. (Cal-Tom). Among the claimants, SBA claims priority to any remaining funds for the unliquidated balance of advance payments made to Cal-Tom by SBA under both subcontracts; the Surety claims an equitable lien against remaining funds in favor of subcontractors, materialmen and suppliers under both subcontracts; and the Internal Revenue Service (IRS) claims a lien on contract proceeds for unpaid back taxes, interest and penalties. Also, the Army may have a claim for liquidated damages under its contract.

For the reasons given below, we find the order of priority of payment to be, first, the Army for any liquidated damages that may be applied to its contract; second, the Surety for any performance bond payments it may have made; third, SBA and IRS for the unliquidated balance of advance payments and for the tax debt; and last, the Surety on its payment bonds.

Background

In September 1985, SBA and the Naval Facilities Engineering Command, Department of the Navy (Navy), entered into a contract for the construction of a child care center at the Naval Air Station, Chase Field, in Beeville, Texas, in the amount of $489,000. In January 1986, SBA and the Army entered into a contract for the construction of an addition to the NCO Club at Fort Sam Houston in San Antonio, Texas, in the amount of $1,182,059. Under its 8(a) program, SBA subcontracted both contracts to Cal-Tom (Subcontract Nos. SBA 6-86-2-7008, SBA 6-86-2-7023). In early 1986, performance and payment bonds were executed under both subcontracts between Cal-Tom and the Surety, St. Paul Insurance Company, to satisfy the requirements of the Miller Act, as amended, 40 U.S.C. §§ 270a-270d.

In July 1986, SBA modified both subcontracts to permit advance payments by SBA to Cal-Tom in amounts up to $125,000 for the Navy contract and $250,000 for the Army contract. *See* 15 U.S.C. § 637(a)(2) and 41 U.S.C. § 255. Under the terms of the modifications and an agreement among SBA, Cal-Tom, and Texas Bank, advance payments to Cal-Tom were deposited in special accounts at Texas Bank in San Antonio, Texas.

Beginning in April 1987, claims by subcontractors, suppliers, and materialmen were filed with Cal-Tom, the Surety, and its Surety's guarantor. In October 1987, Donald E. Barnhill, the Surety's attorney, sent letters to the Navy, the Army, and SBA which included lists of subcontractors, suppliers, and materialmen who had made demands on the Surety as to payments due from Cal-Tom. The Surety's attorney also gave notice of competing claims to any remaining contract funds under Navy and Army control, and demanded that both the Navy and the Army withhold payment of those funds pending resolution of such claims.

On October 14, 1987, the Surety and its guarantor filed a request that our Office determine the priority of payment under both subcontracts. Shortly after this request was filed, we asked the Navy and the Army to withhold any remaining contract funds pending our decision. According to SBA, the Navy presently holds $49,965.45, and the Army holds $140,107.00.

By letter of November 24, 1987, SBA requested that Texas Bank close the special accounts and forward to SBA any funds remaining in the accounts. Based on this request, SBA received a cashier's check in the amount of $2,800 from the Navy account, and $63,709.15 from the Army account. SBA is holding both checks pending our decision.[1]

With respect to the Navy contract, by letters of December 14, 1987 and May 5, 1988, SBA made demands on Cal-Tom for payment of $45,000, the amount of unliquidated advance payments, *i.e.,* the amount of outstanding advance payments not recovered by repayment from Cal-Tom or by deductions from payments from the Navy. According to SBA, interest began to accrue on the unpaid balance as of May 12, 1987, the date on which SBA found Cal-Tom to be in default of its repayment obligation under the modification to the Navy subcontract. Beginning on February 18, 1988, the Surety began making payments to subcontractors, suppliers and materialmen under its payment bond obligation. As of March 25, 1988, the Surety contended that it had paid out $47,564.67 under the payment bond. As of August 30, 1988, the Navy subcontract has been completed and accepted. As noted above, the final payment of $49,965.45 remains outstanding and currently is in possession of the Navy. With respect to the Army contract, SBA made demand on Cal-Tom for payment of $170,000, the amount of unliquidated advance payments, by letters of December 14, 1987 and April 22, 1988. According to SBA, interest began to accrue on the unpaid balance as of June 15, 1987. Beginning on March 2, 1988, the Surety began making payments to subcontractors, suppliers and materialmen under its payment bond obligation. As of March 25, 1988, the Surety contended that it had paid out $45,625.67 under the payment bond. According to the Surety's attorney, on October 11, 1988, the Army subcontract was completed and accepted.

