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COMPTROLLER GENERAL OF THE UNITED STATES

Charles A. Bowsher

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

ACTING GENERAL COUNSEL

Harry R. Van Cleve

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

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[B-204404]

Pay—Readjustment Payment to Reservists on Involuntary Release—Recoupment—Retirement—Bankruptcy Effect

An Air Force officer who received readjustment pay upon discharge subsequently enlisted and completed 20 years of active duty for retirement. Upon retirement the member's retired pay was withheld until an amount equal to 75 percent of his readjustment pay was recouped as is required under 10 U.S.C. 687(f). Although the member received a discharge in bankruptcy effective shortly after he retired, this did not entitle him to receive the retired pay withheld under section 687. Deduction from retired pay in the amount of 75 percent of readjustment pay is not a debt and, therefore, it is not discharged by an adjudication of personal bankruptcy.

Matter of: Major Peter J. Mullen, USAF, Retired, November 3, 1981:

This case concerns the effect of a discharge in bankruptcy granted a service member on the retired rolls who is not receiving retired pay because of the statutory requirement that his retired pay be withheld in the amount of 75 percent of any readjustment pay he received. The specific question is whether the amount to be withheld constitutes a debt which is dischargeable in bankruptcy. We find that it is not a debt and hence is not dischargeable in bankruptcy.

The question was submitted for an advance decision by the Accounting and Finance Officer, Air Force Accounting and Finance Center, Denver, Colorado. The Department of Defense Military Pay and Allowance Committee approved the submission and assigned it Control Number DO-AF-1370.

On July 31, 1975, Major Peter J. Mullen was involuntarily released from active duty. Since he met the requirements for readjustment pay under 10 U.S.C. § 687, he was paid $15,000 at the time of his release.

On the day following his involuntary release, he enlisted in the Air Force in the rank of sergeant. With this additional service as an enlisted member, he subsequently completed 20 years of active service and became entitled to retired pay under 10 U.S.C. § 8911. The Air Force correctly determined that retired pay could not be paid to him until an amount equal to 75 percent of the readjustment pay he received had been deducted immediately from his retired pay. Such action was required by the explicit language of 10 U.S.C. § 687(f).

Major Mullen retired on February 29, 1980, and received no retired pay until November 30, 1980, when the retired pay withheld equaled $11,250, 75 percent of his readjustment pay. Generally, no question would be raised by such action since the action is mandated by 10 U.S.C. § 687(f); however, Major Mullen filed a petition in bankruptcy on April 24, 1980. Therefore, the Air Force asked whether Major Mullen is entitled to be repaid any amount of the retired pay withheld after

April 24, 1980. The specific question is whether the requirement to withhold retired pay in the amount of 75 percent of readjustment pay is to be considered a debt which could be discharged in bankruptcy or simply a reduction in retired pay entitlement.

The applicable statute, 10 U.S.C. § 687(f), provides in part:

> If a member who received a readjustment payment * * * qualifies for retired pay * * * upon completion of twenty years of active service, an amount equal to 75 percent of that payment, without interest, shall be deducted immediately from his retired pay.

We have indicated that the withholding of retired pay pursuant to section 687(f) is not the collection of a claim; that is, it is not a debt due the United States and the amount to be deducted, 75 percent of readjustment pay, cannot be deducted from other than retired pay. B–199155, July 24, 1980. In essence, once the member retires his readjustment pay is viewed as a substitute for retired pay until 75 percent of the amount he received for readjustment pay is withheld. Thus, readjustment pay is considered to be in lieu of retired pay. In other words, his entitlement to receive retired pay does not begin until the time period expires in which the amount of retired pay he would have received equals 75 percent of his readjustment pay. Since the withholding of retired pay required under 10 U.S.C. § 687(f) creates no debt due the United States, it cannot be discharged in bankruptcy. B–197624, October 3, 1980. In reaching this conclusion, we have not relied exclusively on the general rule discussed above, but also have considered the bankruptcy laws as they relate to the question at hand.

A debt under the bankruptcy law is liability on a claim. 11 U.S.C. § 101(11) (Supp. III, 1979). A claim is basically a right to payment. 11 U.S.C. § 101(4) (Supp. III, 1979). And a creditor is one who has a claim against the individual filing the bankruptcy petition which arose before the filing of the petition. 11 U.S.C. § 101(9) (Supp. III, 1979). A discharge in bankruptcy does not extinguish a debt but rather frees the debtor from personal liability and provides him with a personal defense to debt collection actions by a creditor. *United States* v. *Midwest Livestock Producers, Cooperative*, 493 F. Supp 1001, 1002 (E. D. Wis. 1980); see 11 U.S.C. § 524 (Supp. III, 1979). As concerns this readjustment pay Major Mullen received, he has no personal liability to repay it. Instead of having a debt for readjustment pay, under the statutory provisions he has a reduced retired pay entitlement. If, for example, the member were to die, then the United States would be unable to recover any further amounts.

Accordingly, the withholding of Major Mullen's retired pay in the amount of 75 percent of the readjustment pay he was paid is required, and none of the amount so withheld may be repaid to him.

[B-202159]

Attorneys—Hire—Independent-Contractor Basis—Advisory Commission Authority—United States Advisory Commission on Public Diplomacy

Contract entered into by the United States Advisory Commission on Public Diplomacy with private law firm for legal services concerning authority of the Advisory Commission and extent of its independence does not constitute illegal personal services contract, since law firm was hired on an independent contract basis requiring no more than minimal supervision and not on employer-employee basis. Furthermore, type of legal services required, involving legal analysis of authority and independence of Advisory Commission, was not related to litigation within jurisdiction of Department of Justice. Also, Advisory Commission's need for second legal opinion, unencumbered by conflict of interest, was not unreasonable under circumstances.

Boards, Committees, and Commissions—Advisory Commissions—Procurement of Services From Parent Agency—Statutory Exemptions, etc.—United States Advisory Commission on Public Diplomacy

Although advisory committees ordinarily must obtain needed services from parent agency, authority granted the U.S. Advisory Commission on Public Diplomacy in 22 U.S.C. 1469(b) to procure services to the same extent as authorized by 5 U.S.C. 3109 is sufficiently broad to allow Advisory Commission to enter into contract with private law firm on independent contractor consultant basis.

Experts and Consultants—Compensation—Aggregate Limitation—Not for Application—Independent Contractor's Services

Since contract U.S. Advisory Commission on Public Diplomacy entered into with private law firm was on independent contractor basis, statutory limitation in 22 U.S.C. 1469, which only applies when services are procured from individuals as employees, was not applicable and did not limit amount of compensation that could be paid to law firms.

Personal Services—Contracts—Compliance with Federal Procurement, etc. Statutes

When agency contracts under authority of 5 U.S.C. 3109 with consultant on independent contractor basis, it is still required to follow formal contracting procedures and otherwise comply with the applicable statutory and regulatory provisions governing Federal procurements and the recording of obligations. Although the U.S. Advisory Commission on Public Diplomacy did not follow proper procedures in this respect in contract it entered into with private law firm we do not object to payment of contract claim in this case because the Advisory Commission has authority to contract and because the law firm satisfactorily performed its obligations under the contract. Also, the parent agency—the International Communication Agency—has indicated its willingness to pay the claim.

Matter of: United States Advisory Commission on Public Diplomacy, November 6, 1981:

This decision is in response to a request from Certifying Officer James Q. Kohler, Jr., Chief, Financial Operations Division of the International Communication Agency (ICA), for a legal opinion as to the authority of the ICA to pay a claim presented to it by the

United States Advisory Commission on Public Diplomacy (Advisory Commission). The claim, totaling $2850.00, represents legal fees charged by the private law firm of Glassie, Pewett, Beebe and Shanks (law firm) for legal services rendered to the Advisory Commission. For the reasons set forth below, it is our view that the ICA is authorized to pay the full amount of the claim in question.

On July 30, 1980, ICA's Contract and Procurement Division received from the Advisory Commission, a "Request for Supplies/Services" standardized form, dated July 11, 1980, requesting ICA to pay the attached invoice from the law firm in the amount of $2850.00, covering legal services that the law firm had already provided to the Advisory Commission. The request form justified the Advisory Commission's need for the legal services in question as follows:

> To provide expert advice on certain matters of concern to the Advisory Commission. The Chairman of the Commission determined this was a necessary expenditure for the new Commission.

The attached invoice from the law firm further explained the bill as representing the firm's charges for professional services rendered:

> From January 18, 1980, to date [March 27, 1980] in connection with research and consultations on the statutes and legislative history relative to the mission, status and authority of the Commission.

Subsequently, CIA requested and received an itemized bill, which stated that a total of 33.25 hours of legal work was performed by the law firm for the Advisory Commission. In his letter to us, the Certifying Officer stated that the itemized bill "revealed that legal advice was received by the Commission on substantially the same matters which were the subject of review and advice by the Agency's [ICA] Office of the General Counsel and by OPM [Office of Personnel Management]." Until ICA received the request form, its officers were unaware that the Advisory Commission had been seeking or had obtained any legal advice from this or any other law firm. In requesting a legal opinion from our Office as to the propriety of paying this claim, the Certifying Officer states his view that the Advisory Commission had no authority to enter into this contract. Nevertheless, he requests our concurrence in his recommendation that the claim be paid on the basis of "quantum meruit."

In order to determine whether the ICA is authorized, or obligated, to pay any or all of the claim in question, we must resolve two separate although related questions. The initial question is whether the Advisory Commission has authority to procure the services of a private law firm by contract for the purpose and at the rate of compensation involved here. Assuming that question is answered affirmatively, the

second question is whether the informal contracting procedures followed by the Advisory Commission were so improper as to nullify what would otherwise be a binding contractual obligation. In order to answer the initial question, we must first examine the historical background and evolution of the Advisory Commission.

The United States Advisory Commission on International Communication, Cultural and Educational Affairs (ICCEA Advisory Commission), the predecessor of the current Advisory Commission, was created on April 1, 1978, under section 8 of Reorganization Plan No. 2 of 1977. 42 Fed. Reg. 62461, 91 Stat. 1636, 5 U.S. Code Appendix. All of the functions that had previously vested in the United States Advisory Commission on Information and the United States Advisory Commission on International Educational and Cultural Affairs, both of which were abolished by section 9 of Reorganization Plan No. 2 of 1977, were consolidated and vested in the then newly created ICCEA Advisory Commission. The primary responsibility of the reconstituted Advisory Commission was stated in section 8(b) of Reorganization Plan No. 2 of 1977 as follows:

> The Commission shall formulate and recommend to the Director [of ICA], the Secretary of State, and the President policies and programs to carry out the functions vested in the Director or the Agency, [ICA], and shall appraise the effectiveness of policies and programs of the Agency. * * *

Notwithstanding the functional independence with respect to policy and program matters that is inherent in being granted such authority, as an advisory committee, the ICCEA Advisory Commission was completely dependent on ICA for administrative and budgetary support. *Cf.* B–143181, October 9, 1975 and B–179188, April 15, 1975. In this connection, section 12(b) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 12(b), authorizes agencies to provide support to their advisory committees as follows:

> Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. * * *

Also, under 22 U.S.C. § 1467(h), ICA is specifically authorized "to provide the necessary secretarial and clerical assistance" for its advisory commission.

The legal status of the ICEEA Advisory Commission was modified again, effective October 1, 1979, pursuant to section 203(f) of the Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96–60, 22 U.S.C. § 1469 (Supp. III, 1979). The primary mission of the Advisory Commission, as set forth in Reorganization Plan No. 2 of 1977, was left unaltered. However, Pub. L. No. 96–60 changed the name of the Advisory Commission to what it is today—the United

States Advisory Commission on Public Diplomacy—and granted the renamed Advisory Commission the following new authority:

* * * * * * *

(b) The Commission shall have a Staff Director who shall be appointed by the Chairman of the Commission. Subject to such rules and regulations as may be adopted by the Commission, the Chairman of the Commission may—

(1) appoint such additional personnel for the staff of the Commission as the Chairman deems necessary; and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay payable for grade GS–18 of the General Schedule under section 5332 of Title 5, United States Code.

