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[B-150217]

Travel Expenses—Actual Expenses—Predetermined Rates in High Cost Areas

Public Law 94–22 provides express authority to reimburse employees for actual subsistence expenses for travel to high cost areas designated in travel regulations. Accordingly, agencies which believe that other localities should be so designated, should request General Services Administration (GSA) to add those localities to the listing of high cost areas in the Federal Travel Regulations. 42 Comp. Gen. 440, distinguished.

Travel Expenses—Actual Expenses—Reimbursement Basis—Criteria

General Accounting Office would not object to appropriate changes that GSA might wish to make in criteria for determining when "unusual circumstances" exist so as to justify actual expense reimbursement to travelers. Also, GSA is not precluded by law or legislative history from modifying the Federal Travel Regulations by citing additional situations involving "unusual circumstances."

In the matter of reimbursement of actual subsistence expenses based on unusual circumstances, January 2, 1976:

This decision involves a request from the Deputy Assistant Secretary of the Interior dated March 7, 1975, that we review our decision in 42 Comp. Gen. 440 (1963) concerning the propriety of authorizing reimbursement of subsistence expenses on an actual expense basis.

In 42 Comp. Gen. 440, *supra*, we held that an Air Force regulation authorizing reimbursement of employees on an actual subsistence expense basis for temporary duty assignments in designated high cost localities was not proper under the second proviso of section 3 of the Travel Expense Act of 1949, now codified as 5 U.S. Code § 5702(c) (1970). The proviso authorized an employee to be reimbursed for the actual and necessary expenses of a trip if the maximum per diem allowance would be much less than the actual expenses due to the unusual circumstances of the travel assignment. In reaching our determination, we stated on page 442 of our decision the following:

> * * * We do not believe it [5 U.S.C. § 5702(c) (1970)] was intended to apply to normal, routine travel in a high expense area unless some unusual circumstance of the particular travel assignment is involved. Any cost resulting solely from inflated prices would be common to all travelers in the area; and the circumstance becomes usual rather than unusual. If normal travel within specified areas could be excepted from the commuted per diem allowance on the basis of a general cost finding for the area, then the statutory limitation on the allowance can be nullified, whenever costs rise, without further legislative action. We do not believe the law was intended to permit that effect.

In requesting reconsideration of 42 Comp. Gen. 440, *supra*, the Department of the Interior has requested us to consider certain statements contained in the legislative history of Public Law 91–114, approved November 10, 1969, 83 Stat. 190, which increased the maximum amounts allowable as per diem and reimbursement for actual subsistence expenses. Specifically, the Department refers to statements on page 7 of Senate Report No. 91–450, October 3, 1969, in which the Senate Committee on Government Operations stated that "increased use of authority to pay reimbursement for actual expenses in proper cases would result in the correction of existing inequities" and urged agencies to make additional use of this method of reimbursement for actual travel expenses, subject to the exercise of prudence and good judgment. The Department of the Interior contends that our interpretation of 5 U.S.C. § 5702(c) (1970) substantially precludes reimbursement on an actual subsistence expense basis, and that it is unable to find any situation which would be considered to involve "unusual circumstances" under our interpretation of that phrase.

Subsequent to the date of the Department's request, the Congress passed and the President approved legislation which substantially corrects the problems referred to by the Department of the Interior. On May 19, 1975, there was enacted the Travel Expense Amendments Act of 1975, Public Law 94–22, 89 Stat. 84 (5 U.S.C. 5701 note). The Act amended 5 U.S.C. § 5702(c) to provide that an employee may be reimbursed on an actual subsistence expense basis for travel to high rate geographical areas designated as such in regulations prescribed by the Administrator of General Services. Also, the Act continued the provision enabling the authorization of the reimbursement of actual expenses when it is determined that the per diem otherwise allowable is inadequate due to the unusual circumstances of the travel assignment.

We believe that the Act and the regulations issued thereunder cover the problem of travel to high cost areas and supersede 42 Comp. Gen. 440 in that regard.

As to travel involving "unusual circumstances," the 1975 Amendments enacted as Public Law 94–22 continued the prior authority to pay actual expenses. 5 U.S.C. § 5702(c), as amended, provides that, by regulations, the General Services Administration may prescribe the conditions for reimbursing actual expenses when the per diem allowances are inadequate due to unusual circumstances of the travel assignment; it does not limit the payment of actual subsistence to the examples mentioned in the legislative history. The General Services Administration has implemented the 1975 Amendments by issuing Temporary Regulation A–11, Federal Property Management Regulations (FPMR 101–7), on May 19, 1975. Paragraph 10 of Temporary Regulation A–11 amends paragraphs 1–8.1 through 1–8.3 of the Federal Travel Regulations (FPMR 101–7) (May 1973), concerning travel situations involving unusual circumstances. Paragraph 10 provides for authorization or approval of actual expenses by agency heads, authorizes reimbursement of daily maximum rates not to exceed the statutory maximum of $50 a day, and contains criteria for determining when unusual circumstances exist together with several illustrative examples. However, amended FTR para. 1–8.1c(2) states that notwithstanding the outlined criteria, actual expenses shall not be authorized or approved for unusual circumstances solely on the basis of inflated lodging or meal costs since inflated costs are common to all travelers, citing 42 Comp. Gen. 440. In this connection nothing in the law or its legislative history would preclude the General Services Administration from appropriately modifying the travel regulations by changing the criteria for or citing additional examples of unusual circumstances, either on its own initiative or at the request of an agency.

Temporary Regulation A–11 was amended in June 1975 to permit agencies to authorize higher maximums than those specified in the Federal Travel Regulations for high rate geographical areas when travel to such areas also involve unusual circumstances.

We have been advised that there are localities other than those now designated as high rate geographical areas, such as Reston, Virginia, and Gaithersburg, Maryland, where lodging and subsistence expenses exceed the per diem maximum. Under current law agencies which believe that their employees are not properly reimbursed for travel to such localities by per diem payments should request the General Services Administration to designate such areas as high rate geographical areas.

[B–183346]

Transportation—Motor Carrier Shipments—Payment—Set-Off

Disallowance of carrier's amended claim for refund of an amount administratively deducted from its account due to damage to floodlight units is sustained where carrier is liable for damage without proof of negligence unless damage is affirmatively shown to be the result of one of the exceptions to its liability as a common carrier, *Federated Department Stores* v. *Brinke*, 450 F. 2d 1223 (5th Cir., 1971), and cases cited. Evidence on carrier's freight bill indicates extent of damage and allegations of faulty packaging without evidence that packaging was the sole cause of damage will not rebut the presumption of negligence by the carrier.

In the matter of the Brown Transport Corporation, January 2, 1976:

Brown Transport Corp. (Brown), by letter dated August 5, 1975, protests the action of our former Transportation and Claims Division in disallowing its amended claim for $519.11. The total amount of the claim, $521.91, was deducted from monies otherwise due Brown because of damage sustained to two floodlight units which moved from Fort Campbell, Kentucky, to Robbins Air Force Base, Georgia, on Government bill of lading No. F–4756064, dated April 20, 1972.

Brown contends that (1) at destination, only damage to part of the floodlights (the tie rods, valued at $2.80) was noted; (2) the carrier does not have to show that it is free from negligence and the burden of proof is on the Government to prove that the carrier was negligent; and (3) the damaged items were not adequately packaged and packed in accordance with tariff provisions.

Brown admits that some damage to the tie rods on the floodlight units was noted at destination. However, Brown contends that the Government is speculating as to whether or not the remainder of the damage was caused by Brown because the additional damage was not noted at the time of delivery. The record indicates otherwise. Brown's Freight Bill No. 1–269413, dated 4/25/72, together with Thurston Motor Lines, Inc. (the origin carrier) Freight Bill No. 19–260678, dated 4/20/72, are stamped as received by the transportation officer on April 27, 1972, the date of delivery and further stamped as to an exception for damage. Printed on the freight bill, together with two signatures, are the words "Reflectors damaged tie rods on both floodlights bent." Brown was notified of the damage on April 27, 1972, the date of delivery, and given the opportunity for a timely inspection within 48 hours of delivery. The record indicates, however, that although Brown was given the opportunity to promptly inspect the damaged floodlight units, an inspection was not performed until May 9, 1972, some 13 days after delivery. Further, the record contains a sworn affidavit by the destination receiving clerk as to the extent of the damage at delivery. Therefore, when coupled with the itemized repair bill, the actual damages of $521.91 is substantiated.

It is well settled in transportation law that under the Carmack Amendment, 49 U.S. Code 20(11) (1970), the initial and delivering carrier is liable to the holder of a bill of lading, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, act of God, the public enemy, public authority or the inherent vice or nature of the commodity. *Federated Department Stores* v. *Brinke*, 450 F. 2d 1223, 1225 (5th Cir. 1971); *Secretary of Agriculture* v. *United States*, 350 U.S. 162 (1956); *Chesapeake & Ohio Ry.* v. *Thompson Mfg. Co.*, 270 U.S. 416 (1926); *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913). And if goods leave the shipper's hands in good condition and arrive at their destination damaged, it is presumed that the carrier was negligent and responsible. *Johnson Motor Transport* v. *United States*, 149 F. Supp. 175, 137 Ct. Cl. 892 (1957). Thus, the very fact that the floodlight units were tendered to the carrier in good order, and damaged upon delivery, as evidenced by the Government bill of lading, presumes that Brown was negligent unless Brown can establish that the damage was caused solely by one of the exceptions previously mentioned.

Brown alleges that the floodlight units were not adequately packaged and in effect alleges that damage was occasioned by an act of the shipper, one of the exceptions to the carrier's liability. However, once the shipper has proved a prima facie case, the burden of proof shifts to the carrier and remains there. *Super Service Motor Freight Co.* v. *United States*, 350 F. 2d 541 (6th Cir., 1965). Thus, mere allegations as to the cause of damage on the part of Brown will not rebut the presumption that the damage was due to the negligence of the carrier. And assuming that the damage was the result of the shipper's defective packaging, the burden of proof is on the carrier to prove that the faulty packaging was the sole cause of the damage. *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134 (1964).

Accordingly, Brown has not met the burden of proof required by law and the disallowance of its amended claim for $519.11 is sustained.

[B-183979]

Officers and Employees—Transfers—Relocation Expenses—Authorization—Not Discretionary

Where transferred employee's travel authorization did not expressly provide for reimbursement of expenses in connection with purchase of a residence at her new duty station, orders may be amended to authorize payment of residence transaction expenses. The provision for payment of expenses in connection with the purchase or sale of a residence contained at subpart 2-6.1 of FPMR 101-7 contemplates uniform allowance of such expenses to transferred employees.

In the matter of residence transaction expenses, January 2, 1976:

This decision involves the issue of whether Ms. Vernice Buell, an employee of the Department of Housing and Urban Development, may be reimbursed expenses incurred in connection with the purchase of a residence at her new duty station even though her original orders did not expressly authorize payment of such relocation expenses. Ms. Buell was transferred from Camden, New Jersey, to Washington, D.C., in May of 1974.

The employee's request for a decision, which was forwarded to this Office by an authorized certifying officer, explains the circumstances giving rise to her claim as follows:

> * * * I was informed at the time the original request for authorization was submitted not to complete item 10B, Real Estate Transactions, Purchase of Residence at New Station, until I was sure that I would be purchasing a home. I was only

cautioned that settlement must take place within one year in order for the costs to be recognized. I therefore completed only items 10A and 10C and left item 10B blank to be completed only if a decision was made to purchase a home within the year.

When a supplementary form HUD-25a was submitted to the Philadelphia Regional Office for approval of item 10B it was returned marked "Disapproved by Headquarters & GAO." The verbal explanation given for the rejection was that an amendatory form cannot be approved.

Authority for payment of expenses incurred in connection with residence transactions is contained in Part 6 of Federal Property Management Regulation (FPMR) 101-7 (May 1973). Subpart 2-6.1 thereof provides for reimbursement of such expenses as follows:

2-6.1 *Conditions and requirements under which allowances are payable.* To the extent allowable under this provision, the Government shall reimburse an employee for expenses required to be paid by him in connection with the sale of one residence at his old official station, for purchase (including construction) of one dwelling at his new official station, or for the settlement of an unexpired lease involving his residence or a lot on which a mobile home used as his residence was located at the old official station;

FPMR 101-7 provides for administrative discretion in authorizing reimbursement of certain expenses as, for example, in the case of house-hunting trips and subsistence expenses while occupying temporary quarters. *See* FPMR 101-7, subparts 2-4.1 and 2-5.1. Other provisions of the FPMR contemplate that certain allowances will be allowed uniformly to transferred employees. The above-quoted authority for reimbursement of expenses incurred in connection with residence transactions is in the latter category as to which agency discretion to deny reimbursement is limited.

In B-161583, June 15, 1967, we reviewed an agency-wide policy determination not to reimburse real estate transaction or miscellaneous expenses except in the case of transfers to positions for which a manpower shortage exists and unless there was competition for the services of the individual concerned from private industry. We there stated that the regulations providing for reimbursement of residence transaction and miscellaneous expenses were mandatory and hence that the agency's attempt to deny approval of those expenses was ineffective. We similarly upheld reimbursement of residence transaction expenses notwithstanding lack of prior authorization in B-166681, July 9, 1969, and B-168658, January 14, 1970.

In view of the above-cited decisions holding that departments and agencies have no discretion to reduce or change benefits otherwise provided by regulation, Ms. Buell's travel authorization may be amended to authorize payment of residence transaction expenses, and she may be reimbursed such expenses insofar as her claim is otherwise proper. In this regard we stress that the subsequent amendment of her travel orders may not be regarded as extending the time limitation set forth at subpart 2-6.1e of FPMR 101-7 within which the residence transaction must take place.

[B-184228]

Contracts—Specifications—Failure to Furnish Something Required—Amended Specification Notice Not Received

Failure to acknowledge material amendment to invitation for bids (IFB) which was received and acknowledged by all other bidders justifies rejection of bid even though bidder claims it was never received, so long as there was no deliberate and conscious effort on part of agency to exclude bidder from competition.

Contracts—Specifications—Failure to Furnish Something Required—Addenda Acknowledgment—Wage Determinations

Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation is made that procedures be instituted to assure that wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment.

In the matter of the Porter Contracting Company, January 2, 1976:

On May 8, 1975, the National Institutes of Health, Bethesda, Maryland (NIH), issued invitation for bids (IFB) No. NIH-75-B(91)-254 for the renovation of laboratory modules. Porter Contracting Company (Porter) has protested the rejection of its low bid for failing to acknowledge amendment No. 1 to the IFB.

Modification No. 2 to Wage Determination MD-75-3003 contained in the IFB was published in the Federal Register on May 9, 1975, and subsequently incorporated in amendment No. 1 dated May 21, 1975. This modification increased the wage rate for bricklayers.

Following the opening of bids on June 4, 1975, a protest was lodged with the contracting officer by the second low bidder, Crystal Construction Company (Crystal), contending that amendment No. 1 was material and that the failure of Porter to acknowledge it rendered Porter's bid nonresponsive.

Prior to ruling on the protest, the contracting officer inquired of the Construction Engineering Services Branch (CESB), NIH, as to whether a bricklayer would be required during the performance of the contract. The CESB advised the contracting officer that while the specifications did not specify any new construction involving masonry, "* * * the work will require some alteration of existing masonry partitions. Repairs could require the use of a bricklayer to assure structural integrity and compliance with contract requirements." Because of the above advice, the contracting officer determined that a bricklayer might be needed during performance and, therefore, the failure of Porter to acknowledge the amendment rendered the bid nonresponsive.

Following the rejection of Porter's bid, on June 12, 1975, the contracting officer awarded the contract to Crystal, the second low bidder.

Porter has protested the rejection of its bid on the grounds that it never received the amendment and that the amendment was not material.

Regarding the failure of Porter to receive the amendment, the contracting officer states that a systematic approach was used to mail the amendment to all bidders and that all other bidders received and acknowledged the amendment. Generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. *Mike Cooke Reforestation*, B–183549, July 2, 1975, 75–2 CPD 8. Based on the record, we have no reason to believe the failure of Porter to receive the amendment was the result of a deliberate attempt on the part of NIH to exclude it from competition.

Addressing now the question of the materiality of the amendment, the wage rates contained in the IFB are required to be included in all construction contracts by the Davis-Bacon Act, 40 U.S. Code § 276a (1970). Therefore, the failure of a bid to contain the current wage rates, in effect at the time of bid opening, required rejection of that bid. *I–K Electric Company, Inc.*, B–184332, July 17, 1975, 75–2 CPD 47. Accordingly, the crucial question is whether bricklayers would be required in the performance of the instant contract and, therefore, entitled to protection under the Davis-Bacon Act.

Upon review of the specifications contained in the IFB, we agree with NIH that there is the possibility that a bricklayer may be required during the course of contract performance. Also, the protester has submitted no evidence to indicate to the contrary. Therefore, amendment No. 1 contained a material wage determination and the failure of Porter to acknowledge it rendered the bid nonresponsive.

Porter argues that this result allows the contracting agency to outline the manner and method of performance to be used by the contractor to insure compliance with the wage determination and that this broad discretion residing in the contracting officer will produce inconsistent and unfair results as to which wage determination should apply. Porter requests our Office to establish more definite guidelines in this area.

We believe it would be most difficult to establish definite guidelines in this area because each contracting officer's determination must be based on the particular specifications contained in an IFB on a case by case basis.

However, in the past, our Office has recognized that a determination such as was made in the instant case following bid opening is not as preferable as one made prior to the inclusion of a wage determination modification in an amendment. In connection with *Prince Construction Company*, B–184192, November 5, 1975, we made the following comments to the Acting Administrator, General Services Administration, in a separate letter of the same date:

> Finally, today's decision, B–184192, is based on an after-the-fact determination that Amendment No. 1 [containing a wage rate modification] was inapplicable. We consider the necessity for employing hindsight regrettable where the matter could have been resolved by a similar determination prior to issuance. Consequently, our decision recommends that Davis-Bacon wage rate determinations be surveyed prior to issuance to ascertain their applicability to the contract work involved.
>
> We expect that, by bringing the above-mentioned matters to your attention, we can prevent the recurrence of such difficulties in future procurements. We would appreciate being advised of actions taken pursuant to our recommendations.

While NIH reached the conclusion here that the wage modification was applicable, we believe it would have been better to consult with the CESB prior to the issuance of amendment No. 1 rather than following the bid opening and subsequent protest by Crystal.

Accordingly, while we find the rejection of Porter's bid to have been proper and the protest is denied, we are recommending, by letter of today to the Secretary of Health, Education, and Welfare, that consideration be given to instituting procedures to assure the review of the applicability of wage determination modifications to a specific procurement prior to the issuance of an amendment incorporating such modification.

