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[B-191662]

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Appliances—Disconnection and Reinstallation

Transferred employee who had water line run from supply pipe to ice maker in refrigerator at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Drilling hole in wall is not "structural alteration" since it is necessary for connection and proper functioning of refrigerator. Prior decisions to contrary will no longer be followed.

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Structural Alteration or Remodeling—Appliance Reinstallation—"Alteration" Status

Transferred employee who had gas line connected to and vent pipe run from clothes dryer at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Necessary holes in walls are not "structural alterations" since they are necessary for connection and proper functioning of dryer. Prior decisions to contrary will no longer be followed.

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Telephone Reinstallation—Comparable Service

Where transferred employee at new duty station acquires level of telephone service comparable to what he had at old duty station, total installation charges may be reimbursed under miscellaneous expense allowance, even where "jacks" have been installed. Prior decisions to the contrary will no longer be followed.

General Accounting Office—Decisions—Overruled or Modified—Prospective Application

Holdings allowing reimbursement under miscellaneous expense allowance for cost of connecting ice maker and connecting and venting clothes dryer are substantial departure from prior decisions and will be applied only to cases in which the expense is incurred on or after date of this decision. However, claimant here may be reimbursed in accordance with this decision.

Matter Of: Prescott A. Berry—Miscellaneous Expense Allowance, March 2, 1981:

The issues presented here concern what items may be included in the reimbursement of miscellaneous expenses paid to an employee at the time of his transfer. The items specifically raised are the installation of a water line to an ice maker in the refrigerator, the installation of a gas line to and vent from a clothes dryer, and the acquisition of a comparable level of telephone service in the employee's residence at his new duty station. For the reasons set forth below, all of the above items may be included within the reimbursement of miscellaneous expenses. Prior decisions to the contrary will no longer be followed.

Mr. Prescott A. Berry, an employee of the Internal Revenue Service, was transferred to Philadelphia, Pennsylvania. In order to com-

plete the installation of the refrigerator that he had transported from his old duty station, it was necessary to drill a one-fourth inch hole in the floor and run tubing from the water supply pipe to the ice maker in the refrigerator. In order to connect the gas clothes dryer, which was also brought from the old duty station, it was necessary to drill a one-inch hole in the wall, extend an existing gas line for approximately one foot, and run a gas supply line from there to the dryer. It was also necessary to cut a four-inch hole in the outside wall to connect the vent pipe. Additionally, Mr. Berry had a telephone "jack," along with the basic service, installed. He states that the telephone equipment installed merely duplicated the service that existed at his prior duty station. The costs for these installation or connection charges were:

Ice maker	$25.00
Clothes dryer	85.00
Telephone jack	16.42

On the basis of various decisions of this Office, the agency disallowed Mr. Berry's claim for inclusion of all of the above items in the miscellaneous expense allowance. On the same grounds our Claims Division, in Settlement Certificate Z-2473522, October 5, 1977, sustained that disallowance. Mr. Berry appealed that settlement, but in *Matter of Prescott A. Berry*, B-191662, December 28, 1978, the disallowance was again sustained. Mr. Berry has requested that the entire matter again be reviewed.

The holding in our decision of December 28, 1978, is based upon paragraph 2-3.1(c)(13) of the Federal Travel Regulations (FPMR 101-7) (May 1973) (FTR), which lists costs which may not be included within the reimbursement for miscellaneous expenses. Subparagraph 13 excludes:

> Costs incurred in connection with structural alterations; remodeling or modernizing of living quarters, garages or other buildings to accommodate privately owned automobiles, appliances or equipment; or the cost of replacing or repairing worn-out or defective appliances, or equipment shipped to the new location.

Mr. Berry contends that the work done to connect and accommodate his dryer and refrigerator was not structural in nature, but was only what was necessary to connect these appliances.

As a result of this appeal, we have reviewed the decision in Mr. Berry's case and our other decisions involving appliance connection fees. We find that these decisions have unnecessarily focused on the exclusionary language of FTR para. 2-3.1c(3) rather than on FTR para. 2-3.1b(1), which lists among the types of costs intended to be reimbursed as part of miscellaneous expenses:

> * * * Fees for disconnecting and connecting appliances, equipment, and utilities involved in relocation and costs of converting appliances for operation on available utilities * * *.

Clearly, there can be a conflict between the two quoted sections. At some point the work involved in installing appliances in a transferred employee's new residence can exceed that normally associated with connection and can become that of structural alteration or remodeling. Exactly when that point may be reached is a factual question.

Although we do not believe that the term "structural alteration" is susceptible to precise definition, we agree with Mr. Berry's view that it was not intended to include a change so minimal as cutting a hole through a wall or other barrier for the purpose of connecting or venting appliances, a purpose clearly within the ambit of the miscellaneous expenses allowance.

Thus, while each case must be individually considered, we have concluded that our decisions in this area have been unnecessarily restrictive in that they tend to relegate the transferred employee to that level of appliance or equipment service already in the residence which he has leased or purchased at his new duty station. Further, a definition which includes drilling or cutting a hole in a wall as a "structural alteration," includes changes that can only be categorized as *de minimis*. This result is the current rule and is not altogether consistent with the purpose of the miscellaneous expenses allowance which, in part, was intended to reimburse costs the employee incurs in relocating appliances and equipment to his new residence and re-establishing the level of service he had at his old station.

Of course, in achieving a comparable level of appliance service at his new duty station, an employee must work within the confines of the new residence. Installing new utility service in a residence or altering the basic structure of the residence in order to permit use of appliances or other possessions would not come within the cost allowable as miscellaneous expenses under this decision.

As we have indicated the determination is a factual one and should be made by the certifying officer or other appropriate official after a consideration of the circumstances in each case. The emphasis should be on whether the claimed expenses were necessary to connect the appliances in such a way that they can function properly and legally. The cost of parts, such as pipes or wire, reasonably necessary to connect the appliances to the existing utility service may be reimbursed as connection costs, since the precise sizes and types of such connecting materials are dependent upon the physical layout of each residence.

Although Mr. Berry does not specifically challenge our denial of his claim for installation of telephone service at his new duty station, we find that he has been improprly denied reimbursement for the installation cost of a new telephone "jack." While our decisions on this

point have not been consistent, we held in B–170589, November 13, 1970, that the cost of having a telephone "jack" installed in the employee's new residence was reimbursable as a miscellaneous expense where, as in Mr. Berry's case, the employee had similar service at his old duty station. The result in B–170589 is consistent with the purpose of FTR para. 2–3.1b(1) as discussed above. Therefore, our prior decision disallowing Mr. Berry's claim in the amount of $16.42 is overruled and he may be reimbursed for that amount. Decisions to the contrary will no longer be followed.

Since our holding with respect to the connection costs claimed by Mr. Berry represents a substantial departure from long-held positions which have been justifiably relied upon by certifying and disbursing officers, it will be applied prospectively only—to cases where the expense in question is incurred on or after the date of this decision. However, the holdings will be applied to the specific claims presented by Mr. Berry, and he may be reimbursed for the amounts set out above. See *Matter of George W. Lay*, 56 Comp. Gen. 561 (1977).

Accordingly, a settlement will be made in the amount found due.

[B–199050]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc. Determinations—Locality Basis for Determination—Court–Decision Effect

When Department of Labor adopts final rule indicating that it will follow Court of Appeals decision, issued after date of solicitation, and will examine procurements on case-by-case basis to determine appropriate locality for wage determinations, protest arguing that minimum hourly wage rates were improperly set on nationwide basis is denied.

Matter of: Hayes International Corporation, March 2, 1981:

Hayes International Corporation protests the award of a contract under a Federal Aviation Administration solicitation for painting of a single airplane, arguing that the minimum hourly wage rates specified in the solicitation pursuant to the Service Contract Act of 1965, as amended, 41 U.S.C. § 351(a)(1) (1976) (SCA), were improperly set on a nationwide basis.

Hayes cites a recent U.S. Court of Appeals decision, *Southern Packaging and Storage Co., Inc.* v. *United States*, 618 F. 2d 1088 (4th Cir. 1980), which held that for wage determination purposes, "locality" as used in the SCA refers to the Standard Metropolitan Statistical Area where the bidding party's plant or facility is located. Hayes'

wage rates, which were established by a collective bargaining agreement, were less than those specified in the solicitation.

During development of the protest, the Department of Labor (DOL) published final rules which indicate that it will follow *Southern Packaging*. In the future, the regulation states, DOL will examine each procurement on an individual basis to determine the appropriate locality or localities for wage determinations. 46 Fed. Reg. 4320 at 4326, 4348 (1981). *But see* 29 CFR 4.53(b), as revised at 46 Fed. Reg. 4348 (1981) with respect to successor contractors). We are denying Hayes' protest.

Hayes recognizes that under prior decisions of our Office, it could not have prevailed. *E.g.*, *The Cage Company of Abiline, Inc.*, 57 Comp. Gen. 549 (1978), 78–1 CPD 430. *Cage* also concerned a contract whose actual place of performance was not known prior to contract award except in terms of broad geographic scope. DOL established a five-state "composite" prevailing wage rate as applicable to the contract. While we disagreed with DOL's position that its "flexible" approach, which it viewed as placing all bidders on an equal footing with respect to wage rates, was necessary to effectuate the purpose of the SCA, we nonetheless concluded that:

> DOL's use of a wide geographic area * * * as the locality basis for a wage determination in connection with a procurement conducted by [a GSA] regional office, when it is not known where the services will be performed, is not clearly contrary to law.

We stated that the legislative history of the SCA did not indicate that the Congress intended to eliminate any competitive advantage held by a firm which operated in an area with lower prevailing wages than other prospective contractors. Our conclusion, however, was based on testimony to the contrary, presented during Congressional hearings on regulations proposed by the Department of Labor in 1975, and a planned Executive Branch review of the entire problem.

The Fourth Circuit is the first Court of Appeals to construe "locality," as used in the SCA. We note that it affirmed a lower court ruling for three reasons. First, DOL indicated that in 98 percent of requested determinations, the Standard Metropolitan Statistical Area provides an appropriate base for mean average wages, and that a nationwide minimum wage rate is used in only one-half of one percent of requested determinations. The court found this was not an undue burden. Second, the court believed that the definition of "locality" as a "particular spot, situation, or location" could not, by common sense, be considered synonymous with nationwide. Third, the court distinguished "locality" as used in the Walsh-Healey Act from the term used in the Service Contract Act. Both the Court of Appeals and the lower court in *Southern Packaging* adopted the view of *Descomp*,

Inc. v. *Sampson*, 377 F. Supp. 254 at 265 (D. Del. 1974), which, in turn, had relied on 1965 testimony of the then-Solicitor of Labor before a Congressional subcommittee that the term "locality" was comparable to that used in the Davis-Bacon Act, and meant the city, town or village in which the contract was to be performed.

In a footnote, the Court of Appeals stated that it did not accept Southern Packaging's contention that national wage rates were never permissible, since there might be "rare and unforeseen" service contracts which might be performed at locations throughout the country and which would generate truly nationwide competition. Whether national wage rates might be permissible under these circumstances was not decided.

Although we agree with the Court of Appeals, we note that the protested solicitation was issued before the decision was rendered and closed before the time for seeking review by the Supreme Court had expired. The resulting contract had been awarded and performance completed long before DOL announced its decision to follow *Southern Packaging* and issued implementating regulations. Under these circumstances, we do not believe it appropriate to disturb the action taken.

The protest is denied.

[B-199268]

Bonds—Bid—Timeliness—Independent Evidence—Bond Misplaced by Government Finding—Bid Responsive

Bid found after bid opening to include required bid bond was properly accepted as responsive despite agency bid opening officials' announcement at bid opening that there was no bond, since protesting second low bidder has not submitted independent evidence to refuse agency's evidence that bond was out of low bidder's control and in hands of Government before bid opening.

Matter Of: A–1 Acoustical Ceilings, Inc., March 4, 1981:

A–1 Acoustical Ceilings, Inc. (A–1), protests the award of a term contract to Brandolini Corporation (Brandolini), for partition work in Philadelphia area Federal buildings under invitation for bids (IFB) No. GS–03B–04404, issued by the General Services Administration, Region 3, Philadelphia, Pennsylvania (GSA). It contends that the Brandolini bid was not accompanied at the time of bid opening by a bid guarantee required by the IFB and should have been rejected as nonresponsive to the terms of the IFB, and that the contract awarded to Brandolini should be terminated and award made to A–1. For the reasons discussed below, the protest is denied.

The IFB, as amended, set bid opening at 11 a.m. on April 11, 1980. Paragraph 3.1 of section 0110, "Special Conditions," provides in per-

tinent part that "[t]he bidder shall submit with his bid, a bid guarantee in the penal amount of *$90,000.*" Paragraph 4 of Standard Form 22, "Instructions to Bidders," included in the IFB, warns bidders that where a bid guarantee is required by the IFB, failure to furnish one in the proper form and amount, by the time set for opening of bids, may be caused for rejection of the bid. *See* Federal Procurement Regulations (FPR) § 1–2.404–2 (1964 ed. amend. 121).

Of the three bids GSA received in response to the IFB, Brandolini was the apparent low bidder, the protester was the second low bidder, and F&S Quality Construction, Inc. (F&S), submitted the highest bid.

A–1 has submitted affidavits of representatives of the protester and of F&S who were present concerning the events which transpired during the bid opening. (Brandolini's representative deposited the firm's bid on the morning of April 11, 1980, but did not remain for the bid opening.) A–1's representative avers that when the Brandolini bid was opened and the GSA employees conducting the bid opening announced that the bid contained no bid bond, he objected to any further reading of the Brandolini bid. Both GSA employees again searched for a bond with the Brandolini bid whereupon one left the room, made a telephone call, returned, stating that she was told to read the prices entered on the Brandolini bid, and did so. On April 14, 1980, the A–1 representative sent a letter to the GSA Assistant Regional Administrator, protesting any award to Brandolini. The contract was awarded to Brandolini on June 9, 1980. Having received no response to the letter, A–1 filed its protest with our Office on June 17, 1980.

The protester states that a thorough search for a bid guarantee for the Brandolini bid was made by the GSA personnel conducting the bid opening at the time the bids were opened, that no bid guarantee accompanied the bid at that time, that the Tabulation of Bids for Brandolini bears the entry "no bid bond," and that according to the notation on the bid tabulation, a bid bond for the firm was not located until April 18, 1980 (1 week after the bid opening). A–1 asserts that where a bond has not been included in the bid, as required by the IFB, it may not be added at a later date, citing our decisions in *Washington Patrol Services, Inc.*, B–196997, March 25, 1980, 80–1 CPD 220, and *Engineering Service Systems, Inc.*, B–192319, July 19, 1978, 78–2 CPD 53.

GSA reports, on the basis of affidavits submitted by the two bid opening officials, the contract negotiator for the procurement, and the Chief of the Real Property Services and Sales Branch, that upon completing the opening and reading of all three bids, the bid opening

officials took the bids and envelopes to the office of the contract negotiator, who immediately examined the materials and discovered the Brandolini bid bond attached to the firm's bid package. GSA states that during the entire time from bid opening until the contract negotiator's discovery of the Brandolini bid bond, all three bids and envelopes were in the possession and view of the two bid opening officials or the contract negotiator and that they were neither tampered with nor was anything removed from or added to them.

The contract negotiator states in her affidavit that when the bids and envelopes were brought to her office at about noon on April 1, 1980, she immediately looked at the Brandolini bid, stapled to the upper left corner of which was a small, brown, letter-sized envelope in which she found the firm's bid bond folded in thirds like a letter. Although one of the bid opening officials was in the room at the time, the contract negotiator did not say anything to her, but completed her examination of the bids and placed them in a locked file cabinet in her office. Sometime between April 11 and 16, 1980, she advised her superior, the Branch Chief, that she had found the bond. (The Branch Chief avers that she was so informed on April 14, 1980, the next working day following the bid opening.) She further states that the envelope or envelopes containing the Brandolini bid were discarded after bid opening but before A–1 filed its protest with our Office, and that she customarily discards bid envelopes shortly after bid opening unless they are late bids.

The bid bond (Standard Form 24) is dated April 11, 1980, refers to the instant IFB with the Brandolini Corporation as principal and Fidelity and Deposit Company of Maryland as surety, and is in the penal amount of $90,000. Brandolini states that at the time the firm submitted its bid, a bid bond was enclosed with the bid form in accordance with the requirements of the IFB and FPR § 1-2.404-4 (1964 ed. circ. 1).

A–1, however, argues that none of the four persons present at the bid opening saw the brown, letter-sized envelope in which the bond was purportedly discovered. The protester takes the position that it is not difficult for anyone to ascertain the contents of a bid envelope, that neither of the two bid opening officials saw a bond in the Brandolini envelope which they searched at least three times during the bid opening, and that it is simply beyond belief that they would not have seen it. A–1 questions why upon finding the bond the contract negotiator did not tell the bid opening officials of her discovery or so inform the Branch Chief until several days after bid opening and did not delete the entry, "no bid bond" on the Brandolini bid tabulation until April 18, 1980. A–1 believes that GSA's failure to retain the bid envelopes

under the circumstances, as required by General Services Administration Procurement Regulations (GSPR) § 5A-2.402(m) (1979 ed.), further indicates that there was no bid guarantee accompanying the Brandolini bid at the time of the bid opening, citing GSPR § 5A-2.402(h) (1979 ed.), and that neither GSA nor Brandolini should be permitted to make the firm's bid responsive by adding a bid guarantee which was not present at the time specified in the IFB for bid opening. The protester concludes that the contracting agency's actions in handling the bid opening tainted the procurement, constitute improprieties and conduct tantamount to fraud, and together with the agency's failure to respond to A-1's protest to the Assistant Regional Administrator impugn the integrity of the bidding process.