According to the Certifying Officer, the ICA argues that, even with the new authority provided the Advisory Commission in Pub. L. No. 96–60, the Advisory Commission was not authorized to contract with the law firm for the purposes and at the rate of compensation involved. For the reasons discussed below, we disagree.

First, ICA maintains that as a general matter no governmental entity can procure by contract the type of legal services involved here from a private source since Government functions must be performed by Government employees. The general rule, established by decisions of our Office and the former Civil Service Commission, is that "personal services may not be obtained on a contractual basis and must be performed by personnel employed in accordance with the civil service and classification laws." B–190118.2, January 24, 1978. However, an exception to the general rule, allowing services normally performed by governmental personnel to be performed under a proper contract with a private contractor, has been commonly recognized "if that method of procurement is found to be more feasible, more economical, or necessary to the accomplishment of the agency's task." 51 Comp. Gen. 561, 562 (1972). *Also see* B–193035, April 12, 1979; 45 Comp. Gen. 649 (1966); 43 *id.* 390 (1963), and numerous other cases cited in those decisions. In this connection, a "proper contract" for services is one in which the relationship between the Government and the contracting personnel is not that of employer and employee. B–193035, *supra;* B–190118.2, *supra;* 51 Comp. Gen. 561, *supra*, and other cases cited therein.

In other words, if the Advisory Commission has authority to contract for services, the basic issue is whether the present contract created a relationship between the Government and the law firm of employer and employee—in which case it would be prohibited—or whether the law firm's status is that of an independent contractor—in which case it would not be prohibited. In making this determination our Office has relied primarily on the degree of supervision involved. For example, in B–193035, *supra*, we said the following:

> Where services directed at the performance of a Federal function are obtained by contract rather than appointment, the question of whether contractor personnel are functioning in an employer-employee relationship with respect to the Government is one of supervision. If contractor personnel are in fact supervised by a Federal officer or employee, the contract is not one for independent contract services but involves the procurement of services in avoidance of civil service laws and regulations. * * *

Also see B–183487, April 25, 1977; B–186700, January 19, 1977. (Specific guidelines for determining whether an employer-employee relationship exists are set forth in Federal Personnel Manual Letter 300–8, December 12, 1967.)

We believe that the nature and type of legal services required by the instant contract could necessarily only be performed on an independent contractor basis, with no more than minimal supervision by the Advisory Commission. In essence, the Advisory Commission requested an end product—a legal review of its authority and a determination of the extent of its independence from ICA—and it was the responsibility of the law firm to determine how best to achieve the desired goal. This necessarily required the law firm to perform its own research and to conduct an independent "unsupervised" legal analysis.

Furthermore, our decisions in this area support the view that the contract in question did not violate the limitation on personal service type contracts to perform functions which could otherwise be performed by Government personnel. On several occasions we have upheld the authority of agencies to procure the services of private attorneys for purposes other than the conduct of litigation, which under 5 U.S.C. § 3106 must be conducted by the Department of Justice. For example, in B–133381, July 22, 1977, we upheld the authority of the International Trade Commission (ITC) to contract out for legal services notwithstanding the availability of attorneys within the agency who could have performed that task. In our opinion we said the following:

> In general, Government agencies may not procure services on a contractual basis where regular employees of the Government are qualified and available to perform the work involved. Thus, where an agency has employees available, whether attorneys or not, to perform a particular task, it should not contract for performance of the same task. Each agency is responsible for determining, in each case, whether the particular services could be performed by agency employees. With respect to the particular contract here under consideration, the ITC apparently determined that its Office of General Counsel could not be asked to represent the Commission's views upon appeal, given its prior advocacy of the opposing position and hence that ITC's legal staff was not able to provide the legal assistance necessary to that appeal. Based on the information that we have been provided, we are unable to conclude that such a determination is altogether lacking in foundation.

Also see B–192406(2), October 12, 1978; B–114868.18, February 10, 1978; and B–141529, July 15, 1963.

The Advisory Commission's rationale for entering into the contractual arrangement with the law firm in the present case is substantially the same as was involved in the above-quoted opinion, *i.e.*, the Advisory Commission's need and desire to obtain a second legal opinion concerning the extent of its independence "unencumbered by a conflict of interest." (Letter dated January 21, 1981, from the Advisory Commission Acting Staff Director to ICA.) Obviously, it would have been impossible for the Advisory Commission to obtain an independent second opinion from the ICA. Therefore, as in B–133381, *supra*, if the contract is otherwise authorized, we cannot conclude that the Advisory Commission's determination that it was necessary to contract out for legal services was so unjustified and without foundation as to violate the general rule restricting personal services contracts. Furthermore, since the legal services required involved research and analysis of the "statutes and legislative history relative to the mission, status and authority of the Commission," and not litigation or other matters within the sole jurisdiction of the Department of Justice, the contract was not prohibited by 5 U.S.C. § 3106.

The second issue raised by ICA in relation to the Advisory Commission's contracting authority focuses on the specific limitations and restrictions that are applicable to the Advisory Commission because it is an advisory committee. In this connection, ICA points out that the Federal Advisory Committee Act, 5 U.S.C. App. I, requires the parent agency to provide support services (including, presumably, legal services) to its advisory committees, unless the establishing authority provides otherwise. Furthermore, the ICA states that since the primary purpose of the Advisory Commission is an advisory one, a review of "Federal Advisory Committee Act procedures and the Commission's own personnel functions may be outside the scope of permissible activity for the Commission, especially if authority for these activities is vested elsewhere."

Ordinarily, we would agree that an advisory committee lacking its own appropriated funds and having no authority to hire staff or contract for services would be required, under Section 12(b) of the Federal Advisory Committee Act, to obtain services of the type involved here from the parent agency. In fact, it is our view that the Advisory Commission would not have had the authority to enter into this contract prior to enactment of Pub. L. 96–60. However, the contract in question was entered into after enactment of Pub. L. 96–60, which granted the Advisory Commission specific authority to "appoint" additional personnel for the staff of the Commission and to "procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of Title 5, of the United States Code * * *." 22 U.S.C.

§ 1469(b) (Supp. III, 1979). Although ICA suggests that the Advisory Commission's authority under this provision is insufficient to encompass a contract for the purpose and at the rate of compensation involved here, it is our view, for the following reasons, that the language in 22 U.S.C. § 1469(b) is broad enough to authorize the Advisory Commission to enter into a contract of this type.

First, as recognized by ICA, section 12(b) of the Federal Advisory Committee Act specifically provides that the parent agency is responsible for providing support services to its advisory committee (thereby implying that the advisory committee does not have authority to obtain such services directly) unless the establishing authority provides otherwise. Thus, since 22 U.S.C. § 1469(b) does provide otherwise, it supersedes the requirement in the Federal Advisory Committee Act that the Advisory Commission receive all necessary support services from the ICA.

Second, our Office has, on numerous occasions, upheld the authority of Federal agencies to contract for legal services under the authority of 5 U.S. § 3109, which 22 U.S.C. § 1469(b) makes specifically applicable to the Advisory Commission and which defines the extent of its hiring authority. For example, in B–133381, *supra*, we said the following:

> * * * Under 5 U.S.C. § 3109, when authorized by an appropriation, as here, the services of experts or consultants may be obtained either on an independent contract or employment basis. In our opinion, since the contract at issue does not appear to involve matters covered by 5 U.S.C. § 3106 or otherwise under the jurisdiction of the Department of Justice, the contract for the services of * * * [the law firm] would appear to be within the authority of 5 U.S.C. § 3109. * * *

Also see B–192406(2), October 12, 1978, *supra.*

Our holding in another case—B–114868.18, *supra*—is of special significance here. In that case we considered whether the Navajo and Hopi Indian Relocation Commission, an independent entity in the executive branch, had the authority to hire outside counsel. Like the Advisory Commission, which receives administrative support from ICA, the Indian Relocation Commission was furnished necessary administrative and housekeeping services by the Department of the Interior pursuant to statute. Also, like the Chairman of the Advisory Commission, the Chairman of the Indian Relocation Commission was authorized to procure the services of experts and consultants to the same extent allowed by 5 U.S.C. § 3109. Finally, like the Advisory Commission, the Indian Relocation Commission was concerned that representation of the Commission by Interior Department attorneys would create a conflict of interest. We concluded that the Indian Relocation Commission could "execute a contract for legal services with

an expert or consultant as an independent contractor—that is, one not subject to the Commission's supervision and control * * *."

With respect to the subject matter of the Advisory Commission's contract, we do not agree that a legal analysis by a private law firm of "Federal Advisory Committee Act procedures and the [Advisory] Commission's own personnel functions" is not the type of service that can be contracted for under the authority of 22 U.S.C. § 1469(b). We believe that no serious argument can be made restricting any Federal entity from reviewing the extent of its own authority either from a substantive or procedural standpoint. In other words, if a Federal entity is otherwise allowed to procure legal services from a private law firm for any purpose, it may exercise such power in order to determine the parameters of its authority.

In accordance with the foregoing, we believe that the Advisory Commission did have authority to enter into a contract with the law firm on an independent contractor basis pursuant to 22 U.S.C. § 1469(b) and 5 U.S.C. § 3109.

The final issue concerning the Advisory Commission's contracting authority is whether the Advisory Commission was authorized to approve a contract in which the total amount of compensation to be paid exceeds the express statutory limitation in 22 U.S.C. § 1469(b) restricting pay for consultants to "rates for individuals not to exceed the daily equivalent of the annual rate of basic pay for grade GS-18 * * *."

Specifically, the Certifying Officer's submission reads as follows:

> Because the firm charged $2850 for 33.25 hours of work, the daily equivalent of an eight hour workday is $685.68. This far exceeds the maximum daily equivalent of the rate payable for a GS-18 ($192.74 with current pay cap, or $275.90 daily if GS-18 set at $71,7734 annual rate).

The statutory responsibility for establishing the maximum rate for consultant services to Federal advisory committees was granted to the Office of Management and Budget (OMB) by section 7(d)(1) of the Federal Advisory Committee Act, 5 U.S.C. App. I § 7(d)(1), which provides as follows:

> The Director after study and consultation with the Civil Service Commission, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors.* * *

Guidelines were issued by OMB pursuant to Executive Order No. 11769, February 21, 1974, and are set forth in section 11 of OMB Cir. No. A-63, March 27, 1974. (Although the authority granted by OMB was transferred to the General Services Administration by Exec. Order No. 12024, December 1, 1977, OMB Cir. No. A-63 was left standing.) With respect to pay for consultants to an advisory commission, section 11(c) of the Circular reads as follows:

An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The rate of pay shall not exceed the maximum rate of pay which the agency may pay experts and consultants under 5 U.S.C. § 3109.

Together, section 7(d)(1) of the Federal Advisory Committee Act and section 11(c) of OMB Circular No. A–63 would appear to make it the responsibility of the parent agency, rather than the advisory committee, to set the pay of advisory committee consultants. Although that may be true generally, we do not believe that such is the case here. It is our view that the authority provided the Advisory Commission in 22 U.S.C. § 1469(b) to "procure * * * services" carries with it the implied authority to establish the rate of compensation to be paid for those services, subject to any applicable statutory limitations or restrictions.