[B–184430]

Contracts—Protests—Interested Party Requirement

Protester should be considered as interested party absent objective evidence to contrary. Mere allegation by awardee based upon its experience that protester was not eligible small business under Small Business Administration (SBA) "Grandfather" clause is insufficient, considering significance of issues involved, to show protester as uninterested in protest dealing with sufficiency of notice of applicable size standard.

Bids—Invitation for Bids—Clauses—Grandfather

Question regarding propriety of invitation for bid's (IFB) failure to reference applicable SBA "Grandfather" clause (used in determining small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures.

Contracts—Awards—Small Business Concerns—Size—Change in Standards

Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed.

Contracts—Awards—Small Business Concerns—Size—Standards Used in Invitation Erroneous

Where change to SBA's small business size standard was published in Federal Register prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated General Accounting Office recommendation for termination.

In the matter of Enterprise Roofing Service, January 2, 1976:

Invitation for bids (IFB) No. N62474–74–B–3032 was issued on March 4, 1975, by the Western Division of the Naval Facilities Engineering Command. The IFB sought bids to replace roofing and miscellaneous repairs at the Naval Support Activity, Mare Island Naval Shipyard, Vallejo, California. The procurement was a 100–percent small business set-aside.

Standard Form 20, included in the IFB, indicated that for the purpose of this procurement, any concern submitting a bid is classified as small if its average annual receipts for its preceding 3 fiscal years do not exceed $1 million. In response to the IFB the following bids were received upon opening, April 22, 1975:

	Item 1	Additive Item 1A
Western Roofing Service	$357,913	$45,302
Victor Z. Hanson	359,300	62,000
Merz Brothers	384,459	51,000
Coast Roof Co	390,950	38,750
Sal Cola Construction Co	411,956	59,000
Madsen Construction Co	468,912	56,000

The agency notes that Enterprise did not submit a bid in response to the IFB, but rather was a subcontractor to one of the bidders. By letter of April 23, Enterprise complained to the contracting officer that several of the bids that were received on April 22 were submitted by firms which did not qualify under the conditions stated in the IFB regarding size standard. Enterprise sought an explanation of the regulations and any clarifications that the Navy could give. By letter of May 7, 1975, the Navy indicated the following:

Your understanding, as stated in your letter of 23 April 1975, concerning the $1,000,000 annual receipts limit to qualify as a small business concern was the size standard intended and used in the subject procurement. However, prior to bid opening the Small Business Administration published the so called "Grandfather Clause" in the Federal Register (enclosure (1)), which apparently led the bidders you protested to submit their bids as small business concerns.

Your protest letter of 29 April 1975, was received by this Command on 30 April 1975, which is considered untimely (received after five working days from the date of bid opening) and therefore cannot be considered on the instant procurement. Your protest has been referred to the Small Business Administration for its consideration in any future actions. This Command, however, has lodged a protest of Western Roofing Service with the Small Business Administration, and will advise you of their determination.

Indeed, by letter of April 24, 1975, the Navy had in fact protested the size status of Western Roofing Service since the Command felt that Western could not meet the $1 million size standard and that the only way Western could submit a responsive bid was if the size standard had been changed to $7.5 million or the pending "Grandfather" clause was put into effect prior to bid opening. By letter of May 12, 1975, the Small Business Administration (SBA) responded to the Navy, indicating that the following "Grandfather" clause became effective on April 17, 1975, and was thus applicable to the subject procurement. The instant clause amended part 121 of chapter I of title 13, Code of Federal Regulations, revising section 121.3–8(a)(1) (1975) to read as follows:

§ 121.3–8 Definition of small business for Government procurements.

* * * * * * *

(a) * * *

(1) Small if its average receipts for its preceding 3 fiscal years do not exceed $7.5 million: *Provided, however,* That if the requirements of the contracts are classified in an industry set forth in Schedule H of the part, it is small if it does not exceed the size standard established therein for that industry. (Notwithstanding the above proviso, for a period of 1 year from the effective date of this amendment, any concern which from March 18, 1973, to March 18, 1974, was primarily engaged in performing small business set-aside contracts is small for the purpose of any contract covered by the proviso if its average annual receipts for its preceding 3 fiscal years did not exceed $7.5 million. For the purpose of this rule, a concern was primarily engaged in performing small business set-aside contracts if 50 percent or more of its receipts (including receipts of its affiliates were attributable to such contracts.)

Thus, the SBA went on to indicate that:

Regarding the size status of Western Roofing, because of the fact that the Grandfather Clause was in effect at bid opening, the firm could have had sales of up to $7.5 million (50% set aside) during the applicable period. Because of the fact that the firm certified itself to be a small business as of the time of the bid opening, its certification can be accepted by the contracting officer unless an adequately supported protest is filed. Accordingly, in the absence of such a protest at this time, the firm can be considered to be a small business for purposes of the procurement.

By letter of May 20, 1975, Enterprise was advised that its protest regarding the ability of Western Roofing to qualify as a small business concern was forwarded to SBA for consideration and that the SBA rejected its protest due to lack of specific details. The Navy also advised Enterprise that since the SBA decision on size status was final, an award had been made to Western Roofing. The Navy did not, however, respond to the question raised by Enterprise on May 8 as to "* * * our assumption * * * that the wording used in the bidding documents was definitive [as to the question of the size standard to be used]."

Western Roofing Service, the awardee, has raised several procedural questions with regard to Enterprise's protest. First, it argues that Enterprise is not an interested party in accordance with our bid protest procedures, 4 C.F.R. § 20, *et seq.* (1974), and also 40 Fed. Reg. 17979 (1975). With regard to this issue, we have stated that generally in determining whether a protester satisfies the interested party requirement consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester. *ABC Management Services, Inc.*, 55 Comp. Gen. 397 (1975), 75–2 CPD 245; *Kenneth R. Bland, Consultant*, B–184852, October 17, 1975, 75–2 CPD 242; *Coleman Transfer and Storage, Inc.*, B–182420, October 17, 1975, 75–2 CPD 238. This requirement that a party be interested serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged action may be decided. However, the concept of an interested party should not be equated with the concept of standing to sue as developed by the courts. *ABC Management Services, Inc., supra; Coleman Transfer and Storage, Inc., supra.* Western specifically alleges that while Enterprise stated that it was not eligible to bid on the subject IFB because its yearly average for the preceding 3 fiscal years was in excess of $1 million, thus exceeding the $1 million size standard set forth in the IFB, "* * * Enterprise presents no statement, documented or otherwise, that it considers itself eligible to bid under the exemption of the GF [(Grandfather)] clause."

We believe that a party should be considered as interested in the absence of objective evidence to the contrary. The sole evidence presented by Western to show that Enterprise is not "interested" is the following quote:

> * * * From our own experience participating in and observing Government roofing solicitations over the years, and in subcontracting certain roofing contracts to Enterprise, we can safely aver that Enterprise is not one of those concerns eligible to bid under the exemption of the GF Clause.

We do not believe, considering the significant issues here involved, that the above-noted statement is sufficient for us to declare that Enterprise is other than an interested party. Moreover, contrary to the further assertions of Western, we do not think the mere fact that Enterprise did not participate in the solicitation as a bidder, but rather only as a subcontractor to another bidder, destroys its entitlement to be considered an interested party under our bid protest procedures.

Western also questions the timeliness of Enterprise's protest to our Office on two points. First, it alleges that since Enterprise was on constructive notice of the "Grandfather" clause contained in the Federal Register of April 17, 1975, it was required under our Interim Bid Protest Procedures and Standards, 4 C.F.R., *supra,* to protest the apparent impropriety in the IFB, namely, the use of an erroneous size standard, before bid opening. In this regard, section 20.2(a) of 4 C.F.R., *supra,* indicates that "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Therefore, Western argues that since Enterprise did not file its protest until long after bid opening, the protest is untimely.

Secondly, Western notes that (1) Enterprise did not introduce the issue regarding the omission of the "Grandfather" clause from the IFB until May 8, 1975, although it had previously questioned the size status of a number of the bidders who had participated in this solicitation, and (2) the contracting officer's answer to Enterprise's complaints dated May 20, 1975, merely referenced the fact that Western was found to be small within the governing regulations of the SBA. This letter admittedly did not respond specifically to Enterprise's contention that without an addendum to the IFB regarding the "Grandfather" clause, the effective clause stated in the IFB should govern for purposes of the procurement at hand. Western, however, argues that regardless of the agency's failure to give Enterprise a decision on the merits of this issue, by its letter of May 20, 1975, it gave Western notice of adverse action in that it stated that an award has been made to Western Roofing Service and it was therefore incumbent upon Enterprise to protest to GAO within 5 working days thereafter. 4 C.F.R. § 20.2, *supra.*

We agree with Western that a substantial question has been raised as to the timeliness of this protest. However, in accordance with 4 C.F.R. § 20.2(b) (1974), the Comptroller General for good cause shown or where he determines that a protest raises issues significant to procurement practices or procedures may consider any protest which is not filed timely. *See also* Bid Protest Procedures section 20.2(c), 40 Fed. Reg., *supra.*

As stated in 52 Comp. Gen. 20, 23 (1972), " 'Issues significant to procurement practices or procedures' refers not to the sum of money involved, but to the presence of a principle of widespread interest." In this regard, we are of the view that the issue regarding the applicable size standard to be used in a procurement where there is a conflict between the size standard expressed in the IFB and that which exists in the Federal Register is an issue of such widespread interest. Therefore, irrespective of the possible untimeliness of the Enterprise protest, our Office will consider this issue on the merits.

Western attempts to categorize the instant issue presented to us as a question involving the small business size status of bidders and rightfully quotes the rule that our Office has consistently held that these matters are for consideration by the SBA and that the SBA's determination of the size status of small business may not be reviewed by us absent a *prima facie* showing that the action of the SBA was taken fraudulently or with such willful disregard of the facts as to necessarily imply bad faith. *Zac Smith & Company, Inc.*, B-183843, November 4, 1975, 75-2 CPD 276.

We do not, however, agree with Western's characterization of the instant issue. As noted by Western itself, the protest of Enterprise to GAO for a decision is "a cut above its protest to SBA" regarding the size status of the four low bidders on the instant procurement. We do not question the SBA's determination as to Western's size. Our inquiry in this matter will therefore be restricted to the propriety of the procuring agency's alleged failure to reference the applicable "Grandfather" clause and the effect of any such failure upon competition.

The IFB in question contained the following provisions:

NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (1972 JUL)

* * * * * * *

(b) Definition. A "small business concern" is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is offering on Government contracts, *and can further qualify under the criteria set forth in the regulations of the Small Business Administration (Code of Federal Regulations, Title 13, Section 121.3-8).* * * *

(c) *Small Business Size Standard for this Procurement:* The average annual receipts of the concern and its affiliates for its preceding three fiscal years must not exceed $1,000,000. [Italic supplied.]

The IFB also indicated that the form of the contract to be executed will include clause 1 of Standard Form 19-B, 1969 edition, which as amended read in pertinent part:

* * * (For this purpose, a small business concern is a business concern, including its affiliates, which (a) is independently owned and operated, (b) is not

dominant in the field of operation in which it is bidding on Government contracts, and (c) *had average annual receipts for the preceding 3 fiscal years not exceeding $1,000,000.00. For additional information see governing regulations of the Small Business Administration.*) [Italic supplied.]

The IFB on at least two instances merely states that to be considered as a small business concern the firm must not have average gross receipts exceeding $1 million, although the IFB also indicates that a firm must further qualify under the applicable SBA regulations.

In the usual situation, where the size standard set forth in the IFB is the same as that indicated in the SBA regulations, there is no problem with this procedure. However, where the procuring agency indicates one size standard and the SBA indicates another, there is an immediate question raised as to which of the two seemingly inconsistent size standards should be considered as controlling. In this regard, we believe that the case of *Atkinson Dredging Company*, 53 Comp. Gen. 904 (1974), 74-1 CPD 299, is helpful for it indicates that the Armed Services Procurement Regulation cannot impose a size standard differing from that promulgated by the SBA. As set forth in *Atkinson, supra*, we believe that SBA has an *exclusive* role in this size area as mandated by the Congress. At page 907 of the referenced decision we stated:

* * * In furtherance of this declared national policy [that a fair proportion of purchases and contracts for property and services for the Government be placed with small business], the Congress has countenanced the small business set-aside program as a valid restriction on competition (15 U.S.C. 644) and has delegated conclusive authority to SBA to determine matters of small business size for procurement purposes (15 U.S.C. 637(b)(6)).

In discharge of this responsibility, SBA has promulgated small business size regulations found at part 121, chapter I of title 13 of the Code of Federal Regulations, which have the force and effect of law. See 15 U.S.C. 634(b)(6); *Otis Steel Products Corp.*, 161 Ct. Cl. 694 (1963); 53 Comp. Gen. 434 (1973). * * *

Thus, since it would seem to us that the procuring agencies cannot by regulation impose a size standard differing from that established by the SBA, it would seem equally as impossible for the agency to do so by contract clause, for this function, even if by contract clause, would still amount to a usurpation of SBA's statutory function. Therefore, any situation which could be reasonably construed as being one in which the agency advocates the use of a size standard differing from that applicable under SBA regulation would amount to an encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. We believe that to be the case here since the applicable SBA regulations were changed prior to the opening and the IFB can be reasonably construed as setting forth a size standard differing from that of the SBA.

However, the inquiry then turns to the question of what impact did this seemingly unintentional encroachment on SBA's jurisdiction have upon competition. See *Atkinson Dredging Company, supra.*

Western argues that Enterprise, like all other potential bidders, was on constructive notice of the change in the applicable SBA size standard and thus irrespective of the fact that the Navy indicated a different size standard, competition was not adversely affected. We agree that under the applicable case law all parties are held to be on constructive notice of material contained in the Federal Register. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947); *DeWitt Transfer and Storage Company*, 53 Comp. Gen. 533 (1974), 74–1 CPD 47. However, some degree of constructive notice would seem to apply to the procuring agency, especially so when the information contained in the Federal Register is such that it should have caused some action to be taken with regard to a pending procurement. This question aside, the matter at hand seems to be one of fundamental fairness and from a practical point of view to what extent is the agency obligated to fully apprise bidders of all factors of which it knew or should have known that could have a substantial impact upon competition.

In this regard, we note the decision of *Dyneteria, Inc.*, 55 Comp. Gen. 97 (1975), 75–2 CPD 36, affirmed in *Tombs & Sons, Inc.*, B–178701, November 20, 1975, 75–2 CPD 332. In that case, the IFB and the resulting contract incorporated by reference the applicable provisions of the Service Contract Act (41 U.S. Code § 351 (Supp. II, 1972)). The IFB contained the Department of Labor's (DOL) Service Contract Act Wage Determination. On May 16, 1974, DOL issued revision 3 to this determination which increased the applicable hourly wage rate to be paid by the contractor in accordance with the act. This issuance occurred approximately 2 weeks after bid opening but almost 3 months before award. Our decision concluded that since the new wage rate would have a substantial impact upon the ultimately successful bidder, the IFB should have been canceled and a new IFB issued because competition was not served by assuming that the new wage rate would affect all bids equally.

We believe that the net effect of the agency's unintentional failure to bring its IFB size standard into line with the then newly issued SBA size determination could have had a substantial adverse effect on competition and in this regard we must conclude that the instant procurement was defective for want of an amendment bringing its stated size standard into line with that of the SBA's. However, in light of the fact that the contract in question has been substantially performed, our Office is not in a position to recommend that any corrective action be taken with regard to the instant procurement. Moreover, even if this were not the case, we are not sure that the harm to the competitive system generated by the agency's inadvertence would necessitate our concluding that the contract awarded to Western should have been terminated for the convenience of the Government.

We would suggest, however, that in the future the Navy be more responsive to SBA changes in size standards so long as it attempts to definitively spell out the applicable size standard in its IFB's or, on the other hand, the Navy should perhaps couch its size standard terminology as merely being best the information then available to the procuring activity with reference given to the SBA's regulations with an indication that they may be amended from time to time. In choosing this latter course, we would suggest that the agency also include a provision which would indicate that in the case of a conflict between the standards set out in the IFB and those in the SBA's regulations, the SBA's regulations as of the time of bid opening shall control.

[B-184479]

Internal Revenue Service—Fines—Violation of Wagering Tax—Refunds—Appropriation Chargeable

Refund by Internal Revenue Service (IRS) of fine paid pursuant to conviction for violation of wagering tax statutes, which refund was ordered in connection with subsequent vacation of judgment, should be charged against account 20X0903 (Refunding Internal Revenue Collections) rather than account 20X1807 (Refund of Moneys Erroneously Received and Covered), since initial receipt of fine by IRS was apparently treated as internal revenue collection, and account 20X1807 is available only when refund is not properly chargeable to any other appropriation.

In the matter of the use of account 20X1807, "Refund of Moneys Erroneously Received and Covered," January 2, 1976:

This decision is in response to a request from an Authorized Certifying Officer, Fiscal Management Division, Internal Revenue Service (IRS), Department of the Treasury. The question presented is whether the account 20X1807, "Refund of Moneys Erroneously Received and Covered," may properly be used to make payment in the situation described below.

On December 17, 1964, Mr. Peter Grafner paid a fine of $2,000 to the Clerk, United States District Court, Northern District of Illinois, pursuant to a conviction under 26 U.S. Code § 7203 (1970) for violation of wagering tax provisions of the Internal Revenue Code. The funds were transmitted by the Clerk to the Director of the IRS Chicago District in January, 1965. In 1968, the Supreme Court held that similar wagering tax statutes "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against selfincrimination." *Marchetti* v. *United States*, 390 U.S. 39, 42 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968). These decisions have been applied retroactively. *Pasha* v. *United States*, 484 F. 2d 630 (7th Cir. 1973). Upon Grafner's motion based on *Pasha* v. *United States*, *supra*, the District Court, on January 27, 1975, ordered the prior judgment of conviction vacated and directed the return of the $2,000 paid as a fine. The Clerk of Court has requested payment from IRS. There is thus no doubt as to the propriety of payment, the sole question being the appropriation to be charged.

The disposition of Mr. Grafner's original fine is summarized in a June 9, 1975, memorandum from the Director, IRS General Legal Services Division, to the Chief, Accounting Branch, Fiscal Management Division (IRS):

> The clerk transmitted this fine to the District Director on January 11, 1965 for deposit in the appropriate account. This is established by a certified copy of the transmittal voucher which was attached to the clerk's letter. Presumably, the Internal Revenue Service deposited the money in accordance with applicable procedures. In this regard, we understand that procedures called for such funds to be deposited as miscellaneous collections. Also, it would appear that 26 U.S.C. 7809 treats such funds as internal revenue collections. There is no indication the money was placed in an escrow account or in another separate account designated by statute. Indeed, we know of no reason why in this instance any account would have been used other than above described.