GSA notes that we have held that the furnishing of a bid bond is a material requirement which cannot be waived, and that failure to submit one before bid opening renders a bid nonresponsive, *Engineering Service Systems, Inc., supra.* Further, that the contracting agency may reject a bid as nonresponsive, notwithstanding the bidder's assertion that the bond was included in its bid package and was in the agency's control before bid opening, where the bidder's contentions are not supported by independent evidence from other than the bidder's employees or surety to establish that the bond was submitted to the agency before bid opening citing our decisions in *P. W. Parker, Inc.*, B-190286, January 6, 1978, 78-1 CPD 12; *Roderick Construction*, B-193116, January 30, 1979, 79-1 CPD 69; and *Washington Patrol Service, Inc. supra.* Unlike those cases in which the low bidder protested the rejection of its own bid for failure to submit a bid bond, GSA points out that here A-1, the second low bidder, has protested Brandolini's alleged failure to timely furnish a bid bond before bid opening. GSA argues that our decision in the *Parker* case shows both that a bid opening officer's statement concerning the existence of a bid bond at the time of the bid opening is not dispositive and that the contracting agency's determination as to the existence of a bond will be sustained absent persuasive, independent countervailing evidence. GSA contends that A-1 has not submitted such evidence. GSA believes that the affidavits of the bidders' representatives who attended the bid opening are consistent with those of the agency's bid opening officers, but show only that at the bid opening there appeared to be no Brandolini bid bond and do not refute the contract negotiator's affidavit that she later located the missing bid guarantee. Contrary to the protester's assertions, the agency explains, the April 18 notation on the Brandolini bid tabulation is only the date the notation (deletion of the entry, "no bid bond") was made, not the date the bid bond was found. GSA therefore concludes that the protester's evidence sup-

ports the contracting agency's determination that a bid bond was properly submitted by Brandolini, that an honest oversight by the bid opening officials created an appearance to the contrary, and that such a mistake should not be permitted to disqualify the low responsive, responsible bidder or to deprive the Government of a contract awarded at the lowest competitive price.

We stated in *Parker* that the focus of decisions which allows deviations from the bid bond requirement is that there must be independent affirmative evidence that the bid bond was (1) out of control of the bidder and (2) in the hands of the Government before bid opening. In *Parker*, the bid opening officer erroneously announced that the protester's bid included a bid bond on the basis of the protester's indication to that effect in its bid. Shortly after bid opening, however, the agency's contracting specialist discovered that a bid bond had not been included with Parker's bid; upon retracing his steps and searching the bid documents, no bid bond was found. We held that contrary to Parker's assertion that we should assume from the bid opening officer's announcement that the Government lost the firm's bid bond, the fact that a thorough search of the bids after bid opening did not produce a bond indicated that the bond was not misplaced by the Government and that Parker failed to meet its burden of establishing by independent evidence that the required bond was submitted with its bid.

We agree with GSA that the evidence submitted by A–1 does not meet the standard set forth in the above-cited cases. The affidavits offered by A–1 are those of representatives of the bidders who attended the bid opening and, therefore, not independent evidence. More importantly, the affidavits of the bidders' representatives are essentially consistent with those of the GSA bid opening officials as to events in the bid opening room, but provide no insight into the events surrounding discovery of the bond. The affidavits of the agency's contract negotiator and Branch Chief do not conflict with one another and constitute independent affirmative evidence that the bid bond was out of Brandolini's control and in the hands of the Government before bid opening. *See* 40 Comp. Gen. 469, 472 (1961); *cf. S. Puma and Company, Incorporated*, B–182936, April 17, 1975, 751 CPD 230. We therefore conclude that GSA's acceptance of the Brandolini bid as responsive was proper. Accordingly, the protest is denied.

We share, however, the protester's concern with GSA's failure to respond to A–1's objections to the consideration of Brandolini's bid. FPR §§ 1–2.407–8(a)(1) and 1–2.407–8(b)(1) (1964 ed. amends. 139 and 68) require that contracting officers consider all protests or objections regarding the award of a contract made before or after award

and that written confirmation or oral protests be requested if the matter cannot otherwise be resolved. *See* GSPR § 5A-2.407-8(a) (1979 ed.). We believe it would not be unreasonable to view the A-1 representative's oral objection to the reading of Brandolini's bid prices during the bid opening as an oral protest. The protester's April 14 letter objecting to any award to Brandolini was unanswered for almost 2 months apparently because it was addressed to the Assistant Regional Administrator rather than to the contracting officer. The failure to respond to the protester's letter is contrary to the agency's interest and our own policy urging that protesters initially seek resolution of their complaints with the contracting agency. 4 CFR § 20.2(a) (1980). The matter is being called to the attention of the GSA Administrator by letter of today.

[B-198512]

Subsistence—Actual Expenses—Hours of Departure, etc.—Excursion Rates—Delay in Travel to Obtain

Employees who traveled on a nonworkday in order to take advantage of a reduced air fare may be considered in a travel status and authorized and paid an extra day's actual subsistence where the cost of subsistence is more than offset by the savings to the Government through use of the reduced fare. Agency's bulletin, to the extent that it is inconsistent with Federal Travel Regulations, need not be followed.

Matter Of: Charles W. Miller—Reimbursement for expenses necessary to obtain reduced air fare, March 5, 1981:

Mr. Richard J. Laulor, an authorized certifying officer with the Federal Mediation and Conciliation Service (FMCS), requests an advance decision on the propriety of paying the reclaim of Mr. Charles W. Miller for an extra day's subsistence expenses incurred in order to obtain reduced air travel fare. Mr. Laulor requests guidance in light of an FMCS bulletin which purportedly limits the period for which such expenses may be reimbursed. We hereby authorize payment for Mr. Miller's claim, based on the following.

FACTS

Charles W. Miller, a Commissioner with FMCS stationed in Toledo, Ohio, was authorized to attend a FMCS seminar in Orlando, Florida, from November 4 through November 9, 1979. By returning on Saturday, November 10th, Mr. Miller was able to obtain a special air fare which reportedly reduced his travel expenses by $130. In order to obtain the special fare, he incurred subsistence expenses for lodging and

meals amounting to $48.68, resulting in a net savings to the Government of $81.32.

Mr. Miller's claim for said expenses however, was suspended by FMCS on December 5, 1979. He subsequently submitted a reclaim voucher for the suspended amount which resulted in the instant request from FMCS.

In its Administrative Suspension Statement of December 5, 1979, FMCS cites a bulletin issued by its Director of Administration on October 15, 1979. The bulletin states in pertinent part:

> All FMCS employees who will be attending mini-seminars are requested to utilize reduced/special airline fares whenever possible.
>
> * * * * * * * *
>
> Reimbursement for subsistence will be limited to the period of the mini-seminar including travel time to and from the site, unless special work on the mini-seminar requires a longer period of travel. Anyone leaving his/her official duty station earlier than required or returning later than required should base claims for subsistence on reconstructed travel for the period stated above. 79-BUL-161, October 15, 1979.

The regional certifying officer apparently concluded that since the subsistence expenses were incurred after the close of the conference on November 9th, but prior to Mr. Miller's return on November 10th, they were outside of the bulletin's stated period of allowable reimbursement.

In a letter attached to his reclaim voucher, Mr. Miller refers to a recent Comptroller General decision in which we allowed an employee's claim for an additional day's per diem incurred in order to qualify for reduced air fare, since there was an overall savings to the Government, and the employee acted in a prudent manner. See *Lawrence B. Perkins*, B–192364, February 15, 1979, and cases cited therein.

DISCUSSION

The *Perkins* decision, *supra*, is also consistent with several recent cases involving members of the uniformed services in which we allowed payment of an employee's "extra" per diem where, as is true in the present case, the increased travel time did not interfere with the performance of official duties (e.g., travel occurred on a nonworkday), was not solely for personal convenience, and the cost of the extra expenses was more than offset by the savings to the Government. *Dr. Kenneth J. Bart*, 58 Comp. Gen. 710 (1979); *Dr. Alexander W. Teass*, B–194381, August 2, 1979. Although the above cases involve per diem, we believe that the same principle would apply to actual subsistence. Mr. Miller traveled on a nonworkday (Saturday), and the cost of the actual subsistence was more than offset by the savings to the Government through use of the reduced fare. Thus, he may be

considered to be in a travel status for the extra time required to take advantage of the reduced fare. *Perkins, supra.*

While the above-cited cases support our allowing Mr. Miller's claim, it is also necessary to consider the effect of the FMCS bulletin. As will be seen, to the extent that the bulletin is contrary to existing regulations, it must be disregarded.

The controlling statutory provisions regarding reimbursement for travel and subsistence expenses of civilian employees are contained in sections 5701–5709 of title 5, United States Code (1976). Regulations implementing these provisions are issued by the General Services Administration and are found at Chapter 1, Travel Allowances, of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973). As a statutorily authorized regulation, the FTR has the force and effect of law and may not be waived or modified by an employing agency regardless of the existence of any extenuating circumstances. 49 Comp. Gen. 145, 147 (1969); *Johnnie M. Black*, B–189775, September 22, 1977.

An examination of the relevant regulations shows that FTR para. 1–1.3a, and 1–3.4b(1), apply to the present case. They provide:

1–1.3. *General rules.*

a. *Employee's obligation.* An employee traveling on official business is expected to exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business."

1–3.4b. *Reduced rates.*

(1) *Use of special lower fares.* Through fares, special fares, commutation fares, excursion, and reduced-rate roundtrip fares *shall* be used for official travel when it can be determined prior to the start of a trip that any such type of service is practical and economical to the Government. * * * [Italic supplied.]

We have held that FTR para. 1–3.4b(1) not only permits the use of special reduced rates but actually *requires* a traveler to use them for official travel when it can be determined in advance that it would be advantageous to the Government. 54 Comp. Gen. 268, 269 (1974).

In the present case, Mr. Miller effected a net savings to the Government, and acted in the manner required of him by the FTR and decisions of this Office. Indeed, even the FMCS bulletin clearly instructed him to use reduced airline/fares whenever possible. Any reading of the FMCS bulletin which would prohibit reimbursement for expenses incurred by Mr. Miller when so acting must be disregarded as inconsistent with provisions of the FTR, and cannot be relied on to suspend his claim. The agency may wish to amend its bulletin to clear up any inconsistency.

Accordingly, the reclaim voucher submitted may be certified for payment.

357-651 O - 81 - 3

[B-200092]

Contracts—Architect, Engineering, etc. Services—Retired Employees—Right to Compete for Award

Forest Service excluded retired employee from contract for architect and engineering services even though employee was highest-ranked competitor for services. Exclusion was improper since General Accounting Office is not aware of any basis for excluding retirees from obtaining Government contracts.

Matter Of: Edward R. Jereb, March 6, 1981:

Mr. Edward R. Jereb protests the Forest Service's decision not to enter into price negotiations with him for an architect and engineering (A&E) contract involving surveying services in Klamath National Forest located in Region 5 of the Forest Service. Mr. Jereb, a retired Forest Service employee, had been selected for negotiations under the procedures prescribed by the Brooks Bill, 40 U.S.C. § 541 *et seq.* (1976). Thereafter, the contracting officer, Klamath National Forest, requested "approval for [sole-source] contracting to a retired employee." Nevertheless, the Chief of the Forest Service disapproved the contracting officer's request to negotiate with Mr. Jereb. Mr. Jereb contends that the Forest Service negotiated an A&E contract with him in 1979, notwithstanding agency policy limiting contracting with retirees and that, therefore, it should be required to do so here where he had been found to be most qualified to perform the required services.

Based on our analysis, we sustain the protest.

In *Paul F. Pugh and Associated Professional Engineers*, B-198851, September 3, 1980, 80-2 CPD 171, we summarized the A&E selection procedure established by the Brooks Bill as follows:

> Selection procedure for A&E services prescribe that the requirement be publicly announced. An evaluation board set up by the agency then reviews statements of qualifications and performance data already on file and statements submitted by other A&E firms responding to the public announcement. * * * The board must then hold discussions with no less than three firms regarding anticipated concepts and the relative quality of alternative methods of approach for providing the services. The board prepares a report for the selection official ranking in order of preference no fewer than the three firms considered most qualified. The selection official makes the final choice of the three highest-ranked firms and negotiations are held with the highest-ranked A&E firm. If the contracting officer is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

After an initial evaluation of qualification and performance data submitted, as contemplated under the A&E procedures, the evaluation board for these services held discussions with the contending firms and Mr. Jereb. The evaluation board then finally evaluated each firm and reduced its judgment to a numerical score. Mr. Jereb received the highest score and Olson and Associates (Olson) was second with 16

fewer points; Engineering Consultants, Inc. was ranked third. The Chief of the Forest Service subsequently disapproved the contracting officer's request to negotiate the required services on a "sole-source" basis with Mr. Jereb because the "selection was not via competitive price bidding but rather by panel of * * * employees who used the judgmental approach." Thereafter, Olson was awarded the A&E contract which was recently completed.

The Director of Administrative Services, Forest Service, states: "We feel that as a general policy awards to retirees should be avoided unless no other alternative is available." The Director states that this is especially true when price competition is not present as in this case and the difference is as minimal as 16 points out of a possible 1,840.

Mr. Jereb argues that the Forest Service has adopted inconsistent interpretations of its procurement regulations governing contracting with retirees as evidenced by the 1979 A&E contract awarded to him and by the refusal to contract with him for these services. Those regulations provide:

4G-1.302-70—*Contracts between Government and retired Government employees.*

* * * * * * *

(b) *Policy.* Employment procedures will be used to obtain the services of retirees, unless for nonpersonal services under circumstances excepted below:
(1) *Solicitation by bid invitation.* * * * formally advertised contracts [may be] awarded to retirees * * * when they are the low responsible bidders on solicited bids offered to all sources of supply and open to price competition.
(2) *Solicitation by proposal.* * * * negotiated contracts [may be] awarded to retirees * * * when they are the low responsible offerors on proposals offered to all sources of supply and open to price competition.
(3) *Solicitation by proposals from sole source.* Proposals may be solicited and negotiated contracts awarded to retirees * * * on a sole source basis only under circumstances provided below:

* * * * * * *

(c) *Sole source procedures and approvals.*
(1) * * * the [contracting] officer * * * shall include the following information in his request.

* * * * * * *

(iii) List of possible sources of supply other than the proposed sole source, and reasons they are not considered qualified.

In our view, none of the above contracting "circumstances" precisely apply to A&E contracting procedures. Obviously, circumstances (1) and (2), describing advertised and competitively negotiated contracts—both of which involve price competition—do not apply to A&E contracting procedures where price is not considered until after selection of the proposed awardee is made. Contracting circumstance (3), solicitation from sole source, although characterized by the lack of price competition (as is the case with A&E contracts), contemplates situations where the retiree involved is deemed the only "source

of supply" for the contract requirement. However, A&E procurements contemplate that several sources of supply are available for the A&E contract. (In this procurement, for example, there were two other qualified sources.) Another difference between A&E procurements and sole-source procurements is that A&E procurements involve a degree of competition on factors other than price especially involving "anticipated concepts and the relative quality of alternative methods of approach for providing the services;" by contrast, there is no competition on any basis for a sole-source contract.

We appreciate the Forest Service's desire to avoid the appearance of favoritism by limiting awards of contracts, in the case of retired Government employees, to procurment where price competition has been obtained or where no other source was available. However, the effect of the policy in the case of A&E procurements is to exclude retirees entirely, since price competition is not obtained for A&E contract awards. We question whether such a policy is justified in the absence of any law or government-wide regulation sanctioning the exclusion. We recognize that there is a policy against awarding contracts to current Government employees, but this policy is embodied in Federal Procurement Regulations § 1–1.302–3 (amend. 95, 1964 ed.). We find no such Government-wide regulation applicable to retired Government employees. In the absence of such a law or regulation, we believe the Forest Service has no basis to implement a policy the effect of which is to exclude a class of bidders (retired Government employees) from obtaining awards of A&E contracts. To this extent, we think the Forest Service policy is improper. Therefore, we find that Mr. Jereb was improperly excluded from the competition.

Protest is sustained; however, we cannot recommend action to correct the improper award since the contract has been performed. Nevertheless, we are recommending that the Secretary of Agriculture eliminate the Forest Service policy which permitted the exclusion. We are also recommending that the Director, Office of Federal Procurement Policy, consider whether a comprehensive regulation concerning contracting with retired employees should be issued as part of the proposed Uniform Procurement System.

[B–198510]

Transportation—Household Effects—Weight—Tare—Determination

When tare (container) weight is not on Government bill of lading (GBL), it is determined by subtracting net weight from gross weight.

Transportation—Household Effects—Weight—Net Determination—Containerized *v.* Crated Shipments

Lift vans and overflow box are "containers" within meaning of paragraph 2-8.2b (3) of Federal Travel Regulations (FTR); thus net weight of household goods shipment is determined by applying 85 percent to gross weight and subtracting weight of containers.

Transportation—Household Effects—Weight—Net—Packing Materials' Inclusion—Containerized Shipment

Under usual household goods carriers' Tender of Services net weight of containerized shipment contains weight of packing and household goods.

Transportation—Household Effects—Weight Limitation—Excess Cost Liability

Assessment of excess weight against employee was improper where excess weight was determined on basis of net weight shown on GBL; proper formula for determining net weight of containerized shipment in paragraph 2-8.2b(3) of FTR results in net weight below employee's authorized maximum weight.