In our opinion, the pay restrictions imposed by 22 U.S.C. § 1469(b) and 5 U.S.C. § 3109 are not applicable to a contract for the services of a legal consultant engaged on an independent contractor basis. As stated above, under 22 U.S.C. § 1469(b) the Advisory Commission is authorized to procure services to the same extent as authorized by 5 U.S.C. § 3109(b). Ordinarily, the procurement of experts or consultants pursuant to 5 U.S.C. § 3109 is limited to a rate of compensation not to exceed the pay schedule of a GS–15, unless a higher rate of pay is specifically authorized. *See* 55 Comp. Gen. 1237 (1976); 51 *id.* 224 (1971); 43 *id.* 509 (1964); and 29 *id.* 267 (1947). However, we have consistently held that the maximum compensation limitation of 5 U.S.C. § 3109 is applicable only to the procurement of personal services on an employer-employee basis. *See e.g.*, 26 Comp. Gen. 188 (1946). For example, in B–191865, November 13, 1978, we considered whether a Department of the Interior contract for consultant services was subject to the compensation limitation of 5 U.S.C. § 3109. In that case we said the following:

* * * With respect to procurement of the services from individuals in circumstances amounting to employment, that section [5 U.S.C. § 3109] makes the provisions of title 5, United States Code, governing appointments in the competitive service, classification of positions and pay under the General Schedule inapplicable. However, a limitation is contained in the statute which precludes payment in excess of the daily equivalent of the highest rates payable under the General Schedule unless an appropriation act or other statute authorizes a higher rate. This restriction is applicable when services are procured from an individual as an employee. When services are procured on other than an employment basis the effect of 5 U.S.C. § 3109 is to provide an exception from the formal advertising requirement applicable to Government contracting.

On the other hand, the limitation of 5 U.S.C. 3109 concerning the rate of compensation is not applicable to a contract for expert or consultant services, which results in an independent contractor relationship. That is, it does not establish an employer-employee relationship between the Government and the contractor. See 26 Comp. Gen. 188 (1946). * * *

While the language of 22 U.S.C. § 1469(b) raised the maximum permissible rate for experts and consultants hired as employees by the

Advisory Commission from the GS–15 level, otherwise mandated by 5 U.S.C. § 3109(b), to that of a GS–18, it did nothing to alter the manner and/or circumstances in which the salary restriction is applicable. In other words, like the limitation in 5 U.S.C. § 3109, the compensation limitation contained in 22 U.S.C. § 1469 applies only when services are procured from an individual as an employee. The actual statutory language in 22 U.S.C. § 1469(b) "but at rates for individuals" clearly supports this view that the GS–18 maximum rate was only intended to apply to *individuals hired as employees.* Thus, since the contract in question was entered into on an independent contractor basis, the restrictive language in 22 U.S.C. § 1467(b) does not limit the total amount of compensation that can be paid to the law firm for the services it rendered.

Having concluded that the Advisory Commission was authorized to contract for the services of a private law firm on an independent contractor basis for the purpose and at the rate of compensation involved here, we must address the second question, concerning the propriety of the contracting procedures that were actually used by the Advisory Commission. In this regard, we believe that the procedures followed by the Advisory Commission were clearly inadequate in several respects.

First, in entering into the contractual agreement with the law firm, the Advisory Commission did not follow a formal contract procedure. For example, except for the invoice prepared by the law firm, the only document supporting the instant claim is the "Request for Supplies/Services" from that the Advisory Commission submitted to ICA for payment. This type of informal procedure is not proper and should not be used. As stated in B–191865, *supra*, a formal contracting procedure should be followed when expert or consultant services are obtained on an independent contractor basis. *Also see* B–174226, March 13, 1972, and B–174226, January 12, 1972. In other words, even though 5 U.S.C. § 3109 provides an agency with limited contracting authority, as discussed herein, and specifically exempts an agency from having to comply with the advertising requirements of 41 U.S.C. § 5, it does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.*, and the Federal Procurement Regulations, 41 CFR Chapter 1, on Government contracts for goods or nonpersonal services. (Although we recognize that the Advisory Commission is obviously not an independent establishment or executive agency, we believe that since 5 U.S.C. § 3109, which ordinarily only applies to the head of an agency, is specifically made applicable to the Chairman of the Advisory Commission, the Advisory

Commission should be treated as an agency for the purpose of determining the applicability of the procurement statutes and regulations.)

Second, having no specific appropriation of its own or separate line item included within the ICA appropriation, the Advisory Commission should have advised the ICA of the intended contract before it was agreed to in order to ensure that sufficient funds were available within ICA's appropriation to satisfy the cost of the contract. This would have also allowed ICA to comply with the requirements set forth in 31 U.S.C. § 200 concerning the recording of obligations.

Nevertheless, we have no objection, under the particular facts and circumstances of this case, to ICA's payment of the full amount of the claim. First, it is clear, as explained above, that the Advisory Commission was authorized to enter into a *proper* contract with the law firm for the purpose and at the rate of compensation involved here. Second, it appears that the law firm was in fact "hired" on an independent contractor basis and, as such, satisfactorily performed its contractual obligations. Third, as stated by the Certifying Officer in his submission:

> * * * Because the Commission's authority to procure temporary services is new there was a reasonable basis for confusion about the scope of the authority.

Fourth, ICA obviously does not object to payment of this claim since it specifically recommended payment on a "quantum meruit" basis. Finally, in several other cases of this type in which the contracting agency, under 5 U.S.C. § 3109, used an informal contracting procedure similar to that used here, we did not object to payment of the contract costs after pointing out that formal contracting procedures should have been followed. *See* B–191865, *supra*, and B–174226, *supra*.

In accordance with the foregoing, this claim can be certified for payment by ICA's Certifying Officer in the full amount of $2850.00, if otherwise correct. However, the Advisory Commission should be advised that in future procurements it will have to comply with all of the applicable statutory and regulatory requirements governing Federal procurements and the recording of obligations.

[B–203301]

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Contractor Eligibility—Termination

Small Business Administration (SBA) regulations which interpret Small Business Act as requiring full hearing prior to termination from 8(a) program of firm found to be a large business are to be accorded great deference, and will be accepted where the protester has not shown interpretation to be unreasonable.

Small Business Administration—Contracts—Contracting With Other Government Agencies—Procurement Under 8(a) Program—Award Validity—Adverse Size Determination After Award

Award of 8(a) contract is not affected by adverse size determination made by SBA subsequent to award.

Contracts—Small Business Concerns—Awards—Small Business Administration's Authority—Size Determination—Procurement Under 8(a) Program

Although SBA may have committed an oversight by awarding to firm it arguably should have known was large, protester has not shown that SBA acted fraudulently or in bad faith.

Matter of: Computer Data Systems Inc., November 6, 1981:

Computer Data Systems, Inc. (CDSI), protests the award of a contract to Systems and Applied Sciences Corporation (SASC) under the Small Business Administration's (SBA) section 8(a) program. The contract is for the provision of data processing services to the Department of Energy. CDSI had been providing portions of these services under previous contracts with Energy. CDSI essentially contends that at the time of award SBA was aware that SASC was in fact a large business and not eligible for the award. We deny the protest.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with any Government agency that has procuring authority and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1976). CDSI argues that the award to SASC violates both the Act and SBA regulations which require that assistance be given only to small businesses. CDSI also asserts that SBA's award of a contract to a firm known to be a large business constitutes bad faith.

CDSI claims that knowledge by SBA officials that SASC was not a small business is evidenced by a press release issued by SBA on May 1, 1981, the date of award to SACS. The release announced that the SBA administrator had directed regional offices to perform size determinations on the 50 largest firms in the 8(a) program. The release listed SASC as the 20th largest 8(a) firm, having received more than $34 million in 8(a) awards through September 30, 1980. CDSI also refers to a May 14 newspaper article which indicated that SASC's receipts for 1979 and 1980 were $5.7 million and $13.2 million, respectively. CDSI alleges the applicable size standard is $4 million in average receipts in the previous 3 years. CDSI further points out that on June 22, 1981, the SBA Philadelphia Regional Office found that SASC was not a small business. This determination was not specifi-

cally made in reference to this particular procurement. SASC has appealed this determination.

SBA contends that award to SASC was proper because SBA is not precluded from providing contract support to a firm in the 8(a) program until that firm is formally terminated from the program following a statutorily required adjudicatory hearing. Section 8(a)(9) of the Small Business Act provides that no firm previously deemed eligible for 8(a) assistance "shall be denied total participation in any program conducted under the authority of [section 8(a)] without first being afforded a hearing on the record in accordance with the Administrative Procedure Act (APA)." 15 U.S.C. § 637(a)(9) (Supp. III 1979). Implementing SBA regulations provide that prior to termination for failure to meet eligibility standards, a firm must be granted an opportunity for a hearing. 13 CFR § 124.1–1(e) (1981). The regulations further provide that formal size determinations are merely advisory to the Assistant Administrator for Minority Small Business and Capital Ownership Development and to the administrative law judge in termination proceedings, 46 Fed. Reg. 2591, 2594 (1981) (to be codified in 13 CFR § 121.3–17). SBA reports that termination action is instituted after a firm has exhausted its size appeal rights under the regulations.

CDSI contends that the legislative history of section 8(a)(9) indicates that the provision applies only to terminations based upon determinations unique to section 8(a), such as the determination that a firm is not socially and economically disadvantaged. Terminations based upon size status, a determination germane to all assistance under the Act, are not subject to the provision.

Although CDSI has presented a well reasoned interpretation of section 8(a)(9), it has not demonstrated that the SBA's interpretation is unreasonable. Great deference is to be accorded to the interpretation of a statute by an agency which is authorized to enforce and implement that statute. Such an interpretation will not be questioned unless it is unreasonable. *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Budd Co.* v. *Occupational Safety and Health Review Commission*, 513 F. 2d 201 (3d Cir. 1975). Section 8(a)(9) does not on its face qualify in any way the requirement for a hearing prior to termination. Additionally, the conference report accompanying section 8(a)(9) evidences an intent to give due process rights to all 8(a) firms and states that, "once a firm is certified as eligible it cannot be *terminated, graduated or in any other way removed from the program* without the opportunity for a hearing under the terms of the Administrative Procedure Act, at the option of the firm." H.R. Rep. No. 1714, 95th Cong.,

2d Sess. (1978). [Italic supplied.] Under the circumstances, we cannot find SBA's interpretation that 8(a)(9) requires a proper hearing prior to termination because of size is unreasonable.

CDSI alternatively argues that even if section 8(a)(9) requires a hearing prior to termination based upon size, the denial of a particular contract in recognition of an adverse size determination does not constitute termination. Thus, CDSI contends that SBA should have withheld the award from SASC pending a final decision on its program eligibility. We agree that following an adverse size determination SBA could withhold a particular contract from a firm without effectuating a *de facto* program termination and engaging the hearing requirement. See *Quality Dry Cleaner & Industrial Laundry—Reconsideration*, B-202751, August 12, 1981, 81-2 CPD 131; *cf. Greenwood's Transfer and Storage Co., Inc.*, B-186438, August 17, 1976, 76-2 CPD 167. In fact, where a firm is found to be a large business in the course of an SBA size determination, we think SBA should curtail subcontracting with the firm until a termination hearing, which should be held promptly, conclusively resolves the issue. Otherwise SBA will run the risk of going beyond the clear mandate of the Act to aid only small businesses.

In this case, however, the initial adverse size determination was not made until June 22, 1981, nearly 2 months after award. SASC has appealed the determination. Since a size determination has only prospective application unless it is the result of a protest timely filed with SBA (which is not the case here), the award on May 1 was not affected by the size determination. *See* 13 CFR §§ 121.3-4 and 3-5. We also point out that at the time of award, SASC had not been given an opportunity to refute any possible allegations pertaining to size.

CDSI also argues that the award constituted bad faith by SBA because SBA knew (at least institutionally) at the time of award that SASC was a large business. We disagree, because *at the time of award* SASC was still legally a small business, that is, no contrary size determination was in existence at the time of award. Although SBA may have had records in its possession indicating an eligibility problem, the record is devoid of evidence which indicates a willful disregard of facts. Thus, to the extent SBA was lax by failing to initiate and make a size determination at an earlier date, it would appear to have been the result of administrative problems rather than the type of animus which would normally be associated with bad faith. In any event, we find that CDSI has failed to sustain its burden to prove bad faith or violation of statute or regulation.