On May 16, 1988, the Surety's attorney filed findings of fact and legal arguments with our Office in furtherance of his request that we determine the prior-

[1] SBA is also holding a check in the amount of $59,000 which Cal-Tom delivered to SBA in December 1987, for partial payment of the unliquidated advances under the Army contract.

ity of payment under these subcontracts. The facts outlined above are consistent with the facts submitted by both the Surety and SBA. On October 19 and 25, 1988, the Surety's attorney filed additional legal arguments on the questions before this Office.

On October 7, 1988, SBA submitted its factual statements and legal arguments. In its filing, SBA notes that IRS also has a claim on contract proceeds under both the Army and Navy contract, and that it filed a lien against Cal-Tom in 1987. According to SBA, IRS filed a request with SBA on February 23, 1988, to offset the Army subcontract to recover $7,680.67 in unpaid back taxes, interest and penalties through March 31, 1988.

The Army and Navy also filed statements with our Office. In its letter of December 8, 1987, the Army stated that, at that time, it had assessed $65,550 in liquidated damages against Cal-Tom for late completion of the contract. The Navy has made no claim to contract proceeds.

Legal Discussion

Standing of Surety under Payment Bond

As a preliminary matter we will address the issue raised by the SBA concerning the Surety's standing to assert its claim. SBA argues that the Surety lacked standing when the Surety initially filed its request with our Office on October 14, 1987. At that time, the Surety had not yet paid any of the claims filed by Cal-Tom's subcontractors, suppliers, or materialmen under either the Army or Navy subcontracts. SBA contends that the Surety still does not have standing because, although it began to pay claims on the Army subcontract on February 18, 1988, and on the Navy subcontract on March 2, 1988, it has yet to pay all outstanding claims. SBA maintains that

> the Surety will not have standing until the Surety, under its payment bonds on both the Army and Navy subcontracts, undertakes to pay all the outstanding claims owed by Cal-Tom, the Surety's principal under both payment bonds.

To support its argument, SBA cites *American Surety Co. v. Westinghouse Elec. Mfg. Co.,* 296 U.S. 133, 137 (1935), *United States Fidelity & Guaranty Co. v. United States,* 475 F.2d 1377, 1381 (Ct. Cl. 1973), and 64 Comp. Gen. 763, 766 (1985). We disagree with SBA's reading of these decisions. In *American Surety,* the controversy was between the materialmen and the surety, rather than the surety and a government agency or a contractor's assignee. Moreover, the court merely held that the materialmen's claims took priority where the surety was liable for only part of the debt of the principal. *American Surety* at 137. In *United States Fidelity,* the court held that the surety must only show that it had fully paid any existing claims, and not all potential claims, as SBA apparently argues, of the laborers and materialmen arising out of the contract. Although the facts presented by SBA and the Surety on the amount of the claims paid by the Surety in this case are not entirely clear, we accept the Surety's

contention that as of October 19, 1988, it had paid all the claims it has been called upon to pay. Therefore, and following the reasoning in 64 Comp. Gen. 763, 766, we find that at this time, the Surety has standing to assert all the rights of the creditors who have been paid in order to enforce the Surety's right to be reimbursed. *See Pearlman v. Reliance Ins. Co.,* 371 U.S. 132, 136-37 (1962).