Matter Of: Wayne I. Tucker, March 9, 1981:

A certifying officer, Office of Management and Support, Department of Energy, Dallas, Texas, requests an advance decision pursuant to the act of December 29, 1941, 55 Stat. 876, 31 U.S.C. 82d, concerning the proper method for determining the net weight of the household goods of an employee on change of station.

In connection with the permanent change of official station of Wayne I. Tucker, the Government arranged for the transportation of his household goods from Panama, Canal Zone (now Republic of Panama), to Dallas, Texas, in 1978. In accordance with 5 U.S.C. 5724 (a) (1976), and the Federal Travel Regulations (FTR), FPMR 101-7, paragraph 2-8.2a (FPMR Temp. Reg. A-11, Supp. 4, April 1977), Mr. Tucker was authorized shipment of a maximum net weight of 11,000 pounds. The employee's voucher was paid on the net weight shown on the Government bills of lading (GBL), 11,060 pounds; therefore, the cost of excess weight was assessed.

Mr. Tucker contends that his household goods should have been considered as a "crated" shipment, and the net weight determined by applying the formula in paragraph 2-8.2b(2) of the FTR, which is 60 percent of the gross weight. The gross weight, as shown on the GBLs, is 13,710 pounds, and 60 percent of that weight is 8,226 pounds, which would be within Mr. Tucker's allowance.

Paragraph 2-8.2b(3), which is applicable to "containerized" shipments, provides a different method of determining net weight than that for "crated" shipments. This paragraph provides that if the "known tare weight" does not include the weight of interior bracing and padding materials, but only the weight of the container, the net

weight of the household goods is to be computed at 85 percent of the gross weight less the weight of the container. But if the known tare weight does include interior bracing and padding materials the net weight is to be computed as an "uncrated" shipment which is covered by subparagraph b(1) and the net weight shall be that shown on the bill of lading or on the weight certificate. Finally, if the gross weight of the container cannot be obtained, the net weight of the household goods is to be determined from the cubic measurement on the basis of 7 pounds per cubic foot of properly loaded container space.

Since the weight of the containers and the tare weight are not shown on the GBLs, the certifying officer contends that it is not possible to determine the net weight under paragraph 2–8.2b(3). However, the tare weight can be computed. The gross weight of the shipment is shown on the GBLs, and since the net weight is the difference between the gross weight and tare weight, tare weight of 2,650 pounds can be determined by subtracting the net weight shown on the GBLs (11,060 pounds) from the gross weight (13,710 pounds).

There are two pertinent factual questions: (1) whether the shipment was "crated" or "containerized," and (2) whether the tare weight includes the weight of packing materials.

Reference to the GBLs and to common practice, as reflected in household goods carriers' Tenders of Service, and in the Personal Property Traffic Management Regulation (DOD 4500.34–R) lead to the conclusion that the method provided in paragraph 2–8.2b(3) of the FTR is applicable to Mr. Tucker's shipment. Although DOD 4500.34–R concerns the movement of personal property for Department of Defense personnel, they are instructional regulations (see B–195256, November 15, 1979) and, as such, we consider them relevant in determining the common practice of carriers in handling international door-to-door container shipments for employees of civilian agencies.

The record indicates that Mr. Tucker's was an international door-to-door containerized shipment, which the Government managed throughout by the Direct Procurement Method. See paragraph 2001(*l*) of DOD 4500.34–R. Under this method it seems clear that while the weight of the containers is known in advance of loading, for practical reasons the separate weights of the household goods and packing materials that are stuffed into the containers are not known at the origin residence; therefore, the combined weight is determined after loading.

GBL K–3438012, dated October 2, 1978, describes the shipment as consisting of "7 liftvans" and "1 wooden box" of household and personal effects. Liftvans are specifically mentioned in subparagraph b(3) of paragraph 2–8.2 of the FTR under "containerized" shipments.

The bills of lading show that the shipment also contained one wooden box. However, household goods shipping boxes designed normally for repeated use are also covered by subparagraph b(3). There is no showing by Mr. Tucker or by anything in the record that the wooden box was a crate.

Paragraph 20 of the Tender of Service, DOD 4500.34–R, Appendix, page A–4, provides that the net weight of all codes of service will consist of the actual household goods and all packing. Paragraph 40 thereof provides that containers and overflow boxes, when moving in door-to-door service, will be packed and stuffed at the origin residence unless a specific exception is authorized.

In the absence of evidence to the contrary, the above warrants the following presumptions: that the gross weight of the shipment (shown on the GBLs as 13,710 pounds) includes the weight of the containers, packing, and household goods; that the Panama Packing & Storage Company packed and stuffed the shipment at Mr. Tucker's residence at origin, and that the net weight, contained on the GBLs issued to the Panama Canal Company and to McLean, consists of the weight of all the packing materials as well as the household goods; and that the weight of the empty containers and overflow box, is the equivalent of the tare weight, 2,650 pounds, because the packing is included in the net weight.

Therefore, computation of the net weight for transportation allowance purposes on the basis of paragraph 2–8.2b(3) is possible. Applying the formula, 85 percent of the gross weight (13,710 pounds) is 11,654 pounds, minus the weight of the containers (2,650 pounds) is 9,004 pounds, results in the conclusion that the net weight of Mr. Tucker's shipment did not exceed his authorized weight allowance of 11,000 pounds.

Accordingly, it would be improper to assess Mr. Tucker for costs of excess weight.

[B–200017]

Equal Employment Opportunity—Ethnic/Cultural Programs—Expense Reimbursement—Entertainment *v.* Training—Regulation Guidelines

Internal Revenue Service may certify payment for a live African dance troupe performance incident to agency sponsored Equal Employment Opportunity (EEO) Black history program because performance is ligitimate part of employee training. Although our previous decisions considered such performance as a nonallowable entertainment expense, in this decision we have adopted guidelines developed by the Office of Personnel Management (OPM) that establishes criteria under which such performances may be considered a legitimate part of the agency's EEO program. 58 Comp. Gen. 202 (1979), B–199387, Aug. 22, 1980, B–194433, July 18, 1979, and any previous decisions to the contrary are overruled.

Travel Expenses—Private Parties—Invitation Travel on Federal Government Business

Internal Revenue Service may use appropriated funds to buy lunches for guest speakers on program held in observance of National Afro-American (Black) History Month, under 5 U.S.C. 5703, which provides authority for per diem or subsistence expenses for individuals serving without pay.

Matter Of: Internal Revenue Service—Live Entertainment and Lunch Expense for National Black History Month, March 10, 1981:

This responds to a request from Mr. Michael J. Higgins, Chief, Fiscal Management Branch, North Atlantic Region, Internal Revenue Service, Department of the Treasury, for a ruling on whether to certify a reimbursement voucher covering payments for a performance by African dancers and for lunches for guest speakers at a ceremony observing Black History Month in February, 1980. Based on the rationale set forth below, we have concluded that the Service may certify payment for the dance performance and the lunches.

President Carter declared February, 1980, as National Afro-American (Black) History Month by a Message of the President signed on January 15, 1980. (See Weekly compilation of Presidential Documents, vol. 16, No. 3, pages 84–86 (January 21, 1980).) The Buffalo Office of the Service's North Atlantic Region conducted activities designed to celebrate Black History Month. The Chief of Resources Management in Buffalo has indicated informally that the African dance troupe's performance was part of a 3 day program designed to familiarize employees of the Buffalo District with the cultural history of Black people. In addition to the dance performance the program consisted of displays of African artifacts and wearing apparel, posters depicting aspects of Black life, films, formal discussions of Black history, and the serving of Black ethnic food for lunch in the cafeteria. All these activities were conducted during the lunch hour. We also understand that two senior citizen guest speakers were provided lunch at Government expense once during the program.

The Buffalo District cashier paid $75 to the Buffalo African Cultural Center for the dance troupe performance, and $4.55 for the speakers' lunches from the Small Purchase Imprest Fund. The cashier then presented a reimbursement voucher in the amount of $79.55, representing the two expenditures to the Regional Office for replenishment of the Fund. The Regional Office refused to pay the voucher, relying on our holding in 58 Comp. Gen. 202 (1979), and submitted the question to this Office for a decision.

The factual situation of the opinion relied upon by a Regional Office was similar to the present case in that it involved the legality of a payment for an ethnic music presentation as a part of an Equal

Employment Opportunity (EEO) special emphasis program. In that decision we pointed out that Federal funds could not legally be expended for employee entertainment. Because we were unable to distinguish between musical and other artistic presentations for employee entertainment and such presentations for EEO program activities, we stated that we would consider all such future presentations as employee entertainment and therefore illegal in the absence of official guidelines detailing the circumstances under which such presentations may be made in connection with EEO special emphasis programs.

Since we issued that decision we have held informal discussions with the Director of the Office of Affirmative Employment Programs, Office of Personnel Management (OPM) regarding the criteria that should be instituted to govern artistic presentations at agency sponsored EEO special emphasis programs. We discovered that the Office of Affirmative Employment Programs has developed guidelines for artistic presentations at agency sponsored Hispanic Heritage Week programs.

These guidelines provides as follows:

Each year Hispanic Heritage Week is celebrated by more Federal agencies than ever before. Hispanic Heritage Week is becoming an American traditional event. Nevertheless, some members of the Hispanic community have expressed concerns about the purely entertainment aspect of some celebrations. In addition, a number of Federal agencies have found it difficult to allocate funds, and still others have raised legal questions about expenditures.

The Hispanic Heritage Week observance should not be viewed as an end in itself. The observance is an excellent opportunity to add substance and lasting visibility to the Hispanic Employment Program. Often, celebrations are held year after year with no thought to their impact during the intervening months. In addition, the celebrations often conclude with no measurable or significant concrete accomplishments which can benefit the Hispanic community. We can improve upon this situation by generating official support for the Hispanic Employment Program and its objectives. We know, for example, that stereotypes are a major barrier to Hispanic employment. The Heritage Week activities could be geared to eradicating these misconceptions in a direct and unalienating manner. Further, during this week, new programatic goals could be enunciated by management, with results to be evaluated during the following year's celebration. By emphasizing commitment to the program and a wide understanding of its purpose we can ensure that substantive issues are addressed and that lasting results are achieved.

* * * * * * *

It is important to make clear that (1) cultural events are related to the observance of Hispanic Heritage Week, and (2) intent is shown to develop cultural awareness rather than just entertainment. If ethnic music is provided, for example, it can be introduced as an element of the celebration since music is one of the cultural influences Hispanics have exerted in this country.

* * * * * * *

The observance of Hispanic Heritage Week should emphasize the rich diversity of Hispanic cultural background, the varied manifestations of the performing arts, values, history, and accomplishments and contributions to the American society. It should also touch on concerns, especially employment concerns.

* * * * * * *

Recitals, folkloric dances and music, and other social activities can certainly add a picturesque element to the Hispanic Heritage Week observance. However,

an explanation of the relevance, the meaning, the roots, or the history of such activities should be an integral part of the performance. In doing that, we will avoid presentations or activities which instead of enlightening the audience with the cultural aspects of the Hispanic heritage might tend to perpetuate some of the stereotypes which are now serving as employment-barriers.

We were informed by the Director that these guidelines were intended to be "generic" in scope; i.e., that they should be read as applying to analogous situations. We were also informed that OPM is considering issuance of formal guidance which would apply to all similar ethnic or cultural programs.

After reviewing the above-quoted guidelines, we believe they provide a reasonable basis for distinguishing EEO special emphasis program artistic presentations from employee entertainment. Accordingly we are of the opinion that criteria along the lines of those developed for Hispanic programs may be applied on a uniform basis to all EEO ethnic and cultural special emphasis programs such as Afro-American (Black) History and American Indian History programs.

In light of these guidelines, we now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is a part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethic history being celebrated. This view is contrary to our holding in 58 Comp. Gen. 202, above, B-199387; August 22, 1980, and B-194433, July 18, 1979, which are therefore overruled.

With reference to the expenditure for the lunches, we note that 5 U.S.C. § 5703 authorizes per diem (including subsistence), travel, and transportation expenses for individuals serving without pay while away from their homes or regular places of business. *See* 37 Comp. Gen. 349 (1957). The two senior citizen guest speakers had agreed to participate in the program, without compensation, solely for the benefit of the Government. On the assumption that they were in fact away from their homes or regular places of business, the Service may therefore also allow the $4.55 guest speaker luncheon expenses.

[B-200695, B-200696]

Contracts—Requests for Quotations—Evaluation Factors—Disclosure—Life-Cycle Costing

Request for quotations for dictation equipment available under multiple-award Federal Supply Schedule contract, one of which did not inform quoters of life cycle evaluation factors and another which did not indicate the life cycle cost would be evaluated at all, are defective and, under circumstances, did not permit fair and equal competition.

Matter Of: Lanier Business Products, Inc., March 10, 1981:

Lanier Business Products, Inc. protests the issuance of two purchase orders to Dictaphone Corporation for dictating equipment by the Veterans Administration Regional Office, Winston-Salem, North Carolina, and by the Veterans Administration Medical Center, Montgomery, Alabama.

Lanier, a dictation equipment contractor listed on the General Services Administration multiple-award Federal Supply Schedule (FSS), asserts that it submitted the lowest quotes and therefore the purchase orders should have been issued to it.

Since the VA is a mandatory user of the FSS for dictating equipment, the agency, before issuing the orders, requested quotations from available FSS contractors for dictating equipment. The request for quotations (RFQ) issued by the Regional Office was silent as to the method to be employed in evaluating the lowest priced system. The RFQ issued by the Medical Center contained only the following statement:

> Life cycle costing analysis will be used by the VA to determine the lowest acceptable offer.

Both VA offices, after receipt of quotations, then proceeded to perform an extensive, albeit inconsistent, life cycle costing analysis. For example, the Regional Office evaluated such factors as paper index strips, power consumption, telephone lines and maintenance while the Medical Center evaluated paper index strips, maintenance and cassette tapes. In both instances, Dictaphone was evaluated as the contractor offering the lowest priced system.

The basis of Lanier's protest is that "the [VA] performed a life cycle costing comparison without prior notice in the RFQ [and that] in order to insure a fair basis for evaluation, [the VA] should have notified all possible offerors that a life cycle costing * * * would be the basis for award." We agree.

In our view, the real issue in this case is whether the VA's RFQs adequately advised offerors of the basis and procedures for cost evaluation. We do not believe that they did.

In one case, the RFQ completely failed to inform quoters that life cycle costing would be employed. In the other case, the RFQ merely stated that life cycle costing would be used without adequately informing quoters of the basic evaluation factors to be used. We fail to see how a quoter could intelligently submit an offer under the circumstances.

We have often pointed out the need for agencies to provide in their solicitations a clear statement of the evaluation factors to be used so that fair and intelligent competition can be achieved. See, *e.g.*, *Sig-*

natron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 368; *Frontier Broadcasting Co. d.b.a. Cable Colorvision*, 53 Comp. Gen. 676 (1974), 74-1 CPD 138. Therefore, when life cycle costs are to be evaluated, the solicitation must indicate that fact. *Eastman Kodak Company*, B-194584, August 9, 1979, 79-2 CPD 105. In addition, we believe that in most cases the particular elements of the life cycle cost evaluation should be disclosed since they may vary from procurement to procurement and from agency to agency. See, *e.g.*, *Hasko-Air, Inc.*, B-192488, March 19, 1979, 79-1 CPD 190 (special inspection and repair costs were considered); *Eastman Kodak Company*, *supra* (maintenance and operating costs were considered); *Philips Business Systems, Inc.*, B-194477, April 9, 1980, 80-1 CPD 264 (telephone company rental charges were considered). The need for such disclosure is readily evident from the present case, where even the procurement of identical items by the same agency did not result in use of identical life cycle cost evaluation factors. That disclosure of precise evaluation elements may be important to quoters under an FSS contract is also apparent: while equipment prices are generally fixed by the FSS, individual vendors, to be more cost competitive under the general rules established for a particular purchase, can vary both the equipment offered (provided that it meets the agency's needs) and trade-in allowances offered. See *Philips Business Systems, Inc.*, *supra*.

The VA argues that a letter it sent to potential offerors prior to the instant procurements in which a policy of implementing life cycle costing was set forth provided sufficient notice for the quoters. We disagree. We fail to see how a general policy letter can sufficiently alert quoters as to whether or not any particular procurement is to be subject to life cycle costing. Moreover, the letter is devoid of potential evaluation factors to be used in any procurement.

Under these circumstances, we must conclude that the RFQ did not permit fair and equal competition. We find that no award could have properly resulted from these RFQs because all quoters were not aware of how they would be evaluated. Consequently, we sustain the protest and recommend that the requirements be resolicited.

We are bringing this matter to the attention of the Administrator of Veterans Affairs.

[B-196260]

Officers and Employees—Transfers—Service Agreements—Overseas Employees Transferred to U.S.—Return Travel, etc. Expense Liability—Breach of Agreement With Gaining Agency

Employee who had fulfilled overseas service agreement with first agency transferred to position in the United States with another agency and thereafter breached service agreement with second agency. Notwithstanding violation of

service agreement, employee is not required to refund transfer expenses paid by second agency where those were solely for transportation of household goods and employee's own travel, since he was entitled to such expenses as a consequence of having satisfied overseas service agreement with first agency.

Matter of: Johnny R. Dickey—Violation of Service Agreement, March 11, 1981:

Mr. Johnny R. Dickey requests reconsideration of our Claims Division's September 17, 1979 denial of his claim for refund of transfer-related expenses collected as a result of his breach of a service agreement.