Further in this connection, we have been informally advised by IRS officials that, since the fine was originally paid over 10 years ago, records of its initial disposition have been destroyed.

The provision of law cited in the IRS memorandum, 26 U.S.C. § 7809(a), provides in pertinent part that, with exceptions not relevant here—

> * * * [T]he gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary or his delegate as internal revenue collections, by the officer or employee receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer of the United States, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Secretary or his delegate.

This appears to be the appropriate provision for the disposition of the original fine. *See also* 26 C.F.R. § 301.7406-1 (1974).

The account for "Refund of Moneys Erroneously Received and Covered" was established by section 18 of the Permanent Appropriation Repeal Act, 1934, 48 Stat. 1224, 1231, 31 U.S.C. § 725q (1970), which provides in pertinent part:

> * * * On July 1, 1935, there shall be established on the books of the Government an account to be designated "Refund of Moneys Erroneously Received and Covered", and there is authorized to be appropriated such sums as may be necessary to meet any expenditures of the character now chargeable to the appropriation accounts herein abolished and other collections erroneously received and covered which are not properly chargeable to any other appropriation. * * *

Appropriations necessary to meet expenditures under this account are provided on a permanent indefinite basis in 31 U.S.C. § 725q–1 (1970).

The general rule for the use of the account for "Refund of Moneys Erroneously Received and Covered" was stated in 17 Comp. Gen. 859, 860 (1938) as follows:

> When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable. * * * It is only when collections erroneously covered into the Treasury as miscellaneous receipts are involved and the refund is not properly chargeable to any other appropriation that there is for consideration charging the appropriation "Refund of moneys erroneously received and covered."

See also 19 Comp. Gen. 788 (1940); 29 *id.* 78 (1949). Before the account 20X1807 may be used, these criteria must be met.

Based on the information supplied by IRS, it appears that the amount subject to refund cannot be traced to a specific appropriation account. Also, while the term "miscellaneous receipts" generally refers to moneys covered into the Treasury under 31 U.S.C. § 484 (1970), section 7809 of Title 26, *supra*, appears to serve a somewhat similar purpose with reference to amounts received under the internal revenue laws. In fact, some of the language used in the two sections is virtually identical.

One of the criteria set forth in 17 Comp. Gen. 859, *supra*, is that "the refund is not properly chargeable to any other appropriation." This is fortified by the specific language of the permanent appropriation in 31 U.S.C. § 725q–1. In the United States Treasury Department's "Federal Account Symbols and Titles," on page 135, there is listed the account 20X0903, "Refunding Internal Revenue Collections." This account appears to generally contemplate refunds of amounts initially collected as taxes. Nevertheless, since the amount of the fine in question was apparently treated as an internal revenue collection when it was received (26 U.S.C. § 7809, *supra*), it seems entirely proper to us to treat it similarly for purposes of the refund. Accordingly, it is our view that the subject refund should be charged to account 20X0903, "Refunding Internal Revenue Collections," rather than account 20X1807, "Refund of Moneys Erroneously Received and Covered."

[B-185069]

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—House Deposit Forfeiture

Employee who was in the process of purchasing a new residence incident to a transfer and was prevented from completing the purchase transaction by a second transfer may have the deposit forfeited included as a miscellaneous expense allowance incident to his two transfers and he would be entitled to the maximum miscellaneous expense allowance for each transfer as provided in paragraph 2-3.3b of the FTR not to exceed the actual miscellaneous expense incurred.

In the matter of reimbursement of forfeited deposit on house purchase, January 2, 1976:

This action is in response to a request for an advance decision by an authorized certifying officer of the United States Department of Justice as to the propriety of certifying for payment the reclaim voucher of George T. Quinn for expenses incurred in connection with the purchase of a house incident to his transfer to Tampa, Florida.

The record shows that Mr. Quinn was transferred from Washington, D.C. to Tampa, Florida, on April 7, 1975. On May 8, 1975, he entered into a contract to purchase a house at his new official duty station. Pursuant to the contract he deposited $2,500 as earnest money and the settlement date was to be on or before June 30, 1975, but due to certain legal requirements the settlement date was rescheduled for July 18, 1975. On July 16, 1975, Mr. Quinn received official notification of his transfer from Tampa to Baltimore, Maryland. As a result of this transfer, he elected not to proceed with the settlement on the purchase of the house. He therefore forfeited the $2,500 he had deposited as earnest money.

Mr. Quinn states that his original voucher was returned by the administrative office with a copy of our decision B-162274, dated September 11, 1967, disallowing a claim by an employee for earnest money deposited. Reimbursement of the forfeited deposit in that case was disallowed on the ground that, had the sale of the realty been completed, the employee could not have been reimbursed under Public Law 89-516 (5 U.S. Code 5724a) or the regulations issued pursuant thereto for the earnest money deposited in accordance with the contract of sale.

It is true that in B-162274, *supra,* the claimant was not reimbursed for the deposit that he had forfeited. However, it was not contended there that the forfeiture was a miscellaneous expense, and that theory of reimbursement was not considered. In more recent cases, the miscellaneous expense theory has been considered and adopted. *See* B-170632, September 10, 1970; B-177595, March 2, 1973; and B-180377, August 8, 1974.

Under the miscellaneous expense theory and the applicable regulations, mainly para. 2–3.2 and para. 2–3.3 of the Federal Travel Regulations (FPMR, May 1973), we would not object to the $2,500 deposit forfeited being included as a miscelleneous allowance incident to both of Mr. Quinn's transfers to Tampa and Baltimore. He is, therefore, entitled to the maximum miscellaneous expense allowance for each transfer as provided in para. 2–3.3b not to exceed the actual miscellaneous expenses incurred. Any miscellaneous expense allowance already paid either under para. 2–3.3a or para.2–3.3b for each transfer should be deducted from the maximum allowable.

Action on the reclaim voucher should be taken in accordance with the foregoing.

[B-180010]

Arbitration—Award—Overtime and Time Not Worked—Implementation by Agency—Back Pay Act

Federal Labor Relations Council requests decision on legality of arbitration award of backpay to 54 shipyard employees for overtime and time not worked. The arbitrator found that Shipyard changed basic workweek of employees without complying with consultation requirements of negotiated agreement. However, because, arbitrator did not find that but for failure of shipyard to consult with union, the change in basic workweek would not have occurred, award does not satisfy criteria of Back Pay Act, 5 U.S.C. 5596 and, therefore, it may not be implemented.

In the matter of Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL–CIO—arbitration award of backpay for overtime, January 6, 1976:

This action involves a request for an advance decision from the Federal Labor Relations Council on the legality of payments ordered by a labor relations arbitrator in the matter of *Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO* (Durham, Arbitrator), FLRC No. 74A–64. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the Department of Defense and the Department of the Navy alleging that the award violates applicable laws and regulations.

On July 5, 1972, the U.S.S. *Abraham Lincoln*, a nuclear–powered fleet ballistic submarine attached to the U.S. Pacific Fleet, was withdrawn from active duty and entered Mare Island Naval Shipyard for overhaul and repairs. The Chief of Naval Operations determined that the *Lincoln* could be relieved from fleet operations for a period of 13 months and that it should be returned to service by August 6, 1973. The Shipyard planned and scheduled the overhaul work to be performed and the work was begun. However, it became obvious by early

February 1973 that the repair work on the *Lincoln* was so far behind schedule that the programed completion date could not be met. As a result, the Commander of the Submarine Forces for the Pacific criticized the Shipyard's failure to adhere to the work schedule and demanded that the *Lincoln* be returned to his command as soon after the original completion date as possible. Also in early February, the Naval Ship Systems Command conducted an inspection and audit of the Shipyard and severely castigated its failure to complete repair work on schedule and condemned its excessive use of overtime.

Faced with the problem of speeding up work on the *Lincoln* while restricting the use of overtime, the Shipyard commander ordered subordinate officials to investigate the possibility of initiating a shifted workweek for employees in the propulsion plant testing facility. The purpose of the proposed workweek shift was to achieve a 7 days per week continuous test program. The proposed plan for accomplishing this objective was to schedule the basic workweek of certain employees from Sunday through Thursday and to schedule the basic workweek of other employees from Tuesday through Saturday.

On March 2, 1973, a meeting was held with the president of the Mare Island Navy Yard Metal Trades Council during which shipyard officials discussed the proposal. The president expressed his personal opposition to the proposed change in workweek but promised to confer with representatives of the various unions affiliated with the Metal Trades Council during a meeting scheduled for March 5, 1973. On March 6, 1973, the president informed shipyard officials that the Metal Trades Council was opposed to the plan and suggested alternative solutions to the problem. The Shipyard officials advised the president that they would inform the shipyard commander of the Council's position and that the president would be informed as to the commander's decision.

During the afternoon of March 6, 1973, the Shipyard commander decided to implement the plan to change the basic workweek of certain employees beginning on the following Sunday, and Shipyard officials were instructed to notify the affected employees. The Council's president was not informed of the decision until the following day. Also on March 7, Shipyard supervisors began notifying employees whose basic workweek had been changed. The plan was placed in operation effective Sunday, March 11, 1973.

Four groups of affected employees from various shops at the shipyard, totaling about 54 individuals, presented grievances through the Metal Trades Council protesting the change of their basic workweek. The parties were unable to adjust the grievances under the negotiated grievance procedure and the issues involved were submitted to binding arbitration under the terms of the agreement.

In the arbitration proceeding the union contended that the shipyard violated section 2 of article VI and section 3 of article VIII of the negotiated agreement in changing the basic workweek of the grievants. Section 2, article VI, provides:

Section 2. In formulating or modifying Shipyard instructions and notices concerning policies and programs related to working conditions, the Employer will notify the Council. The Employer will furnish the Council with information as to the content of the instruction being formulated or revised, and will request written comments and suggestions from the Council. At the request of the Council, representatives of the Employer will meet with the representatives of the Council Policy Committee for purposes of oral consultation and to provide the opportunity for an exchange of views.

Section 3, article VIII, provides:

Section 3. When necessary to meet operating needs, the Employer may schedule basic workweeks other than Monday through Friday for employees. When changing the days of a unit employee's basic workweek, the Employer, except as otherwise provided in Section 4 below:

a. Will give notice to the employee at least three (3) calendar days before the first administrative workweek affected by the change,

b. Will make the change for a period of not less than three (3) consecutive weeks, and

c. Will notify the appropriate Council steward and, upon request, provide information as to the reason for the change.

The union argued that the consultation requirements of section 2, article VI, were not satisfied by the shipyard before it implemented the plan and that the change in basic workweek was not "necessary to meet operating needs" under the terms and conditions of section 3 of article VIII.

The Shipyard maintained that section 2 of article VI was inapplicable to the instant dispute inasmuch as it neither formulated nor modified a Shipyard instruction or notice relating to hours of work within the meaning of that section. Also, it contended that the change of the grievants' basic workweek was necessary to meet "operating needs" within the meaning of article VIII and that it complied with the consultative requirements of that article in making the change.

After considering the evidence and arguments presented by the parties during the proceeding, the arbitrator found that the shipyard's "action was not arbitrary or capricious and was necessary to meet operating needs within the meaning of Article VIII, Section 3, of the Agreement." The arbitrator also found, however, that the shipyard had modified one of its Instructions (NAVSHIPMAREINST 5330.2D) governing hours of work, when it changed the basic workweek of the grievants, and in doing so violated the consultative provisions of section 2, article VI. As a remedy for this violation the arbitrator fashioned the following award:

The change in the basic workweek of the aggrieved employees instituted by the Employer was in violation of ARTICLE VI, Section 2, of the Negotiated Agreement. The Employer shall pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force. The days each was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave.

The sole issue presented for consideration by us is whether or not the arbitrator's award of backpay to the aggrieved employees violates applicable law and regulations.

The Department of the Navy has challenged the validity of the award of overtime pay, relying on the rule stated in several of our decisions that employees may not be compensated for overtime work when they do not actually perform work during the overtime period. *See for example* 42 Comp. Gen. 195 (1962); 45 *id.* 710 (1966); and 46 *id.* 217 (1966). Our "no work, no pay" rule set forth in the cited decisions was based on the premise that the statutes authorizing overtime, 5 U.S. Code § 5542(a) and 5 U.S.C. § 5544(a) clearly contemplated the actual performance of overtime duty. The Navy further points to our decision B–175867, June 19, 1972, which held that the improper denial of the opportunity for an aggrieved employee to work overtime in violation of a mandatory provision of a negotiated agreement is not an unjustified or unwarranted personnel action within the purview of the Back Pay Act, 5 U.S.C. § 5596 (1970), and the regulations implementing that statute. Hence, the Navy argues there is no available remedy for employees who are denied the opportunity of performing scheduled overtime work.

Our holding in B–175867, *supra*, was based on our previous decisions holding that the overtime statutes required the actual performance of work during the overtime period. However, upon reexamination we have subsequently changed our view and held that an employee improperly denied overtime work may be awarded backpay. *See* 54 Comp. Gen. 1071 (1975) where we expressly stated that we would no longer follow our decision B–175867, *supra*. *See also* 55 Comp. Gen. 171 (1975).

In our recent cases we have also held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974); 54 *id.* 403 (1974); 54 *id.* 435 (1974); and 54 *id.* 538 (1974). Thus, the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), is the appropraite statutory authority for compensating an employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 (1970), there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless it is also established that, *but for* the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760, 763 (1975). We further stated in that decision the general rule that:

> * * * failure-to-consult actions, in the absence of a requirement that the agency carry out the advice received as a result of the consultation, are not likely to result in the necessary "but for" relationship between the wrongful act and the harm to the individual employee for which the Back Pay Act is the appropriate remedy.

In light of the foregoing, in order to make a valid award of backpay, it is necessary for the arbitrator not only to find that the negotiated agreement has been violated by the agency, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

Here, the arbitrator found that the Shipyard violated the agreement by its failure to consult with the union before initiating a change in the basic workweek of the grievants which caused them to undergo an unjustified and unwarranted personnel action. However, the arbitrator did not find that the agreement imposed a requirement on the Shipyard to carry out the advice it received during the consultation process or that the agency would have been precluded from implementing the workweek changes if it had complied with the consultation provisions of the agreement. Therefore, there is no showing that but for the shipyard's failure to consult with the union the grievants would have received overtime pay for each Saturday and Sunday they worked during the period that the changed basic workweek was in effect.

Accordingly, there is no legal authority for the payments awarded by the arbitrator, and the award may not be implemented.

It should be pointed out that if the arbitrator had made the proper findings to support the award as fashioned, he should also have awarded backpay instead of administrative leave for days off during the grievants' regular basic workweek on which they normally would have worked but for the change in workweek.

We note that, pursuant to section 19(d) of Executive Order 11491, the union had the option of raising the failure to consult issue as either an unfair labor practice under section 19(a)(6) or as a grievance under section 13, but not under both procedures. The union elected to file a grievance under section 19 of the Order which resulted in the arbitration award now being reviewed. Where an award is defective the reviewing authority should, if feasible, resubmit the award to the arbitrator for corrective action. *Enterprise Wheel and Car Corp.* v. *United Steelworkers of America*, 269 F. 2d 327 (4th Cir. 1959), approved in part 363 U.S. 593, 599 (1960), *National Brotherhood Packinghouse and Dairy Workers Local No. 52* v. *Western Iowa Pork Company, Inc.*, 247 F. Supp. 663 (1965), affirmed 366 F. 2d 275 (8th Cir. 1966). Therefore, to provide a remedy for the union, we recommend that the Federal Labor Relations Council consider resubmitting the award to the arbitrator with instructions that he fashion an award similar to the remedies permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975).

[B-183490]

Transportation—Household Effects—Transfers—Successive Changes

Employee was transferred from Denver to Los Angeles. Before most of his household effects were shipped to Los Angeles, he was retransferred to Sacramento, a location farther from Denver. He is entitled to mileage based on the greater distance from the original station to the final station in determining the commuted payment covering the transportation of the household effects. However, total reimbursement for actual successive transfers may not exceed the reimbursement the employee would otherwise have been entitled for each transfer individually. Further, maximum weight which may be transported incident to any one transfer at Government expense is subject to 11,000 pound limitation in 5 U.S.C. 5724. 48 Comp. Gen. 651, modified.

In the matter of excess of household goods, January 8, 1976:

This decision responds to the request dated March 17, 1975, of Elaine K. Shelleman, an authorized certifying officer of the Federal Mediation and Conciliation Service, concerning the voucher of Mr. Joseph H. Baylis for payment of $1,756.53 in connection with the movement of 9,480 pounds of household effects incident to his successive changes of station from Denver, Colorado, to Los Angeles, California, and from Los Angeles to Sacremento, California, pursuant to Authorizations for Travel Nos. 0–74–75, September 26, 1973, and 0–73–95, June 5, 1973.

For both changes of station from Denver to Los Angeles and from Los Angeles to Sacramento, Mr. Baylis was authorized to transport household effects. Mr. Baylis was reimbursed $117.29 for 740 pounds of household goods as a partial shipment from his home near Denver to Los Angeles, and later $263.11 for 1,520 pounds of household goods shipped from Los Angeles to Sacramento. However, he was transferred to Sacramento before most of his household goods could be shipped to Los Angeles. Consequently, he ordered those goods to be shipped directly from the Denver area to the Sacramento area.

On September 11, 1974, Mr. Baylis submitted an additional claim for $1,756.53 for the final shipment of 9,480 pounds of household goods from Denver to Sacramento. Mr. Baylis actually shipped 12,400 pounds, but he claimed only 9,480 pounds, representing the difference between the 11,000 pounds originally authorized and the 1,520 pounds previously shipped from Los Angeles to Sacramento for which reimbursement had already been received.

By Administrative Suspension Statement dated September 24, 1974, the agency deducted $603.75 from the voucher and authorized payment of $1,152.61. The amount was computed by determining the rate for a shipment of 11,000 pounds from Los Angeles to Sacramento on a commuted rate basis ($1,415.72), less $263.11, the amount reimbursed separately for the prior shipment of 1,520 pounds from Los Angeles to Sacramento. The authorized certifying officer cites as authority for such determination paragraph 2–8.2(d) of the Federal Travel Regulations, FPMR 101–7, which provides in pertinent part as follows:

> d. *Origin and destination.* Cost of transportation of household goods may be paid by the Government whether the shipment originates at the employee's last official station or place of residence or at some other point, or if part of the shipment originates at the last official station and the remainder at one or more other points. Similarly, these expenses are allowable whether the point of destination is the new official station or some other point selected by the employee, or if the destination for part of the property is the new official station and the remainder is shipped to one or more other points. However, the total amount which may be paid or reimbursed by the Government shall not exceed the cost of transporting the property in one lot by the most economical route from the last official station of the transferring employee (or the place of actual residence of the new appointee at time of appointment) to the new official station. * * *

This provision permits reimbursement for the costs of transportation of household goods regardless of whether the point of origin or destination of some or all of the goods is the old or new official station or some other point, provided that the costs do not exceed the cost of transporting the property in one lot by the most economical route.