Priority of Payment

1. Army

Notwithstanding the extensive arguments presented by both SBA and the Surety, we think that the priority of payment rules are well established as they apply to this case. The government is first entitled to recover any liquidated damages under the contracts. 65 Comp. Gen. 29 (1985); B-192237, Jan. 15, 1979. In its letter of December 8, 1987, the Army claimed that $65,550 was being held as liquidated damages. However, in an affidavit of an SBA official sent to our Office on October 18, 1988, the official stated that the Army had agreed to forego the assessed liquidated damages if the contract could be completed by a certain date. Whatever the status of this agreement is at present, it is our understanding that the Army is still asserting $60,030.00 in liquidated damages under the contract. If the Army retains a claim for liquidated damages, it has first priority to any remaining contract proceeds under the Army contract.

2. Performance Surety

If the performance bond surety completed either subcontract in this case, the performance bond surety would have next priority with respect to performance bond payments. When a surety completes performance of a contract, the surety is not only a subrogee of the contractor, but also a subrogee of the government and entitled to any rights the government has to remaining funds. *Pearlman v. Reliance Ins. Co.* 371 U.S. 132, 139 (1962); *Trinity Universal Ins. Co. v. United States,* 382 F.2d 317, 320 (5th Cir. 1967), *cert. den.* 390 U.S. 906 (1968). Thus, a surety completing a defaulted contract under a performance bond has a right to reimbursement from the unexpended contract balance for the expenses it incurs, free from set-off by the government of the contractor's debts to the government, less any liquidated damages to which the government is entitled under the contract. 65 Comp. Gen. 29, 31 (1985); 62 Comp. Gen. 498, 500-501 (1983). The performance bond surety's priority over the government

> avoids the anomalous result whereby the performance bond surety, if set-off were permitted, would frequently be worse off for having undertaken to complete performance.

Security Ins. Co. of Hartford v. United States, 428 F.2d 838, 844 (Ct. Cl. 1970).

In its October 14, 1987 request, and its May 16, 1988, submission of facts and legal arguments, the Surety claimed priority over SBA based on its status as a payment bond surety. The Surety further stated that no payment was due on a performance bond. In its more recent submissions, made on October 19 and 25, 1988, however, the Surety apparently argues that it has made payments under its performance bond. Based on the facts presented by SBA and the Surety, we cannot determine to what extent the Surety actually made payments under its

performance bonds. In light of the above decisions, however, the Surety would be entitled to be reimbursed for the amount of any payments growing out of its performance bonds after any liquidated damages under the contracts have been paid.

3. SBA

The principal dispute between SBA and the Surety concerns whether SBA has priority over a payment bond surety. We think this issue is well settled. In *Robert L. Singleton; Capital City Construction, Inc., et al.,* B-189183, Jan. 12, 1979, 79-1 CPD ¶ 17, SBA also was owed a debt by the contractor as a result of advance payments made under the advance payment statute, 41 U.S.C. § 255. We there held, apparently in the absence of a "no set-off" clause in the contract, that SBA had priority over a payment bond surety based on its right of set-off as a government agency.[2] In support of our decision, we relied on *United States v. Munsey Trust Co.,* 332 U.S. 234, 239-44 (1947), which held that the government's right of set-off is superior to that of a payment bond surety who had paid the claims of laborers and materialmen.

In *Singleton* we held that in making advance payments to subcontractors, SBA's status is that of a government agency. Accordingly, we refused to view SBA in a functional role as a contractor's assignee. We find no reason to conclude otherwise in this case. Since neither contract or subcontract had a "no set-off" clause, SBA's claims through set-off are superior to those of the payment bond surety in this case. The SBA has the right of set-off to the extent of the outstanding unliquidated advance payments under both subcontracts.