The protest is denied.

[B-202382]

Leaves of Absence—Sick—Recredit of Prior Leave—Break in Service—What Constitutes—Service With Federally Funded Private, etc. Organizations

Employee who had a break in Federal service of over 3 years seeks recredit of sick leave on basis that he was employed by various organizations and instrumentalities that receive Federal funding. Employee contends that such employment avoids a break in service in excess of 3 years. Under 5 C.F.R. 630.502(b)(1), a recredit of sick leave is permitted when an employee's break in service does not exceed 3 years. Since service with private organizations or state instrumentalities that receive Federal funding does not constitute Federal service, employee may not have sick leave recredited.

Matter of: Irving A. Taylor—Recredit of Sick Leave, November 12, 1981:

Mr. Irving A. Taylor appeals the settlement of our Claims Group which denied his request for recredit of sick leave because he had had a break in Federal service in excess of 3 years. Since the applicable regulations do not permit the recredit of sick leave where an employee has a break in service in excess of 3 years, Mr. Taylor's appeal is denied.

Mr. Taylor has been employed as a Public Health Advisor by the Public Health Service (PHS) since February 1979 following a break in Federal service of over 11 years. In July 1980, he was advanced 240 hours of sick leave to help him cover a period of incapacitation from July 23 to October 4, 1980. The agency states that as of June 13, 1981, Mr. Taylor had reduced the balance of the advance of sick leave to 178 hours. Apparently, faced with the uncertain condition of his health, Mr. Taylor is interested in eliminating this negative sick leave balance. Therefore, he asked the PHS personnel office whether he could be recredited with a portion of the 840 hours of sick leave he had to his credit when he was separated from the Agency for International Development in 1967. The personnel office advised him that the sick leave could not be recredited since applicable regulations do not permit the recredit of leave when the employee has had a break in Federal service in excess of 3 years. Mr. Taylor appealed that determination to our Claims Group, which issued a settlement concurring with the PHS personnel office.

In his appeal of the Claims Group settlement, Mr. Taylor states that he originally requested recredit of only enough sick leave to cover the advance of sick leave. However, he notes that, although he did not serve as a Federal employee following his departure from AID in 1967 until his appointment with the PHS in 1979, all of the interim positions that he held were with various private organizations and state instrumentalities that were federally funded. He concludes, therefore, that there was no break in service. Accordingly, he now requests re-

credit of the full 840 hours of sick leave to his credit at the time of his separation from AID in 1967. Finally, Mr. Taylor requests that, in the event his appeal is denied, the matter be considered for submission to Congress as a meritorious claim under 31 U.S.C. § 236 (1976).

Under the authority of 5 U.S.C. § 6311 (Supp. III 1979), the Office of Personnel Management (OPM) has issued regulations governing the recredit of sick leave. See 5 CFR § 630.502 (1981). These regulations provide at paragraph (b)(1):

> * * * an employee who is separated from the Federal Government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia, without a break in service of more than 3 years.

As to what constitutes a "break in service," our Office has held that it means an actual separation from the Federal service. See 54 Comp. Gen. 669 (1975); and 47 *id.* 308 (1967). The fact that an employee does not accrue leave in a position is not determinative of his entitlement to later recredit of prior accrued sick leave. 31 Comp. Gen. 485 (1952). However, because the regulations at section 630.502 do not define what type of service qualifies as Federal service, this Office has decided these questions on a case-by-case basis. Thus, we have held that service as a Peace Corps volunteer does not constitute "service" for the purpose of this regulation. B-175209, August 14, 1972. We have also held that service with the Food and Agricultural Organization of the United Nations does not constitute service for the purposes of the regulation. *Richard E. Corso*, B-180857, August 27, 1974. On the other hand, we have held that congressional employment, although not subject to a statutory leave system, does constitute Federal service for the purpose of this regulation. *Anthony J. Gabriel*, 59 Comp. Gen. 704 (1980). See also the discussion and table of creditable civilian and military service contained in Appendix B of the Federal Personnel Manual Supplement 296-31.

Service with a private organization or state instrumentality where the sole connection with the Federal Government is that it is the recipient of Federal funds pursuant to a program authorized by Congress does not qualify under any of the above-cited references. Accordingly, we hold that such service does not constitute Federal service within the meaning of 5 CFR § 630.502. It follows that, for the purposes of section 630.502(b)(1), Mr. Taylor had no qualifying service between his separation from AID in 1967 and his employment with the PHS in 1979. Thus, his break in service exceeds the 3 years permitted by section 630.502(b)(1). For this reason, he is not entitled to a recredit of the sick leave to his credit at the time of his separation from AID in 1967.

Finally, Mr. Taylor has requested that in the event his claim for recredit of sick leave is denied, we consider his claim has a meritorious claim under 31 U.S.C. § 236. That section authorizes the Comptroller General to submit to the Congress a claim which may not lawfully be allowed, but which contains such elements of legal liability or equity to be deserving of consideration by Congress.

The problem that gave rise to Mr. Taylor's recredit of sick leave was his concern about being indebted for the advance of the 240 hours of sick leave. We have been advised that Mr. Taylor is about to submit an application for disability retirement. Section 630.209(b) of title 5 of the Code of Federal Regulations (1981) provides that an employee who is indebted for unearned leave and who retires for disability or is separated or resigns on such account is not required to refund the amount of that indebtedness. See *Jay Sisco*, B–188903, July 6, 1977. If Mr. Taylor's application for disability retirement is acted upon favorably, then he will not be required to refund the advance sick leave. For this reason, we will take no action on his request for referral of this matter to Congress as a meritorious claim at this time.

[B–199160, B–199496]

Contracts—Annual Contributions Contract-Funded Procurements—Complaints—General Accounting Office Review—Indian Low-Income Housing Projects

Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.*, is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts.

Contracts—Annual Contributions Contract-Funded Procurements—Indian Low-Income Housing—Preference to Indian Concerns

Housing authority's failure to make award to Indian-owned enterprise whose bid was eight percent higher than low bid from non-Indian owned firm was proper since solicitation required award to low bidder and neither it nor HUD regulations or Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450e(b), required preference be granted to Indian-owned firm in particular procurement.

Contracts—Annual Contributions Contract-Funded Procurements—Indian Low-Income Housing—Federal Competitive Bidding Principles—Applicability—Ambiguous Bid

Basic principles of Federal competitive bidding require that all bidders be treated fairly and equally and that bidder be precluded from deciding after bid opening whether to assert that its lump-sum price or its inconsistent individual item prices are correct. Thus, Indian housing authority which was required to adhere to

Federal competitive bidding principles acted improperly in accepting bid based on bidder's post-bid opening explanation of intended bid where bid was subject to two reasonable interpretations and was low only under interpretation proffered by bidder.

Matter of: Curtiss Development Co. and Shipco, Inc., November 20, 1981:

Curtiss Development Co. and Shipco, Inc. have filed complaints concerning the award of a contract by the Spokane Indian Housing Authority. The contract is for the construction of 27 mutual help single family dwelling units to be financed by the Department of Housing and Urban Development (HUD) pursuant to an annual contributions contract (ACC). Although HUD argues that we should not consider these complaints because the contract awarded by the Housing Authority is neither a direct Federal procurement nor funded under a grant as defined by the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §§ 501–509 (Supp. III 1979), for the reasons given below we believe the complaints are properly for our consideration. While we deny the complaint filed by Curtiss, we believe there is merit in Shipco's contention that the awardee was improperly allowed to clarify its bid.

BACKGROUND

On June 14, 1976, HUD and the Housing Authority entered into an ACC pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 *et seq.* (Supp. III 1979). Under the ACC, as amended, the Housing Authority agreed to develop 29 mutual help single family dwelling units to be sold to eligible home buyers in accordance with HUD regulations. *See generally* 24 CFR Part 805 (1981). In exchange, HUD agreed to provide the Housing Authority financial assistance for the construction of the project in the form of a loan or, at HUD's option, a loan guarantee, and to make annual contributions to reimburse the Housing Authority for indebtedness incurred (both principal and interest) in building the project. Specifically, HUD agreed to loan the Housing Authority the estimated cost of the project and to make periodic advances as needed. The ACC also provided that HUD could, at its option, require the Housing Authority to borrow the balance of funds not yet advanced from another lender and that HUD would guarantee payment under the loan.

In addition to agreeing to loan the Housing Authority the necessary money or guaranteeing any loans obtained by the Housing Authority at HUD's direction, HUD agreed to make annual contributions for 25 years or until the Housing Authority paid off the indebtedness in-

curred in building the project, whichever came first. The ACC further provided that the Housing Authority would "comply with all HUD regulations and requirements" in developing the project. In this connection, 24 CFR § 805.203(c) provides that award of a contract for the construction of the project "shall be made to the lowest responsible bidder." The ACC further required the Housing Authority to obtain HUD's approval prior to making an award of any contract in connection with the development of the project.

On April 18, 1980, the Housing Authority issued an invitation for bids (IFB) for the construction of 27 mutual help single family dwelling units.[1] Although the IFB required bidders to bid on a lump sum basis and provided that award would be made on that basis, it also provided for the separate listing of the amounts bidders included for general construction, mechanical work and work outside the building line. In addition, Paragraph 9 of the "Instructions to Bidders" indicated that award would be made "to the responsible bidder submitting the lowest proposal complying with the conditions of the Invitation for Bids * * *." Further, the IFB also stated that "Section 7(b) of the Indian Self-Determination and Education Assistance Act * * * provides * * * preferences in the award of contracts and subcontracts be given to Indian organizations and Indian-Owned Economic Enterprises."

Bids were opened on May 27. Webb Construction and LKM General Contractors, Inc., a joint venture, submitted the lowest lump-sum bid totaling $1,162,200; however, the individually priced items listed on the bid did not add up to the lump sum but instead totaled $1,308,394. Shipco submitted a lump-sum bid of $1,195,200 and Curtiss submitted a lump sum bid of $1,264,959. The total of the individually priced items in the Shipco and Curtiss bids equaled their respective lump-sum bid prices.

Following bid opening, a Housing Authority official contacted a representative of Webb-LKM to discuss the discrepancy between its lump-sum bid and the total of the individually priced items contained in Webb-LKM's bid. Webb-LKM confirmed that the lump-sum bid price was its intended bid and explained that the total of the prices for the individual items exceeded the lump-sum bid price because the work called for under some of the items overlapped with work called for under other items.

By letters dated June 4 and June 5, Curtiss filed protests with the Housing Authority and our Office, respectively. Curtiss objected to an award to any firm other than itself due to its understanding that an

[1] As noted above the ACC provided for 29 units. The record does not indicate the reason the IFB was for only 27 units.

award would be made to an Indian-owned enterprise provided that the bid of such an enterprise was no more than ten percent higher than the lowest bid received. Curtiss argued that since it was an Indian-owned enterprise and since its bid was only eight percent higher than Webb-LKM's bid, it was entitled to the award.

On June 5, the Housing Authority passed a resolution accepting Webb-LKM's lump-sum bid of $1,162,200 subject to approval by HUD. Approval of the proposed award was made by HUD on June 19.

Subsequently, by letter of June 18, Shipco filed a protest with HUD objecting to an award to Webb-LKM. Shipco contended that Webb-LKM's bid was ambiguous on its face due to the discrepancy between its lump-sum bid and the total of the individually priced items and should not be accepted.

On July 1, the Housing Authority passed a resolution waiving the discrepancy in Webb-LKM's bid as a minor informality. Thereafter, on July 8, Shipco filed a protest with our Office objecting to an award to Webb-LKM due to the apparent error in its bid. The Housing Authority decided on July 10 to make an award to Webb-LKM notwithstanding the protests of Curtiss and Shipco and made award to Webb-LKM on July 14.