In the case of successive transfers, however, such as involved herein, the general rule enunciated in our prior decisions is that the employee is entitled to reimbursement for transportation of his household goods from the first to the third duty stations if such transportation is commenced within 2 years from the effective date of the initial transfer, as specified in paragraph 2–1.5(a)(2) of FPMR 101–7. *See*

48 Comp. Gen. 651 (1969). However, the total reimbursement for the actual successive transfers may not exceed the reimbursement to which the employee would otherwise have been entitled for each transfer individually. The transportation of Mr. Baylis' household goods from Denver to Sacramento commenced August 14, 1974, which date is within the 2-year limitation period. Therefore, reimbursement may be based on the commuted rate for the actual distance of the shipment, from the Denver area to the Sacramento area, in accordance with the rule expressed above rather than the rate between Los Angeles and Sacramento.

However, as recognized in both the travel voucher submitted and the suspension statement issued, the maximum weight of the goods authorized to be transported at Government expense incident to any one transfer is 11,000 pounds. *See* 5 U.S. Code § 5724 as implemented by Federal Travel Regulations (FPMR 101–7), para. 2–8.2 (May 1973). Therefore, in accordance with the rules expressed above, Mr. Baylis should be reimbursed for the shipment of 11,000 pounds of household goods based upon the commuted rate from Denver to Sacramento, minus $263.11 previously reimbursed Mr. Baylis for the shipment of 1,520 pounds from Los Angeles to Sacramento. The other reimbursement received by Mr. Baylis for 740 pounds of household goods shipped from Denver to Los Angeles would appear to be within the total reimbursement for actual successive transfers indicated above, and thus, it need not reduce the reimbursement under the travel authorization covering the change of station from Los Angeles to Sacramento. The voucher which is returned may be certified for payment in accordance with this decision.

[B–183677]

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Second Offer Technically Unacceptable

Contracting officer's rejection of protester's second best and final offer as technically unacceptable was proper where cost data submitted with proposal appeared to materially change previously acceptable technical proposal and protester did not furnish adequate detailed explanation of apparent revisions.

Contracts—Negotiation—Reopening—Not in Best Interests of Government

Contracting officer properly did not seek clarification of revised best and final offer which appeared to be inconsistent with offer previously submitted and with requirements of solicitation, since matter went to heart of promised performance and could only be resolved by reopening negotiations with all offerors in competitive range, and reopening of negotiations after submisssion of second best and final offers was deemed not to be in best interests of the Government.

In the matter of Electronic Communications, Inc., January 9, 1976:

Electronic Communications, Inc. (ECI) protests the award of a contract to Honeywell Information Systems, Inc. under request for proposals (RFP) DAAB07–74–R–0231 by the U.S. Army Electronics Command (ECOM). This RFP was issued on April 8, 1974, with a due date for submission of proposals of May 10, 1974. The RFP covered requirements for a total quantity of 6,900 TSEC/KG–27 Electronic Key Generators, together with mechanical gages and gage cases, production evaluation, data items and concurrent repair parts. A firm fixed price multi-year contract with an Economic Price Adjustment clause was to be awarded to that responsive, responsible offeror submitting the lowest priced, technically acceptable proposal.

Initial proposals were submitted by 10 offerors. Negotiations were conducted and eight proposals were received in response to a request for best and final offers. The contracting officer, however, determined that it was essential to continue discussions and accordingly reopened negotiations and advised the offerors of this action. At the conclusion of this round of negotiation, offerors were advised by TWX dated February 27, 1975, that they had the opportunity to submit a new best and final offer. The TWX contained the following language:

> Major revisions are not expected but should you *revise your offer in any way, complete and detailed support* for the revision and any other affected part of your proposal *must accompany the revision.* [Italic supplied.]

In response to this TWX, ECI in March 1975 submitted a revised best and final offer, which consisted of a cover letter, DD Form 633 entitled "Contract Pricing Proposal," and certain other data including a computer run which reflected total labor hours by contract line item. This new best and final offer was approximately $11 million less than ECI's previous best and final offer, and showed both a reduction in overhead rates and an increase in direct labor hours. Although ECI's previous offer had been regarded as technically acceptable, ECOM viewed this new offer as unacceptable because it reflected an unsatisfactory performance schedule, particularly with respect to the level of effort allocation over the 5 years of the contract, and because it lacked sufficient support for the changes made in price, overhead rates, and direct labor. As a result, ECI's low offer of $27,238,098 was rejected and award was made to Honeywell, the next low offeror, at a price of $27,598,958.61.

ECOM's actions were predicated primarily on its reading of the data included with ECI's revised best and final offer. The RFP

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envisioned a production effort of 3 program years and 5 calendar years, with the first program year extending over 3 calendar years. The RFP contained various contract line items (Clins) for each of the 3 program years. ECI's data indicated to ECOM that ECI had "shifted the incurrence of cost on 11 out of 13 CLINS" and that the "net effect is confusion when one tries to relate the application of effort to the proposed incurrence of cost."

It was ECOM's view that ECI's proposal showed that efforts would be expended and costs incurred at times that were inconsistent with the needs of the agency and with the established program years. This view was based on the computer run furnished with ECI's proposal, which indicated to ECOM that ECI would incur costs during inappropriate calendar or contract years with respect to the Clins calling for first article requirements, production of gages, test equipment and support services, test plans, and data items. For example, ECOM read the computer run as indicating that production and delivery of mechanical gages, required by Clin 0003, would occur throughout the 5 calendar years of the contract. This was unacceptable to ECOM because delivery of the gages was required prior to the start of first article testing during the second calendar year. In addition, the computer run was read by ECOM as indicating that the major production evaluation effort, required by Clins 0010, 0014, and 0018 for each of the 3 program years respectively, would take place during the second program (fourth calendar) year rather than the first, which was also unacceptable to ECOM.

ECI argues that ECOM improperly read the computer run as allocating costs and labor hours to particular calendar years. ECI claims that it submitted the cost data solely to support its best and final price, and that it did not submit such data to amend or modify its technical proposal which previously had been classified as acceptable. ECI states that the computer run should have been used by ECOM to review the total proposed labor hours to be expended in the performance of each contract line item and for no other purpose. ECI concludes that the cost data submitted in March 1975 "was not and was not intended to be expressions by ECI of its technical responsibilities or intentions, or to vary the clear and acceptable milestone charts carefully prepared and submitted as part of its Technical Proposal."

Further, ECI maintains that ECOM's determination that the ECI proposal was unacceptable because it did not contain an explanation of the differences between the prior proposal and the revised best and final offer was improper because "No such explanation was included in the Evaluation Factors of the RFP * * *." ECI contends that the changes in the March 1975 best and final offer were consistent with a previous ECOM-approved change to its technical proposal which necessitated increase in direct labor but allowed a reduction in overhead.

ECI also asserts that if ECOM had any questions about its proposal, it should have requested clarification rather than treating the proposal as unacceptable.

We believe the record supports ECOM's actions in this case. It is well settled that "an offeror must demonstrate affirmatively the merits of its proposal," *Kinton Corporation*, B-183105, June 16, 1975, 75-1 CPD 365, and that it runs the risk of proposal rejection if it fails to do so clearly. See *Programming Methods, GTE Information Systems, Inc.*, B-181845, December 12, 1974. It is also well settled that when a procurement is negotiated and a cost or price proposal is one segment of an overall proposal containing technical and/or other sections, the cost or price proposal, along with supporting data, may be considered by contracting agencies in their evaluation of the offeror's understanding of what is required by the technical or other segments of the solicitation. *See, e.g.*, 52 Comp. Gen. 198 (1972); 50 *id.* 788 (1971); *Kinton Corporation, supra; Programming Methods, GTE Information Systems, Inc., supra;* B-174947, August 30, 1972. This rule is for application with respect to evaluation of both initial proposals and best and final offers, including situations in which a best and final price proposal has a negative impact on a technical proposal previously regarded as acceptable. *Kinton Corporation, supra;* see also *Systems Consultants, Inc.*, B-179825, March 12, 1974, 74-1 CPD 128, and *American Maintenance and Management Services, Incorporated*, B-179126, February 12, 1974, 74-1 CPD 64.

The protester claims that ECOM could not properly regard the submitted cost data as modifying ECI's technical proposal because of the "well established presumption * * * that after technical acceptability has been established a bidder would not likely disqualify its technical proposal by inserting a contrary condition in its bid." That presumption, as the protester recognizes, is applicable to two-step advertising. *See, e.g.*, 52 Comp. Gen. 821 (1973); *Spectrolab, a Division of Textron, Inc.*, B-180008, June 12, 1974, 74-1 CPD 321. The protester argues, however, that the situation in this case is analogous to two-step advertising because the RFP provided that after technical acceptability was established award would be made to the lowest offeror.

We do not agree. Under the two-step formal advertising method of procurement, only offerors submitting acceptable technical proposals during the first step are permitted to bid during the second step, and the bids, to be responsive, must be based on those technically acceptable proposals. Bidders do not have the option of proposing changes to their proposals during that second step. In negotiated procurements, however, offerors may revise any aspect of their proposals until negotiations are closed, see, e.g., *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168, and those revisions must first be evaluated by the procuring activity before there can be any determination of acceptability of the proposals as so revised. Accordingly, we think it is clear that the RFP provision for awarding a contract to the lowest technically acceptable offeror refers to a determination of technical acceptability after receipt and evaluation of all final offers and not to any previous finding of technical acceptability. We therefore find no basis for viewing this situation as analogous to two-step advertising.

With regard to the actual evaluation of ECI's final proposal, we agree with ECOM that ECI's proposal was confusing and subject to being read as not complying with ECOM's requirements. ECI's covering letter stated that "ECI's Best and Final Pricing" was being submitted and was "intended to revise, where applicable, our original proposal * * * and subsequent revisions thereof * * * . [T]his proposal reflects a corporate commitment on the part of ECI." The "DD Form 633 Support Data" submitted with the proposal stated that "Section E provides a computer run which reflects total labor hours by contract line item." This computer run consisted of, *inter alia*, separate pages for each Clin and showed various cost items (material, engineering direct labor, other direct labor, etc.) broken down by calendar year. It is not disputed that for many of the Clins, the calendar year allocations were inconsistent with RFP requirements.

ECI states that the computer run was not intended to reflect cost incurrence in any particular calendar year, but was furnished only to allow ECOM to review for each Clin "the total proposed labor hours to be expended in the performance of each contract line item and for no other purpose." ECI further states that the reference to the computer run in its support data put ECOM on notice "that the run reflected only the total hours by contract line item."

The support data statement, however, was not so limited. While it did say that the computer run "reflects total labor hours by contract line item," the run also reflected an allocation of those labor hours over several calendar years. Nowhere in its final offer did ECI indicate that the computer run was submitted for one purpose only or that the allocation shown was not accurate and was not to be considered. In this regard, we note that ECI's previous best and final offer included a computer run which also allocated labor hours by calendar year and which, for most of the Clins, accurately reflected ECI's proposed allocation of effort. Under these circumstances, we do not think that ECOM acted unreasonably in reading the revised computer run as indicating both total hours and cost per Clin and the calendar year allocation of those hours and costs. Since those allocations were not consistent with RFP performance requirements, ECOM could rationally regard this ECI proposal as unacceptable.

We do note that ECOM has taken inconsistent positions in interpreting the computer run with respect to the production evaluation Clins. The computer run reflected the following:

CLIN	CALENDAR YEAR ALLOCATION		
0010 (Program year 1; calendar years 1975–7).	1975	9,360 hrs.....	$86, 264
0014 (Program year 2; calendar year 1978).	1976	24,614 hrs....	$225, 353
0018 (Program year 3; calendar year 1979).	1977	12,306 hrs....	$112, 679

On the one hand, ECOM's Overview Committee for this procurement pointed out that ECI had shifted its proposed incurrence of cost for these Clins from what had been previously offered to the 3 calendar years shown. The Committee stated, with respect to both these Clins and certain others, that "the contractor expects to expend dollars for succeeding program year efforts, years in advance of authorization to proceed with a given program year." This was consistent with how the computer run was interpreted with respect to the other Clins. On the other hand, the Committee and the contracting officer also expressed concern that ECI's emphasis on production evaluation was now in the second program (fourth calendar) year (Clin 0014) instead of in the first program year (Clin 0010) as it had been in ECI's initial best and final offer. This latter interpretation ignores the calendar year allocation of the computer run and instead relies on the specific amount shown by Clin.

Although these interpretations are inconsistent, we think it is clear from the record that under either reading ECI's proposal was inconsistent with the RFP. Under the first interpretation, all production evaluation would occur during the first program (first 3 calendar) year(s), even though some production evaluation effort was required for the 2 subsequent program (calendar) years. Under the second interpretation, what ECOM regards as "only a nominal effort in the first three calendar years (the critical period)" would take place, while the bulk of the effort would occur during the second program year, which was considered to be too late in view of the nature and purpose of the production evaluation requirement. Furthermore, under both interpretations it is clear that ECI's previous acceptable approach of emphasizing production evaluation at the outset of the contract and then tapering the effort in succeeding years was modified to an unacceptable approach reflecting an initial "nominal" effort followed by a much greater effort.

The significance to ECOM of the production evaluation requirement and the offerors' understanding of and willingness to comply with that requirement is readily apparent from the record. Among the evaluation criteria in the RFP was a provision specifying that "The proposal must demonstrate a clear understanding and knowledge of the technical and contractual responsibilities imposed upon the offeror by the Production Evaluation Provision of J.23. A sufficient degree and level of technical and administrative effort must be allocated to perform all tasks required under J.23." Paragraph J.23 required the contractor to perform "a detailed review of all technical data furnished under the contract * * * to determine, identify, and correct any omission, discrepancy, or error * * * or deficiency in the design which may preclude practical manufacturer or assembly, testing or inspection, or the attainment of required performance * * *." The rationale for this requirement is explained by ECOM as follows:

> The significance of production evaluation is that it gets production engineering immediately involved in the production aspects of the contract by a review of the technical data package. * * * This accomplishes an in-depth review of the technical data package before the contractor gets so deeply into production that changes are both costly and time-consuming. * * * Consequently, it is extremely important that, if any benefits are to be derived * * * the effort involved * * * be performed right after the award of the contract and continue thereafter throughout the life of production.

In light of this explanation and the RFP provisions, we think under either interpretation of ECI's computer run ECOM could rationally conclude that ECI's proposal did not demonstrate ECI's clear "understanding of the level of effort to be applied during contract performance" and regard the proposal as unacceptable for that reason.

ECOM's determination that ECI's second best and final proposal was unacceptable was also based in part on the approximately $11 million price decrease coupled with an increase of 265,000 hours of direct labor. ECOM believed the price decrease was not explained "in any terms which could relate the decreases to the impact on technical performance," particularly in view of the increase in direct labor hours.

ECI claims, however, that these changes merely reflected its revised approach of using a facility dedicated solely to production for this procurement. ECI states that when negotiations were reopened after submission of initial best and final offers, ECI proposed the use of a dedicated facility, which would involve an increase in direct labor hours and a decrease in the overhead rate because "when a plant is dedicated to the performance of a single project, many more jobs are accounted for as direct labor than in a plant with a multiplicity of projects." According to ECI, it "explained this in its presentation which preceded ECOM's approval of the dedicated facility concept." Also according to ECI, since no evaluation factor required it to explain changes in its price proposal as a condition precedent to award, ECOM could not properly refuse to award a contract to ECI on this basis.

The record shows that while ECI's second best and final offer did state in the covering letter that its revised pricing was attributable to a decision to accept a reduced profit, the change to a dedicated facility, and a revision of the economic price adjustment clause, ECOM regarded that statement alone as insufficient support for the changes that were made, in part because the dedicated facility did not yet exist and the first 5 to 6 months of contract performance would have to take place in the plant initially proposed. ECOM also believed that various reductions in overhead expenses were "radical" (for example, the manufacturing overhead rate for 1975 was changed from 119.4% to 21.5%) and resulted in "unusually low rates." Concern was also expressed not only over the largest increase in direct labor hours, but also over the elimination of all field engineering efforts.

As noted above, ECOM's message requesting revised best and final offers warned that "complete and detailed support" for any revisions made "must accompany the revision." Although this requirement itself did not thereby become an evaluation factor, it did put offerors on notice that supporting data or explanations for any proposal revisions would be necessary in order for ECOM to evaluate the revisions. While it is true, as ECI points out, that offerors frequently reduce their prices substantially in the final stages of negotiation without any corresponding decrease in Government requirements, see *Global Graphics, Inc.*, 54 Comp. Gen. 84 (1974), 74-2 CPD 73, procuring activities are not thereby precluded from considering the impact of such reductions on the offeror's overall proposal. Here it appears that ECOM believed it could not evaluate certain of the revisions in the ECI proposal because of the absence of the required "detailed support." We find no basis for disagreeing with ECOM on this point.

There remains for consideration ECI's assertion that ECOM, rather than rejecting ECI's proposal, should have attempted to resolve the discrepancies in the proposal by seeking clarification from ECI. According to the protester, the contracting officer had a duty to seek "verification of cost data" and could do so "for purposes of clarification without invoking the requirement for reopening negotiations with all offerors." ECI further claims that the most that could be said of its proposal is that the computer run created an ambiguity which the contracting officer had a duty to resolve by reopening negotiations.

Armed Services Procurement Regulation (ASPR) 3–805.1(b) (1974 ed.) permits inquiries to an offeror for the sole purpose of eliminating minor uncertainties. A minor uncertainty or irregularity is one which is merely a matter of form or some immaterial variation from the exact requirements of the solicitation, having no effect or merely a trivial effect on price, quality, quantity or delivery, the correction of which would not be prejudicial to other offerors. In the present instance the deficiencies in the ECI proposal, as perceived by the contracting officer, were variations from the contract line item requirements which went to the heart of ECI's promised performance and its understanding of what was required. We believe the contracting officer acted properly in viewing these variations as more than minor irregularities which were not susceptible to clarification without the reopening of negotiations. See *Teledyne Inet*, B–180252, May 22, 1974, 74–1 CPD 279.

ECOM recognized that "ECI could probably correct the deficiencies and become acceptable" if negotiations were reopened. However, it was decided not to reopen negotiations because of the "severe" auction implications and because "negotiations had been reopened before, and * * * there had been extensive discussions after that to preclude deficiencies * * *."