The record indicates that Mr. Dickey was transferred on February 16, 1972, from Corbin, Virginia, to Ewa Beach, Hawaii, in connection with his continued employment with the National Oceanic and Atmospheric Administration, Department of Commerce (NOAA). At that time, in accord with 5 U.S.C. § 5724(d) (1976), Mr. Dickey signed a service agreement in which he designated Memphis, Tennessee, as his actual place of residence and by which he agreed to remain in Government service for a period of 2 years following the effective date of his transfer unless separated for reasons beyond his control. Mr. Dickey remained with the NOAA in Hawaii until September 22, 1977, at which time he transferred to the U.S. Geological Survey, Department of the Interior (Geological Survey), Metaire, Louisiana. Incident to that transfer Mr. Dickey signed a service agreement by which he agreed to remain in the Government service for 1 year following the date of his transfer and in consideration of which he was reimbursed $1,404.83 for transportation of household goods and $148.04 for airfare from Hawaii to Los Angeles. Because he resigned from his position with the Geological Survey before he completed 1 year of service, the Geological Survey set off the net amount of his final salary and lump-sum leave payments against his indebtedness of $1,552.84.

Mr. Dickey appeals from our Claims Division's decision of September 17, 1979, upholding the Geological Survey's determination that he was indebted in the $1,552.84 amount as a result of having violated the 1-year service agreement. In support of his claim, Mr. Dickey points out that he was entitled to return travel and transportation expenses under 5 U.S.C. § 5724(d) because he satisfied his service obligation incident to his employment in Hawaii with NOAA. He claims that despite his violation of his employment agreement with the Geological Survey, his right to be reimbursed for these return travel and transportation expenses was not extinguished. He maintains that he should not have been required to sign this new agreement because the cost of his move from Ewa Beach, Hawaii, to Metaire, Louisiana, was

identical to the amount his move would have cost if he had returned to Memphis, Tennessee, his actual place of residence.

When an employee who has satisfied his overseas service agreement is returned to the continental United States for separation he is entitled to expenses of travel and transportation for himself, his family and household goods to his place of actual residence in the United States or, at his election, the actual costs of travel and transportation to some alternate point, the cost of which does not exceed that to his place of actual residence. 5 U.S.C. § 5724(d) (1976); B–195180, October 24, 1979; B–164084, May 29, 1968. However, if the employee, prior to departure from his overseas duty station, accepts a transfer of official station from a post outside the continental United States to one within the United States, he is entitled only to the travel and transportation expenses to his new official station, not his place of actual residence. *Id.* Moreover, pursuant to 5 U.S.C. § 5724(e), these expenses would be paid by the agency to which he transfers. B–164251, June 26, 1968.

While there is no statutory requirement for execution of a service agreement incident to a transfer from overseas to the United States, we have held that an agency has authority to refuse to authorize or approve payment of any expense involved in the travel or transportation of an employee in connnection with such a change of official station until the employee concerned executes an agreement to remain in the Government service for a specified period of time. 47 Comp. Gen. 122, 125 (1969); B–163726, May 8, 1968. Such an agreement having been executed by the employee in the instant case, the employee is bound by the provisions thereof. *Id.*

Ordinarily, Mr. Dickey would have been entitled to be reimbursed by the Geological Survey for any expenses he incurred incident to his move from Hawaii to Louisiana. 5 U.S.C. § 5724(d) (1976). See also 5 U.S.C. § 5724(e) regarding the requirement that expenses of transfer be paid by the gaining agency. However, since he violated the service agreement which the Geological Survey required him to execute, he is only entitled to be reimbursed for expenses incurred pursuant to his move to the extent that these expenses did not exceed the cost of such travel and transportation to his actual place of residence, Memphis, Tennessee—the amount he would have been entitled to receive had he not transferred to the Geological Survey. Mr. Dickey's right to this sum vested once he completed his required tour of duty with the NOAA and only his entitlement to expenses incurred in excess of that amount was contingent upon his satisfying the service agreement with his new employing agency.

The transfer expenses reimbursed by the Geological Survey in-

cluded only expenses related to Mr. Dickey's own travel and movement of his household goods. Since these particular expenses do not exceed the cost of such travel and transportation to his actual place of residence, they are to be considered allowances to which he was entitled as an incident to his return from overseas. See B-164084, May 29, 1968. Moreover, incident to his appeal, Mr. Dickey states that he did not claim and was not reimbursed $348.60 in mileage and per diem expenses for the portion of his trip from Los Angeles to Louisiana. These expenses also may be paid to Mr. Dickey incident to his transfer from funds of his new employer the Geological Survey provided that the total amount he is reimbursed does not exceed the cost of transportation and travel from Hawaii to Memphis, Tennessee.

[B-199721]

General Accounting Office—Jurisdiction—Contracts—Small Business Matters—Procurement Under 8(a) Program—Standard Operating Procedures Compliance

General Accounting Office will review Small Business Administration compliance with its Standard Operating Procedures governing award of 8(a) subcontracts only when showing of bad faith or fraud on part of Government procurement officials has been made. B-193212, Jan. 30, 1979, overruled in part.

Contracts—Maybank Amendment—Price-Differential Prohibition—Nonapplicability—Subcontracts Under 8(a) Program

Maybank Amendment prohibition on use of Department of Defense appropriations for payment of price differential on contracts made for purpose of relieving economic dislocation does not apply to 8(a) subcontracts.

Appropriations—Authorization—Requirement to Contract or Purchase—Compliance—Procurement Under 8(a) Program—Procedural Irregularities

Allegation that violations of Small Business Administration's Standard Operating Procedures (SOP) for award of 8(a) subcontracts make award of subcontract a violation of 41 U.S.C. 11 (1976) statement that "no contract * * * shall be made, unless * * * authorized by law" is denied because purpose of provision is to prevent officers of Government from contracting beyond legislative authorization. Provision is not violated by mere procedural irregularities in award of authorized contract. Here, contract is authorized by section 8(a) of Small Business Act, and sufficient appropriations are available for purpose.

Matter Of: Jets Services, Inc., March 11, 1981:

Jets Service, Inc. (Jets), protests the proposed award of a contract by the Department of the Army (Army) to the Small Business Administration (SBA) and the proposed award of a subsequent subcontract to Wilsyk, Inc. (Wilsyk), under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), as amended by Pub. L. 95-507, October 24, 1978, 92 Stat. 1757. The contract is for the operation of

Government-owned laundry and drycleaning facilities at Fort Richardson, Alaska, and Fort Wainwright, Alaska, and Jets is the incumbent.

Jets argues that the SBA has violated its policies and procedures as set forth in its Standard Operating Procedures (SOP), and that any contract payments by the Army would violate the Maybank Amendment to the Department of Defense Appropriation Act and could violate the 41 U.S.C. § 11 (1976).

Jets' protest is dismissed in part and denied in part.

Concerning Jets' allegations that the SBA has not followed the guidelines set forth in SOP 80 05 for processing 8(a) procurements, our review is limited. Because of the broad discretion afforded the SBA under the applicable statute, SBA determinations will not be questioned absent a showing of fraud or bad faith on the part of Government procurement officials. *Tidewater Protective Services, Inc.*, B-190957, January 13, 1978, 78-1 CPD 33. Also, allegations of SOP violations generally are not sufficient to invoke our review, since the SOP is "primarily for the internal guidance of agency employees in performing their official functions" (SOP 80 05 § 2(e)), and provisions may be waived. *Orincon Corporation*, 58 Comp. Gen. 665, (1979), 79-2 CPD 39.

Jets argues that *Delphi Industries—request for reconsideration*, B-193212, January 30, 1979, 79-1 CPD 70, and *MISSO Services Corporation*, B-197373, June 19, 1980, 80-1 CPD 432, stand for the proposition that GAO will review, without a showing of bad faith or fraud, SBA compliance with SOP provisions that do not require an SBA judgmental determination. According to Jets, the SOP violations in in the instant case do not require judgmental determinations, and, therefore, are reviewable without a showing of bad faith or fraud. Jets also argues that while SOP provisions can be waived, there is no evidence that the provisions in question here have been waived and, therefore, they are reviewable.

Concerning Jets' waiver argument, we have held that questions regarding the waiver of an SOP are a matter for SBA and not GAO. *A.R. & S. Enterprises, Inc.*, B-189832, September 12, 1977, 77-2 CPD 186. Thus, we will not consider whether or not an SOP provision has been waived, or if it has, whether that waiver was effected properly.

Regarding Jets' reading of the *MISSO* and *Delphi—reconsideration* decisions, *MISSO* does state that GAO will not review whether a particular procurement fall within the parameters of an 8(a) firm's business plan, absent a showing of fraud or bad faith because that is a judgmental decision for SBA. However, the decision does not indicate that the GAO will review violations of nonjudgmental SOP

provisions on a different basis. The *Delphi* reconsideration does seem to indicate that GAO will review purely procedural compliance with the SOP, but does not define the nature of the review. In *Delphi*, the review amounted only to our being "advised" by the SBA that the SOP in question had been followed. We answered the protester's substantive allegations by stating that the SBA's determinations under the allegedly violated SOP would not be questioned absent a showing of bad faith or fraud.

It is our opinion that the use of different standards for the review of procedural compliance with a SOP provision as opposed to substantive determinations under the provision is an artificial and impractical exercise which serves no useful purpose, especially in view of our position on SOP waiver, Therefore, we will not review alleged SOP violations without a showing of bad faith or fraud. To the extent that *Delphi Industries, Inc.—request for reconsideration, supra*, holds otherwise it will no longer be followed.

Here, no showing of bad faith or fraud has been made. Therefore, this portion of Jets' protest is dismissed.

Jets contends that the current version of the so-called Maybank Amendment to the Department of Defense Appropriation Act (§ 724 of Pub. L. 96–527, December 15, 1980, 94 Stat. 3068), which provides that "no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations," will be violated by an award to Wilsyk because a price differential will allegedly be paid, and because Wilsyk might be located in a labor surplus area.

The legislative history of the Maybank Amendment shows that the prohibition applies only to a price differential paid on a contract awarded to a firm as a result of a preference granted to that firm because it operates primarily in a labor surplus area. B–145136, April 14, 1978. Here, the subcontract award to Wilsyk is based on a preference granted to Wilsyk because it has been determined to be a small business, owned by socially and economically disadvantaged persons. Therefore, the prohibition does not apply. This result is not altered even if Wilsyk coincidentally does operate primarily in a labor surplus area, so long as the contract or subcontract in question was not awarded as a result of a preference based on that fact. See *Maybank Amendment*, 57 Comp. Gen. 34 (1977), 77–2 CPD 333.

Finally, Jets argues that the alleged violations of the SOP in this case render the award of a subcontract to Wilsyk a violation of 41 U.S.C. § 11 (1976), which states that:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *.

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The purpose of this provision is to prevent executive officers from involving the Government in expenditures and liabilities beyond those authorized by the legislature. 21 Op. Atty. Gen. 248 (1895). The provision is not violated by mere procedural irregularities in the award of a contract. Here the subcontract is authorized by section 8(a) of the Small Business Act and there are sufficient appropriated funds available for this purpose. Therefore, there is no violation of the provision.

The protest is dismissed in part and denied in part.

[B-199985]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Time Limitation—Option to Exclude Departure/Return Days

Employee, who occupies temporary quarters at old duty station and interrupts occupancy for permanent change of station as permitted by Federal Travel Regulations para. 2-5.2a, may elect not to count the day of departure against his 30-day limit for temporary quarters. The principles established in 57 Comp. Gen. 696 (1978) and 57 Comp. Gen. 700 (1978) are applicable regardless of whether the employee interrupts his occupancy of temporary quarters for purposes of temporary duty or change of station travel.

Matter Of: Darrell W. Fletcher—Per Diem and Temporary Quarters Expenses, March 11, 1981:

By letter of June 27, 1980, LTC A.T. Holder, a Finance and Accounting Officer at Redstone Arsenal, Alabama, requested an advance decision regarding the computation of per diem and temporary quarters subsistence expenses for Mr. Darrell W. Fletcher in connection with a permanent change of duty station from the Federal Republic of Germany to Redstone Arsenal, Alabama. This request was forwarded through the Per Diem, Travel and Transportation Allowance Committee and assigned Control No. 80-28.

The record shows that Mr. Fletcher began occupying temporary quarters at his old duty station in Germany on January 11, 1980. He flew to New York on January 17, 1980, having departed from his temporary quarters in Germany at 8:10 a.m. that day. The employee picked up his privately owned vehicle at the Ocean Terminal in Bayonne, New Jersey, on January 17 and drove to Alabama where he and his dependents resumed occupancy of temporary quarters. The specific question presented by the Finance and Accounting Officer is whether January 17 should be counted against Mr. Fletcher's 30-day limit for temporary quarters subsistence expenses, since he was in temporary quarters until 8:10 a.m. on that day. In addition, he inquires whether Mr. Fletcher is entitled to per diem for three-fourths or a full day on January 17 in the event January 17 is not charged

against his temporary quarters authorization. For the reasons stated below we find that January 17, the day Mr. Fletcher departed Germany, need not be counted against his 30-day limit, and we find that he is entitled to receive per diem for three-fourths of the day of January 17.

Under paragraph 2–5.2a of the Federal Travel Regulations (FTR) (FPMR 101–7, May 1973) the period of 30 days for temporary quarters occupancy runs consecutively except that "the period of consecutive days may be interrupted for the time that is allowed for travel between the old and new official stations or for circumstances attributable to official necessity, as for example, an intervening temporary duty assignment." While we have held that an employee who interrupts his occupancy of temporary quarters to perform temporary duty (TDY) may choose not to count the days of departure and return against the 30-day period of eligibility, we have not specifically addressed this issue in the case where an employee interrupts his occupancy of temporary quarters to perform permanent change of station travel. We believe, however, that the same rule should apply.

Our decisions involving interruptions of temporary quarters occupancy for temporary duty travel, 57 Comp. Gen. 696 (1978) and 57 *id.* 700 (1978), were predicated on the following language of FTR para. 2–5.2g:

> g. *Effect of partial days.* In determining the eligibility period for temporary quarters, subsistence expense reimbursement and in computing maximum reimbursement when occupancy of such quarters for reimbursement purposes occurs in the same day that en route travel per diem terminates, the period shall be computed beginning with the calendar day quarter after the last calendar day quarter for which travel per diem described in 2–2.1 and 2–2.2 is paid, except that when travel is 24 hours or less the period shall begin with the calendar day quarter during which travel per diem terminates. In all other cases, the period shall be computed from the beginning of the calendar day quarter for which temporary quarters subsistence reimbursement is claimed, provided that temporary quarters are occupied in that calendar day. The temporary quarters period shall be continued for the day during which occupancy of permanent quarters begins.

In 57 Comp. Gen. 696, *supra*, we stated that since an employee's return travel from temporary duty is not considered to be "en route" travel, the second sentence of the quoted regulation should be applied and the period for computing temporary quarters would resume "either the day the employee returns from temporary duty or the following calendar day, depending upon when the employee claimed reimbursement for temporary quarters." We make it clear in 57 Comp. Gen. 700, *supra*, that this election to claim or not claim temporary quarters subsistence expenses extends to the day of departure for temporary duty as well as to the day of return and has the practical effect of permitting an employee to extend his occupancy of temporary quarters for up to 2 days.

If we were to strictly apply the language of FTR para. 2–5.2g to interruptions of temporary quarters occupancy for "en route" or permanent change of station travel, we would be obliged to apply the first sentence of that regulation to at least the day en route travel is completed. In accordance with 56 Comp. Gen. 15 (1976) and 57 *id.* 6 (1977) we would be required to conclude that an employee whose en route travel terminates during the third quarter of a day must count that day as one of the 30 days for which he may be reimbursed temporary quarters subsistence expenses. This conclusion is not compelling, however, because FTR para. 2–5.2g is not necessarily intended to be applied to cases in which temporary quarters occupancy is interrupted for permanent change of station travel. As we stated in 56 Comp. Gen. 15, *supra:*

> The quoted provision was added by section 2.5(b)(6) of Bureau of the Budget Circular No. A–56 on June 26, 1969. By transmittal memorandum No. 5 of the same date, the revision was explained as "clarifying the allowances payable for the first and last day of use of temporary quarters." The first two sentences of the regulations, then clarify the commencement of the eligibility period; the last sentence clarifies its cessation.

Because we do not believe the regulations require us to reach a conclusion in this case that is inconsistent with our holdings in 57 Comp. Gen. 696, and 57 *id.* 700, we hold that the principles set forth in those decisions are to be applied regardless of whether the employee's occupancy of temporary quarters is interrupted for purposes of temporary duty or change of station travel.

Accordingly, Mr. Fletcher may elect not to count the day he departed Germany, January 17, 1980, in calculating his temporary quarters allowance.

Regardless of whether Mr. Fletcher elects to count January 17 in calculating his temporary quarters allowance he is entitled to per diem for three-fourths of that day having entered a travel status at 8:10 a.m., i.e., during the second quarter of the day. 56 Comp. Gen. 15, *supra.* While Mr. Fletcher points out that he was in a travel status for more than three-fourths of a day (or 18 hours) based on his actual elapsed traveltime, FTR para. 1–7.6c requires per diem calculations to be made on the basis of "the standard time then currently in effect at the place involved," except when the traveler crosses the international dateline.

[B–200753]

Bids—Multi–Year—Evaluation—Multi–Year *v.* Single Year Award—Inflation Rate Factor—Failure to Compound

Cancellation and resolicitation of refuse collection service requirement was improper since contracting officer by failing to compound assumed inflation rate erroneously calculated inflation factor to find bid to be unreasonable as to price. This decision is overruled by 60 Comp. Gen. — (B–200753.2, Aug. 12, 1981).