JURISDICTION

HUD maintains that we do not have jurisdiction over Curtiss' and Shipco's complaints. First, HUD argues that since procurements made by Indian housing authorities under an ACC clearly are not procurements made "by or for" a Federal agency, they are not subject to review under our Bid Protest Procedures. 4 C.F.R. Part 21 (1981). HUD also argues that procurements conducted by housing authorities under ACCs are not subject to review under our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), because they are not funded by grants as defined by the Federal Grant and Cooperative Agreement Act of 1977. HUD asserts that the Federal Grant and Cooperative Agreement Act defines the term "grant" as not including any agreement under which "* * * a subsidy, a loan [or] a loan guarantee * * * is provided." HUD contends that since the assistance under an ACC takes place in the form of a loan or a loan guarantee and also a subsidy over a long period, we do not have jurisdiction under our Public Notice. The agency further argues that the Office of Management and

Budget (OMB) has held that an ACC is not a "grant" and that Attachment O to OMB Circular A–102, which is applicable to procurement conducted by local and state governments receiving Federal grant funds, does not apply to procurements conducted by a housing authority under an ACC. Consequently, HUD concludes that we do not have jurisdiction over complaints concerning procurements conducted by housing authorities under an ACC.

We agree with HUD that the procurement is not a direct Federal procurement and thus not reviewable under our Bid Protest Procedures. However, we do not agree that the complaints are not otherwise subject to our review.

The General Accounting Office has the responsibility to "investigate * * * all matters relating to the receipt, disbursement, and application of public funds." 31 U.S.C. § 53 (1976). Pursuant to this authority, we announced in our Public Notice that we would review complaints concerning procurements made by recipients of Federal grant funds. The purpose of that review is to insure that recipients of Federal assistance comply with all requirements imposed upon them by the terms of the grant agreement and Federal law or regulation when contracting for goods or services. *International Business Machines Corp.*, B–194365, July 7, 1980, 80–2 CPD 12.

Although the Public Notice was couched in terms of "grants," our statutory authority obviously goes well beyond what is denominated a grant and cannot be circumscribed by a Public Notice which delineated one area in which we would exercise that authority and how we would do so. Thus, even if we read the Public Notice narrowly to apply only to what is called a "grant," we would not be precluded from considering other forms of financial assistance. In issuing our Public Notice, however, we did not intend to limit our review solely to those procurements conducted under agreements designated by the parties as "grants" or to those agreements made pursuant to statutory provisions authorizing Federal agencies to make "grants." Rather, our Notice was intended to cover all agreements, other than contracts resulting from a Federal agency's direct procurement action, which (1) provide for Federal funding and (2) impose upon the recipients certain conditions of payment. *Xcavators, Inc.*, 59 Comp. Gen. 758 (1980), 80–2 CPD 229. Thus, under our Public Notice we have reviewed procurements made by recipients of Federal assistance through a subsidy, see *E. P. Reid, Inc.*, B–189944, May 9, 1978, 78–1

CPD 346, as well as under a cooperative agreement. See *Xcavators, Inc., supra.* We have, however, generally declined to consider under our Public Notice complaints concerning procurements made under loans since the Federal funds involved are repaid. See *Neal & Company, Inc.*, B-199022, June 19, 1980, 80-1 CPD 434.

The ACC under consideration provided for Federal funding and imposed upon the Housing Authority conditions for the funding. Although HUD is obligated under the ACC to lend the Housing Authority funds covering the cost of project construction or, at its option, to guarantee loans obtained by the Housing Authority from private sources at HUD's direction, HUD's involvement goes well beyond that of a lender or a guarantor. HUD is also obligated under the ACC to make annual contributions to the Housing Authority to reimburse it for the indebtedness incurred (both principal and interest) in building the project. In other words, HUD not only lends the Housing Authority the money necessary to construct the project, but also gives the Housing Authority the money to pay back the loan. The net effect of ACC is that of a substantial outright transfer of Federal funds to the Housing Authority in order to build the project. Thus, unlike a typical loan agreement, the ACC clearly satisfies the first element of what constitutes a reviewable agreement for the purposes of our Public Notice. See *Niedermeyer-Martin Co.*, 59 Comp. Gen. 73, 76 (1979), 79-2 CPD 314. Moreover, under the ACC the Housing Authority is required to comply with all HUD regulations and requirements in developing the project. In particular, the Housing Authority is required both by HUD regulations and the ACC provisions to award the contract for the construction of the project to the "lowest, responsible bidder." 24 CFR § 805.203(c). Thus, the ACC clearly is the type of agreement which is covered by our Public Notice.

Moreover, the fact that Attachment O to OMB Circular A-102, which contains the general guidelines to be followed by grantees in conducting their procurements, does not apply to the type of agreement involved here is irrelevant to the question of our own role in reviewing procurements conducted by recipients of Federal funds pursuant to such an agreement. What is controlling is that the agreement imposes upon the recipient requirements, such as one for competitive bidding, which must be followed in the award of contracts. See *International Business Machines Corp., supra.* As we have already noted, the Housing Authority is required by the ACC and HUD regu-

lations to use competitive bidding. Consequently, we think our review is appropriate regardless of whether Attachment O applies.

INDIAN-OWNED FIRM AWARD PREFERENCE

Curtiss maintains that it was entitled to the award because it is an Indian-owned firm and its bid was only eight percent higher than the lowest responsive bid received from Webb-LKM. Curtiss states that it was its understanding that an award would be made to an Indian-owned enterprise so long as the bid of such enterprise was no more than ten percent higher than the lowest responsive bid from a non-Indian-owned firm such as Webb-LKM. In support of this understanding, Curtiss points out that the IFB stated:

> Attention is called to the fact that Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450e(b) provides preferences and opportunities for training and employment to be given to Indians, and that preferences in the award of contracts and subcontracts be given to Indian organizations and Indian-Owned Economic Enterprises.

The IFB did not specifically provide for a ten-percent preference for Indian-owned enterprises. It merely called attention to the existence of the Act which does not require preferences in all cases but only to the "greatest extent possible." Thus, there is no requirement that preferences for Indian-owned firms be incorporated in every project. In fact, the IFB stated that award would be made "to the responsible bidder submitting the lowest proposal" and made no mention of preferences for Indian-owned firms other than in the quoted general notice. HUD's regulations implementing the preferences set forth in the Indian Self-Determination and Education Assistance Act do not provide for the use of a ten-percent preference, although they authorize restricting procurements to Indian-owned firms. *See* 24 CFR § 805.204 (a). Since the IFB did not provide for a ten-percent preference and HUD's regulations do not otherwise require such a preference, we see no basis upon which to conclude that Curtiss was entitled to the award.

DISCREPANCY BETWEEN LUMP-SUM PRICE AND TOTAL OF INDIVIDUALLY PRICED ITEMS

Webb-LKM's lump-sum price of $1,162,200 included $914,564 for general building construction, $74,645 for mechanical, $75,030 for electrical and $244,155 for off-site work. These sub-items totaled $1,308,394. On the other hand, Shipco's lump-sum price of $1,195,200

was the total of the $866,520 for general building construction, $179,280 for mechanical, $77,688 for electrical and $71,712 for off-site work figures included in Shipco's bid.

Shipco maintains that Webb-LKM's bid was ambiguous on its face due to the discrepancy between the lump-sum bid price and the total of the individually priced items. Shipco contends that where a bid is low under one interpretation but not under another, the bid may not be accepted if the intended bid can only be established by resort to information outside the bid. As the total of the individually priced items contained in Webb-LKM's bid exceeded Shipco's lump-sum bid price and as Webb-LKM's intended bid price could not be ascertained without resort to information outside the bid, Shipco argues that Webb-LKM's bid should not have been accepted.

HUD disputes Shipco's contention that the Housing Authority acted improperly in permitting Webb-LKM to clarify its intended bid. HUD states that "[c]onsistent with the practice in Federal procurement of ascertaining mistakes in bid * * * the contracting officer called [Webb-LKM] to determine whether a mistake has been made because of [the] disparity and to confirm [Webb-LKM's] lump sum bid." HUD contends that we have held that a bidder may confirm a bid "provided that the confirmation is not inconsistent with a reasonable interpretation of the bid submitted * * *." The agency argues that Webb-LKM's explanation that the discrepancy was due to an overlap of work in the various categories listed in the IFB was consistent with the bid as submitted and that therefore Webb-LKM's bid was properly accepted. We believe the Housing Authority erred in accepting Webb-LKM's bid.

The ACC required the Housing Authority to follow all HUD regulations in developing the project. HUD regulations specifically required it to award the contract to the "lowest, responsible bidder." Where competitive bidding is required as a condition to receipt of Federal assistance, certain basic principles of Federal procurement law must be followed by the recipient in award contracts. *Copeland Systems, Inc.*, 55 Comp. Gen. 390, 393 (1975), 75-2 CPD 237. Basic principles of Federal procurement law require that procurement officials treat all bidders fairly and equally. *RAJ Construction, Inc.*, B-191708, March 1, 1979, 79-1 CPD 140. One fundamental aspect of these principles which we have applied to recipients of Federal assistance is that a bidder should not be permitted to decide after bid

opening whether its bid is, in fact, the low bid. *RAJ Construction, Inc., supra.* Likewise, a bid which is subject to two reasonable interpretations may not be accepted if under one interpretation the bid is low and the other it is not. *Broken Lance Enterprises, Inc.*, 57 Comp. Gen. 410 (1978), 78–1 CPD 279. On the other hand, however, where an alleged ambiguity in a bid admits of only one reasonable interpretation substantially ascertainable from the face of the bid, the bid may be accepted. *Ideker, Inc.*, B–194293, May 25, 1979, 79–1 CPD 379, *affirmed* August 21, 1979, 79–2 CPD 140.

We believe that Webb-LKM's bid is subject to two reasonable interpretations and should not have been accepted because it is the low bid under only one of those interpretations. Although the discrepancy between the lump-sum price and the individually priced items may have resulted for the reason proffered by Webb-LKM, an equally reasonable explanation is that Webb-LKM made a mistake in adding the total of the individual items comprising the lump sum and that the total of individually priced items was the intended bid price. The fact that the individual item prices were not the basis for award does not negate the existence of ambiguity and possible error in the bid. See *Broken Lance Enterprises, Inc., supra.* Since the ambiguity could not be resolved from the bid itself, but only through a communication with Webb-LKM, Webb-LKM's bid should not have been accepted.

NOTIFICATION OF AWARD

Shipco complains that it was not notified prior to the award as required by Federal Procurement Regulations § 1–2.407–8(b)(4). These regulations are only applicable to direct procurements by Federal agencies. In addition, even if these regulations were applicable to this procurement, the Housing Authority's and HUD's failure to notify Shipco of its plans to proceed with an award notwithstanding the protest would constitute a procedural, not a substantive, defect and would not affect the validity of the award. *New Haven Ambulance Service, Inc.*, 57 Comp. Gen. 361 (1978), 78–1 CPD 225.

CONCLUSION

The complaint of Curtiss is denied; the complaint of Shipco is sustained in part and denied in part. In sustaining the complaint, however, we cannot recommend corrective action for the procurement involved

because of the substantial time that has elapsed since contract award. We are, however, advising the Secretary of Housing and Urban Development of the need to inform appropriate personnel of the basic Federal principles which must be followed in HUD-assisted procurements.

[B-201968]

Leaves of Absence—Lump-Sum Payments—Rate at Which Payable—Increases—Prevailing Rate Employees—Separation After Effective Date of Increase

Lump-sum annual leave payments made to prevailing rate employees may be adjusted to reflect the increase in new rates of pay commencing after the effective date of Public Law 96-369 only if the employee performed service after the effective date of the act as required by subsection 114(c) of the act.