4. IRS

In 64 Comp. Gen. 763 (1985), we held that the government's right to set-off IRS' tax claims is superior to the claims of a payment bond surety. We there concluded that, absent a "no set-off" clause in a contract, the government may satisfy by set-off any tax claim it has against a contractor, notwithstanding that all or part of the tax claim does not pertain to the contract under which the parties are contesting payment. *See* 63 Comp. Gen. 534 (1984). In *United States Fidelity & Guaranty Co. v. United States,* 475 F.2d 1377, 1383 (1973), the Court of Claims also upheld the priority of the government's right to set-off a tax debt over a payment bond surety.

Therefore, we conclude that the tax claims of IRS are superior to those of the payment bond surety, and that IRS has the right to set-off the amount of its tax liens under both subcontracts. We agree with SBA that we do not need to decide the issue of which claim, as between the two government claims of the IRS and SBA, takes priority since sufficient funds appear to exist to satisfy the claims of both IRS and SBA.

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[2] This right has been grounded in statute since the Debt Collection Act of 1982, 31 U.S.C. § 3716 (1982), and no longer depends upon the common law right in the case of persons covered by the Act.

5. Payment Surety

Finally, after the above claims have been paid, the Surety has the right to be reimbursed for any payments made under its payment bond obligations.

Surety's Contentions

The foregoing notwithstanding, the Surety maintains that the rights of a payment bond surety are superior to those of a contractor's assignee, and that SBA is merely Cal-Tom's assignee under the facts presented here. The Surety argues that SBA should not be treated as a government agency because, in this case, it performed a function normally performed by the private sector.[3] We think our holding in *Singleton* forecloses this argument. On facts very similar to those presented here, we concluded that in making advance payments to subcontractors, SBA's role is that of a government agency, not a contractor's assignee. We continue to adhere to this view.

The Surety also argues that SBA wrongfully diverted contract proceeds in the special bank accounts when, on November 24, 1987, SBA requested that Texas Bank close the accounts and forward any remaining funds to SBA. The agreements establishing the accounts provided that two out of four named SBA officials must authorize the withdrawal of any account funds. The Surety argues that, in violation of the agreements, only one of the two officials that requested the bank to release account funds was so authorized. Citing *Coconut Grove Exchange Bank v. New Amsterdam Casualty Co.,* 149 F.2d 73 (5th Cir. 1945), the Surety contends that

> where a Surety can show a wrongful diversion of funds, it has an equitable right in the money wrongfully repaid to the Contractor's assignee.

To counter the Surety's argument, SBA maintains that its decision to withdraw account funds was based on its belief in November 1987 that

> the contract proceeds would be more secure if they were no longer held in the two Special Accounts, where Cal-Tom might obtain access to the funds.

In addition, SBA argues that SBA was within its rights to withdraw account funds because the agreements specifically provided that SBA was the "owner" of any payments deposited into the accounts. Moreover, SBA maintains that the Surety has not alleged any harm, nor has the Surety been harmed, by SBA's custody of the funds.

We think that the court's decision in *Coconut Grove* supports SBA's position. Although the court dealt in that case with funds supposedly diverted to an assignee bank rather than a government agency, the court held that there was no superior equity in a surety unless the surety alleged and proved an actual diversion of money and an injury from such diversion. We agree with SBA that the

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[3] In addition, the Surety argues that SBA did not comply with the Assignment of Claims Act, 31 U.S.C. § 3727, 41 U.S.C. § 15 and therefore, did not even achieve the status as the contractor's assignee. Because we do not view SBA as the contractor's assignee, we see no need to address the Surety's contention that the Assignment of Claims Act controls the order of priority in this case.

account funds have not been diverted, that is, applied to liquidate any unpaid advance payments. Rather, SBA is merely the custodian of such funds, ready to remit the funds based on our decision in this case. Since the Surety has not proven any diversion of such funds or injury resulting from SBA's holding of the funds, we reject the Surety's claimed equitable right to such funds.

Finally, the Surety contends that it has the right under the Equal Access to Justice Act, 5 U.S.C. § 504, to be reimbursed for attorney fees and interest

> based on the conduct of the SBA in removing joint funds to the ultimate detriment of the laborers, materialmen and suppliers on the two contracts.