Matter Of: Honolulu Disposal Service, Inc., March 13, 1981:

Honolulu Disposal Service, Inc. protests cancellation of Lot II of invitation for bids (IFB) DAHC77-80-0280 for a multi-year contract for refuse collection services required by the Army at the Schofield Barracks, Fort Shafter, Hawaii. The protester also complains that in resoliciting this requirement (IFB DAHC77-81-B-0011) the Army departed from prior practice by refusing to limit participation to small businesses and by deleting the bid bond requirement. Further, the protester says that the procedures used by the Army in negotiating an interim extension of the prior contract were irregular. Since we sustain Honolulu Disposal's protest regarding cancellation of the original solicitation, the other issues raised by the protester need not be considered.

The IFB contained eight line items, four of which were designated as Lot I and the balance as Lot II. Only Honolulu Disposal bid on Lot II. Its prices, as evaluated, were as follows:

	Program Duration		
	Single year	2 yrs	3 yrs
Lot II only			
Honolulu Disposal Service, Inc.	$206,974.41	[1] $206,974.41	[1] $206,974.41

[1] Per year.

The IFB (1) required that prices be submitted for the first program year; (2) stated that "prices may be submitted for the total multi-year requirements (two (2) or three (3) program years)"; and (3) required that the multi-year prices "be the same for all program years." Included in the IFB was a statement reserving the right to the Government "to disregard the bid on the multi-year requirements and to make award only for the first program year" if only one bid was received. Bidders were advised that award would be made "from one of the three alternatives" (one, two or three years) "that reflects the lowest price to the Government."

Regarding Lot II, the contracting officer found that the price bid:

represented a 25.36 percent increase over the current contract price of $165,103.54 when taking into consideration discounts for prompt payment as follows:

DAHC77-80-B-0280 Honolulu Disposal Svc., Inc.	DAKF14-78-C-0026 The Refuse, Inc.
with ½ percent discount—$206,974.41	with 2 percent discount—$165,103.54

$206,974.41—$165,103.54=$41,870.87
$41,870.87÷$165,103.54=25.36 percent

Furthermore, since Honolulu Disposal Service, Inc.['s] bid prices were identical for all program years, award on a three (3) program years' basis would have resulted in a total increase of $125,612.61 over the next three years as compared to the current contract price. This is in contrast to the yearly Consumer Price Index rates, furnished by Data Resources, Inc. for the Defense Contract Audit Agency, which reflect a downward trend in inflation from 13.5 percent for 1980 to 9.2 percent, 9.0 percent, and 9.4 percent from 1981 thru 1983 respectively.

Because the contracting officer was unable to "reconcile this significant disparity between the anticipated average inflation rate of 9.2 percent and Honolulu's 25.36 percent increase," he determined that Honolulu's bid was unreasonable as to price and rejected it.

A determination that a bid price is not reasonable is a matter of administrative discretion often involving the exercise of sound business judgment which our Office will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. *Espey Manufacturing and Electronics Corporation*, B–194435, July 9, 1979, 79–2 CPD 19. Moreover, in making such a determination the contracting officer may compare bid prices with a Government estimate, past procurement history, and current market conditions, as well as other relevant factors. *G.S.E. Dynamics, Inc.*, B–189329, February 13, 1978, 78–1 CPD 127; *Westinghouse Electric Corporation*, 54 Comp. Gen. 699 (1975), 75–1 CPD 112.

Although the protester views the Army's actions in canceling the solicitation and reprocuring the Lot II requirement as malicious, we do not believe the record shows bad faith or fraud by Army personnel. We believe, however, that the contracting officer's finding was not reasonable.

As indicated, the solicitation evaluation criteria required that offers be considered on a 1, 2 and 3-year basis and that award would be made on whichever basis proved to best serve the Government's interest. While it is true that the IFB reserved the right to award on a 1-year basis if only a single responsive bid were received, there is no indication in the record that the Army concluded that award otherwise would be limited to a single program year. In addition, we believe that under the terms of the IFB the contracting officer was required to consider the reasonableness of Honolulu Disposal's prices for *each* of the three possible evaluation periods if the bid was to be fairly evaluated. Apparently, he understood his obligation in this regard, because he indicates in his report that he considered multi-year projected inflation rates in reaching his decision. However, we believe the contracting officer's conclusion was based upon an erroneous calculation of the inflation factor for the multi-year period. Thus, while we agree that the protester's price can reasonably be found to be unreasonable for the single year requirement, we do not believe the same finding is reasonable when the 3-year price is considered.

For example, the contracting officer states that he compared the protester's constant annual price with his estimated "average" 9.2 percent inflation rate, but he did not recognize that, while the protester's prices would not change for 3 years, the impact of inflation

would increase because the 9.2 percent average annual rate would compound. As the protester also correctly points out, the contracting officer failed to apply the 9.2 percent rate consistently since he overlooked the fact that the incumbent's price was set *2 years earlier at a fixed rate*. Compounded, a 9.2 percent rate results in more than a 30 percent 3-year increase. If the 13.5 percent 1980 Defense Contract Audit Agency (DCAA) price index is used to project the effect of inflation on a mid-term fixed 1978–1980 contract price, the total increase by the third contract year produces a 48 percent jump—almost *double* the 25 percent figure which the contracting officer found objectionable.

The contracting officer's legal adviser, in a memorandum supporting the contracting officer's determination, cites various cases in which our Office has upheld a determination that bid prices were unreasonable where the determination was based on price increases ranging from 7 to 22 percent. None of those cases, however, dealt with the problem presented here, *i.e.*, where an inadequate analysis resulted in the rejection of a bid which, expressed in constant dollars, was comparable to the standard of comparison the Army selected (the prior contract price).

In this regard we have calculated the projected increase in the prior contract (out-of-pocket) cost which the contracting officer should have computed had he calculated an estimated price assuming inflation at the DCAA rates compounded for the 3-year performance period commencing with FY 1981. We have also compared the FY 1980 (The Refuse) price with prices bid by the protester by expressing each in constant dollars. Since Lot II for the prior and follow-on contracts differ slightly, some alteration must be made to account for this difference. Applying a *pro rata* adjustment to reflect changes in the score of work, our calculations indicate than Honolulu Disposal's price is actually *less than* the projected cost based on the prior contract. It is within a few percent of expected cost even if increased work is not considered. Reviewing the relative value of the protester's and incumbent's prices expressed in constant dollars, we also find that the average value to be paid under the Honolulu Disposal bid is more than the prior contract price but less than that price which would be expected were a modest adjustment made for increased work.

Assuming some reasonable allowance for the change in the scope of the work, therefore, Honolulu Disposal's price must be considered to be within a percent or so of what the record before us suggests the Army should have expected. The record provides no basis for a finding by the Army that Honolulu prices were unreasonable.

A further comment is appropriate regarding a secondary concern raised by the contracting officer in his report. There he explained that in the past contractors had favored the 3-year arrangement because it permitted them to amortize equipment over a longer period of time. Since the contracting officer did not see such a decline in Honolulu Disposal's pricing, he believed the protester was attempting to reap a windfall in the second and third contract years when lower equipment costs would be incurred. Our analysis of the effect of inflation indicates, however, that the cost of Honolulu Disposal's pricing *does decline significantly* in the second and third years when measured in constant dollars. Indeed, the value Honolulu Disposal would receive in the second year is comparable to that paid under the last year of the incumbent's contract. The value paid in the third year of a Honolulu Disposal contract would be significantly less.

As indicated by Defense Acquisition Regulation § 2-404.1 and by prior decisions of our Office, protection of the integrity of the competitive bid system requires that an award be made once bids are publicly opened unless there exists a compelling reason to reject all bids and cancel the invitation. *Dominion Engineering Works, Ltd., et al.*, B-186543, October 8, 1976, 76-2 CPD 324. Absent some rational basis to support rejection of the protester's bid, cancellation of IFB DAHC77-80-B-0280 was improper.

We are aware, of course, that since this solicitation was canceled the Army negotiated and awarded an interim extension of the incumbent's contract and has recently awarded that firm a follow-on contract following resolicitation. Insofar as can be determined by the record before us, the Army should terminate the follow-on contract for the Government's convenience, reinstate solicitation DAHC77-80-B-0280, and award a contract to Honolulu Disposal under it.

Consequently, we recommend that the Army determine whether such action is practical at this time and otherwise legally appropriate. Since the contract is one for services and since the incumbent has simply continued performing services for which presumably it already had equipment, termination costs should be limited. In considering the weight to be attached to termination costs, if any, the Army should keep in mind the importance of taking corrective action to protect the integrity of the competitive procurement system.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the House Committee on Government Operations, the Senate Committee on Governmental Affairs, and the House and Senate Committees on Appropriations in accordance with section 236 of the Legislative Reorganization Act of

1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

[B-201146]

Contracts — Specifications — Amendments — Acknowledgment— Oral—Unacceptable With Respect to Material Amendments

Failure to acknowledge amendment in writing prior to bid opening usually renders bid nonresponsive and that failure cannot be cured by oral acknowledgment or discussions concerning amendment prior to bid opening. Prior decisions inconsistent with this rule are overruled (60 Comp. Gen. 251 (1981) and B-185198, Feb. 24, 1976).

Matter of: MET Electrical Testing, Inc., March 17, 1981:

MET Electrical Testing Company, Inc. (MET), protests the rejection of all bids and subsequent cancellation of solicitation No. N62477-80-B-8455 for maintenance servicing at the Washington Navy Yard. MET initially argued that its bid was improperly rejected as nonresponsive for failure to acknowledge an amendment to the solicitation containing revised wage rates. MET's position is that it orally acknowledged the amendment by telephone prior to the extended bid opening date, and that it was the low, responsive, responsible bidder.

Prior to filing a report with this Office, the Navy advised us that it believed the protester's case had merit and that it had decided to reject all bids submitted under the solicitation. MET then protested this action by the Navy. MET argues that if there is merit to its protest, it should be awarded the contract, and that resolicitation would be injurious to MET since the other two bidders now know MET's bid price.

The Navy sets forth these facts. Four days prior to the bid opening, an amendment was issued which incorporated a revised Department of Labor wage determination and extended bid opening to September 26, 1980, 4 extra days. Due to the time constraints involved, a contracting activity employee telephone MET to advise it of the contents of the amendment and request acknowledgement. By that time, MET had already submitted its bid in response to the original bid opening date. The telegram acknowledging the amendment sent by MET was received late through mishandling by Western Union. However, the protester states that during the phone call initiated by the Navy on September 24, it orally acknowledged receipt of the amendment prior to bid opening.

The Navy states that failure to acknowledge the amendment, which contained wage rates, in writing prior to bid opening would render

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the bid nonresponsive. However, the Navy canceled the solicitation on the basis that insufficient time had been allowed for receipt and acknowledgment of the amendment.

MET concedes that its written telegraphic acknowledgment was late, but contends that its oral acknowledgement prior to bid opening was legally sufficient in that no requirement exists in the solicitation or amendment that the acknowledgment be written.

As the Navy correctly points out, amendments incorporating wage determinations pursuant to the Davis-Bacon Act are material. See *McHenry Cooke*, B–196138, January 28, 1980, 80–1 CPD 74; 51 Comp. Gen. 500 (1972). Thus, the issue to be resolved here is whether an oral acknowledgment of a material amendment, i.e., an amendment incorporating a wage determination, prior to bid opening is sufficient to permit acceptance of a bid which contains no other indication of acknowledgment.

We have previously indicated that an oral acknowledgment of a material amendment may be acceptable where the evidence used to show awareness of, or concurrence with, the amendment is, at the very least, independently verifiable evidence over which the bidder does not have exclusive control as to whether to submit it. 33 Comp. Gen. 508 (1954); *United States Cartridge Company*, 60 Comp. Gen. 251 (1981), 81–1 CPD 94; *Nautical Manufacturing Company*, B–185198, February 24, 1976, 76–1 CPD 129. This language would appear applicable to this case.

However, we have also held that the failure to acknowledge an amendment usually renders the bid nonresponsive and that the failure cannot be cured by oral discussion. *MB Associates*, B–197566, June 4, 1980, 80–1 CPD 383; *Aqua-Trol Corporation*, B–191648, July 14, 1978, 78–2 CPD 41. We have also expressed our preference for written acknowledgment of material amendments in other cases, for example, 42 Comp. Gen. 490 (1963).

We believe the principle stated in *MB Associates*, *supra*, and *Aqua-Trol Corporation*, *supra*, is the better rule and overrule *Nautical Manufacturing Company*, *supra*, and *United States Cartridge Company*, *supra*, to the extent these decisions are inconsistent with that rule.

Permitting oral acknowledgment of a material amendment is detrimental to the competitive bidding process in two ways. First, it allows a bidder "two bites at the apple," by giving it the sole discretion to accept or reject the contract after bid opening, by affirming or denying that it intended to be bound by the amendment and, hence, the agree-

ment. See, *National Investigation Bureau, Inc.*, B-191759, July 18, 1978, 78-2 CPD 44. Second, because of the bidder's failure to timely acknowledge the amendment in writing, the terms of the resulting contract are not clear since the written bid acknowledges the terms of the solicitation, but not relevant amendments. 42 Comp. Gen., *supra.*

Under these circumstances, we believe MET's bid was properly rejected as nonresponsive for failure to timely acknowledge a material amendment in writing.

Protest is denied.

[B-201259]

Prisons and Prisoners—Federal Prison Industries—Prison Industries Fund—Status as Permanent or Continuing Appropriation—Donable Property Purpose

Prison Industries Fund, established by 18 U.S.C. 4126 as operating fund of Federal Prison Industries (FPI), constitutes permanent or continuing appropriation even though amounts originally appropriated have been returned to Treasury and Fund is self-sufficient, in view of fact that statute authorizes deposit into Treasury to credit of Fund of receipts for prison industries products and services and authorizes use of such funds for operation of FPI. Surplus personal property acquired by the Fund thus is donable under 40 U.S.C. 484(j), since it does not constitute nonappropriated fund property within meaning of regulation excluding such property from donation (41 C.F.R. 101-44.001-3).

Matter of: Donation under 40 U.S.C. 484(j) of surplus personal property of Federal Prison Industries, Inc., March 17, 1981:

The General Counsel of the General Services Administration (GSA) asks whether surplus personal property under the control of Federal Prison Industries, Inc. (FPI) may be disposed of by donation in accordance with section 203(j) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 484(j) (1976) (Federal Property Act), and its implementing regulations, 41 CFR Part 101-44 (1979).

Section 203(j)(1) of the Federal Property Act authorizes the Administrator of General Services to transfer surplus personal property under the control of any executive agency to State agencies for donation to qualified recipients. It provides that, in determining whether property is to be donated, "no distinction shall be made between property capitalized in a working-capital fund under [what is now 10 U.S.C. § 2208], or any similar fund, and any other property." FPI, as a wholly owned Government corporation (31 U.S.C. § 846 (1976)), is included in the definition of "executive agency" for purposes of the Federal Property Act. 40 U.S.C. § 472(a) (1976).

The regulations (41 CFR § 101-44.001-3), following the statute, define donable property in pertinent part as follows:

"Donable property" means surplus property under the control of an executive agency (including surplus personal property in working capital funds established under 10 U.S.C. 2208 or in similar management-type funds) except:

* * * * * * *

(d) Nonappropriated fund property.

The exclusion of nonappropriated fund property gives rise to the present inquiry. The Assistant Attorney General for Administration has expressed the view that the operating fund of FPI constitutes a nonappropriated fund, and thus that personal property acquired with FPI funds does not qualify as donable property under the regulation. For the reasons indicated below, we conclude that FPI's operating fund constitutes a continuing appropriation and that surplus personal property originally acquired with FPI funds is donable under section 203(j).

The prison industries program had its origins in the Act of July 10, 1918 (ch. 144, 40 Stat. 896) and the Act of February 11, 1924 (ch. 17, 43 Stat. 6). The 1918 Act established a program to equip the Federal penitentiary in Atlanta for the manufacture of textile products for the Government. Section 5 of that Act authorized creation of a "working capital" fund for carrying on the program. The Act of November 4, 1918 (ch. 201, 40 Stat. 1020, 1035) appropriated $150,000 to the working capital fund. The 1924 Act established a similar program at the Leavenworth penitentiary, and likewise authorized a working capital fund to implement the program. Congress appropriated $250,000 to that working capital fund by the Act of April 2, 1924 (ch. 81, 43 Stat. 33, 45).

The working capital funds for the Atlanta and Leavenworth programs were consolidated by section 4 of the Act of May 27, 1930 (ch. 340, 46 Stat. 391) as part of a grant of authority in section 3 of that Act to the Attorney General to extend the prison industries program to all Federal penal institutions. Section 5 of the 1930 Act provided for the capitalization of the consolidated fund:

All money appropriated for, or now on deposit with the Treasurer of the United States to the credit of the said working-capital funds at Atlanta Penitentiary and Leavenworth Penitentiary, shall be credited to the consolidated prison industries working-capital fund herein authorized. All money received from the sale of the products or by-products of such industries as are now or hereafter established, or for the services of said United States prisoners, shall be placed to the credit of said prison industries working-capital fund, which may be used as a revolving fund. There are authorized to be appropriated such additional sums as may from time to time be necessary to carry out the provisions of this Act.

A major change in the form of the prison industries program was accomplished by the Act of June 23, 1934 (ch. 736, 48 Stat. 1211).

Section 1 of that Act (codified at 18 U.S.C. § 4121 (1976)) authorized the President to establish FPI as a Government corporation. The change to corporate status was intended to allow existing prison industries to operate on a larger scale and to broaden the fields in which the program could operate. Such expansion of scale was considered necessary to accomplish the statutory purpose of providing employment to all inmates in Federal institutions. *See*, *e.g.*, S. Rep. No. 73-1377, 73d Cong., 2d Sess. 2 (1934).