The record before us does not indicate why an auction would have resulted from the reopening of negotiations, since there is no evidence of a price leak and it is well settled that successive calls for new best and final offers after negotiations are reopened do not automatically engender an auction. See *Bell Aerospace Company, supra*. Nevertheless, we cannot say that the contracting officer acted improperly since "once negotiations had been held and best and final offers received, negotiations should not be reopened unless it is clearly in the best interests of the Government to do so." *ILC Dover*, B–182104, November 29, 1974, 74–2 CPD 301. Here ECOM determined that reopening of negotiations would not be in the Government's best interests because the unacceptability of ECI's proposal was due primarily to unexplained changes in its proposal and because negotiations with all offerors would serve no useful purpose and would benefit only ECI.

The cases cited by ECI in support of its assertion that negotiations should have been reopened are inapposite. In *ACCESS Corporation*, B–181962, November 26, 1974, 74–2 CPD 294, which ECI cites for the proposition that "if the Contracting Officer fails to resolve a patent ambiguity in a proposal he must reopen negotiations," the protest was denied because there was no patent ambiguity. In 52 Comp. Gen. 409 (1973), which is cited in *ACCESS Corporation*, the protest was upheld because an ambiguity was contained in the initial proposal and the contracting officer did not specifically seek to resolve it during the discussions which preceded submission of best and final offers. Here, of course, the alleged ambiguity was contained in a best and final offer and resulted from unexplained proposal revisions.

ECI further claims that "the duty to inquire does not change" when an uncertainty arises in a best and final offer, and cites *Lockheed Propulsion Company; Thiokol Corporation*, 53 Comp. Gen. 977 (1974), 74–1 CPD 339. In that case, Lockheed, in its best and final offer, substantially reduced its proposed labor hours without significant substantiation and did not relate the reductions to the work to be performed. There the contracting agency accepted this revised proposal. Although we upheld the agency's action, we stated that it "probably should have questioned Lockheed's significant learning curve reduction * * *." We did not say that such unsupported changes in a proposal must give rise to a reopening of negotiations before the proposal can be rejected as unacceptable. On the contrary, since offerors must affirmatively demonstrate the acceptability of their proposals, *Kinton Corporation*, *supra*, we believe that when a request for best and final offers clearly warns offerors to substantiate any changes made in a proposal and an offeror submits a revised proposal without such substantiation, the contracting officer need not reopen negotiations and may reject the proposal if unsupported changes render the proposal unacceptable.

In the light of the foregoing, the protest of ECI is denied.

[B–185161]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions—Extension—Retirement of Employee Prior to Residence Sale

Although employee voluntarily retired from Government service 4 months prior to final settlement on sale of residence at old official duty station, he is entitled to reimbursement of real estate expenses where sale was completed within the 2–year extended time period following date he reported for duty at new official duty station since he completed 12 months of service required by his transportation agreement, and transferred employee's right to reimbursement of real estate expenses continues after date of voluntary retirement.

General Accounting Office—Decisions—Advance—Disbursing and Certifying Officers—How Requests Should be Addressed

Certifying officers should address requests for advance decisions under the provisions of 31 U.S.C. 82d to the Comptroller General of the United States, Washington, D.C. 20548.

In the matter of reimbursement of expenses incurred in sale of residence after voluntary retirement of employee, January 9, 1976:

This matter was submitted for an advance decision by Florence M. Oakley, Certifying Officer at the Mid-Atlantic Region Office of the Internal Revenue Service (IRS), Department of the Treasury. The question presented is whether a voucher dated April 29, 1975, in the amount of $3,445, in favor of a retired Government employee and representing reimbursement of expenses incurred in the sale of his former residence at his old official duty station, may be certified for payment.

The record indicates that Charles M. Otterback, then an employee of the IRS, was transferred from his official duty station in Washington, D.C., to Bailey's Crossroads, Virginia, under authorization of Travel Order No. RICH–73–14, dated March 28, 1973, and that he reported for duty at his new station on April 30, 1973. Mr. Otterback had executed a 12-month service agreement, as required by subsection 1.5a(1) of Office of Management and Budget Circular No. A–56, revised August 17, 1971, now paragraph 2–1.5a(1)(a) of the Federal Travel Regulations (FPMR 101–7) (May 1973), and had been authorized moving expense reimbursement.

Unavailability of mortgage money caused Mr. Otterback difficulty in selling his old residence in Silver Spring, Maryland. Therefore, he requested and received a 1-year extension of the time period during which real estate expenses would be reimbursable. On December 31, 1974, Mr. Otterback voluntarily retired from Government service. Subsequently, he contracted the sale of his old residence on April 18, 1975, and on April 28, 1975, he completed settlement. Mr. Otterback then submitted a travel voucher seeking reimbursement. Because the sale of the employee's residence was consummated after the date of his voluntary retirement, the IRS is in doubt as to whether the voucher may properly be paid.

In 47 Comp. Gen. 189 (1967) our Office indicated in response to a general inquiry that reimbursement of real estate expenses would be doubtful where no expenses were incurred or binding obligations entered into prior to the death or separation without fault of the employee. It should be noted, however, that the last sentence of that decision stated, "Any actual cases of this nature should be submitted here for separate consideration." Mr. Otterback's claim, before us for decision, presents such a case. The basic question presented is whether a transferred employee's right to reimbursement for relocation expenses continues after his voluntary retirement from Government service so as to permit reimbursement for expenses incurred after his retirement.

Reimbursement to Federal employees for certain expenses related to the sale or purchase of residences incident to transfers is governed by section 5724a(a)(4) of Title 5, United States Code (1970), and implementing regulations. The purpose of the statutory provisions authorizing Government payment of relocation expenses of transferred employees (5 U.S.C. § 5724a (1970)) is to reimburse the extra expenses incurred by the employees in connection with transfers of official duty stations. The right to reimbursement of relocation expenses applies to each employee transferred in the interest of the Government from one official station or agency to another for permanent duty. 5 U.S.C. § 5724(a)(1) (1970). As the submission from the certifying officer clearly points out, Mr. Otterback had been authorized moving expense reimbursement in connection with the transfer of his official duty station and, therefore, the IRS had determined that the transfer was "in the interest of the Government."

The regulations in effect during the period covered by the transaction, the Federal Travel Regulations (FPMR 101–7) (May 1973), provide in paragraph 2–6.1e that the settlement date for the sale of the old residence must be within 1 year of the date on which the employee reported for duty. It further provides that the time limitation can be extended for an additional period of time, not to exceed 1 year "so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station." Since Mr. Otterback was granted such an extension due to the difficulties experienced in attempting to sell the home resulting from the unavailability of mortgage money accessible to prospective purchasers, the IRS evidently determined that sale within the 2-year period following the date Mr. Otterback reported for duty at Bailey's Crossroads would be reasonably related to his transfer. The settlement was completed on April 28, 1975, within the 2-year time period, and were it not for the fact that claimant retired 4 months prior to settlement, there would be no doubt as to the propriety of reimbursement of the real estate expenses incurrcd.

5 U.S.C. § 5724(i) (1970) requires that an employee must agree in writing to remain in Government service for 12 months after his transfer in order to be allowed reimbursement of relocation expenses, unless the employee is separated for reasons beyond his control which are

acceptable to the agency concerned. Our Office has held that the voluntary separation of an employee upon satisfying the age and service requirements for optional retirement may be considered as a reason beyond the control of the employee, and that such retirement prior to the completion of the 12-month period of Government service is not a bar to recovery of relocation expenses if acceptable to the agency. 46 Comp. Gen. 724, 726 (1967). In decision B–180406, July 10, 1974, we considered the situation of an employee who, after executing a 12-month service agreement incident to a transfer, was released from his obligation so that he might retire early. We allowed reimbursement of expenses incurred in connection with the sale of his old residence even though settlement was not effected until after he had retired. Our Office has also allowed reimbursement of expenses related to the sale of a residence at the old official duty station where the transferred employee had died before completing the 12-month service agreement and the sale was not completed until after the employee's death. B–183389, November 24, 1975.

It is significant that Mr. Otterback, unlike the employees in the above-cited cases, also completed the 12 months of required service before he retired on December 31, 1974, and has thereby fully complied with his service agreement. In view of that fact and since we have allowed reimbursement of real estate expenses in the above-cited cases, the voucher for reimbursement of his real estate expenses may be certified for payment if otherwise proper.

We note that the request for decision was addressed to the Transportation and Claims Division of our Office—not the Comptroller General of the United States. In order to expedite a request for decision under the provisions of the Act of December 29, 1941, ch. 641, § 3, 55 Stat. 876, 31 U.S.C. § 82d, the request should be addressed to the Comptroller General of the United States, Washington, D.C. 20548. 22 Comp. Gen. 725 (1943).

[B–183075]

Contracts—Protests—Timeliness—Significant Issue Exception

Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 C.F.R. 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures.

Contracts—Negotiation—Requests for Quotations—Testing, Inspection, etc., Requirements—Dual Standard

Where request for quotations provided only for testing and inspection of product delivered under contract, failure to require preaward sample from manufacturer where such sample was required from surplus dealer creates dual standard which casts doubt on reasonableness of requirement, contrary to principles of free and open competition. However, since contract performance is completed no corrective action is available.

Contracts—Negotiation—Samples—Rejection—Reasonable Basis

Although offeror-protester supplied surplus items from same lot to another agency, rejection of sample submitted in connection with current procurement was not without reasonable basis where, contrary to current procurement, protester was not required to refurbish deteriorative components under prior contract.

In the matter of the D. Moody & Company, Inc., January 12, 1976:

In April 1974, the San Antonio Air Logistics Center (SAALC), Department of the Air Force, issued a request for quotations (RFQ) for the procurement of 81 Pressure Control Valve Assemblies which control directional flow of fuel in F–86 aircraft. Quotations were submitted by two sources: Parker-Hannifin Corporation of Irvine, California, manufacturer of the item, and D. Moody & Co., Inc. (Moody), of Tulsa, Oklahoma, a surplus dealer, which submitted the low offer. Award was made to Parker–Hannifin. Moody has raised several grounds of protest which will be considered below.

In its initial offer dated April 25, 1974, Moody stated that the items were "new surplus currently cure dated and certified airworthy, obtained from AF Surplus approximately Nov. '69." Upon request, Moody submitted five samples which were evaluated for corrosion, deterioration, handling damage, and to ensure that the age of synthetic rubber components did not exceed 3 years. These rubber materials are referred to as "cure dated items." The samples were evaluated and rejected on October 17, 1974, because the cure dated items had deteriorated and their age could not be determined. Upon notification of rejection, Moody protested to the contracting officer by letter of October 22, 1974, stating:

> Our letter attached to our quotation on subject solicitation stated: "Items quoted are new surplus currently cure dated . . ." (A) It should have read; "Items quoted are new surplus. All rubber goods will be replaced with currently cure dated items and the units will be FAA certified Airworthy." * * *
>
> Our intent was, and is, to replace the "rubber goods" and "swing gate rubber seals."
>
> Because of the time factor and cost the soft goods in the samples we submitted were not replaced prior to shipment.
>
> I repeat, the old soft goods will be replaced by ones of current cure date * * *.

On November 6, Moody and the buyer communicated by telephone. The content of that conversation is in dispute. Although Moody insists that it was never informed that currently cure dated and refurbished samples would be required, the buyer notes in his Memo for the File of February 26, 1975, that he instructed Moody to refurbish the five samples for evaluation in that condition. The protest was withdrawn and five more samples were submitted and evaluated. The procuring activity determined to reject the samples on January 9, 1975, because of the absence of cure dates and the deteriorated condition of the rubber goods. Moody was notified of this second rejection by letter of January 15, 1975, whereupon it protested to our Office.

Moody contends that because the manufacturer of the item, Parker-Hannifin, was not required to submit samples prior to award, the requirement that Moody submit such samples constituted unfair discrimination.

At the outset it should be observed that this contention, as well as Moody's argument that the August 1974 request to submit samples was in violation of Armed Services Procurement Regulation (ASPR) § 2-202.4(b) (1974 ed.) and *D. Moody & Co., Inc.*, 53 Comp. Gen. 742 (1974), 74-1 CPD 171, is untimely under the Interim Bid Protest Procedures and Standards of our Office then in effect (4 C.F.R. § 20.2(a) (1974)), since the protest was not filed with our Office within 5 days from the events in question. However, we have determined to consider these issues as an exception to our timeliness rule under 4 C.F.R. § 20.2(b) (1974) since, for the reasons that follow, we feel that they are significant to procurement procedures.

The Air Force responds that an item purchased from the manufacturer is subject to stringent quality control, that surplus items are not necessarily made under the same strict controls, can be subject to deterioration or damage through age or storage conditions, and are susceptible to the possibility of fraud, and that the work done by the surplus dealer himself must be scrutinized. This response ignores the fact that the RFP subjected both Parker-Hannifin and Moody to identical sampling of end items in accordance with MIL-STD-105D and to an inspection system in accordance with MIL-I-45208. Thus, the RFP provided for an inspection system which the Air Force evidently believed would ensure the requisite quality of the valve assemblies.

SAALC has essentially created one standard for treating the proposals of manufacturers and another for treating those of surplus dealers. Such a dual standard is nowhere sanctioned by the applicable regulations. With regard to a similar unstated dual standard which was applied by DSA in a protested procurement which was the subject of our decision in B-162931, February 21, 1968, we stated:

> * * * the principal administrative objection to the award to White is that the Government does not have data from which it can ascertain that the surplus Hartman parts offered by White are of the same quality as the Hartman parts offered by Hartman and other offerors. It is suggested that the surplus parts may have deteriorated in storage, may have been subjected to rough handling, may be from rejected lots, etc. However, these same conditions could very well exist in respect to the parts offered by the name brand manufacturer or other offerors of its products, and the Government apparently does not seek assurances from these offerors against these contingencies and apparently it would have no means of ascertaining any deficiencies, since admittedly it has no data which can be used for testing the parts.
>
> * * * Moreover, the RFP afforded sufficient protection and remedies to the Government respecting the furnishing and receipt of new and unused Government surplus property as would have afforded a basis for an award at an lower price to White.

See also *D. Moody & Co., Inc.; Astronautics Corporation of America'* 55 Comp. Gen. 1, 75-2 CPD 1.

As noted, the inspection and sampling requirement of the RFQ required tests for the purpose of ensuring that the Government received an acceptable product meeting its needs. Therefore, we question the validity of the requirement imposed upon Moody in light of the agency's failure to impose a like requirement on the manufacturer. Where agency personnel determine that such a pre-award sampling is required, it would seem to us consonant with the principles of free and open competition to require samples from each offeror.

Moody has advanced two grounds on which to protest the rejection of its samples. The first is that such rejection was without a reasonable basis because in June 1973 the Defense Construction Support Center (DCSC) had purchased 55 of the same valves as those offered under this procurement from the same lot. In response to this contention, the Air Force notes that the DCSC contract specifically provided that the items be unrefurbished, that possibly the cure dated items were not then out of date, and that the contracting officer under this procurement had no knowledge of the prior contract. In light of the purpose for the sampling—to determine Moody's ability to properly replace cure dated items—we cannot say that Moody's prior contract to provide unrefurbished goods renders the rejection of its samples here without a reasonable basis.

Moody further protests the rejection of its samples as nonconforming because it had offered by its letter of October 22, 1974, to replace all rubber goods with currently cure dated items. Moody contends that SAALC has misconstrued the October 22 letter, since nowhere therein did it offer to refurbish the samples, but offered to replace all rubber goods after award only, and that it had no notice that SAALC was requiring it to refurbish the samples. Moody contends that if it did in fact have to furnish refurbished samples prior to award, such a requirement constitutes an unfair and unreasonable burden.

The buyer asserts, however, in his memo of February 26, 1975, that in the telephone conversation of November 6, 1974, he instructed Moody to refurbish the samples before resubmission and that Moody agreed.

The October 22 letter, as set forth above, does not refer either to samples or to post-award performance; it merely states that the soft goods will be replaced. It is difficult to construe the exchange between Moody and the buyer as requiring merely the resubmission of unrefurbished samples because there is little apparent need for the reevaluation of an unchanged item. There is, however, no probative evidence on this matter. Accordingly, the rejection of Moody's samples for failure to contain currently cure dated items was not unreasonable.

While we do not recommend disturbing the award to Parker-Hannifin in this case, since contract performance has been completed, we are bringing the noted deficiencies to the attention of the agency for corrective action.

[B-158371]

Certifying Officers—Submission to Comptroller General—Advance Decisions—Voucher Accompaniment

Although, normally, the Comptroller General of the United States General Accounting Office (GAO) would not render a decision to a question of law submitted by a certifying officer unaccompanied by a voucher as required by 31 U.S.C. 82d, the statutory authority under which the GAO renders decisions to certifying officers, since the question submitted is general in nature and will be a recurring one, the reply to the question raised is addressed to the head of the agency under the broad authority contained in 31 U.S.C. 74, pursuant to which the GAO may provide decisions to the heads of departments on any question involved in payments which may be made by that department.

Funds—Federal Grants, etc., to Other Than States—Educational Grants—Funding—Direct *v.* Indirect Overhead Costs

Section 204(d)(2) of National Sea Grant College and Program Act of 1966, which prohibits Federal funding for purchase or rental of land, or purchase, rental, construction, preservation or repair of building, dock or vessel applies only to Federal grant payments for direct costs for listed categories. This section does not prohibit payments computed by using standard indirect overhead cost rates, even though such rates may include factors technically attributable to prohibited categories.

In the matter of the National Sea Grant Program—indirect cost rates, January 14, 1976:

This is a response to a request for a decision from Mr. William G. Dodds, Authorized Certifying Officer, National Oceanic and Atmospheric Administration (NOAA), concerning the National Sea Grant Program, established by the National Sea Grant College and Program Act of 1966 (Act), approved October 15, 1966, Public Law 89–638, 80 Stat. 998, as amended, 33 U.S. Code §§ 1121 *et seq.*

At the outset we refer to 31 U.S. Code § 82d (1970), the statutory authority under which this Office renders decisions to certifying officers, which provides as follows:

> The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

Under the above-quoted authority, a certifying officer is entitled to a decision by the Comptroller General on a question of law involved in payment on a specific voucher which has been presented to him for certification prior to payment of the voucher, which should accompany the submission to this Office. 21 Comp. Gen. 1128 (1942).

In the instant case, no voucher accompanied the request for decision and the question presented is general in nature. Normally, we would not render a decision under such circumstances. However, in view of the fact that the problem involved in the instant situation will be of a recurring nature, we are rendering our decision under the broad authority contained in 31 U.S.C. § 74 (1970), pursuant to which we may provide decisions to the heads of departments on any question involved in payments which may be made by that department.