The Equal Access to Justice Act provides for the award of fees and expenses to the prevailing party when an agency conducts an adversary adjudication. 5 U.S.C. § 504(a)(1). Since our Office has not conducted an "adversary adjudication" within the meaning of the Act in this matter, we have no basis upon which to make such an award even if we found merit in the Surety's contentions. *See* 5 U.S.C. §§ 504(a)(1), (b)(1)(C) and 5 U.S.C. § 554 (1982).

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Specific purpose restrictions
■■■ Entertainment/recreation

A federal agency may not use operating appropriations to purchase or pay contractors for gifts, meals, or receptions for foreign and domestic participants in U.S. government-sponsored cooperative activities under international agreement. Official reception and representation funds are available for official entertainment but may not be used for entertainment in connection with an unauthorized activity.

226

■ Purpose availability
■■ Health services

Under 5 U.S.C. § 7901, federal agencies have authority to establish smoking cessation programs for their employees and to use appropriated funds to pay the costs incurred by employees participating in these programs. However, before such programs can be implemented, the Office of Personnel Management would have to amend the Federal Personnel Manual to add smoking cessation as a prevention activity that agencies can include as part of the health services program they provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

222

Budget Process
■ Funding
■■ Contracts
■■■ Gifts/donations

Letters to Representatives Fascell, Garcia and Morella conclude that the Christopher Columbus Quincentenary Jubilee Commission may invest donated funds in non-Treasury, interest-bearing accounts and is not required to comply with the Federal Property and Administrative Services Act or the Federal Acquisition Regulation for contracts financed with donated funds.

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Claims Against Government
■ Interest

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error because earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under the Back Pay Act, 5 U.S.C. § 5596.

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Civilian Personnel

Compensation
■ Fringe benefits
■■ Health services

Under 5 U.S.C. § 7901, federal agencies have authority to establish smoking cessation programs for their employees and to use appropriated funds to pay the costs incurred by employees participating in these programs. However, before such programs can be implemented, the Office of Personnel Management would have to amend the Federal Personnel Manual to add smoking cessation as a prevention activity that agencies can include as part of the health services program they provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

222

■ Overtime
■■ Eligibility
■■■ Travel time

When an employee of the National Park Service is released from temporary duty assignment to return to his home park as soon as possible and be available for fire fighting duty or for backup duty resulting from forest fire emergency, the condition of immediate official necessity occasioned by an administratively uncontrollable event is properly met under 5 U.S.C. § 5542(b)(2)(B)(iv). His claim for overtime pay for traveltime on an off-duty day is allowed.

229

■ Retroactive compensation
■■ Interest

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error because earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under the Back Pay Act, 5 U.S.C. § 5596.

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Relocation
■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

Since no prohibition is found in the authorizing statute or its legislative history, the Federal Travel Regulations may be revised to authorize the transportation of an employee's privately owned vehicle (POV) from overseas at government expense, even though no POV was transported overseas initially, provided the employee was assigned or transferred to a post of duty overseas for other than temporary duty, a determination was made that use of a POV at the overseas station was in the government's interest, and the employee actually used the POV at the overseas station.

258

■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

The Federal Travel Regulations may not be revised to authorize transportation of POVs of employees recruited in Hawaii and Puerto Rico to their first permanent duty station in the continental United States. The statute authorizing transportation of POVs to, from and between posts of duty outside the continental United States provides such authority only where the POV is to be used at a duty station outside the continental United States.

258

Leaves Of Absence
■ Annual leave
■■ Eligibility
■■■ Temporary quarters
■■■■ Actual subsistence expenses

■ Temporary quarters
■■ Actual subsistence expenses
■■■ Eligibility
■■■■ Annual leave

A transferred employee, who occupied temporary quarters at his new duty station, took 6 days personal leave to return to his old duty station for the closing on the sale of his old residence. His claim for the cost of the 6 days as part of his temporary quarters lodging expense is allowed since his taking of leave did not cause an unwarranted extension of the temporary quarters period.