Section 4 of the 1934 Act (codified at 18 U.S.C. § 4126 (1976)) authorized creation of a "Prison Industries Fund" to be composed of "* * * all balances then standing to the credit of the prison industries working capital fund." This new Fund was characterized as a "permanent and indefinite revolving fund" for the operation of FPI. S. Rep. No. 73-1377, *supra.*

The substance of the 1934 Act was retained in 18 U.S.C. § 4126, except for changes in phraseology and the omission of language directing the transfer of funds between the two working capital funds. The current version of the statute provides as follows:

> All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlements issued by the General Accounting Office.
>
> All valid claims and obligations payable out of said fund shall be assumed by the corporation.
>
> The corporation, in accordance with the laws generally applicable to the expenditures of the several departments and establishments of the government, is authorized to employ the fund, and any earnings that may accrue to the corporation, as operating capital in performing the duties imposed by this chapter; in the repair, alteration, erection and maintenance of industrial buildings and equipment; in the vocational training of inmates without regard to their industrial or other assignments; in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount that that provided in the Federal Employees' Compensation Act.

This Office has consistently regarded statutes which authorize collection of receipts and their deposit in a specific fund, and which make the fund available for a specific purpose, as constituting continuing or permanent appropriations. 57 Comp. Gen. 311, 313 (1978); 50 *id.* 323, 324 (1970); 35 *id.* 615, 618 (1956); 35 *id.* 436, 438 (1956). In this case, we conclude that, by authorizing deposit of receipts from sales of FPI products into a special account to be used for operation of FPI, 18 U.S.C. § 4126 in effect makes a continuing appropriation of those revenues for authorized expenditures of FPI.

Our decision in 35 Comp. Gen. 436 (1956) is particularly relevant. That decision involved the status of the Farm Labor Supply Fund,

which was created as a source of working capital for expenses incurred by the United States in transporting and maintaining Mexican agricultural workers employed on a temporary basis in the United States. A total of $1,000,000 was originally appropriated to the Fund, but the statute required that the employers who made use of the agricultural workers reimburse the Fund for the expenses incurred by the Government. As a result, the original appropriation was returned to the Treasury within 1 year. From that time on, the Fund was financed exclusively through collections from the employers.

Despite the fact that the Farm Labor Supply Fund was self-sufficient, this Office determined that the Fund constituted a permanent appropriation. The employers' payments were held to constitute money collected for the use of the United States, and, in the absence of the statute establishing the Fund, they would have been deposited to the Treasury as miscellaneous receipts (31 U.S.C. § 484 (1976)). Because Congress had by statute directed deposit of the payments into the Fund instead, it was regarded as having created a continuing appropriation of those funds.

The Prison Industries Fund originated with appropriated funds derived from the seminal programs at the Atlanta and Leavenworth penitentiaries. No direct appropriations were again made to the Fund, which became self-supporting soon after its creation. (By 1952, for example, a total of $20,400,000 had been paid into the Treasury as dividends. *See* H.R. Doc. No. 96, 83d Cong., 1st Sess. (1953).) However, under the decisions cited above, the fact that the original amounts appropriated have been paid back into the Treasury does not change the character of the Prison Industries Fund as an appropriated fund.

A narrower interpretation of the term "appropriation" to include only moneys appropriated from the general fund of the Treasury for a specific purpose would not be consistent with our prior decisions or the statutory definition of the term in the Budget and Accounting Act of 1921, 31 U.S.C. § 2 (1976). That definition reads as follows:

> The term "appropriations" includes, in appropriate context, funds and authorizations to create obligations by contracts in advance of appropriations or any other authority making funds available for obligation or expenditure.

To similar effect, we conclude that funds of the St. Lawrence Seaway Development Corporation, a Government corporation, constitute appropriated funds despite the fact that they derive from user fees. In that regard, we noted, "* * * it is our view that any time the Congress specifies the manner in which a Federal entity shall be funded and makes such funds available for obligation or expenditure, that constitutes an appropriation, whether the language is found in appropriation act or in other legislation." B–193573, December 19, 1979.

Since we conclude that the Prison Industires Fund is not a nonappropriated fund within the meaning of 41 CFR § 101-44.001-3, personal property acquired through the Fund does not constitute "nonappropriated fund property." Donation of surplus personal property under the control of FPI in accordance with section 203(j) of the Federal Property Act, thus is not barred.

[B-200996, B-200997]

Bids—Evaluation—Aggregate *v.* Separable Items, Prices, etc.—Additives—Failure to Bid On—Bidder Submitting Lowest Base Bid

Protest that successful bids were nonresponsive for alleged failure to bid on additive items is denied. Contracting agency determined not to accept any additive items, properly determined lowest bids on basis of work actually to be awarded (base bid item), and made awards on basis of lowest bids for base bid items.

Bids—Aggregate *v.* Separable Items, Prices, etc.—Additives—Failure to Bid On—Funding (Control Amount) Insufficiency for Base Bid Item—Later Award on Lowest Base-Bid Basis

Where, under Additive or Deductive Items clause, funding available before bid opening was insufficient to cover even lowest base item bid, award may properly be made if funds are subsequently acquired only to bidder submitting lowest base bid.

Matter of: Martin J. Simko Construction, Inc., March 18, 1981:

Martin J. Simko Construction, Inc. (Simko), protests against the award of two construction contracts to E. L. Shea, Inc. (Shea), under invitations for bids (IFB) Nos. N62472-80-B-0069 (IFB-0069) and N62472-80-B-0094 (IFB-0094) issued by the Department of the Navy, Naval Facilities Engineering Command. Simko contends that because Shea did not bid on all the bid items in either IFB, its bids should have been rejected as nonresponsive and the improperly awarded contracts should be terminated and awards made to Simko.

Each IFB solicited a base bid (item 1) for the entire work, exclusive of work to be performed under items 2 through 4 which were additive bid items for additional desired features of construction. The IFBs provided that the control amount, the funds available for each project, was to be recorded prior to and announced at the bid opening, pursuant to Defense Acquisition Regulation (DAR) § 2-201(b)(xli), Defense Acquisition Circular (DAC) No. 76-17, September 1, 1978, and that the low bidder was to be determined in accordance with clause 21, "Additive or Deductive Items," of the IFB's instructions to bidders. The clause provides, in pertinent part, as follows:

The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus * * * those additive * * * bid items providing the most features of

the work *within the funds determined by the Government to be available before bids are opened.* * * * [Italics supplied.]

The control amounts for the projects were $95,715 for IFB–0069 and $95,217 for IFB–0094 and the following bids were received at the bid openings:

IFB–0069

Bidder	Item 1	Item 2	Item 3	Item 4
Shea	$100, 000	0	0	0
Simko	129, 488	$8, 700	$5, 600	$7, 000
Charwill Construction Co	133, 666	3, 600	3, 890	6, 240

IFB–0094

Bidder	Item 1	Item 2	Item 3	Item 4
Shea	$100, 000	0	0	0
Atlantic Builders, Inc.	109, 829	0	0	0
Simko	137, 488	$5, 000	$3, 300	$7, 500
Charwill Construction Co	143, 646	4, 047	4, 480	4, 562
C.M. Builders, Inc	146, 874	2, 097	5, 008	6, 223

The Navy awarded contracts to Shea under each IFB for item 1 in the amount of $100,000, after additional funding was made available for award in that amount.

Simko takes the position that paragraph 2(b) of section 00101 of the IFB, which provides that "bidders shall state prices for each basis for bid given hereinafter," requires that bidders bid on all bid items, and that Shea's failure to bid on items 2 through 4 of either IFB rendered its bids nonresponsive. Similarly, Simko argues that Atlantic Builders' bid in response to IFB–0094 is also nonresponsive, leaving Simko the low responsive bidder. The protester states that previously the Navy has immediately disqualified bids which did not include bid prices for all items in the manner set forth in the IFB, and that paragraph 5(b) of Standard Form (SF) 22, Instructions to Bidders (Construction Contract), included in the IFB explicitly provides that a bid which is not completed for all items under bid instructions "will be disqualified." Simko asserts that contrary to the terms of the Additive and Deductive Items clause, the Navy obtained additional funds and made awards to Shea in amounts exceeding the

pertinent control amounts. Simko also claims that the rapidity with which the awards were made to Shea indicates that the Navy waived its past practice of refusing to make award until it received written confirmation of the bids notwithstanding the fact that Shea's bid prices were almost 30 percent below those of the next low bidder. Finally, Simko questions the fact that Shea bid the same price for two completely different projects at two different locations.

The Navy contends that the bidders' insertion "0" in response to items 2 through 4 of the IFB's did not render their bids nonresponsive because the pertinent control amounts dictated that only the base items bid could be considered and, therefore, the awards were properly made to Shea, citing our decision in *Castle Construction Company, Inc.*, B–197446, July 7, 1980, 80–2 CPD 14. However, Simko asserts that the Navy's reliance on *Castle Construction Company, Inc., supra*, is misplaced because, unlike Shea and Atlantic, the successful bidder inserted dollar prices in response to the additive bid items on the solicitation in question.

Contrary to Simko's assertion, we have held that where, as here, a solicitation which contains paragraph 5(b) of SF 22 does not elsewhere explicitly require bidding on all items, insertion of other than a dollar price for additive bid items does not render a bid nonresponsive. *Mitchell Brothers General Contractors*, B–192428, August 31, 1978, 78–2 CPD 163.

Under the circumstances we cannot agree that the entry "0", rather than a dollar price in response to the additive bid items makes the bids nonresponsive. We have held that when a bidder does not bid on additive items, the firm runs the risk that its bid will be eliminated from consideration as nonresponsive due to the omission only if the evaluation process dictates acceptance of items on which the firm did not bid. *Castle Construction Company, Inc., supra; C. T. Bone, Inc.*, B–194436, September 12, 1979, 79–2 CPD 190; *Mitchell Brothers General Contractors, supra.* In both procurements to which Simko objects, however, bid evaluation pursuant to clause 21 and the pertinent control amount did not permit acceptance of the items upon which Shea and Atlantic bid "0." We therefore conclude that their bids were properly determined to be responsive to the IFB's.

Simko apparently believes that regardless of the fact that the control amount in each procurement is not sufficient to permit an award of any of the additive bid items, award must be made on the basis of the aggregate low bid for all four bid items. We cannot agree with

the protester's characterization of the terms of the solicitations and the bids of Shea and Atlantic. We believe that the IFB's unequivocally stated that the awardee would be selected in accordance with the method prescribed in the Additive or Deductive Items clause and could not reasonably be construed to require an "all or none" bid. *Utley-James, Inc.*, B-198406, June 16, 1980, 80-1 CPD 417. We have consistently held that bids are to be evaluated on the basis of the work to be contracted for because any evaluation which considers more than the work to be contracted for in determining the lowest bidder does not accurately assess bid prices and fails to obtain the benefits of full competition which is one of the primary purposes of Federal procurement laws and regulations. *Castle Construction Company, Inc., supra;* 50 Comp. Gen. 583, 585 (1971).

With regard to the amount of the awards, we have held that where funds determined available before bid opening are not sufficient to cover the lowest base bid, a bidder may nonetheless be selected for award under the Additive or Deductive Items clause and award can be made if funds can be obtained only to the bidder submitting the lowest bid on the least work. *Utley-James, Inc., supra;* B-170795, October 6, 1970; DAR § 2-201(b)(xli), DAC No. 76-17, September 1, 1978. Because the applicable control amounts were not sufficient to cover Shea's low base bids and the Navy selected Shea for the awards pursuant to the clause, the awards could properly be made only to Shea (the lowest bidder) on the base bid item (the least work) when funds in the amount of $100,000 were obtained for each project.

Simko's contentions concerning the relationship of Shea's bid prices to those of the other bidders and the fact that Shea bid the same price on both IFB's appear to question the reasonableness of Shea's bid prices as well as Shea's ability to perform the work at the price bid. Price reasonableness is, however, a determination within the contracting officer's discretion prerequisite to the making of an award and our Office will object to the contracting officer's finding only upon a showing of bad faith or fraud, which has not been made here. DAR §§ 2-404.1(b)(vi) and 2-404.2(e), DAC No. 76-17, September 1, 1978; *Harris Systems Pest Control, Inc.*, B-198745, May 22, 1980, 80-1 CPD 353; *Penn Landscape & Cement Work*, B-196352, February 12, 1980, 80-1 CPD 126. Whether Shea is capable of performing the work at the price bid is a matter of responsibility. The award of a contract imports an affirmative determination of the successful bidder's responsibility, and our Office does not review protests concerning

affirmative determinations of responsibility absent allegations of fraud on the part of contracting officials or of the failure to apply definitive responsibility criteria. *Advertising Distributors of Washington, Inc.*, B–187070, February 15, 1977, 77–1 CPD 111. Finally, whether Shea fulfills its contractual obligations at the price bid is a matter for the contracting agency in the administration of the contracts. *Bayou State Trucking Inc.—Reconsideration*, B–198850, August 29, 1980, 80–2 CPD 158.

The protests are denied.

[B–199918.2]

Equipment—Automatic Data Processing Systems—Rental *v.* Purchasing Equipment—Funding Availability—Notice to Offerors

Allegation that protester should have received award under proper application of solicitation provision stating that award would be made to technically acceptable proposal offering lowest systems life cost, subject to availability of funds for that method of acquisition, is without merit where agency reasonably concluded that funds were not available for exercise of purchase option under protester's lowest cost lease with option to purchase offer.

Matter of: Interscience Systems, Inc., March 25, 1981:

Interscience Systems, Inc. protests the ward of a contract to Sperry Univac under request for proposals (RFP) No. N00600–80–R–5358 issued by the Naval Regional Contracting Office, Washington, D.C.

The procurement was for certain Univac-compatible peripheral automated data processing (ADP) equipment and related items. The RFP solicited offers for a 48-month systems life on four possible methods of acquisition (MOAs): purchase, lease with option to purchase (LWOP), full payout lease, and straight rental.

Interscience contends that it should have received the award under a proper application of the solicitation's evaluation and award criteria, which provided in pertinent part as follows:

> The proposal from a responsible offeror validated as being technically acceptable and offering the lowest (present value discounted) systems life cost, price and other factors considered, shall be selected for award, subject to the availability of funds for the proposed MOA.

The Navy rejected Interscience's LWOP proposal, even though it was technically acceptable and offered the lowest systems life cost, because it found that funds were neither available nor budgeted and could not reasonably be expected to become available for the purchase portion of that MOA.

"Interscience contends that this conclusion was unreasonable, that

the Navy's efforts to make funds available by reprogramming were inadequate, and that section 101-35.206(e) of the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-35.206(e) (1980), requires that award be made on an LWOP basis in these circumstances. We find their allegations to be without merit and deny the protest.

The Navy advises that after systems life cost evaluations were completed, the cognizant Navy budget representatives were briefed by the contracting officer. These representatives were advised that the lowest evaluated systems life cost was LWOP at the end of 12 months (offered by Interscience, which was not identified). Accordingly, in order to take advantage of this offer, lease funds would be required in Fiscal Year (FY) 1980 and purchase funds would be required in FY 1981 (and possibly FY 1982, depending upon the delivery date of the equipment).

The contracting officer was advised by the budget representatives that no purchase funds were available, or budgeted, nor could any be expected to become available for exercise of the purchase option in either FY 1981 or FY 1982, and that attempts to obtain funds through reprogramming (the method by which agencies shift funds within an appropriation account from one program to another) had been unsuccessful.

The contracting officer was also informed that no funds were available for outright purchase (also offered by Interscience, which has not protested the rejection of its proposal on this basis), the next lowest evaluated systems life cost MOA. Consequently, award was made to Univac on a straight rental basis since it offered the third lowest evaluated systems life cost and lease (rental) funds were available in FY 1980 and budgeted for FY 1981.

Interscience argues that despite the fact that the contracting officer was advised that no funds for the exercise of the purchase option were available, budgeted, or expected to become available, her conclusion that funds were unavailable for the LWOP MOA was unreasonable. In support of this contention, Interscience, pointing to the solicitation's "Availability of Funds for Next Fiscal Year" clause, which stated in part that "funds are presently not available for performance under this contract beyond 1980," argues that funds for the LWOP MOA were no more unavailable after FY 1980 than funds for the rental MOA. In addition, Interscience argues that it was improper and unreasonable for the Navy to award to Univac on a rental basis "simply because funds would need to be reprogrammed in a

small amount" in the future in order to take advantage of the lower cost LWOP offer.

First, we believe it is apparent that the provision contained in the solicitation's evaluation and award criteria, warning that award would be "subject to availability of funds for the proposed MOA," is different in intent and scope than the "Availability of Funds for Next Fiscal Year" clause. The latter advised offerors that no funds had yet been appropriated for FY 1981 and made the Government's obligation and legal liability under the contract contingent on the future availability of appropriated funds from which contract payments could be made. (In this regard, the Navy advises that rental funds come from its appropriation for operation and maintenance which is available for one fiscal year only; a purchase, however, is funded out of a separate Navy procurement appropriation ("Other Procurement, Navy") which is available for obligation for three fiscal years.)

In contrast, the evaluation and award contingency establishes a prerequisite to contract award rather than a limitation on the extent of the Government's legal liability under the contract. As such, it cannot logically be viewed as making award on a particular MOA dependent upon future appropriations for that purpose, since award on any MOA covering a fiscal year for which funds had not yet been appropriated would then be impossible. The statement that award is "subject to availability of funds for the proposed MOA" thus references a concern with the existence and expectation of funds availability in a more general sense.