The programs authorized by the Act were originally administered by the National Science Foundation, but all of the functions vested in the National Science Foundation were transferred to the Secretary of Commerce, to be administered by NOAA, by section 1(d) of Reorganization Plan No. 4 of 1970, 84 Stat. 2090.

The Act authorizes, *inter alia*, grants to public and private institutions of higher education to fund education, research demonstration, and information-publication activities relating to development of marine resources. Section 204(d)(2) of the Act, as amended, 33 U.S.C. § 1123(d)(2) (Supp. III, 1973), provides as follows (quoting from the Code):

> No portion of any payment by the Secretary [of Commerce] to any participant in any program to be carried out under this subchapter shall be applied to the purchase or rental of any land or the rental, purchase, construction, preservation, or repair of any building, dock, or vessel: *Provided*, That the prohibitions of this paragraph shall not apply to non-self-propelled habitats, buoys, platforms, or other similar devices or structures, used principally for research purposes.

In accordance with this statutory prohibition no Federal payments for direct costs attributed to the listed categories have been permitted in Sea Grants. Federal Management Circular 73–7, 34 C.F.R. Part

254 (1975) ("Cost Principles For Educational Institutions"), App. A, paragraph D-1 defines "direct costs" as follows:

Direct costs are those costs which can be identified specifically with a particular research project, an instructional activity or any other institutional activity or which can be directly assigned to such activities relatively easily with a high degree of accuracy.

Paragraph D-2 states that "Identifiable benefit to the research work rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect costs of research agreements . . .". Paragraph E-1 defines "indirect costs" as follows:

Indirect costs are those that have been incurred for common or joint objectives and, therefore, cannot be identified specifically with a particular research project, an instructional activity, or any other institutional activity. At educational institutions such costs normally are classified under the following functional categories: General administration and general expenses; research administration expenses; operation and maintenance expenses; library expenses; and departmental administration expenses.

Pursuant to Federal Management Circular 73-6, 34 C.F.R. Part 252 (1975) ("Coordinating Indirect Cost Rates and Audit of Educational Institutions"), indirect cost rates at educational institutions receiving grants under various programs, including the National Sea Grant Program, have been computed in order to establish rates for uniform application to Federal grant and procurement programs. However, in view of section 204(d)(2) of the Act, recent audit reports from Department of Commerce auditors to the NOAA Grants Officer have questioned the propriety of using standard indirect cost rates in awarding Sea Grant funds since, technically, a certain percentage of the standard indirect cost rates can be attributed to such items as the rental, purchase or preservation of buildings or vessels, and the auditors argue that such a result is prohibited by the statutory provision. Accordingly, the question presented for our decision is whether Congress intended that section 204(d)(2) impose an absolute prohibition on any standard indirect cost rate funds being applied toward the prohibited items.

The submission to our Office recites the following background information and considerations with respect to this question:

* * * Department of Commerce auditors have recommended to the NOAA Grants Officer that separate accounting systems and indirect cost rates be established at each institution receiving grants under the National Sea Grant Program, in order to remove these items from the allowable costs comprising the indirect cost pool. Copies of pertinent letters are enclosed.

An analysis of the efforts required to implement this recommendation indicates that it would create a substantial burden on both NOAA and the institutions involved. Initial discussions with certain grantee institutions have revealed an inclination on their part to withdraw from the program rather than undertake such a burdensome arrangement. Furthermore, officials of the National Sea Grant Program and other offices in NOAA question whether such a result was actually intended by the above statutory provision, or whether the recommended action would in fact accomplish the end intended.

* * * * * * *

* * * an evaluation of the consequences resulting from the suggested interpretation of this statute would indicate that such was not intended by Congress when it originally passed the statute. For instance, this interpretation would mean that every purchase by grantees of the National Sea Grant Program must be thoroughly analyzed and subjected to cost breakdown, since some portion of the purchase price thereof eventually would go toward those portions of the manufacturer's costs which would appear to be prohibited by a literal reading of the above statutory provision. Such an approach is obviously unreasonable and would be impossible to administer. Yet, once the agency and affected institutions became involved in analyzing indirect costs, we see no basis for determining a point at which such an analysis would no longer be required.

As already indicated, the burden associated with the establishment of new and separate accounting systems at each institution for identifying indirect costs would be practically insurmountable for both NOAA and the affected institutions. Few institutions possess the same accounting system or determine their indirect costs in the same manner. Since the normal, established indirect cost rates would be unavailable under such an arrangement, a complete analysis for each institution would have to be made each year before a grant could be issued, or certification for payment under a grant could be made by this office.* * *

* * * * * * *

It would appear to be a much more reasonable approach for the National Sea Grant Program and NOAA to continue to follow the policy, as established in Federal Management Circular 73–6, which provides for uniformity of indirect cost rates throughout the Federal Government.

A review of the legislative history of the Act reveals no evidence that Congress considered this specific problem in enacting the 1966 legislation. However, the following colloquy during debate in the House of Representatives suggests the general intent behind the provision:

Mr. GROSS. I would like to ask the gentleman if this is a brick and mortar bill? In other words, would this bill launch us in the business of building sea-grant colleges from scratch, or is it intended that the colleges be located in already existing institutions?

Mr. MOSHER. Mr. Chairman, the gentleman from Iowa has asked a very good question. This is intended to involve existing institutions; that is, there is no intention on the part of the committee that his bill will launch what the gentleman from Iowa calls a brick–and–mortar program of new institutions.

Mr. LENNON. Mr. Chairman, will my distinguished friend, the gentleman from Ohio [Mr. MOSHER], yield to me at this point?

Mr. MOSHER. I am glad to yield to the gentleman from North Carolina.

Mr. LENNON. Mr. Chairman, if the gentleman from Iowa will look on page 6, subsection (2), the gentleman will find the following language:

"No portion of any payment by the Foundation to any participant in any program to be carried out under this title shall be applied to the purchase or rental of any land or the rental, purchase, construction, preservation, or repair of any building, dock, or vessel."

Mr. Chairman, that language appears beginning at line 7 on page 6 and ending on line 11 of the same page.

Mr. GROSS. Mr. Chairman, I thank both gentlemen. 112 Cong. Rec. 22432 (1966).

Thus it was apparently the intent of the Congress in enacting section 204(d)(2) to prohibit the use of Federal funds for capital grants as such. There is no indication that Congress intended the prohibition to be so rigid as to affect the payment of indirect cost factors common to many Federal assistance programs. We would be particularly reluctant to adopt such a construction, absent support therefor in the legislative history, in view of the practical consequences described in the submission.

For the reasons stated above, it is our opinion that continued use of the standard indirect cost rates in awarding grants under the National Sea Grant Program is not inconsistent with section 204(d)(2)

[B-184803, B-184804, B-184805]

Bids—Competitive System—Superior Advantage of Some Bidders—"Win" Program

Protests against award of contracts because possible competitive advantages may accrue to competitors availing themselves of "WIN" program (providing for limited wage rate reimbursement and tax benefits for hiring and training of welfare recipients) are denied since matter is conjectural and any competitive advantages would not result from preferential or unfair treatment by Government. While possible ramification of WIN program might be inconsistent with one purpose of Service Contract Act of 1965, program is not contrary to any provision of Act.

In the matter of ENSEC Service Corporation, January 19, 1976:

ENSEC Service Corp. (ENSEC) has protested the award of any contracts under three General Services Administration (GSA) invitations for bids (Nos. 03C5086901, 03C5094201, and 03C5085301) for the provision of security guard services at various locations in the Washington, D.C. area (GSA Region 3).

Bids on these procurements were opened during August 1975. ENSEC, the incumbent contractor at the locations covered by the three solicitations, was determined to be the 5th, 11th, and 3rd low bidder respectively. GSA has withheld making award on each of these procurements pending resolution of the protests.

ENSEC's protests are based on its assertion that incumbent contractors are placed at a competitive disadvantage because of the participation by competing firms in the Work Incentive Program (WIN) administered by the Department of Labor (DOL). Under WIN, employers hiring welfare recipients participating in the program are reimbursed by DOL for up to 50 percent of such employees' wage rates for the first 26 weeks of employment. In addition, employers can claim tax credits covering 20 percent of the total wages paid to WIN employees. ENSEC alleges that nonincumbent contractors intending to utilize WIN personnel may offer substantially lower bids than they would otherwise because of the "subsidy" provided by the Government under WIN. ENSEC claims that this would not only place it at a competitive disadvantage, but would also be contrary to the Service Contract Act of 1965, 41 U.S. Code 351 *et seq.* (1970), which ENSEC contends is intended to protect against the displacement of long term employees.

The Secretary of Labor has provided our Office with the following analysis of WIN and its relationship to the Service Contract Act:

> Under the Work Incentive Program under Title IV of the Social Security Act, employers who employ welfare recipients who are participating in a WIN on-the-job training program (OJT) are compensated for the special costs of training such employees, including the loss in productivity inherent in trying to train such employees. Reimbursement for the employer is fixed 50% of an employee's wage rate for the first 26 weeks of employment. This is directly related to the general inexperience and training status of the WIN employee workforce.
>
> The WIN Tax Credit was enacted as Title VI of the Revenue Act of 1971 (Pub. L. 92–178) and is administered by the Internal Revenue Service under regulations at 26 CFR Parts 1 and 301. The Welfare Tax Credit enacted by the Tax Reduction Act of 1975 does not directly apply to the WIN program. Rather, it gives to employers who employ welfare recipients, who may or may not be WIN participants, the opportunity to take a tax credit as an incentive to employing such persons. This credit, too, is administered by the Internal Revenue Service with some collaboration by the Department of Health, Education, and Welfare. The Welfare Tax Credit is temporary and will expire on July 1, 1976.
>
> The WIN Tax Credit is not temporary. It does, however, have several limitations. To qualify for the WIN Tax Credit an employer must retain a former WIN employee for one year. Otherwise the credit is subject to recapture except in certain instances, such as if the employee is terminated because of misconduct on the employee's part. Finally, the maximum credit * * * may only be 20% of the employee's gross wages, with, however, the additional limitation that an employer's total annual credit may not exceed $25,000 plus ½ of the amount of creditable expenses in excess of $25,000.
>
> The McNamara—O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351–358, is designed to assure adequate compensation levels for employees of government service contractors. Section 2 of the Act sets forth standards for wages, fringe benefits and working conditions.
>
> Theoretically, a McNamara—O'Hara employer could also take full advantage of the WIN and Welfare Tax Credits as could his competitor. The incumbent government contractor, however, may have difficulty hiring new people due to his well-established work force.

The Secretary further advises that while "an incumbent service contractor could conceivably be underbid by a competitor making use of WIN and welfare employees, a check of the Department's records * * * indicates that this does not seem to have occurred with sufficient frequency to create a problem of any magnitude."

We have carefully considered this matter and have concluded that the record affords no basis for upholding the protests. A close reading of ENSEC's submissions reveals that ENSEC has not claimed that any of its competitors on these procurements has in fact placed it at the competitive disadvantage by bidding on the basis of actual or intended participation in WIN. ENSEC has asserted only the possibility that this could have happened or might happen in the future. Such a speculative and conjectural argument does not provide an adequate basis for sustaining a protest. Furthermore, even if it were shown that a competitor's participation in WIN did place ENSEC at a competitive disadvantage, the protests could not be sustained on that basis alone. We have long recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances or as a result of Federal or other public programs. B-175496, November 10, 1972; B-175834, December 19, 1972; *Houston Films, Inc.*, B-184402, December 22, 1975. *See also* 53 Comp. Gen. 86 (1973) and 43 *id.* 60 (1963). As we said in B-175496, *supra:*

> * * * it is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other Federal, state or local programs. We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected.

Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the "result of preference or unfair action by the Government." B-175834, *supra.* We do not see how the Government's implementation of WIN could constitute such action.

With regard to the alleged conflict between WIN and the Service Contract Act, we point out that while a possible ramification of WIN could be inconsistent with one of the purposes of the Act, WIN itself is the result of statutory enactments and its implementation does not appear to be directly contrary to any provision of the Service Contract Act. We therefore are unable to sustain the protest on this basis.

In our view, the problem complained of by ENSEC, should it ultimately prove to be significant, is one that must be resolved by DOL, which is responsible for administering both WIN and the Service Contract Act, or, if need be, by the Congress. In this regard, the Secretary of Labor has advised us that if "significant problems arise from the interaction of the two programs (WIN and Service Contract Act) which cannot be handled by the service contractors and their employees, [DOL] will * * * take appropriate action to insure that the matter is resolved."

[B-183784]

Housing and Urban Development Department—Loans and Grants—Mobile Home Loan Insurance—"In Advance" Premiums

Timely payment by insured lender of premiums for mobile home loan insurance under section 2, title I, of National Housing Act, as amended, 12 U.S.C.A. 1703—which requires payment of premiums "in advance"—is a prerequisite to continued insurance coverage. There is no basis for implication, underlying

Housing and Urban Development (HUD) proposal to set off against insurance claims past due and future premiums of delinquent lending institution, that insurance coverage is unaffected by nonpayment of premiums.

Claims—Mobile Home Insurance—Set-Off—Past Due *v.* Future Premiums

Claims under mobile home loan insurance pursuant to 12 U.S.C.A. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default on loan occurred while premium payments were current, but cannot be allowed if default occurred or was imminent after premium payments became delinquent. Past due premium charges may be set off against allowable claims, if lender agrees to such setoff. Alternatively, remaining insurance coverage may be canceled. In no event is set-off of future premium charges appropriate. GAO recommends, pursuant to 31 U.S.C.A. 1176, that HUD regulations be amended in terms of foregoing issues and conclusions.

In the matter of National Housing Act mobile home loan insurance—delinquent insurance premium payments, January 23, 1976:

Mr. B. C. Tyner, Authorized Certifying Officer, Department of Housing and Urban Development (HUD), has requested our decision concerning the propriety of certifying a voucher presented to him in the amount of $7,533.31 covering a claim by the First Colonial Life Insurance Company and then setting off past due and future insurance premiums that have not been paid by First Colonial against the funds otherwise payable under the voucher. This claim, which is one of 30 similar claims by First Colonial that are presently pending at HUD, represents a request for reimbursement of a loss sustained on a loan made by the insured lending institution for the purchase of a mobile home. The loan was made and submitted to HUD for insurance pursuant to section 2, title I, of the National Housing Act, as amended, 12 U.S.C.A. § 1703, and regulations issued pursuant thereto, 24 C.F.R. §§ 201.501 *et seq.* (1975).

The pertinent facts and circumstances concerning this matter as disclosed in the certifying officer's letter are set forth below.

The borrowers obtained $10,000 from the First Colonial Life Insurance Company on February 6, 1973, to purchase the mobile home. According to the record presented to us, the loan went into default on June 1, 1973, after payments of only $318.59, and demand for the full unpaid balance was made on July 30, 1973. Subsequently the home was repossessed and sold at a substantial loss, leaving a reimbursable amount of $7,533.31 which the First Colonial submitted to HUD for payment on September 20, 1974.

In August 1974, First Colonial filed a plan of reorganization under Chapter X of the Bankruptcy Act, as a result of which HUD initiated a review of the entire loan portfolio of the lending institution. Pursuant to this review, and after certain deductions were made for ineligible loans, it was determined that the total insurance reserve for First Colonial was $398,736.04. HUD's review also revealed that loans by First Colonial in excess of $1,000,000 were seriously delinquent although not yet in default. Since First Colonial already had 30 claims pending at HUD (as of April 22, 1975), totaling approximately $227,580.00, the certifying officer expresses concern that exhaustion of the lender's insurance reserve is a distinct possibility, in which case the lender may lack the funds or the incentive to make future insurance premium payments as required. The lender has already been advised that its reserve has been frozen and that new loans will not be accepted for insurance. The certifying officer also points out that First Colonial has been delinquent in making insurance premium payments since September 1, 1974, with a total amount of $12,203.25 past due as of March 1, 1975.

In view of the foregoing, our opinion is requested as to the propriety of HUD's setting off past and future unpaid insurance premiums against the funds otherwise payable under the voucher submitted to us (and presumably First Colonial's other claims as well). In the event we conclude that set-off of future unpaid premiums is permissible, we are also requested to determine whether a computation of present value of future premiums should be made and, if so, at what rate of discount.

For purposes of the questions submitted to us 12 U.S.C.A. § 1703 provides in pertinent part as follows:

(a) The Secretary is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions, which the Secretary finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to June 30, 1977, for the purpose of * * * (ii) financing the purchase of a mobile home to be used by the owner as his principal residence or financing the purchase of a lot on which to place such home and paying expenses reasonably necessary for the appropriate preparation of such lot, including the installation of utility connections, sanitary facilities, and paving, and the construction of a suitable pad, or financing only the acquisition of such a lot either with or without such preparation by an owner of a mobile home. In no case shall the insurance granted by the Secretary under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit, and purchases: *Provided,* That with respect to any loan, advance of credit, or purchase made after the effective date of the Housing Act of 1954, the amount of any claim for loss on any such individual loan, advance of credit, or purchase paid by the Secretary under the provisions of this section to a lending institution shall not exceed 90 per centum of such loss.

* * * * * * *

(f) The Secretary shall fix a premium charge for the insurance hereafter granted under this section, but in the case of any obligation representing any loan, advance of credit, or purchase, such premium charge shall not exceed an amount equivalent to 1 per centum per annum of the net proceeds of such loan, advance of credit, or purchase, for the term of such obligation, and such premium charge shall be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Secretary.

To implement the requirement of section 1703(a) that insurance granted to a lending institution not exceed 10 percent of its eligible loans, HUD regulations provide a general insurance reserve for each lender, 24 C.F.R. § 201.12, which is made applicable to mobile home loan insurance. *Id.*, § 201.675. Apparently this regulatory provision is designed to maintain the amount of a lender's reserve at 10 percent of its outstanding insured loan balance, less claims approved for payment. An insured lender can only be reimbursed by HUD for 90 percent of a claimed loss on an eligible loan up to the amount of its insurance reserve. *Id.*, § 201.680.

With respect to insurance premiums, the regulations impose a charge equal to .54 of 1 percent per annum of the net proceeds of any loan reported and acknowledged for insurance. *Id.*, § 201.625. The times for payment of insurance premiums are specified in section 201.630 of the regulations as follows:

(a) *Single payment.* On loans having a maturity of 25 months or less, the insurance charge for the entire term of the loan shall be paid within 25 days after the date the Commissioner acknowledges to the insured institution the receipt of the report of the loan.

(b) *Installment payments.* On loans having a maturity in excess of 25 months the insurance charge shall be payable in installments. The first installment shall be equal to the charge for 1 year and be paid within 25 days of the Commissioner's acknowledgment of the loan report. The second and succeeding installments each equal to the charge for 1 year, shall be paid within 25 days after billing by the Commissioner on an annual basis.