268

Travel
■ Handicapped personnel
■■ Baggage
■■■ Handling costs

Under the Rehabilitation Act of 1973 an employee confined to a wheelchair may be reimbursed baggage handling fees he incurred at airports on temporary duty travel, but only to the extent that these fees were incurred as the result of his disability and were higher than those that would be incurred by a nondisabled person.

242

Military Personnel

Pay

■ Retired personnel

■■ Post-employment restrictions

A retired Regular Navy officer who was employed by a Department of Defense contractor did not violate 37 U.S.C. § 801(b) and implementing regulations, which prohibit a retired Regular officer from negotiating changes in specifications of a contract with the Department of Defense, when that officer worked with non-contracting Defense personnel as a technical expert for the purpose of coordinating the correction of the malfunctioning of an item that had previously been procured and delivered. This is so even though the technical solution proposed by the officer ultimately led to a modification of the contract.

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Miscellaneous Topics

Federal Administrative/Legislative Matters

■ Administrative regulations

■■ Gifts/donations

■■■ Investments

Letters to Representatives Fascell, Garcia and Morella conclude that the Christopher Columbus Quincentenary Jubilee Commission may invest donated funds in non-Treasury, interest-bearing accounts and is not required to comply with the Federal Property and Administrative Services Act or the Federal Acquisition Regulation for contracts financed with donated funds.

237

Procurement

Bid Protests
■ GAO procedures
■ ■ Interested parties

Where protester seeks cancellation and resolicitation of a procurement based on failure to receive a material amendment to the invitation for bids (IFB), protester is an interested party to challenge award under the IFB despite the fact that it submitted a late bid since, if the protest is sustained, protester will have an opportunity to compete under the new IFB.

213

Competitive Negotiation
■ Contract awards
■ ■ Administrative discretion
■ ■ ■ Cost/technical tradeoffs
■ ■ ■ ■ Technical superiority

Contracting agency acted reasonably in selecting for award an offeror proposing a superior document handling approach over an offeror proposing a less expensive system where the solicitation provided technical factors would be worth 70 percent in the evaluation.

249

■ Discussion reopening
■ ■ Propriety

Where offeror responds to notice of proposal deficiency by taking explicit exception to mandatory requirement with alternate approach in its best and final offer, the agency need not again raise the deficiency and request a second round of best and final offers to allow offeror another opportunity to respond.

265

■ Offers
■ ■ Evaluation
■ ■ ■ Technical acceptability

Mandatory requirement that computed tomography scanner possess an operator console capable of displaying images is not met by proposed scanner which can only meet requirement when operated in conjunction with equipment already possessed by the government, and proposal was therefore properly deemed technically unacceptable.

265

Contract Management
■ Contract administration
■■ Convenience termination
■■■ Administrative determination
■■■■ GAO review

Where contracting agency determined that low bidder had erroneously been rejected as nonresponsible based on inaccurate information, and that award thus should not have been made to second low bidder, agency's subsequent correction of situation by terminating contract for convenience of the government and awarding contract to low bidder is unobjectionable; low bidder had no reason to believe, and was not required to assume, that contracting agency would not rely on correct responsibility information, and thus cannot be faulted for agency's initial erroneous nonresponsibility determination based on inaccurate information.

235

Payment/Discharge
■ Costs
■■ Substitution

A contracting officer is required to pay all allowable costs under a grant or contract up to the maximum amounts authorized and allocated for the contract. If additional amounts become available as a result of some audited cost disallowances, the contracting officer must apply them to any excess costs that are otherwise allowable but which could not previously be paid because they exceeded the cost ceiling.

247

■ Payment priority
■■ Bankrupt contractors
■■■ Tax liability

Order of priority for the payment of remaining contract proceeds held by EPA, the contracting federal agency, is first to the IRS for the tax debts owed by the contractor and the remaining funds to the trustee in bankruptcy.