Consequently, the evaluation and award continguency establishes that contract award is to be based on funds presently budgeted or reprogrammable or, with respect to future fiscal years only, reasonably expected to become available. We find nothing objectionable in this. It seems apparent that in order for the Navy to reasonably determine the availability of funds for MOAs which covered a 48-month systems life, it not only had to consider whether funds were presently available but also, to the extent possible, had to make a reasonable projection about the future availability of funds for that purpose.

We believe that the contracting officer, having been advised by the cognizant budget representatives that no funds for the exercise of the purchase option were budgeted or expected to become available, and that none could be reprogrammed, reasonably concluded that funds were not available for the LWOP MOA. While it is true that

as a consequence, the LWOP proposal offering a lower evaluated systems life cost was rejected in favor of a higher cost rental offer, it is significant that Interscience's LWOP offer was only low if the Navy could take advantage of the purchase option. Without a reasonable expectation that it could do so, we believe that award on that MOA would not have been in the best interests of the Government.

Moreover, we believe that the contracting officer was justified in her reliance on the advice of the cognizant budget representatives. Indeed, we believe that she could no no more since these were matters which were outside the scope of her authority.

While Interscience questions the adequacy of the budget representatives' financial review and reprogramming efforts, largely because of the lack of any documentation in this regard, the Navy has provided a detailed and persuasive defense of the conclusions reached. Furthermore, we agree with the Navy that reprogramming is essentially an internal agency matter and we are not convinced that any procedural deficiency which may have occurred would provide any basis to sustain this protest. See *A.R.F. Products, Inc.*, 56 Comp. Gen. 201 (1976), 76-2 CPD 541; *LTV Aerospace Corporation*, 55 Comp. Gen. 307 (1975), 75-2 CPD 203. We also find no merit to Interscience's allegation that preselection documentation of the details of the Navy's funding decisions was mandated by FPMR § 101-35.208, which requires that documentation of the considerations taken into account and the basis for an agency's decision on an MOA be prepared and available to Office of Management and Budget examiners and the GSA as "necessary."

In addition, we find no merit to Interscience's contention that the contracting officer's rejection of its proposal was unreasonable because its acceptance would only entail reprogramming of funds in a small amount in the future. Interscience apparently bases this argument on the assumption that the only amount which would need to be reprogrammed is the difference between the purchase price under the option and the rental cost (for which funds were expected to be available) for the fiscal year in which the option was exercised. This assumption is erroneous since, as discussed above, funds for purchase and rental are contained in separate appropriations and consequently are not interchangeable through reprogramming. 31 U.S.C. § 628 (1976).

We now turn to Interscience's allegation that it was entitled to award under FPMR § 101-35.206(e), which is part of the General Service Administration's (GSA) ADP and Telecommunications Management Policy. It provides:

(e) *Acquisition criteria.* The following criteria shall be used to determine the appropriate method of acquisition:

(1) The purchase method is indicated when all of the following conditions exist:

(i) The comparative cost analysis, in consideration of all the factors noted above, indicates that purchase will provide the Government with the lowest overall cost.

(ii) The agency's approved budget contains funds intended for the purchase, funds can be reprogrammed, or resources are available from the GSA ADP Fund.

(2) The lease with option to purchase method is indicated when it is necessary or advantageous to proceed with the acquisition of the equipment that meets system specifications, but it is desirable to defer temporarily a decision on purchase because circumstances do not fully satisfy the conditions which would indicate purchase. This situation might arise when it is determined that a short period of operational experience is desirable to prove the validity of a system design with which there is no previous experience.

(3) The straight lease method is indicated when it is necessary or advantageous to proceed with the acquisition of equipment that meets system specifications and it has been established conclusively that any one of the conditions under which purchase is indicated is not attainable.

Interscience argues that under subsection (2) LWOP was the appropriate MOA. Interscience contends that it was "desirable to defer temporarily a decision on purchase because circumstances [did] not fully satisfy the conditions which would indicate purchase" since purchase condition (ii), as set forth in subsection (1), was not met. In addition, LWOP was the lowest cost MOA, and despite the Navy's current assessment of the situation, funds might still become available in the future for the exercise of the purchase option.

The Navy asserts that contrary to Interscience's contention, straight lease was the appropriate MOA under FPMR § 101–35.206(e). The Navy cites subsection (3) and argues that it was faced with precisely the situation described therein: it had been conclusively established that one of the conditions (condition (ii)) under which purchase is indicated was not attainable.

We are not persuaded by Interscience's argument that subsection (2) was applicable to the circumstances of this case. While the language relied upon is quite broad and arguably susceptible to the interpretation urged upon us, we note that the subsection goes on to state that "This situation might arise when it is determined that a short period of operational experience is desirable to prove the validity of a system design with which there is no previous experience." We recognize that this provides only an example of the circumstances under which subsection (2) would apply, but we believe it does militate against Interscience's contention that subsection (2) was applicable here.

More importantly, we agree with the Navy that the situation before

us falls squarely within the scope of the subsection (3), straight lease, since it has been established that one of the conditions under which purchase is indicated is not attainable. The Navy has shown that condition (ii) is not attainable since no funds intended for purchase are budgeted, funds cannot be reprogrammed, and resources are not available from the GSA ADP fund. While Interscience points out that the Navy awarded the contract to Univac before it ascertained that no funds were available from the GSA ADP fund, the Navy was advised shortly thereafter that no funds were in fact available. It is therefore clear that Interscience was not prejudiced by this procedural deficiency.

Finally, Interscience asserts that the solicitation was deficient because it did not inform offerors that funds were not available for particular MOAs. However, the clause in the instant RFP making award subject to the availability of funds for the proposed MOA did apprise offerors that funds might not be available for a given MOA. While the contracting officer apparently did not explore the budget situation before issuing a solicitation, we are aware of no requirement that this be done. See *Scona, Inc.*, B-191894, January 23, 1979, 79-1 CPD 43. Further, such a pre-issuance exercise may have been impracticable here in any case, since the records shows that the procurement was conducted under what were considered to be urgent circumstances. Accordingly, this contention does not provide a basis to sustain the protest.

Nevertheless, we agree with Interscience to the extent that where a solicitation requests offers on a basis that would necessitate the future availability of funds in order for that offer to be selected, a reasonable investigation into the expectation of the availability of such funds should be made before offers are solicited, if otherwise practicable. By separate letter, we are advising the Secretary of the Navy of our view.

The protest is denied.

[B-198211]

Transportation — Household Effects — Overseas Employees— Weight Limitation—Local Movement

A civilian employee of the Air Force was authorized local drayage of household goods incident to his moving from local economy to Government quarters. The maximum weight which may be drayed at Government expense and charged as an operating expense of the installation concerned should not exceed 11,000

pounds consistent with 5 U.S.C. 5724(a)(2). Where the household goods shipment of the employee exceeds the maximum limitation as determined by an appropriate official, then the employee is liable for the excess costs.

Transportation—Household Effects—Weight Limitation—Administrative Determination

The question of whether and to what extent authorized weights have been exceeded in the shipment of household effects is a question of fact considered to be a matter primarily for administrative determination and ordinarily will not be questioned in the absence of evidence showing it to be clearly in error. The Air Force has correctly made that determination based on regulations which provide for constructive weight based on 7 pounds per cubic foot of properly loaded van space. Lower cubic foot measurement of 5.7 pounds within Germany pertains only to military members and is not applicable here.

Matter of: Donald W. Combs—Drayage Between Local Quarters—Excess Weight Charge, March 26, 1981:

This action is in response to a request for a decision submitted by the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) concerning the weight of household goods which may be drayed at Government expense for a civilian employee of the armed forces. The matter was forwarded here through the Per Diem, Travel and Transportation allowance Committee (PDTATAC Control No. 80–10).

The submission states that Mr. Donald W. Combs was transferred to Germany in July 1977 from Fort Monmouth, New Jersey. At the time of his permanent change of station, Mr. Combs elected to occupy Government quarters and the amount of household goods which he was authorized to ship to Germany was restricted to 6,796 pounds pursuant to Volume 2, Joint Travel Regulations (JTR) para. C8002–1b. His actual shipment weighed 6,510 pounds and 4,400 pounds of household goods were placed in nontemporary storage at Government expense. Upon arrival in Germany, Government quarters were not available and Mr. Combs moved into economy quarters with his family. In May 1978, Mr. Combs was assigned and moved into Government quarters. In connection with the move to these quarters, Mr. Combs was authorized drayage of his household goods in accordance with 2 JTR para. C8006. Although his household goods were not weighed at that time, a constructive weight was established at 8,631 pounds and Mr. Combs was billed $46.37 for the excess weight. The excess weight was computed based on a total weight allowance of 11,000 pounds minus the weight of goods in nontemporary storage.

The regulation which authorizes drayage of household goods for civilian employees of the armed forces is contained in 2 JTR para.

C8006. That section states that drayage of an employee's household goods is authorized when, for the convenience of the Government, the local commander issues written orders directing the employee to change his local place of residence. The regulation also states that the authority for drayage will not be used in connection with an authorized permanent change of station and that the cost of the drayage will be charged as an operating expense of the installation concerned. This is in conformity with decisions of this Office. 52 Comp. Gen. 293 (1972); B-163088, February 28, 1968. The provisions for local drayage in 2 JTR para. C8006 do not limit the amount of household goods which may be drayed at Government expense and the statute which limits expenses for moving household goods to 11,000 pounds specifically refers to permanent change of station moves. See 5 U.S.C. § 5724(a)(1), (2) (1976). However, in our decision B-172276, July 13, 1971, this Office considered the local movement of household goods for a Bureau of Indian Affairs employee as an administrative cost of operating an installation, citing to B-163088, *supra*. The employee shipped 11,025 pounds of household goods, and we limited the allowance to 11,000 pounds consistent with 5 U.S.C. § 5724(a)(2). Accordingly, local drayage should be limited to a maximum of 11,000 pounds.

The Assistant Secretary has asked our Office to determine whether the drayage weight limit should be lower than 11,000 pounds if the employee's permanent change of station weight limitation is below 11,000 pounds. We believe that the determination of the employee's authorized weight allowance is discretionary and should be decided by an appropriate official of the Department of the Air Force prior to movement.

Concerning Mr. Combs shipment of household goods, an appropriate official determined the weight allowed for drayage on a total weight allowance of 11,000 pounds minus the weight of the household goods in nontemporary storage. We have no objection to such a determination since it is consistent with regulations that provide that the weight of the household goods placed in storage, plus the weight of the household goods shipped, will not exceed the employee's applicable weight allowance. 2 JTR para. C8002-3c(1). We also note here that Mr. Combs was authorized 11,000 pounds for his local move by the Family Housing Office.

Finally, the Assistant Secretary has asked us to determine what Mr. Combs liability is in this case. Since he was only authorized

drayage for 11,000 pounds minus the amount in nontemporary storage, and he exceeded that amount, he is liable for the excess. This Office has always followed the general rule that the question of whether and to what extent authorized weights have been exceeded in the shipment of household effects is a question of fact considered to be a matter primarily for administrative determination and ordinarily will not be questioned in the absence of evidence showing it to be clearly in error. *Robert W. Dolch*, B–197008, February 20, 1980. The Air Force has correctly made that determination on the basis of 2 JTR para. C8000–2d, which provides for a constructive weight based on 7 pounds per cubic foot of properly loaded van space. This provision is based, in turn, on the Federal Travel Regulations, para. 2–8.2b(4) (FPMR 101–7, May 1973). Thus, the provision in 1 JTR, para. M8002–4 which provides for a lower cubic measurement of 5.7 pounds per cubic foot, within Germany, pertains only to military members and is not applicable in Mr. Combs case.

The questions presented in the submission are answered accordingly.

[B–198246]

Mileage—Travel by Privately Owned Automobile—Constructive Cost—Taxicab Travel—To and From Common Carrier Terminals—Employee Passenger in Vehicle of Other Than Government Employee

Employee on temporary duty was driven by friend in latter's automobile to airport for return flight to official duty station. Employee's claim for mileage and parking fee may be paid to the extent it does not exceed cost of taxicab fare and tip. Decisions limiting reimbursement for travel with private party to actual expenses paid to private party apply only to regular travel on temporary duty, not travel to and from common carrier terminals.

Matter of: Linda A. Johnson—Reimbursement for Travel to Airport, March 31, 1981:

This decision responds to a request from Ronald Boomer, a certifying officer with the General Services Administration (GSA), Region 10, concerning a voucher submitted by Ms. Linda A. Johnson, a GSA employee, for mileage and parking fees incurred during temporary duty travel. The issue presented is whether Ms. Johnson may be reimbursed for mileage and parking fees incurred when a friend drove Ms. Johnson to the airport at the temporary duty station.

Ms. Johnson traveled from Auburn, Washington, to San Francisco, California, to attend a training seminar for the period September 24–28, 1979, and she elected to remain in San Francisco on personal

business over the weekend, September 29–30. On Sunday, September 30, Ms. Johnson was driven by a friend in the friend's automobile from the friend's residence to the San Francisco Airport, and for this trip Ms. Johnson has claimed mileage (26 miles times 18½ cents per mile) of $4.81 and a parking fee of $1. Since the privately owned vehicle was not owned by Ms. Johnson, the agency questioned whether she may be reimbursed for round-trip mileage not to exceed the cost of a taxicab fare or only for the actual expenses she paid to the driver for gas, oil, tolls, etc.

Under the authority of 5 U.S.C. § 5704 (1976) and the implementing regulations contained in the Federal Travel Regulations (FTR) (FPMR 101–7), employees who use a privately owned vehicle (POV) on official business may be reimbursed for mileage, parking fees, and other expenses. For travel to and from common carrier terminals, the FTRs permit reimbursement for round-trip mileage to the extent that it does not exceed the cost of taxicab fare, including tip. See FTR paras. 1–4.2c and 1–2.2d.

Neither the Federal Travel Regulations nor our decisions limit the payment of mileage under these circumstances to travel in a POV owned by the employee. Therefore, we have no objection to the payment of mileage to an employee on temporary duty for travel to or from common carrier terminals, regardless of who owns or operates the POV.

In the present case, the voucher reviewer denied Ms. Johnson's claim based on GSA's internal regulations, Order OAD P 7620.7, chapter 4–21.1a, which limits reimbursement for employees traveling as a passenger in a POV owned and operated by a person not traveling on Government business. This internal regulation reflects prior decisions of this Office limiting reimbursement under such circumstances to the amount paid by the employee to the driver of the vehicle for gasoline, oil, tolls, parking fees, etc., not to exceed the cost of common carrier travel. *Walter D. Felzke*, B–191282, September 29, 1978; B–152030, August 15, 1963; B–150486, February 1, 1963; and B–147455, November 21, 1961. Those decisions related to employees traveling to and from temporary duty stations. In view of the round-trip mileage authority in the FTRs above, we do not believe that the rule set forth therein should be applied to automobile travel to and from common carrier terminals. Therefore, we find that GSA's internal regulation should be construed to relate to temporary duty travel and not to apply to travel to and from common carrier terminals.

Accordingly, we hold that Ms. Johnson's claim for mileage and the parking fee may be paid if otherwise proper.