The questions submitted to us by the certifying officer, particularly as to set-off of "future premiums," implicitly but necessarily assume that insurance coverage continues even if the required premium payments are not made. However, we cannot accept this assumption.

Under 12 U.S.C.A. § 1703(f), *supra*, insurance premium charges "shall be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Secretary." This requirement for premium charges derives originally from section 2 of the act approved June 3, 1939, ch. 175, 53 Stat. 804, 805. Prior to that amendment no premiums were required. The charges imposed in 1939 were designed to defray the Federal Housing Administration's administrative and operating expenses and to assist in reducing losses to the Government. *See, e.g.*, H.R. Report No. 313, 76th Cong., 1st sess., 1 (1939); 84 Cong. Rec. 4119 (1939) (remarks of Representative Wolcott); *id.*, 4829 (remarks of Senator Brown).

The legislative history of the 1939 amendment does not expressly address the requirement for payment "in advance." However, it has been held that the purpose of statutory requirements for advance payment of insurance premiums is to prevent the insured from being protected by insurance for which he has not paid. 44 C.J.S., Insurance, § 345, pp. 1315–16. Similarly, when the insurance contract provides that premiums are payable in installments, each installment must be paid when it becomes due in order to keep the policy in force, unless payment is waived or excused by the insurer. *Id.*, 1317–18. These interpretations are consistent with the general rule that the time of payment of premiums is material and of the essence of an insurance contract, *id.*, at 1315, and seem fully applicable to the loan insurance here involved under 12 U.S.C.A. § 1703.

Section 201.630 of the HUD regulations, *supra*, requires full payment of the insurance premium for loans having a maturity of 25 months or less within 25 days following acknowledgment of the loan report. For loans having a longer maturity period, premiums are payable in annual installments. The first payment is due within 25 days of acknowledgement, and subsequent installments shall be paid within 25 days after billing therefor. The premium charge schedule contained in this regulation presumably reflects the Secretary's discretion to prescribe the precise time and manner of payment. It is not, in our view, inconsistent with the statutory requirement for payment "in advance" in the sense that the basic effect of such requirement is to make premium payments a prerequisite for initial and continued insurance coverage. We note in this regard that the first Federal Housing Administration regulations issued after enactment of the 1939 amendment requiring insurance premiums expressly provided (with respect to programs then in effect) that installment premium charges "may be paid annually *in advance* during the term of the loan * * *." § 501.17(b), 4 Fed. Reg. 3789, 3794 (September 1, 1939). [Italic supplied.] These initial regulations also expressly conditioned insurance coverage upon payment of premium charges:

> Subject to the other provisions of these Regulations, the insurance granted under Title I of the National Housing Act, as amended, shall be effective with respect to any loan from the date of the report thereof to the Administrator *provided that the insurance charge with respect to such loan has been paid as required by this Regulation.* § 501.17(g), *id.* at 3795. [Italic supplied.]

While the current regulations applicable to insurance for mobile home loans do not expressly include the above-quoted provisions, we see no basis to infer that their absence reflects a substantive departure from the original administrative construction of what is now 12 U.S.C.A. § 1703(f).

Consistent with the foregoing observations, our decision of July 16, 1971, B–172965, to a HUD certifying officer declined to approve payment of an insurance claim under 12 U.S.C.A. § 1703 in part on the basis that the insurance premium had not been remitted to HUD. Our 1971 decision construed section 1703(f) to require the premium payment in advance in order for a loan to be eligible for insurance, at least when nonpayment of the premium is solely the fault of the financial institution. It is particularly notable that in the 1971 decision nonpayment of the premium resulted from an administrative oversight by the claimant bank, rather than a presumably knowing failure to pay such as in the present case.

For the reasons stated above, we believe that timely payment of required premiums is a prerequisite to insurance coverage for mobile home loans under 12 U.S.C.A. § 1703 and implementing regulations. Consequently, it is further our opinion that HUD may not honor insurance claims with respect to which premium payments are not current either at the time of loan default or at a time when the lender has reason to believe that loan default is imminent. Any other approach not only seems contrary to the authorities discussed herein but would defy all reason and common sense. However, we have no objection to the allowance of claims on loans for which premiums were current at the time of default since insurance coverage was then in effect. *Cf.*, B-181432, March 13, 1975, wherein we followed an analogous approach in considering the timing of fee payments under a Small Business Administration loan guaranty program.

Turning to the specific claim accompanying the instant submission, as noted previously, default occurred (June 1, 1973) well before the lender became delinquent in its premium payments (September 1, 1974), even though the claim was actually filed (September 20, 1974) after the first nonpayment of premiums. Accordingly, this particular loan was covered by insurance at the time of default, and may be honored if otherwise proper. The certifying officer's submission to us does not describe the precise timing of the other pending claims by First Colonial, which should, of course, be disposed of in accordance with the conclusions expressed herein.

With respect to the certifying officer's first question concerning set-off of past due premiums, we believe that either of two alternative approaches is possible. As stated previously, it is our view that the lending institution's insurance coverage has lapsed for loans on which premium payments are not current, since the statute requires that the premium payments be made in advance. Thus one alternative would be to formally advise First Colonial that insurance on such loans is canceled. In this event, there would be no basis for set-off of past due premiums. We note in this regard that under 24 C.F.R. § 201.640(b), insurance premiums falling due after filing of an insurance claim are abated. Thus there would be no past due premiums to set-off on loans which went into default while premium payments were current and for which insurance claims are now pending with HUD.

The other possible alternative would be to deduct from the instant claim, and any additional claims by First Colonial which qualify for payment under the conclusions herein, past due premiums attributable to loans not yet in default. To the extent that allowable pending claims by First Colonial are sufficient to make current its premium payments, the basic result of set-off would be to reinstate lapsed insurance coverage for such loans. However, such an approach could be pursued only with First Colonial's agreement, since the lender may not desire to continue insurance coverage. If this alternative is adopted, with First Colonial's consent, two additional caveats must be emphasized. First, the set-off may not include amounts attributable to loans which went into default while premium payments therefor were not current since in no event are these loans eligible for insurance. Second, if a further delinquency in premium payments occurs after initial reinstatement by set-off, we believe that any remaining insurance should immediately be canceled. In this regard, we consider the alternative of initially reinstating First Colonial's insurance to be permissible only due to the unique circumstances and status of this particular case. In our view, cancellation is generally the appropriate remedy in case of nonpayment of premiums by an insured lending institution.

With respect to the certifying officer's second question, it is our opinion for the reasons already stated that no basis exists for set-off of "future" unpaid premiums under any of the considerations and alternatives discussed above.

Finally, in order to avoid the situation which has developed in this case, and as a matter of fairness to all concerned, we recommend to the Secretary of Housing and Urban Development that appropriate amendments to the current HUD regulations be considered in terms of the issues and conclusions discussed herein. This recommendation is made pursuant to section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C.A. § 1176. Accordingly, copies of the decision are being sent to the Secretary and to the appropriate congressional committees.

[B-183828]

Officers and Employees—Transfers—Relocation Expenses—Break in Service—Reemployed by Term Appointment

Employee who was separated by reduction-in-force (RIF) by National Aeronautics and Space Administration (NASA) and employed after break in service of less than 1 month by term appointment with Health, Education, and Welfare (HEW), may be reimbursed expenses of selling house at NASA duty station since term appointment with HEW was "nontemporary appointment" and eligibility for relocation expenses arose under that section incident to RIF by NASA and employment by HEW.

In the matter of the reimbursement of real estate expenses, January 23, 1976:

This action concerns the claim of Alfred H. Gaehler, an employee of the Department of the Army, for reimbursement of real estate expenses under the circumstances described below.

Mr. Gaehler was employed at the Ames Research Center, Moffett Field, California, by the National Aeronautics and Space Administration (NASA), when he was the subject of a reduction-in-force (RIF) action, which terminated his position with NASA effective September 30, 1970. At the time, Mr. Gaehler was residing in Cupertino, California. Effective October 26, 1970, Mr. Gaehler received a term appointment to a manpower shortage position with the Department of Health, Education, and Welfare (HEW) in Sacramento, California. Pursuant to his appointment to the manpower shortage position, he was issued Travel Order No. PHS 374897, dated October 23, 1970, authorizing travel and transportation expenses for himself and his wife and also authorization for transportation of household effects from Cupertino to Sacramento. Subsequently, he transferred from HEW to his current position with the Army, effective September 19, 1971. Pursuant to the latter transfer, Mr. Gaehler was reimbursed for proper expenses, including lease-breaking expense incurred by him at his former duty station in Sacramento.

Mr. Gaehler now claims reimbursement for the expenses incurred in the sale of his residence at Cupertino on January 21, 1971. He first submitted his claim to the Army incident to his tranfer from HEW to Army, and it was denied on the basis that the residence sold was not his residence when he was first officially notified of his transfer to the Army, as required by Office of Management and Budget Circular No. A–56, para. 4.1d (September 1, 1971), and that his term appointment did not constitute a "nontemporary appointment" within the meaning of 5 U.S. Code § 5724a(c) (1970).

The fact that the Cupertino residence was not Mr. Gaehler's residence at the time he was first officially notified of his transfer was not a proper basis for denying reimbursement for the real estate expenses of the sale. In 51 Comp. Gen. 27 (1971) we stated that a former employee who is reemployed after a break in service of less than 1 year is entitled, pursuant to 5 U.S.C. § 5724a(c), to the same benefits he would have been entitled to had he transferred without a break in service. Accordingly, in that decision we held that the employee was entitled to reimbursement for travel expenses, real estate expenses incurred in the sale of his house, storage of his household effects, and other proper relocation expenses incurred prior to his reinstatement.

Notwithstanding the above, the Army is not liable to Mr. Gaehler for the expenses incurred incident to the sale of his residence on January 21, 1971.

Section 5724a(c) states:

> Under such regulations as the President may prescribe, a former employee separated by reason of reduction in force or transfer of function who within 1 year after the separation is reemployed by a nontemporary appointment at a different geographical location from that where the separation occurred may be allowed and paid the expenses authorized by sections 5724, 5725, 5726(b), and 5727 of this title, and may receive the benefits authorized by subsections (a) and (b) of this section, in the same manner as though he had been transferred in the interest of the Government without a break in service to the location of reemployment from the location where separated.

The applicability of this section specifically is limited to a "former employee" who is "reemployed" by the Federal Government. It is clear that at the time of his appointment with the Army, Mr. Gaehler was not a "former employee" of the Government who was being "reemployed." Rather, Mr. Gaehler was already an employee who was transferring from one agency to another. Accordingly, section 5724a(c) is not applicable to Mr. Gaehler's transfer from HEW to Army, and he is not entitled to reimbursement pursuant to that transfer.

However, we are of the view that Mr. Gaehler's term appointment with HEW was a "nontemporary appointment" for the purpose of section 5724a(c) so that his reemployment by HEW, after being subjected to a reduction in force by NASA, would be within the scope of section 5724a(c). Although the legislative history of this provision is not definitive concerning this point, we believe that the term "nontemporary appointment" refers to appointments other than temporary limited appointments, which are defined in subpart D, part 316, of title 5, Code of Federal Regulations (1975), as appointments of 1 year or less.

Our rationale is as follows: Employees holding temporary limited appointments are not subject to reduction-in-force actions since they do not acquire tenure; rather, appointments of this type are *terminated* without following the RIF procedure when a RIF situation occurs in the agency. Thus, a person holding a temporary limited appointment could in no instance be covered by section 5724a(c) upon termination of his appointment since that section is applicable only to a "former employee *separated by reason of reduction in force or transfer of function.* [Italic supplied.] However, a person who is employed under a term appointment, an indefinite appointment, or a temporary appointment pending establishment of a register (TAPER) does acquire tenure and is subject to RIF procedures as outlined in part 351 of title 5, Code of Federal Regulations (1975). *See, generally*, Federal Personnel Manual, chapter 316 (1969). Therefore, upon being subjected to a RIF, an employee holding one of the three above-mentioned types of appointments would acquire eligibility under section 5724a(c) if he subsequently received another nontemporary appointment after a break in service of less than 1 year.

Accordingly, Mr. Gaehler may be reimbursed for the expenses incurred in the sale of his residence in Cupertino incident to his reemployment in the nontemporary appointment with HEW. This transaction is separate from his subsequent transfer from HEW to Army, incident to which he was properly reimbursed for lease-breaking expenses which he incurred.

We have instructed our Claims Division to issue a settlement in the amount found due in accordance with this decision.

[B-181694]

Pay—Retired—Disability—Temporary Retired List—Death Prior to Senate Confirmation to Appointment on Permanent Retired List

Navy officer whose permanent grade was rear admiral (0-8) and who was serving as an admiral (0-10) under 10 U.S.C. 5231, was transferred directly to the temporary disability retired list (TDRL) pursuant to 10 U.S.C. 1202 and then died before the Senate could confirm him on the permanent retired list as an admiral (0-10) pursuant to 10 U.S.C. 5233. Regardless of the grade to which he was entitled on the retired list under 10 U.S.C. 1372, or other law, under Formula No. 2, 10 U.S.C. 1401, such member's retired pay while on the TDRL is to be computed on basic pay of an admiral (0-10) and Survivor Benefit Plan annuity based thereon.

In the matter of Admiral Richard G. Colbert, USN, Retired (Deceased), January 27, 1976:

This action is in response to a letter with enclosures from Mr. C. R. Davies, Disbursing Officer, Retired Pay Department, Navy Finance Center (file reference XO:MTP:blf 081 32 6038), requesting an advance decision concerning the proper grade to be used in the computation of the retired pay of Admiral Richard G. Colbert, USN, Retired (Deceased), 081 32 6038, for purposes of the Survivor Benefit Plan, 10 U.S. Code 1447-55 (Supp. II, 1972). The request has been assigned submission number DO-N-1224 by the Department of Defense Military Pay and Allowance Committee and forwarded to this Office by Office of the Comptroller of the Navy letter (file reference NCF-411, 7220/6-1).

The submission indicates that Admiral Colbert was appointed to the grade of admiral (0-10), apparently with the advice and consent of the Senate, pursuant to 10 U.S.C. 5231 (1970), to serve as Commander in Chief, Allied Forces, Southern Europe. Due to the development of a serious illness, he departed his command on November 25, 1973, and was transferred to the temporary disability retired list under 10 U.S.C. 1202 (1970), effective that same date, in his permanent grade, rear admiral (upper half, 0-8). A nomination was sent to the Senate pursuant to 10 U.S.C. 5233 (1970), for the purpose of effecting his appointment on the retired list in a grade commensurate with the highest grade he held while on the active list (admiral). However, before the Senate could act on the nomination, Admiral Colbert died on December 2, 1973.

The order which transferred Admiral Colbert to the temporary disability retired list provided that he was released from all active duty "effective 2400 on 24 Nov 1973" and was transferred to that list on November 25, 1973, in such grade as he "may be entitled on date of retirement pursuant to provisions of Title 10, USC 1202." He was posthumously appointed to the grade of admiral on the retired list pursuant to 10 U.S.C. 1521 (1970); however, pursuant to 10 U.S.C. 1523 (1970), such a posthumous appointment does not provide entitlement to "any bonus, gratuity, pay or allowance."

By memorandum dated January 15, 1974, the Head, Retirement Branch, Navy Finance Center, determined that since Admiral Colbert had not been confirmed on the retired list as an admiral (O-10) by the Senate prior to his death, his retired pay and survivor benefits must be based on the pay of a rear admiral (upper half, O-8). Accordingly, Admiral Colbert's retired pay was computed based on 75 percent of the basic pay of a rear admiral (upper half O-8) with over 30 years of service. Based on that computation, his retired pay due for the period of November 25 through December 2, 1973, was paid to his widow, Mrs. Prudence A. Colbert, as his beneficiary. In addition, based on such computation of retired pay, a Survivor Benefit Plan annuity was established in favor of Mrs. Colbert.

Since a greater retired pay entitlement and Survivor Benefit Plan annuity would result if it is determined that Admiral Colbert's retired pay should have been computed based on the grade of admiral (O-10) rather than rear admiral (upper half, O-8), the disbursing officer requests advice as to the proper grade to be used in such computation.

Enclosed with the disbursing officer's letter is a copy of an opinion of the Judge Advocate General of the Navy in which it is indicated that the matter is complex and troublesome and suggesting that its resolution is dependent upon the interplay of different statutes enacted at different times for different purposes. After a discussion of the various statutes involved, the opinion concludes that strong arguments exist for the position that legislation would be necessary to establish Admiral Colbert's retired pay and his widow's annuity as based on the pay of an admiral (O–10).

As was indicated previously, at the time Admiral Colbert was placed on the temporary disability retired list he was serving in the grade of admiral (0–10) pursuant to the provisions of 10 U.S.C. 5231 (1970), which is the current codification of section 413 of the Officer Personnel Act of 1947, August 7, 1947, ch. 512, 61 Stat. 795, 875. Subsection 5231(a) provides in pertinent part as follows:

> (a) The President may designate officers on the active list of the Navy above the grade of captain and, in time of war or national emergency, above the grade of commander for—
> (1) command of fleets or subdivisions of fleets;
> (2) command of naval units afloat to perform special or unusual missions; or
> (3) performance of duty of great importance and responsibility.
> An officer so designated may be appointed by the President, by and with the advice and consent of the Senate, to the grade of admiral or vice admiral. Such an appointment is effective on the date the officer reports for the designated duty and terminates on the date he is detached. * * *

A similar statute applying to the Marine Corps is 10 U.S.C. 5232 (1970) which was derived from section 415 of the Officer Personnel Act of 1947, 61 Stat. 876.

Concerning retirement of officers serving in such positions, 10 U.S.C. 5233 (1970) provides as follows:

> An officer who is serving or has served in a grade to which appointed under section 5231 * * * of this title may, upon retirement, be appointed by the President, by and with the advice and consent of the Senate, to the highest grade held by him while on the active list and with retired pay based on that grade.

That provision is derived from sections 414 and 415(e) of the Officer Personnel Act of 1947, as amended by subsection 6(4) of the act of May 20, 1958, Public Law 85–422, 72 Stat. 122, 129.

Provisions similar to 10 U.S.C. 5231, 5232 and 5233 relating to generals and lieutenant generals of the Army (10 U.S.C. 3066) and Air Force (10 U.S.C. 8066) are also derived from the Officer Personnel Act of 1947, subsections 504(b) and (d), 61 Stat. 886–888, 10 U.S.C. 506b.

The Judge Advocate General indicates that the question to be resolved is whether the provisions of 10 U.S.C. 5233 constitute the only mechanism by which an officer appointed under 10 U.S.C.

5231 can lawfully be appointed on the retired list to the highest grade held while on the active list with retired pay based on the pay of that grade, or whether other provisions of law may provide alternate means. In this regard, the Judge Advocate General further indicates that he has found only one decision, 38 Comp. Gen. 167 (1958), to be of some relevance.