215

■ Payment priority
■■ Sureties/Government

In making advance payments to subcontractors, SBA's status is that of a government agency and not a contractor's assignee. Therefore, because the United States' right of set-off extends to debts owed as a result of loans by SBA to 8(a) subcontractors, SBA's claim to remaining contract proceeds is superior to that of a payment bond surety.

269

■ Payment priority
■■ Sureties/Government

Order of priority for remaining contract funds held by the contracting agencies and Small Business Administration (SBA) is to the Army for any liquidated damages under its contract, the Surety on its performance bonds, the SBA and Internal Revenue Service (IRS) for debts owed by the contractor, and the Surety on its payment bonds.

269

■ Payment procedures
■■ Bankrupt contractors
■■■ Set-off rights
■■■■ Statutory restrictions

The government's right of set-off is affected by the filing of a bankruptcy petition. Under the bankruptcy law, although a party's right to set-off is preserved, 11 U.S.C. § 553, the automatic stay provision does not allow the exercise of that right unless the creditor obtains relief from the bankruptcy court. 11 U.S.C. § 362(a)(7). Therefore, before the government can exercise its right of set-off against the remaining contract proceeds of a bankrupt contractor, it must apply to the bankruptcy court to have the automatic stay lifted.

216

■ Payment procedures
■■ Contracts
■■■ Assignment

Since the assignee of amounts retained by contracting agency did not render any financial assistance to specifically facilitate the performance of the government contract, the assignment is invalid against the government. Accordingly, the assignee is not entitled to any of the remaining contract proceeds held by a contracting federal agency.

215

Sealed Bidding
■ Bids
■■ Responsiveness
■■■ Determination criteria

Rejection of bid that was inordinately low based on bidder's mistaken interpretation of specifications was proper despite bidder's assertion that no error was made, where bid was substantially below the government estimate and agency properly determined that the bidder's proposed method of performance did not conform to the solicitation specifications.

244

■ Invitations for bids
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

Where full and open competition and a reasonable price are obtained and the record does not show a deliberate attempt by the contracting agency to exclude the offeror from the competition, an offeror's nonreceipt of a solicitation amendment establishing a new bid opening date does not require cancellation and resolicitation of the procurement.

213

■ Low bids
■■ Error correction
■■■ Price adjustments
■■■■ Propriety

Low bid was properly corrected to include amount omitted due to an extension error in calculating home office overhead where clear and convincing evidence established both the existence of the mistake and the amount the bidder actually intended to include in its bid calculations for the overhead, and the bid will remain low by approximately 12.6 percent.

232

Special Procurement Methods/Categories
■ Architect/engineering services
■■ Contract awards
■■■ Administrative discretion

The Architect of the Capitol acted reasonably in selecting the most highly qualified firm for negotiations leading to award, at a fair and reasonable price, of a contract for the conservation of murals at the Library of Congress; the agency was not required to base its ranking of interested firms on price, and acted properly in evaluating qualifications based on responses to qualifications questionnaires sent the firms and recommendations from listed references.

261

Specifications
■ Ambiguity allegation
■■ Specification interpretation

Specification language requiring that cables be concealed in walls "where practicable" and that conduits be similarly concealed "wherever possible" clearly indicates that agency desired concealment, with reasonable exceptions; protester's interpretation that contractor had discretion to decide that none of the cable or conduit would be concealed is unreasonable since it gives no effect to agency's clear intent.

244

■ Minimum needs standards
■■ Competitive restrictions
■■■ Performance specifications
■■■■ Justification

Contracting agency may state its minimum needs in terms of performance, rather than design, specifications requiring offerors to use their own inventiveness or ingenuity in devising approaches that will meet the government's requirements; the agency need not specify in the solicitation the manner in which offerors are to fulfill the performance requirements, or advise a technically acceptable offeror during discussions that another approach is superior.

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