Matter of: Lump-sum leave payment—prevailing rate employees, November 24, 1981:

The questions to be resolved involve what rate of pay should be used for lump-sum leave payments to prevailing rate employees who separated from Government service at about the time Public Law 96-369, October 1, 1980, 94 Stat. 1356, was approved. Should the increase in pay authorized by that law be applicable to those employees separating after the approval date of that law; or, only to those separating on or after the effective date of Executive Order No. 12248, October 16, 1980; or, does the increase apply to all separated employees whose extended leave would have carried past either the date of the law or the Executive order?

Prevailing rate employees separated after the date Public Law 96-369 was enacted, October 1, 1980, are entitled to the increased rate of pay. Employees who separated on or before that date are not entitled to the increase.

These questions were presented by Lieutenant Colonel G. Lipka, FC, Office of the Comptroller of the Army.

The questions arise as a result of provisions in recent appropriation acts which limit the amount of wage increases for prevailing rate employees authorized by 5 U.S.C. 5341 *et seq.* The pay of prevailing rate employees is adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. These rates are established by wage surveys and subsequently implemented by an order granting the increase. Since 5 U.S.C. 5344 requires that increases pursuant to these surveys be granted within a period of time after the sur-

vey is ordered, a retroactive entitlement is often effected because the implementing order granting the increase is issued later. This provision requires that employees must be in the service of the United States, including the Armed Forces, or the Government of the District of Columbia, on the date of the issuance of the order granting the increase in order to be entitled to retroactive pay. In addition, entitlement to a retroactive increase exists if an individual died or retired during the period beginning on the effective date of the increase and ending on the date the order is issued.

The questions concern whether these rules apply to pay increases stemming from the enactment of Public Law 96–369. Specifically, the question is raised concerning whether the increases authorized by this law also authorize an adjustment in lump-sum payments made to employees for unused annual leave at the time of separation.

Lump-sum annual leave payments are authorized and governed under 5 U.S.C. 5551. That section provides in part:

*** * * The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. * * ***

Recent appropriation acts have had provisions limiting prevailing rate employees' pay increases resulting from wage surveys to a rate which would not exceed the overall average increase in pay granted to General Schedule employees in that particular year. Section 114 of Public Law 96–369 in effect provided in part that, for the period commencing October 1, 1980, until the effective date of the next wage survey, the rate of pay of these employees could be increased by 75 percent of the difference between the rates in effect on September 30, 1980, and the rate that would have been in effect but for a limitation in a prior appropriation act, Public Law 96–74.

Subsection 114(c) of Public Law 96–369 provides as follows:

(c) The provisions of this section shall apply only with respect to pay for services performed by affected employees after the date of enactment of this Act.

Thus, prevailing rate employees became entitled to an increase after the effective date of the act for service actually performed. Likewise, a prevailing rate employee who actually performed service after the effective date of the act and was then separated is entitled to an adjustment in his lump-sum payment for annual leave. The fact that Executive Order No. 12248 implementing various laws granting increases to Government employees was not issued until October 16, 1980,

did not delay this entitlement. In fact prevailing rate employees are not covered by Executive Order No. 12248. That Executive order merely implemented pay increases for General Schedule and other pay systems and has no bearing on prevailing rate employee increases. Public Law 96–369 itself provides the increase for prevailing rate employees.

Accordingly, a prevailing rate employee who separated after the effective date stated in Public Law 96–369 and received a lump-sum payment for annual leave which did not include the increase authorized by that act is entitled to an adjustment reflecting the new rate. Such an employee actually performed service after the effective date of the act and at the time of separation and entitlement to a lump–sum payment the increased rate was the rate of pay for the position. This rate is also the rate legally payable under 5 U.S.C. 5551. However, if the employee was separated on or prior to the effective date of Public Law 96–369 he would not have performed service after that date and would not be entitled to the increase in computing the lump-sum payment.

[B–202018]

Officers and Employees—Transfers—Real Estate Expenses—Husband and Wife Divorced, etc.—House Sale

Transferred employee sold her interest in residence to former husband. Although sale of interest in residence constitutes residence transaction within meaning of 5 U.S.C. 5724a(a)(4) and Federal Travel Regulations (FTR) para. 2–6.1, broker's fee paid may not be reimbursed absent showing that employee was legally obligated to make such payment to brokerage firm under law of state where residence was located. Employee may be reimbursed legal and advertising costs, but since she held title to residence with person not a member of immediate family at the time of the sale, as defined in FTR para. 2–1.4d, reimbursement is limited to extent of her interest in residence.

Matter of: Patricia A. Wales—Real Estate Expenses—Brokers' Commission, November 24, 1981:

This is in response to a request from Gerald R. Pierce, Authorized Certifying Officer, Department of Housing and Urban Development (HUD), concerning the entitlement of Ms. Patricia A. Wales to reimbursement for certain real estate expenses.

Effective August 28, 1978, Ms. Wales was transferred from her position with the Department of the Army in El Paso, Texas, to a position with HUD in Denver, Colorado. Ms. Wales was authorized reimbursement for relocation costs, including the costs of the sale

of a residence at the old duty station. The 1-year time limitation for the completion of real estate transactions was extended on August 28, 1979. It is Ms. Wales' entitlement to reimbursement for the costs associated with sale of her residence which is presently at issue.

The facts which caused doubt as to Ms. Wales' entitlement were set forth in the administrative report as follows:

> Patricia A. Wales and her former husband Robert Wales were divorced in September 1978, and the divorce decree called for the proceeds from the sale of their residence to be split. After unsuccessfully trying to sell the house, Patricia sold the house to Robert in August 1979, for which she received $6000 from Robert. Later an amendment was made to the divorce decree to provide for the $6000 payment rather than the split of the proceeds.
>
> Robert Wales initially tried to sell the house himself, and when this proved unsuccessful, he listed the house with Winco Associates, a real estate firm. When the sale was made from Patricia to Robert, Winco Associates claimed they were entitled to a commission of $6,088.25 (7% of the sales price of $86,975) and threatened lawsuit if it was not paid. Patricia paid $6,088.25 commission to Winco Associates and claimed reimbursement on April 24, 1980, and was paid the amount by this office.

The certifying officer has asked whether the transfer of Ms. Wales' interest to her former husband constituted a sale so as to entitle her to reimbursement for the broker's fee and for real estate expenses. In addition to the broker's fee, Ms. Wales claimed advertising expenses in the amount of $199.88 and legal and related costs in the amount of $325. It appears that, like the broker's fee, these costs have already been reimbursed by the agency. The certifying officer has also asked whether Ms. Wales was legally obligated to pay the broker's fee.

In *Kirk Anderson*, 56 Comp. Gen. 862 (1977), we held that the transfer of an employee's interest in a residence to his estranged wife was a sale within the meaning of 5 U.S.C. § 5724a(a)(4) (1976), which governs reimbursement of an employee's relocation expenses. Thus, Ms. Wales' transfer of her interest in the residence to her former husband may also be considered a sale.

However, 5 U.S.C. § 5724a(a)(4) authorizes reimbursement of only those expenses which employees are *required* to pay. Chapter 2, part 6 of the Federal Travel Regulations, FPMR 101–7 (May 1973) (FTR), which was issued pursuant to that statute, contains similar language. In accordance with those provisions we have held that a broker's commission may be reimbursed only where the employee has incurred a legally enforceable obligation. See *Mathew Biondich*, B–197893, June 4, 1980, and cases cited therein.

In determining whether a debt is legally enforceable in this situation we look to the State law. Article 6573a, Section 28, of the Revised

Civil Statutes of the State of Texas provides in pertinent part as follows:

> No action shall be brought in any court in this State for the recovery of any commission for the sale or purchase of real estate unless the promise or agreement upon which action shall be brought, or some memorandum thereof shall be in writing and signed by the party to be charged therewith or by some person by him thereunder duly authorized.

The listing contract, which was signed on April 6, 1979, provided that Winco Associates would have an exclusive listing on the house until July 20, 1979. The contract further provides for the payment of a commission if the property is sold after the listing period under the following conditions:

> * * * such commission shall be payable to the Agent if the Agent was the procuring cause of the sale, or if the property was sold within 90 days after the expiration of the exclusive listing to a purchaser whose attention was called to the property by the Agent, provided the Agent shall have advised the Owner in writing of the identity of such prospective purchaser on or before the date of expiration of this exclusive listing * * *.

According to a deed in the record, Ms. Wales transferred her interest to her former husband on August 20, 1979, which was after the expiration of the listing contract. Although the contract was amended on June 1, 1979, to change the price of the house from $90,000 to $94,500 and the commission, from flat amount of $1,450 to 7 percent of the sale price, it does not appear that the contract was extended beyond its original termination date. Therefore, under the terms of the contract Winco Associates would be entitled to the commission only if they were the procuring cause of the sale or if they called the property to the attention of the purchaser and identified him in writing to the owner. We do not believe that it can be argued that Winco Associates was the procuring cause of this sale or that they called the property to the attention of Mr. Wales. It does not appear that Ms. Wales was legally obligated to pay the commission under the contract and, therefore, she is not entitled to reimbursement for the commission paid. Steps should be taken to collect that amount from her unless she can show that she was obligated to make payment under Texas law.

In relation to reimbursement of expenses associated with the sale or purchase of a residence, 5 U.S.C. § 5724a(a)(4) sets forth certain requirements relating to the title to the property. These requirements are carried over into FTR para. 2–6.1c which states, in pertinent part, that real estate expenses may be reimbursed provided that:

> The title to the residence or dwelling at the old or new official station, or the interest in a cooperatively owned dwelling or in an unexpired lease, *is in the*

name of the employee alone, or in the joint names of the employee and one or more members of his immediate family, or solely in the name of one or more members of his immediate family. * * * [Italic supplied.]

Paragraph 2–1.4d of the FTR defines "immediate family" as any of the following members of the employee's household: spouse, certain children, or dependent parents of the employee or of the employee's spouse. Clearly a former husband is not included in this definition. Our decisions hold that in these circumstances an employee may be reimbursed expenses only to the extent of his interest in the residence. See *Thomas G. Neiderman*, B–195929, May 27, 1980, and cases cited therein.

We assume that Ms. Wales had a 50 percent interest in the residence. Therefore, if the legal and advertising costs she claimed are otherwise appropriate for reimbursement she is entitled to half the amount claimed. The amount finally allowed may be set off against the broker's fee she is obligated to refund. Should Ms. Wales show that she was legally obligated to pay the broker's fee she would be entitled to reimbursement for only one half of the amount claimed. If reimbursement of the broker's fee is finally allowed, the prevailing commission rate in the area should be determined to insure that that rate is not exceeded here. In addition, we have held that the provision authorizing reimbursement of advertising costs does not authorize such reimbursement if an employee is reimbursed for a broker's fee which includes advertising costs. 46 Comp. Gen. 812 (1967).

[B–202966]

Bids—Unbalanced—Propriety of Unbalance—Material Unbalance—Solicitation Clause Prohibition

When procuring agency's best estimate involves unknown factors, so there are no realistic safeguards to insure that mathematically unbalanced bid which is evaluated as low actually results in lowest cost to Government, bid should be rejected under solicitation clause warning against material unbalancing.

Matter of: TWI Incorporated, November 24, 1981:

TWI Incorporated protests the proposed award of a contract for repair of watertight closures aboard ships to B&M Marine Repairs, Inc., under a solicitation issued by the Naval Supply Center, Norfolk, Virginia. TWI contends that the bid submitted by B&M is materially unbalanced and therefore should be rejected. We sustain the protest.

The invitation for bids, No. N00189–81–B–0037, was set aside for small business. It required submission of unit and extended prices for

48 line items representing a mix of labor and materials, as well as prices for an equal number of items for an option year. Bids were to be evaluated by adding prices for estimated quantities of all items for both years, with an award to the qualified bidder with the lowest total price.