As stated by him, that decision involved an Army officer who was first retired in 1953 in the grade of major general and who was advanced on the retired list to the grade of general with the advice and consent of the Senate, under the provisions of section 504(d) of the Officer Personnel Act of 1947, 61 Stat. 888. Under the provisions of that law at that time, such an advancement did not entitle him to increased retired pay. Subsequently, his military records were corrected to show that he had been placed on the temporary disability retired list in 1953 rather than retired under other provisions of law. He was later recalled to active duty and then retired again in 1958. The question involved in the case concerned the application to him of the active duty pay increases provided in the act of May 20, 1958, Public Law 85–422, *supra*, and not whether by virtue of the correction of his records he was properly placed on the temporary disability retired list in the grade of general in 1953. However, since it was stated in the decision that he was entitled to temporary disability retired pay based upon the active duty pay of the highest grade held by him on the active list (general) by virtue of such correction of records, that decision lends some support to the view that Admiral Colbert would likewise be entitled to be placed on the retired list under 10 U.S.C. 1372 in the highest grade he held on the active list (admiral).

It is clear that Admiral Colbert could not be retroactively appointed to the grade of admiral (0–10) on the retired list pursuant to 10 U.S.C. 5233. *See* 38 Comp. Gen. 340 (1958) and 41 Comp. Gen. 43 (1961). As was stated in the orders transferring Admiral Colbert to the temporary disability retired list, such transfer was made pursuant to the authority of 10 U.S.C. 1202 which was derived from subsections 402(a) and (b) of the Career Compensation Act of 1949, October 12, 1949, ch. 681, 63 Stat. 802, 816–817. Section 1202 of Title 10 provides in pertinent part as follows:

> Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay * * * would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature, the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title.

Section 1401 of Title 10, U.S. Code, provides a table of formulas specifying methods of computing retired pay for certain types of retirements. Formula No. 2 of that table provides the method of computation to be used in computing disability retired pay of members covered by 10 U.S.C. 1202 and provides in part in column 1 thereof that such computation is to be based on the—

> Monthly basic pay of grade to which member is entitled under section 1372 *or to which he was entitled on day before * * * placement on temporary disability retired list, whichever is higher.* [Italic supplied.]

The before-cited provisions of Formula No. 2 of section 1401 are derived in part from section 402(d) of the Career Compensation Act of 1949. However, the underscored portion of that formula was added by subsection 6(7)(A) of the act of May 20, 1958, Public Law 85–422, 72 Stat. 122, 129, which appears to have been added in the conference committee consideration of H.R. 11470, the bill which became Public Law 85–422. The legislative history of the provision gives no reason for its addition; however, it should be noted that it was section 1 of Public Law 85–422 which created pay grades 0–9 and 0–10 and assigned vice admirals, lieutenant generals, admirals, and generals to those grades. Thus, since such pay grades were specifically treated in that law, in view of the conditions and limitations otherwise imposed by Congress on the retired grade and retired pay of members serving in those higher grades, e.g., 10 U.S.C. 5233, it would appear that the provision added by subsection 6(7)(A) was intended to authorize payment of the higher rate of retired pay to such members while on the temporary disability retired list pending return to the active list or placement on the permanent retired list in the higher grade.

In the present case, the highest grade the member ever held on the active list was admiral (0–10), which was the grade in which he was serving on the day before placement on the temporary disability retired list. Therefore, it is not necessary for this Office to decide whether Admiral Colbert was entitled to be placed on the permanent retired list in the grade of admiral without Senate confirmation since in computing his retired pay we must apply the specific and unambiguous language of column 1 of Formula No. 2 of 10 U.S.C. 1401. *Cf. Selman* v. *United States*, 204 Ct. Cl. 675 (1974); 55 Comp. Gen. 58 (1975); and 47 *id.* 696, 700 (1968). Under those provisions, Admiral Colbert was entitled to receive retired pay based on the grade of admiral (0–10) while on the temporary disability retired list regardless of his actual grade entitlement on the retired list.

Accordingly, it is our view that Admiral Colbert's retired pay, for the period during which he was on the temporary disability retired list (November 25 through December 2, 1973), should be recomputed based on the monthly basic pay to which he was entitled on the day before placement on the temporary disability retired list (admiral (0–10)) and the amount due paid to his beneficiary (Mrs. Colbert). Additionally, Mrs. Colbert's Survivor Benefit Plan annuity should be recomputed on that basis from December 3, 1973, less any increase in premium cost which was due prior to the member's death.

[B-177640]

Transportation—Automobiles—Military Personnel—Ferry Transportation—Alaska State Ferry System

Incident to a permanent change of station Coast Guard member's privately owned vehicle was transported via the Alaska State Ferry System from Juneau, Alaska, to Seattle, Washington. Member is entitled to such transportation at Government expense since "privately owned American shipping services," as used in 10 U.S.C. 2634 authorizing the transportation at Government expense of a privately owned motor vehicle of a member of an armed force ordered to make a permanent change of station, includes State-owned vessels.

In the matter of a shipment of a privately owned vehicle on Alaska State Ferry System (Alaska Marine Highway), January 29, 1976:

This action is in response to the claim of a Coast Guard officer for reimbursement of expenses in the amount of $212 incurred incident to the shipment of a privately owned vehicle (POV) on the Alaska State Ferry System (Alaska Marine Highway) from Juneau, Alaska, to Seattle, Washington, in connection with a permanent change of station. The claim was forwarded to this Office by the Authorized Certifying Officer, United States Coast Guard, Department of Transportation.

The record indicates that Captain John H. Byrd, Jr., USCG, at the end of a tour of duty in Alaska, made arrangements for his own passage and that of his wife and for transportation of his POV via the Alaska State Ferry Service, also known as the Alaska Marine Highway, from Juneau, Alaska, to Seattle, Washington. He paid $366 in advance for these services. On July 3, 1973, Captain Byrd was issued a transportation request in favor of the Alaska State Ferry System for ferry class water transportation from Juneau to Seattle with stateroom accommodations for himself and his wife. On the same day he conveyed the transportation request to the Division of Marine Transportation, Department of Public Works, State of Alaska, and was refunded all of his initial outlay except the $212 cost of shipment of his POV. He now claims a refund of this sum.

Captain Byrd in his claim dated July 19, 1974, says that there is nothing in the language of the controlling statute that excludes transportation of authorized motor vehicles at United States expense aboard the Alaska State Ferry System vessels and that Congress did not intend to exclude the Alaska State Ferry System as a carrier authorized to transport motor vehicles at the expense of the United States in change of permanent station cases such as his own. Captain Byrd also says that had the schedules of ships operated by the ferry service been such that his automobile was aboard the Panamanian flag M/V *Wickersham* instead of the United States flag M/V *Malispina*, then the claim would have been paid.

As indicated by Captain Byrd the language of 10 U.S. Code 2634 does not specifically exclude the transportation of members' vehicles aboard vessels of the Alaska State Ferry System. That section provides in pertinent part for the shipment of one motor vehicle incident to a member's change of permanent station, at Government expense—

(1) on a vessel owned, leased, or chartered by the United States;
(2) by privately owned American shipping services; or
(3) by foreign-flag shipping services if shipping services described in clauses (1) and (2) are not reasonably available.

Since the inception of the Alaska State Ferry System in about 1963 it apparently has been understood by the Department of Defense that shipment of an automobile by means of that System was not authorized at Government expense. However, paragraph 11007 of the Joint Travel Regulations was not amended until August 1, 1975, to state specifically that there is no authority to reimburse a member for the cost of transporting his automobile on the Alaska State Ferry System.

We have reviewed the question and now believe that it is the better position that the cost assessed by the Alaska State Ferry System for transportation of automobiles should be considered an allowable charge for automobile transportation under 10 U.S.C. 2634. Although the clause "privately owned American shipping services" is used in that provision of law, it is clear that the phrase was used, when enacted, to permit the use of American shipping not owned or controlled by the Federal Government. At the time this language was first enacted the Alaska State Ferry System was not in being and the designation of Government shipping and "privately owned American shipping" was understood to cover all existing American flag ocean shipping. The advent of the Alaska State Ferry Service created an entity which arguably was not included in the basic authorization. Such a result, however, would be contrary to the intent of Congress in providing for the transportation of automobiles for members of the military services stationed overseas.

As this law developed it was intended to provide for the transportation of automobiles of military personnel on a reasonable and economical basis. We believe that to exclude use of the Alaska State Ferry Service simply because it is controlled by a State rather than a commercial enterprise would defeat the purpose of the law. Therefore, it is our view that the pertinent regulations should be changed to authorize payment of the costs of transporting privately owned automobiles on the Alaska State Ferry System incident to a change of permanent station. *Cf.* 53 Comp. Gen. 131 (1973). Further, since paragraph 11007, Volume 1 of the Joint Travel Regulations, does not reflect the scope of authority granted as discussed herein that provision need not be considered as precluding otherwise proper payments for Alaska State Ferry Service transportation of automobiles.

For the reasons stated the voucher presented may be paid if otherwise correct.

[B-183670]

General Accounting Office—Jurisdiction—Contracts—Nonappropriated Fund Activities

Since protested award of procurement pursuant to section 22(a) of Foreign Military Sales Act will not involve use of appropriated funds, matter is not subject to settlement by General Accounting Office and is dismissed.

In the matter of Tele-Dynamics, Division of AMBAC Industries, January 29, 1976:

This protest concerns a noncompetitive contract award by the Department of the Navy, Naval Sea Systems Command (NSSC) to Nelson Electric Division of Sola Basic Industries under request for proposals No. N00024-75-C-4425(S).

By a letter received in this Office on December 12, 1975, from NSSC, the Navy raised, *inter alia*, a question concerning our jurisdiction to render an authoritative decision on the merits of this protest. The Navy states that the transaction in the instant case represents a cash sale of defense articles pursuant to section 22 of the Foreign Military Sales Act, as amended, 22 U.S. Code 2762 (Supp. III, 1973).

Section 22(a) authorizes the President, without requirement for charge to any appropriation or contract authorization otherwise provided, to enter into contracts to procure defense articles or services for cash sale to a foreign country upon a dependable undertaking by that country to make available in advance sufficient funds to cover payments, damages, and other costs due under the contract.

The Navy indicates that the instant transaction was based upon such a "dependable undertaking" pursuant to section 22(a), i.e., advance payment. According to NSSC, the contract costs are charged against Navy's Foreign Military Sales Trust Fund, consisting of payments made by foreign governments.

From the foregoing record it is sufficiently clear that this contract will not involve payments from appropriated funds. It is well established that this Office is without authority to render authoritative decisions with respect to procurements which do not involve expenditure of appropriated funds. B–171067, March 18, 1971. Our bid protest jurisdiction is based upon our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. 71, 74 (1970). Where we do not have such settlement authority over the account concerned, we have declined to consider protests on the grounds that we could not render an authoritative decision on the matter. See *Equitable Trust Bank*, B–181469, July 9, 1974, 74–2 CPD 14 and *Relco, Inc.*, B–183686, May 5, 1975, 75–1 CPD 276.

Since no useful purpose would be served by our consideration of the matter, the protest is dismissed.

[B–184093, B–184178]

Contracts—Labor Stipulations—Service Contract Act of 1965—Applicability of Act—Data Processing Services

General Accounting Office will not object to inclusion by contracting agency of Service Contract Act provisions in solicitations for data processing services, even though U.S. District Court has ruled that Act is not applicable to such services, since Department of Labor (DOL), which has responsibility for administering Act, has declined to follow the decision in all other jurisdictions and has been supported in its position by cognizant Congressional committee, and since there is conflict within same judicial circuit as to whether decisions by DOL regarding coverage of the Act are judicially reviewable.

In the matter of Central Data Processing, Inc., January 30, 1976:

Central Data Processing, Inc. (CDP) has protested the inclusion of Service Contract Act (Act) provisions and Department of Labor

(DOL) Wage Determinations in invitations for bids (IFB) Nos. F05602-75-B-0042 and F05602-75-B-0046 issued by the United States Air Force (USAF) Accounting and Finance Center, Denver, Colorado. CDP states that the Act is not applicable to these procurements, which involve data conversion services, because only white collar labor will be employed. Awards were made to the low bidders on June 27, 1975, notwithstanding the pendency of the protests, after the USAF determined that the services were urgently needed and that no alternate means of procuring them were available.

The Service Contract Act of 1965, as amended, 41 U.S. Code 351 (1970) *et seq.*, provides that every contract entered into by the United States in excess of $2,500, subject to certain exceptions set forth in 41 U.S.C. 356, "the principal purpose of which is to furnish services in the United States through the use of service employees," shall contain provisions specifying the minimum wages to be paid and fringe benefits to be furnished service employees "in the performance of the contract," as determined by the Secretary of Labor. Implementing regulations, setting forth the specific provisions to be included in contracts and providing for agencies to notify DOL of their intent to award service contracts, have been promulgated by the Secretary of Labor and adopted by the Department of Defense. 29 C.F.R. 4.4–4.6 (1975); Armed Services Procurement Regulation (ASPR) 12.1004, 12.1005 (1975). Pursuant to these regulations, contracting officers file with DOL a notice of intent to award a service contract whenever they intend to issue a solicitation leading to the award of a contract "which may be subject to the Act," and DOL issues, when appropriate, a wage determination setting forth minimum wages and fringe benefits. The wage determination is included in the solicitation and resulting contract. These procedures were followed in the two procurements being protested.

The protester's position is based on the holding in *Descomp, Inc.* v. *Sampson*, 377 F. Supp. 254 (D. Del. 1974). In that case, it was held that "white collar" keypunch operators were not service employees within the meaning of the Act even though they were performing services, and that the Act therefore was inapplicable to the contract in dispute. *See also* 53 Comp. Gen. 370 (1973), in which we expressed doubt that the Act was applicable to clerical workers and recommended that clarifying legislation be obtained. It is not disputed that the contracts are to be performed primarily by "white collar" keypunch operators and other clerical workers.

The USAF position in this matter is that these procurements were conducted in accordance with the ground rules established in *Descomp*, *Inc.*, 53 Comp. Gen. 522 (1974), 74–1 CPD 44 and *Hewes Engineering Company, Incorporated*, B–179501, February 28, 1974, 74–1 CPD 112. In *Descomp, Inc.* we denied a protest against the inclusion of Service Contract Act wage determinations in two solicitations calling for key-punching services, saying that while the applicability of the Act to clerical workers was a matter of serious doubt, the statutory language did not specifically prohibit DOL from classifying clerical workers as service employees. Furthermore, in *Hewes Engineering* we concluded that notwithstanding our doubts, until clarifying legislation was obtained contracting agencies must give due regard to DOL's position when determining whether a particular procurement may be subject to the Act "unless those views are clearly contrary to law."

USAF reports that DOL's views are clear. According to USAF, DOL, by letter dated August 7, 1974, requested that all future contracts for the conversion of legal texts to magnetic tapes include provisions implementing the Act. As a result of the request from DOL, the contracting officer, prior to issuing the instant solicitation, forwarded a Notice of Intention to Make a Service Contract to DOL, expressing his reservations as to the applicability of the Act. DOL responded by issuing the wage determination which was included in the solicitations.

Although the USAF states that it has complied with our previous decisions, it points out that those decisions preceded the Court's decision in *Descomp, Inc.* v. *Sampson, supra*, and suggests that we may want to reconsider our position, especially since DOL refuses to follow the Court's decision outside of Delaware. The USAF position is stated thusly:

> Since the Federal District Court for the District of Delaware has now ruled that the DOL position is contrary to the law, the GAO may now wish to review its previous conclusion. The Air Force is particularly concerned about this situation, because the DOL position is currently unsupported by any ruling of a court, and because the Air Force expects repetitive litigation of the matter unless the "white collar" issue is resolved. In addition, the Service Contract Act is now administered in one way for the State of Delaware, and in another way for the other 49 states. This can only lead to conflict and confusion, especially where the competition for certain contracts extends over a multi-state area.

We continue to be of the belief that the application of the Act to "white collar" clerical workers, even though not specifically prohibited by the language of the Act, is of doubtful propriety. Our belief in this regard is of course buttressed by the District Court's decision in *Descomp, Inc.* v. *Sampson, supra*. However, as noted, DOL does not agree with the Court's decision and is refusing to follow it outside the District of Delaware.

In *Hewes Engineering Company, Incorporated, supra*, we recognized that under 41 U.S.C. 353 the Secretary of Labor is responsible for administering the Act and for promulgating implementing regulations. DOL continues to include under the coverage of the Act workers in clerical operations, office machine operation, data processing and other similar work. In addition, we note that DOL's position has been supported by the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, which strongly disagrees with the *Descomp, Inc.* v. *Sampson* decision. The Subcommittee stated the following in an April 1975 report:

> That the court in *Descomp* placed a construction upon the language of the statute that is clearly not there is well supported by statements of Congressional intent in the 1974 Oversight Hearings. * * *
>
> *Descomp* * * * established an incorrect test for defining a service employee based upon a distinction between so-called "blue" and "white" collar employees. * * *
>
> The Subcommittee rejects the holding in *Descomp* and endorses the government's position in the case with regard to the use of the words "any" and "all" in the § 8(b) definition of service employee, that it evidenced a legislative intent to give an expansive scope to the coverage of the Act and the definition of "service employee."
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> * * * * * * *
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> As problems have now arisen concerning white collar workers, the Subcommittee accordingly recommends that § 2(a)(5) be amended to require inclusion of the schedule of pay that would be applied to white collar employees if the general schedule pay rates (5 U.S.C. § 5332) governed. Staff of the Subcommittee on Labor-Management Relations, House Committee on Education and Labor, 94th Cong., 1st Sess., *Congressional Oversight Hearings: The Plight of the Service Worker Revisited* 11–12 (Committee Print 1975).

Moreover, we note that there is a conflict within the Third Judicial Circuit (in which the *Descomp* court sits) with respect to the reviewability of the Secretary of Labor's determination as to the coverage of the Act. See *Curtiss-Wright Corporation* v. *McLucas*, 364 F. Supp. 750 (D. N.J. 1973), in which the court held that the Secretary's determination was "not judicially reviewable." 364 F. Supp. at 769. The court in *Descomp* specifically declined to follow the *Curtiss-Wright* case. 377 F. Supp. at 259.

Under these circumstances, we think it would be inappropriate at this time for this Office to decide that as a matter of law the Act must be construed only as the court construed it in the *Descomp* case.

With regard to the instant protests, the USAF, relying on our prior decisions and on DOL's interpretation of the Act, complied with the implementing regulations and included the wage determinations in the solicitations. For the reasons stated above, we do not find such actions to be legally objectionable.

In light of the foregoing, the protests are denied.

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