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General Accounting Office recommends that DAR provision, covering certificate of competency procedures, be promptly revised to eliminate exception to procedures for nonresponsibility determinations involving small business' alleged ineligibility to receive award under "applicable laws and regulations," since legislative history of Small Business Act Amendments of 1977 and implementing regulations do not provide for exception..... 275

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GENERAL ACCOUNTING OFFICE
Claims. (*See* STATUTES OF LIMITATION, Claims)
Decisions
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Holdings allowing reimbursement under miscellaneous expense allowance for cost of connecting ice maker and connecting and venting clothes dryer are substantial departure from prior decisions and will be applied only to cases in which the expense is incurred on or after date of this decision. However, claimant here may be reimbursed in accordance with this decision 285

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General Accounting Office will review Small Business Administration compliance with its Standard Operating Procedures governing award of 8(a) subcontracts only when showing of bad faith or fraud on part of Government procurement officials has been made. B–193212, Jan. 30, 1979, overruled in part 311

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Where Small Business Administration (SBA) headquarters was aware of definitive responsibility criteria in solicitation but decides compliance with criteria is not necessary for issuance of Certificate of Competency (COC), protester's "vital information" regarding small business concern's ability to meet invitation for bid's definitive responsibility criteria is irrelevant to SBA's decision and SBA's alleged failure to consider that information provides no basis for General Accounting Office review of SBA's action ... 283

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A Navy petty officer who reenlisted became entitled to a reenlistment bonus in the amount of $3,209.40, computed under the statutory provisions of 37 U.S.C. 308 (1976) and implementing service regulations, but a recruiting official miscalculated the amount of his bonus entitlement and entered the higher figure of $3,459.60 in his reenlistment agreement as the amount of the bonus payable to him. Such mistake may not serve as a basis for payment of a bonus to him in excess of $3,209.40, the amount authorized by statute and regulations---------- 257

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Federal Archives Building
New York City Page

We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly owned subsidiary of the New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes 158

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Housing and Community Development Act
Community Development Programs
Block Grant funds invested in MESBICs
Authority for SBA to leverage

Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5305(a)(15), authorizes Small Business Administration to leverage (match) Community Development Discretionary (Block) Grant funds invested in minority enterprise small business investment companies 210

INDIAN AFFAIRS
Sioux benefits
Proposed regulation revision
Double benefits prohibition
Sex-neutral standard adopted

Eligible recipient of Sioux benefits—farm equipment and stock (or cash equivalent) granted by law to Sioux Indians—is entitled to only one allowance of benefits. Interior proposes sex-neutral standard of eligibility. GAO agrees with Interior, that rule in A–19504, February 1, 1929—that a formerly married Sioux woman's entitlement to benefits in her own right was exhausted when her then-husband received benefits as head of family—is impermissibly discriminatory on basis of sex and overrules that portion of A–19504. This decision also overrules in part 9 Comp. Gen. 371, 11 *id.* 469, A–61511, July 15, 1935, and A–98691, Oct. 28, 1938 212

Eligibility determination
Date of original application *v.* date of application's approval

Where application for Sioux benefits—farm equipment and stock (or cash equivalent) granted to Sioux Indians—was disapproved on grounds now recognized as improper (for example, sex discrimination), and Indian now reapplies, Interior Department proposes to determine eligibility based on applicant's status at time of original application. Department suggests that two GAO decisions (A–19504, February 1, 1929, and 11 Comp. Gen. 469 (1932)) prevent implementation of proposal. Decisions, which require that eligibility be determined not as of date of application but as of date of approval, are overruled to extent they conflict with proposed exception. This decision also overrules in part 9 Comp. Gen. 371, A–61511, July 15, 1935, and A–98691, Oct. 28, 1938 ... 212

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Sioux benefits—Continued
Proposed regulation revision—Continued
Head of family determination
Sex-neutral standard adopted Page

Sioux benefits are farm equipment and stock (or cash equivalent) granted by law to Sioux Indians who are heads of families. Interior Department proposes sex-neutral standard for determining head of family status. General Accounting Office (GAO) agrees that change is constitutionally required. Therefore, following decisions, insofar as they hold that Sioux woman married to non-Sioux man is conclusively presumed to be head of family and that Sioux woman married to Sioux man cannot be head of family, are overruled: A–19504, February 1, 1929; A–98691, October 28, 1938; 11 Comp. Gen. 469 (1932). This decision also overrules in part 9 Comp. Gen. 371 and A–61511, July 15, 1935..... 212

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Four statutes—1889, 1896, 1928, and 1934—govern award of Sioux benefits, farm equipment and stock (or cash equivalent) granted by law to eligible Sioux Indians. Under 1928 and 1934 statutes, applications must be approved during applicant's lifetime, or right lapses. Two GAO decisions (9 Comp. Gen. 371 (1930) and A–61511, July 15, 1935) held that limitation did not apply to benefits under 1889 law. Interior interprets 1928 and 1934 laws as making limitation applicable to *all* Sioux benefits. Language is ambiguous so GAO defers to administering agency's preferred interpretation and overrules cited decisions. This decision also overrules in part 11 Comp. Gen. 469, A–19504, Feb. 1, 1929, and A–98691, Oct. 28, 1938..... 212

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Civilian employee of Department of the Army claims that Government is estopped to adjust his Living Quarters Allowance in accordance with 1974 revision of Department of State Standardized Regulations (Government Civilians, Foreign Areas) because his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, unassignable, and can be canceled at any time..... 243

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When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance..... 181

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Propriety of exclusion Page

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License contract for patent between Government employee-inventor and Air Force would not be legal or appropriate if employee is in position to order, influence, or induce use of invention pursuant to 28 U.S.C. 1498 (1976), even though employee's invention was not related to his official duties and there was no contribution of Government equipment, facilities, materials or information. If employee can be insulated from decision to use patented device so as to avoid violation of conflict of interest statutes and regulations, the Air Force may enter into license agreement. Neither DAR 1–302.6, 28 U.S.C. 1498 nor Executive Order 10096 would prohibit such an arrangement 248

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Internal Revenue Service may certify payment for a live African dance troupe performance incident to agency sponsored Equal Employment Opportunity (EEO) Black history program because performance is legitimate part of employee training. Although our previous decisions considered such performance as a nonallowable entertainment expense, in this decision we have adopted guidelines developed by the Office of Personnel Management (OPM) that establishes criteria under which such performances may be considered a legitimate part of the agency's EEO program. 58 Comp. Gen. 202 (1979), B–199387, Aug. 22, 1980, B–194433, July 18, 1979, and any previous decisions to the contrary are overruled 303

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Transferred employee who had water line run from supply pipe to ice maker in refrigerator at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Drilling hole in wall is not "structural alteration" since it is necessary for connection and proper functioning of refrigerator. Prior decisions to contrary will no longer be followed 285

Structural alteration or remodeling
Appliance reinstallation—"alteration" status

Transferred employee who had gas line connected to and vent pipe run from clothes dryer at new duty station may be reimbursed for the cost, including pipe used, under miscellaneous expenses allowance. Necessary holes in walls are not "structural alterations" since they are necessary for connection and proper functioning of dryer. Prior decisions to contrary will no longer be followed 285

Telephone reinstallation
Comparable service

Where transferred employee at new duty station acquires level of telephone service comparable to what he had at old duty station, total installation charges may be reimbursed under miscellaneous expense allowance, even where "jacks" have been installed. Prior decisions to the contrary will no longer be followed 285

Temporary quarters
Subsistence expenses
Declining rate of reimbursement

Employee, who transferred to new duty station, occupied temporary quarters and was joined by his family during second 10-day period of temporary quarters at new station. He claims reimbursement for them based upon higher rate applicable during first 10-day period. Claim is denied since regulations governing temporary quarters provide for reimbursement based on 10-day periods beginning when either employee or a family member first occupies temporary quarters, irrespective of when other family members begin to occupy temporary quarters 281

Time limitation
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Employee, who occupies temporary quarters at old duty station and interrupts occupancy for permanent change of station as permitted by Federal Travel Regulations para. 2-5.2a, may elect not to count the day of departure against his 30-day limit for temporary quarters. The principles established in 57 Comp. Gen. 696 (1978) and 57 Comp. Gen. 700 (1978) are applicable regardless of whether the employee interrupts his occupancy of temporary quarters for purposes of temporary duty or change of station travel 314

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Employee who had fulfilled overseas service agreement with first agency transferred to position in the United States with another agency and thereafter breached service agreement with second agency. Notwithstanding violation of service agreement, employee is not required to refund transfer expenses paid by second agency where those were solely for transportation of household goods and employee's own travel, since he was entitled to such expenses as a consequence of having satisfied overseas service agreement with first agency 308

Travel by privately owned automobile

Mileage. (*See* **MILEAGE, Travel by privately owned automobile**)

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PAY

Civilian employees. (*See* **COMPENSATION**)

Compensation. (*See* **COMPENSATION**)

Entitlement

Not a contractual right

The United States Supreme Court's opinion in *United States* v. *Larionoff*, 431 U.S. 864 (1977), concerning military reenlistment bonuses, did not alter the fundamental rules of law that (1) a service member's entitlement to military pay is governed by statute rather than ordinary contract principles, and (2) in the absence of specific statutory authority the Government is not liable for the negligent or erroneous acts of its agents; hence, the amount of any reenlistment bonus payable to a service member depends on the applicable statutes and regulations, and in no event can the bonus amount be established through private negotiation or contract between the member and his recruiter 257

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Retired

Reduction

Peace Corps volunteers' status

Peace Corps volunteers serving under section 5 of the Peace Corps Act (22 U.S.C. 2504) do not hold "positions" as defined by the dual pay provisions of 5 U.S.C. 5531 and, therefore, retired Regular officers of the uniformed services are not subject to retired pay reduction as required by 5 U.S.C. 5532 for retired Regular officers who hold other Government positions 266

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Children
Status after death or remarriage of eligible spouse
Children by prior marriage Page

A service member who was married and had children elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried, but died prior to the first anniversary of the remarriage. His surviving spouse, who was pregnant when he died, later gave birth to his posthumous child. Not only does the birth of a posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but such child immediately joins the member's other children in the class stipulated in 10 U.S.C. 1450 (a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death 240

Widow potentially eligible

A service member who elected spouse and children coverage under the Survivor Benefit Plan at retirement was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify for annuity purposes as his eligible widow at his death, she was pregnant. In view of the 10 U.S.C. 1450(a) provision that payment of the annuity will begin "the first day after the death," an annuity may be paid to his surviving dependent children of the prior marriage but must terminate on the date that the surviving spouse qualifies under 10 U.S.C. 1447(3)(B) for an annuity by the birth of his posthumous child 240

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Spouse's annuity eligibility
Posthumous child effect

A service member elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify under 10 U.S.C. 1447(3)(A) for any annuity at the time of his death because they had not been married at least 1 year, she was pregnant and later gave birth to his child. On that basis she qualifies as the eligible widow for annuity purposes effective the date of the child's birth 240

Selective reenlistment bonus. (*See* **GRATUITIES, Selective reenlistment bonus**)

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

PAYMENTS
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Urban Mass Transportation Administration (UMTA) grant authority under 49 U.S.C. 1602 (h) is sufficient to avoid the restrictions of 31 U.S.C. 529 on advance payments. 41 Comp. Gen. 394 (1961). Accordingly, UMTA can make advance payments to grantee under this authority before disbursement of required non-Federal matching share of grant costs.. 208

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PER DIEM (*See* SUBSISTENCE, Per diem)

PRISONS AND PRISONERS
Federal Prison Industries
Prison Industries Fund
Status as permanent or continuing appropriation
Donable property purpose Page

Prison Industries Fund, established by 18 U.S.C. 4126 as operating fund of Federal Prison Industries (FPI), constitutes permanent or continuing appropriation even though amounts originally appropriated have been returned to Treasury and Fund is self-sufficient, in view of fact that statute authorizes deposit into Treasury to credit of Fund of receipts for prison industries products and services and authorizes use of such funds for operation of FPI. Surplus personal property acquired by the Fund thus is donable under 40 U.S.C. 484(j), since it does not constitute non-appropriated fund property within meaning of regulation excluding such property from donation (41 C.F.R. 101–44.001–3)---------- 323

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Surplus
Federal Property and Administrative Services Act
Donations for historical preservation
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We are unaware of any basis for legally objecting to approval of Archives Preservation Corporation's (a wholly owned subsidiary of New York State Urban Development Corporation) application for conveyance of the Federal Archives Building in New York City for historic monument purposes and revenue producing activities pursuant to 40 U.S.C. 484(k)(3). Even though the application requires the developer who will be restoring and maintaining the property to make payments in lieu of real estate and sales taxes, these are customary costs for UDC sponsored projects and they are not being assessed merely to circumvent the requirement that "all incomes in excess of costs" be used for historic preservation purposes---------- 158

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No ceiling on excess income generated Page

Nothing in 40 U.S.C. 484(k)(3) serves to limit amount of "incomes in excess of costs" which could be generated by revenue-producing activities. Legislative history indicates that Secretary of the Interior is to use as an important criteria, in approving financing plans under the statute, whether the plan will generate significant amount of income. It also indicates that strict limitations should not be placed on the amount of income which could be generated by a plan. Thus, the bill was amended to indicate that excess income in whatever amount generated be used primarily for public historic preservation purposes. This furthers the purpose of the law by permitting projects susceptible to generating income to assist in restoring and maintaining projects that are not 158

Participating nonprofit corporations—cost reimbursement

New York Landmarks Conservancy, a nonprofit corporation which participated at the request of the General Services Administration and New York City in preparation of plan and selection of developer to implement plan for repair and maintenance of Federal Archives Building in New York City following donation to States pursuant to 40 U.S.C. 484(k)(3), may be paid a fee to reimburse the Conservancy its costs if the Secretary of the Interior finds it reasonable. Reimbursement may properly be considered project cost and not "incomes in excess of costs" .. 158

State, etc. urban development corporations—cost reimbursement

New York Urban Development Corporation may be reimbursed fee representing costs it has incurred in participating in the development and implementation of plan for restoration and maintenance of Federal Archives Building in New York City pursuant to 40 U.S.C. 484(k)(3) if the Secretary of the Interior deems the fees to be reasonable (and we have no information that they are not) since it is UDC's custom to recover these costs from developers under projects it sponsors and these are valid costs of the project 158

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Government procurement by contract

When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance 181

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QUARTERS ALLOWANCE
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Where children are placed with a member of the uniformed services for adoption in the State of California by an agency of the State, the effective date for determining entitlement to dependency benefits is the date an order of adoption has been entered by a court of co mpetent jurisdiction--- 170

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Different from that for family separation allowance

The statutory purpose of the Basic Allowance for Quarters authorized by 37 U.S.C. 403 is to reimburse a service member for personal expenses incurred in acquiring non-Government housing when rent-free Government quarters "adequate for himself, and his dependents," are not furnished. The Family Separation Allowance, Type II-R, authorized by 37 U.S.C. 427(b)(1) has a separate and distinct purpose, i.e., to provide reimbursement for miscellaneous expenses involved in running a split household when a member is separated from his dependents due to military orders, and it is payable irrespective of the member's eligibility for a quarters allowance---------- 154

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Entitlement
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Civilian employee of Department of the Army claims that Government is estopped to adjust his Living Qu arters Allowance in accordance with 1974 revision of Department of Stat e Standardized Regulations (Government Civilians, Foreign Areas) bec ause his entitlement to the allowance vested under terms and conditions of 1967 regulations. Claim is denied because doctrine of equitable estoppel does not apply in cases where, as here, the relationship between the Government and the employee is not contractual but appointive, and, pursuant to statute, allowance in question is ultimately discretionary and creates no permanent entitlement for any employee. Also, employee entered into licensing agreement, not a contract, when he constructed portable home on Government property, and such agreements are permissive, unassignable, and can be canceled at any time---------- 243

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One parent's entitlement
Other parent's eligibility for Family Separation Allowance

Marine Corps member separated from her child and husband while serving an unaccompanied tour of duty overseas may properly be regarded as a "member with dependents" under 37 U.S.C. 427(b)(1) and is entitled to a Family Separation Allowance, Type II-R, notwithstanding that her husband is also a Marine and is drawing a Basic Allowance for Quarters at the "with dependent" rate on behalf of the child, since their child is their joint dependent and since payment of the two allowances—each for a separate purpose—would not improperly result in dual payments of the same allowance for the same dependent---------- 154

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Section 105(a)(15) of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5305(a)(15), authorizes Small Business Administration to leverage (match) Community Development Discretionary (Block) Grant funds invested in minority enterprise small business investment companies 210

STATUTES OF LIMITATION

Claims

General Accounting Office

Vietnam conflict

Member whose claim arose during active duty from June 30, 1970, to September 30, 1970, filed claim with Navy on September 14, 1979. Claim was forwarded to GAO on September 24, 1979. Member contends that claim is not barred as it arose during time of war (Vietnam conflict) and under the proviso in 31 U.S.C. 71a he has 5 years after peace is established to file claim. Even under that proviso a decision of when peace is established is dependent on political acts and, for Vietnam conflict, a political act which established peace took place on January 27, 1973. Therefore, proviso would not operate to alter untimeliness of this claim. 200

Ten year period for filing

Reduced to six

Member performed active duty from June 30, 1970, to September 30, 1970, and filed claim with Navy for basic allowance for quarters for this period on September 14, 1979. The claim was forwarded to General Accounting Office (GAO) on September 24, 1979, as a possible time barred claim. Under provisions of 31 U.S.C. 71a as amended in 1975, member had 6 years, not 10 years, from date claim accrued to file in GAO. Accordingly, claim is barred 200

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Hours of departure, etc.

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Employee who traveled on a nonworkday in order to take advantage of a reduced air fare may be considered in a travel status and authorized and paid an extra day's actual subsistence where the cost of subsistence is more than offset by the savings to the Government through use of the reduced fare. Agency's bulletin, to the extent that it is inconsistent with the Federal Travel Regulations, need not be followed---- 295

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Lodging costs

Average cost

More than one trip on voucher

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Transferred employees

Employee, who occupies temporary quarters at old duty station and interrupts occupancy for permanent change of station as permitted by Federal Travel Regulations para. 2-5.2a, may elect not to count the day of departure against his 30-day limit for temporary quarters. The principles established in 57 Comp. Gen. 696 (1978) and 57 Comp. Gen. 700 (1978) are applicable regardless of whether the employee interrupts his occupancy of temporary quarters for purposes of temporary duty or change of station travel---------- 314

TRANSPORTATION

Household effects

Overseas employees

Weight limitation

Local movement

A civilian employee of the Air Force was authorized local drayage of household goods incident to his moving from local economy to Government quarters. The maximum weight which may be drayed at Government expense and charged as an operating expense of the installation concerned should not exceed 11,000 pounds consistent with 5 U.S.C. 5724(a)(2). Where the household goods shipment of the employee exceeds the maximum limitation as determined by an appropriate official, then the employee is liable for the excess costs---------- 336

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Determination

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Lift vans and overflow box are "containers" within meaning of paragraph 2-8.2b(3) of Federal Travel Regulations (FTR); thus net weight of household goods shipment is determined by applying 85 percent to gross weight and subtracting weight of containers---------- 330

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Employee who traveled on a nonworkday in order to take advantage of a reduced air fare may be considered in a travel status and authorized and paid an extra day's actual subsistence where the cost of subsistence is more than offset by the savings to the Government through use of the reduced fare. Agency's bulletin, to the extent that it is inconsistent with the Federal Travel Regulations, need not be followed..... 290

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Employee who had fulfilled overseas service agreement with first agency transferred to position in the United States with another agency and thereafter breached service agreement with second agency. Notwithstanding violation of service agreement, employee is not required to refund transfer expenses paid by second agency where those were solely for transportation of household goods and employee's own travel, since he was entitled to such expenses as a consequence of having satisfied overseas service agreement with first agency 308
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When a contracting officer procures lodgings or meals for an employee on temporary duty and furnishes either to the employee at no charge, the lodgings plus system is normally inappropriate and a flat per diem at a reduced rate should be established in advance 181

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