The solicitation specifically listed two grounds on which any bid might be rejected: (1) lack of facilities within a geographic radius of 50 miles and (2) material unbalancing of prices as applied to basic and option quantities. An unbalanced bid was defined as one based on prices significantly less than cost for some work and significantly overstated for other work.

Bids were opened on April 15, 1981, and B&M, the incumbent contractor, was the apparent low bidder with an evaluated price of $599,730. TWI was second-low at $737,794. TWI argues that B&M's bid is mathematically unbalanced because its prices for the first 10 line items are overstated, equaling 74 percent of the total bid. Nine of these items cover removal, repair, and replacement of different types of closures (watertight doors, scuttles, and hatches). According to TWI, the items are labor-intensive but do not require manhours or skill levels which would justify B&M's high prices. The remaining items, TWI states, primarily cover materials which B&M has bid at less than cost.

In addition, TWI contends that B&M's bid is materially unbalanced in that it will not necessarily result in the lowest cost to the Government, since this is a requirements contract and payment will be made on the basis of actual orders, not estimated quantities. In this regard, TWI points out that estimated quantities are large for the labor-intensive items on which B&M has bid low, and smaller for the items on which it has bid high. TWI examined delivery orders issued to B&M between June 1980 and May 1981 and found that many of the materials listed as line items in this solicitation had never been ordered. If the contracting officer had reviewed the delivery orders, TWI argues, some quantities would have been decreased or the items omitted. TWI has prepared an exhibit which purports to show that its own bid price would be 23 percent lower than B&M's for a contract based on items actually ordered by the Navy during the current year.

After receiving the protest, the Navy requested and obtained verification of B&M's bid prices. The firm stated that while performing the current contract, it discovered that the labor-intensive items required more work than anticipated, thus justifying higher bid prices in

response to this new solicitation than it had been charging under the existing contract. In addition, B&M now states that it must pay higher than prevailing wages to obtain skilled labor, but that it has found economical sources and bought materials in quantity, enabling it to bid lower prices for material-intensive items. In light of this explanation, the Navy concludes that B&M's bid is not mathematically unbalanced, but states that even if it is, it is not materially unbalanced.

We are not persuaded that B&M's bid is mathematically balanced. The record does not include any Government estimates for the various items listed in the solicitation, and the Navy appears simply to have accepted at face value B&M's statements justifying its pricing scheme. However, from a breakdown of various items according to the mix of skills and estimated number of hours which it will take to perform specified tasks, provided by TWI, and a comparison of B&M's prices with those of other bidders, it appears that B&M has bid so that some items carry more and others carry less than their share of actual costs.

One example, cited by TWI, is the difference between B&M's prices for repair of closures and for repair of knife edges on board ship. According to TWI, removal and replacement (separate items) of different types of closures will require only unskilled labor to get the closures off the ship, into the contractor's shop, and back again. Except for the use of rigging to remove large closures from below decks (covered by an item for crane services), these would not be expensive or time-consuming tasks, TWI asserts; skilled labor will be needed only for straightening, welding, and other repairs, and for aligning and chalk-testing the closures during replacement. The vast difference between B&M's bid prices and TWI's bid prices for repair of closures is indicated by the following chart:

		B&M		TWI	
Item	Quantity	Unit	Extended	Unit	Extended
1AB	300	$250	$75, 000	$48	$14, 400
2AB	125	150	18, 750	36	4, 500
3AB	75	200	15, 000	44	3, 300
Total			108, 750		22, 200

With respect to the knife edge repairs, TWI asserts that the contractor must bring a welding machine on board ship and furnish stainless steel rods; these repairs also require a more highly skilled mechanic than the closure repairs, since Navy standards for stainless steel welding are more stringent than those for the carbon steel and

aluminum welding required for closure repairs. B&M's and TWI's prices for repair of knife edges were as follows:

		B&M		TWI	
Item	Quantity	Unit	Extended	Unit	Extended
0014AA----	1,200 linear ft---	$.50/ft---	$600	$10/ft----	$12,000

TWI argues that B&M cannot justify its high prices for closure repairs on the basis of the need for skilled labor while ignoring the level of skill needed to perform the knife edge repairs.

Carrying TWI's analysis a step further, we have reviewed the prices of the four other bidders for repair of closures. Three of these bidders submitted unit prices ranging from $33.75 to $60 for item 1AB, from $22.50 to $60 for item 2AB, and from $33.25 to $110 for item 3AB. (The remaining bidder was considerably higher and also may have been engaged in unbalancing.) Thus, TWI's unit prices for these labor-intensive items were consistent with those of the majority of other bidders, while B&M's were not. And while B&M states that its prices allow for variations in size, configuration, and location of the closures aboard ship, the specifications include a maximum size for each closure, so that all bidders should have allowed for such variations in setting their prices.

Moreover, we question whether B&M's statement that it must pay higher than prevailing wages to obtain skilled labor since any contractor must have employees meeting the qualifications listed in the solicitation for mechanics, painters, welders, and chippers. In addition, any contractor will be subject to the quality assurance procedures outlined in the solicitation and must submit to Navy inspection at designated check points.

As for B&M's prices for materials, a comparison with other bidders shows, for example, that for 100 of each of the following—dog wrenches (item 8AA), dog wrench stowages (item 9AA), and toggle pins and wire rope (item 10AA)—B&M bid $1, $2, and $3 respectively, while TWI bid $8.50, $7.50, and $10. The four remaining bidders submitted unit prices ranging from $6 to $27 for item 8AA, from $8 to $22 for item 9AA, and from $10 to $24 for item 10AA. Thus, B&M's prices for these materials bear little relation to those of other bidders, and we question whether either economical sources or quantity buying can account for the disparity.

An analysis of B&M's bid prices according to estimated quantities also confirms that its bid is mathematically unbalanced. For installa-

tion of rubber gaskets (item 12AC), for an estimated 6,500 linear feet, B&M bid $1 a foot, $6,500 extended; TWI bid $3.25 a foot, $21,125 extended. Other unit prices ranged from $4 to $22 a foot, or from $26,000 to $143,000 extended. On another high-quantity item—cleaning, priming and painting entire watertight closures (item 30AA)—for an estimated 17,000 square feet, B&M bid $.30 a square foot, $5,100 extended; TWI bid $.90 a square foot, $15,300 extended. Other bidders ranged from $1.40 to $35 a square foot, or from $23,800 to $585,000 extended.

In our opinion, these figures clearly indicate that B&M has submitted a mathematically unbalanced bid.

This unbalancing is not, of itself, grounds for rejection of B&M's bid. See *Global Graphics, Inc.*, 54 Comp. Gen. 84 (1974), 74–2 CPD 73. Our Office recognizes two aspects of unbalanced bidding: mathematical and material. See *Mobilease Corporation*, 54 Comp. Gen. 242 (1974), 74–2 CPD 185; *Oswald Brothers Enterprises, Incorporated*, B–180676, May 9, 1974, 74–1 CPD 238. The first aspect involves a determination as to whether each item or, in the case of options, each year carries its share of the cost of work plus profit; the second requires a determination as to whether there is a substantial chance that acceptance of a bid in which prices are disproportionate will result in the lowest cost to the Government. *Id.*

These distinctions are somewhat artificial and, in any event, do not provide a rule to be applied in all cases without a careful review of the factors underlying the unbalanced bid and the effect of acceptance of such a bid upon the competitive system. See, for example, *Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75–2 CPD 164.

The essential question in this case is whether the Navy's estimates are sufficiently accurate to permit a determination that B&M's bid actually is lowest. We do not believe that they are. First, the record indicates that this is only the second year that this work is to be performed under a single, indefinite quantity-type contract, so that the "historical" period on which the Navy's estimates are based is only one year. Second, the estimates include a factor for "any unforeseen growth." In a supplemental report to our Office, the Navy states that due to demands on surface forces, it is not possible to program ships in advance for this type of repair work or to anticipate with any degree of accuracy how many ships may require various quantities of individual line items. This statement suggests that the Navy's esti-

mates cannot be relied upon to overcome the effects of a mathematically unbalanced bid.

We have found that B&M's bid is mathematically unbalanced. We believe that it may also be materially unbalanced, since—although it has been evaluated as low—it may not actually result in the lowest cost to the Government. Under these circumstances, we believe the bid must be rejected.

The solicitation specifically warned bidders that a materially unbalanced bid might be considered nonresponsive. Moreover, the application of the unbalanced bidding clause has not been limited, as the Navy argues, to unbalancing between base and option years. See *Inland Service Corporation*, B-198925, October 17, 1980, 80-2 CPD 292. We would apply it here, and therefore recommend that award be made to the next-lowest evaluated bidder who has submitted a mathematically balanced bid.

By letter of today, we are advising the Secretary of the Navy of our views. The protest is sustained.

[B-205185]

Husband and Wife—Divorce—Validity—Foreign—Acceptance Criteria—Military Pay and Allowances

The General Accounting Office will not question the validity of the divorce and subsequent remarriage of a Navy petty officer, notwithstanding that the divorce was rendered by a foreign court, where it appeared that the petty officer had long resided in the foreign country on a permanent duty assignment; the foreign court had jurisdiction over the subject matter of the divorce; and the foreign divorce decree would be recognized as valid by American State courts.

Matter of: Petty Officer Martha E. Laster, USN and Airman Michael L. Laster, USN, November 24, 1981:

This action is in response to a letter dated August 13, 1981, with enclosures, from the Disbursing Officer of the Navy Personnel Support Activity, Bermuda, who requests an advance decision on the question of whether Airman (ABHN) Michael L. Laster, USN, 499-70-0601, and Petty Officer (YN1) Martha E. Laster, USN, 497-62-5076, may properly be considered husband and wife for purposes of computing their pay and allowances, and for purposes of generally establishing their eligibility for monetary payments and benefits dependent upon the existence of a marital relationship. The request was forwarded here by endorsement dated October 13, 1981, from the Navy Accounting and Finance Center after being approved and assigned submission number DO-N-1374 by the Department of Defense Military Pay and Allowance Committee.

We have concluded, in view of the facts presented, that the marriage of Airman and Petty Officer Laster is clearly valid, and that they are therefore properly to be regarded as husband and wife for the purposes mentioned.

In April 1978 Petty Officer Martha Laster, then Jackson, arrived in Bermuda to begin a permanent duty assignment there with the Navy. She was accompanied on the assignment by her former husband, Petty Officer (ABH2) Richard C. Jackson, USN. They resided in Bermuda continuously during the following 2 years. On March 17, 1980, Petty Officer Laster commenced a divorce proceeding in Bermuda by having Petty Officer Jackson served personally with the petition and other necessary documents. She alleged that their marriage had broken down irretrievably. At that time Petty Officer Jackson completed and signed a document acknowledging that he had received the petition and in which he stated that he did not intend to defend the action. The Supreme Court of Bermuda granted an interlocutory divorce decree on April 28, 1980, and then a final decree on June 12, 1980.

Subsequently, on July 12, 1980, Petty Officer Martha Laster entered into the marriage here at issue. On December 30, 1980, the Navy Family Allowance Activity sent the concerned Navy command authorities in Bermuda a message stating in part:

> (Airman and Petty Officer Laster) should be advised that the validity of the Bermudan [sic] divorce is considered too doubtful for the purpose of authorizing disbursement of government funds based upon a subsequent marriage in the absence of a decision relative thereto granted by a court of competent jurisdiction in the United States.

The Navy legal assistance officer representing the Lasters' interests in the matter, on the other hand, has expressed the opinion that the Bermudian divorce proceedings met all of the traditional tests of legal due process and that the divorce decree should thus be deemed valid by the Navy, since it would doubtless be recognized as such under all existing principles of comity by State courts in America. He suggests that the Navy should therefore also recognize Petty Officer Martha Laster's subsequent remarriage as being valid.

The Comptroller General has no authority to render judgments or otherwise adjudicate rights between husbands and wives in matters involving domestic relations. We are, however, charged with a responsibility for deciding questions related to the proper expenditure of Federal funds. See 31 U.S.C. 71, *et seq.* Hence, we have generally held that where the validity of a marriage is dependent upon the dissolution of a prior marriage by a divorce of questionable validity, the marital status of the parties is too doubtful to serve as a proper basis for any payment of public funds. See, generally, 55 Comp. Gen. 533 (1975); 49 *id.* 833 (1970); 45 *id.* 155 (1965); 38 *id.* 97 (1958); 36 *id.* 121 (1956); 25 *id.* 821 (1946). For the most part, those decisions involved situations in which one or both spouses traveled to a foreign country where they remained for only a brief time, but where they

purported to establish a permanent residence or domicile, for the sole purpose of obtaining a divorce. Our Office, in accord with the decisions of the courts of most jurisdictions, has viewed divorce arrangements of that sort with a great deal of skepticism.

However, in other situations where the divorcing parties resided in the foreign country for an extended period, and it appeared that the foreign court granting the divorce had jurisdiction over the subject matter of the divorce and the divorce would doubtless be considered valid in the United States, we have held that the validity of a subsequent remarriage by one of the parties is not subject to question by Federal accounting officers. See, e.g., *Matter of Lt. David H. Stang, USN*, B-188215, August 19, 1977.

We understand that at all times relevant to the present action the prevailing statutory law of Bermuda provided that the Supreme Court of Bermuda shall have jurisdiction in proceedings for divorce if either party to the marriage was resident in Bermuda for 1 year prior to commencement of suit, and that a divorce may be granted upon a showing that the marriage has broken down irretrievably. It thus appears that the Bermudan jurisdictional requirements, and requirements for proof of grounds for divorce, were substantially similar to those imposed by American States. Furthermore, since both parties to the divorce in this case had resided in Bermuda for 2 years prior to the initiation of suit, and they were both personally present and personally participated in the proceedings, there appears to be no basis for a conclusion that the Bermudan court lacked jurisdiction in the matter.

Given these circumstances, it is our view that the divorce here in question would without doubt be recognized as valid by the courts of our States under principles of comity. See generally 13 ALR 3d 1423, *et seq.* We therefore conclude that the divorce of Petty Officer Martha Laster and her subsequent marriage to Airman Michael Laster are properly to be considered as legally valid and binding by the accounting officers of the Federal Government.

[B-186311.2]

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—*Morgan* Case

Claimant is not entitled to recover proposal preparation costs because procuring agency's postaward, cost realism analysis indicates that claimant's proposal would not have been the best buy for the Government. Therefore, the claimant did not have a substantial chance of receiving the award and the claimant was not prejudiced or damaged.

Matter of: University Research Corporation, November 30, 1981:

University Research Corporation (URC) requests reconsideration of our decision in the matter of *University Research Corporation—Reconsideration*, B-186311, June 22, 1978, 78-1 CPD 450. That

decision was the fourth in a series of decisions which have denied URC's claim in the amount of $35,093.02 for proposal preparation costs in connection with request for proposals No. L/A 76-9 issued by the Department of Labor for furnishing certain technical assistance.

URC argues that, under a recent Court of Claims decision, URC is entitled to proposal preparation costs because there was a substantial chance that it would have received the award. Labor essentially argues that URC has presented nothing new and the prior decision should be affirmed. We conclude that URC is not entitled to proposal preparation costs because a selection based on a proper cost realism analysis would not have resulted in award to URC; thus, URC was not damaged.

The four prior decisions* established that (1) the Department of Labor failed to conduct a cost realism analysis, as required by applicable procurement regulations, with the result that Labor's selection of another firm was not rationally supported, but (2) URC was not entitled to proposal preparation costs because Labor's postaward, cost realism analysis indicated that the same firm would have been selected and, therefore, URC was not prejudiced or damaged.

The details of Labor's cost realism analysis and its impact on source selection are set forth in our February 3, 1978, decision. In sum, the record shows that URC received a higher technical rating and the awardee received a higher cost rating. Labor reported that the awardee's proposal presented a better buy for the Government than URC's proposal. Our Office found no fault with Labor's determination. Therefore, we concluded that it was not reasonably certain that URC would have received the award.

URC argues that the legal reasoning employed to deny URC's claim has been fundamentally altered by the Court of Claims decision in *Morgan Business Associates, Inc.* v. *United States*, 619 F. 2d 892 (Ct. Cl. 1980). URC states that, contrary to our decisions, the finding of reasonable certainty that a claimant would have received an award is not essential to recovery of proposal preparation costs. In URC's view, the *Morgan* decision seriously undermined our Office's requirement that a claimant show that it would have received the award.

The *Morgan* case involved a situation where the procuring agency lost Morgan's initial proposal and, therefore, failed to consider it in selecting the awardee. The court concluded that the Government's failure to consider the proposal was violative of applicable procurement regulations and was a *prima facie* breach of the duty to fairly consider

**University Research Corporation*, B-186311, August 26, 1976, 76-2 CPD 188; *University Research Corporation—Reconsideration*, B-186311, August 16, 1977, 77-2 CPD 118; *University Research Corporation—Reconsideration*, B-186311, February 3, 1978, 78-1 CPD 98; *University Research Corporation—Reconsideration*, B-186311, June 22, 1978, 78-1 CPD 450.

Morgan's proposal. The court rejected, however, the proposition that any breach of duty would entitle an offeror to proposal preparation costs because the Government is not an insurer for an offeror's proposal preparation costs whenever the offeror is not selected for award. The court noted that proposal preparation expenses are a cost of doing business that is lost whenever the offeror fails to receive a contract. The court would not assume that an offeror was necessarily damaged by the Government's failure to fairly consider its proposal. Conversely, the court found that the offeror need not show that, but for the Government's failure to fairly consider its proposal, it would have received a contract, in part, because there can be no certainty about the results of any competition.

The court stated that:

> We hold, rather, that when the Government completely fails to consider a plaintiff's bid or proposal, the plaintiff may recover its bid preparation costs if, under all the facts and circumstances, it is established that, if the bid or proposal had been considered, there was a substantial chance that the plaintiff would receive an award—that it was within the zone of active consideration. If there was no substantial chance that plaintiff's proposal would lead to an award, then the Government's breach of duty did not damage plaintiff. In that situation a plaintiff cannot rightfully recover its bid preparation expenses. This principle of liability vindicates the bidder's interest and right in having his bid considered while at the same time forestalling a windfall recovery for a bidder who was not in reality damaged. 619 F. 2d at 896 (footnote omitted).

In applying these principles in the *Morgan* case, the court considered the agency's postaward evaluation of a copy of the proposal submitted by Morgan, indicating that Morgan's chances for award were not substantial. Based on that record, the court concluded that Morgan failed to show that it had a substantial chance for award and the court denied Morgan's claim.

URC argues that since it was in the final competition (competitive range), it was being actively considered for award. URC contends that its proposal was within the *Morgan* court's "zone of active consideration" and, therefore, URC is entitled to proposal preparation costs.

The URC situation and the Morgan situation are substantially similar. Both URC and Morgan involve procuring agencies' failures to observe the requirements of applicable regulations. To recover proposal preparation costs, both URC and Morgan are required to show that they had a substantial chance to receive the award. Both records contain postaward procuring agency evaluations indicating that if the agency had acted properly, neither claimant had a substantial chance of receiving an award. Therefore, in accord with the *Morgan* court's holding, we conclude that, although URC was in the competitive range, URC is not entitled to proposal preparation costs because, based on a proper cost realism analysis, Labor would not have made award to URC. As noted by the *Morgan* court, to allow a claim-

ant, like URC, to recover proposal preparation costs where it was not in reality damaged would give the claimant a windfall.

The prior decision denying URC's claim is affirmed.

[B-203659.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Initial Adverse Agency Action Date—Solicitation Improprieties

Prior decision is affirmed because protester has not shown any errors of law or fact in conclusion that the initial adverse agency action occurs when the agency proceeds with the closing, as scheduled, instead of taking the corrective action suggested by the protester.

Matter of: Mil-Air Engines & Cylinders, Inc.—Reconsideration, November 30, 1981:

Mil-Air Engines & Cylinders, Inc. (Mil-Air), requests reconsideration of the portion of our decision in the matter of *Mil-Air Engines & Cylinders, Inc.*, B-203659, October 26, 1981, 81-2 CPD 341, which dismissed, as untimely, Mil-Air's basis of protest alleging that the Air Force conducted an improper auction. Mil-Air contends that our conclusion inappropriately penalizes a protester for permitting the procuring agency to rule on a protest filed with the agency. After considering Mil-Air's contention, we affirm the prior decision.

The relevant facts are not disputed. On March 30, 1981, Mil-Air was advised that the Air Force wanted a second best and final offer. On March 31, 1981, Mil-Air protested to the Air Force contending that a second round of best and final offers was unnecessary and that, in view of the two price proposals already submitted, the Air Force was conducting an improper auction.

By amendment dated April 6, 1981, the Air Force requested that second best and final offers be submitted by April 20, 1981. On April 17, 1981, Mil-Air submitted its second best and final offer and renewed its protest of March 31, 1981. Mil-Air also offered to withdraw its protest if it was determined to be the successful offeror.

In the face of Mil-Air's protest, the Air Force proceeded with the closing of the second round of best and final offers on April 20, 1981. On June 5, 1981, the Air Force notified Mil-Air that its protest was denied and on June 12, 1981, Mil-Air protested here.

The October 26, 1981, decision notes that our Bid Protest Procedures provide that when a protest has been filed initially with the contracting agency, as here, any subsequent protest to our Office must be filed within 10 working days of notice of initial adverse agency action in order to be considered timely. 4 CFR § 21.2(a) (1981). The decision points out that where a protest concerns an amendment to an RFP and the protest is filed with the contracting agency prior to the closing

date, the initial adverse agency action occurs when the agency proceeds with the closing, as scheduled, without taking the corrective action suggested by the protester. *California Computer Products, Inc.*, B-193611, March 6, 1979, 79-1 CPD 150. See *Advance Machine Company*, B-201954, February 19, 1981, 81-1 CPD 116. Mil-Air knew that the Air Force was proceeding with the closing as scheduled.

Accordingly, the October 26, 1981, decision concluded that since the initial adverse agency action occurred on April 20, 1981, when the Air Force proceeded with the scheduled closing without canceling or suspending it, this aspect of Mil-Air's protest, which was filed on June 12, 1981, was untimely and would not be considered on the merits.

On reconsideration, Mil-Air argues that the Air Force did not raise timeliness as an issue in this matter. Mil-Air concludes that this is evidence that until June 5, 1981, the Air Force was considering Mil-Air's protest. Mil-Air contends that there was no adverse agency action until June 5, 1981. Mil-Air also suggests that the situations in *California Computer Products, Inc.*, and *Advance Machine Company* did not involve a formal protest to the agency followed by a formal decision by the agency on the protest and then a protest to our Office.

First, the fact that the Air Force did not argue timeliness and the Air Force formally denied Mil-Air's protest after it went ahead with the scheduled closing does not alter the conclusion that the initial adverse agency action occurred on April 20, when the Air Force went ahead with the scheduled closing.

Second, the only difference between the instant matter and the two decisions cited above is that in these cases the procuring agencies did not issue formal decisions on the protests. The difference is not material. The point is that when an offeror protests to a procuring agency, the initial adverse agency action occurs when the agency proceeds with the scheduled closing instead of taking the corrective action suggested by the protester. The subsequent formal Air Force decision on Mil-Air's protest was not the initial adverse agency action within the meaning of our Bid Protest Procedures. Our Procedures are intended to provide for the *expeditious* handling of bid protests, which is indispensable to the orderly process of Government procurement and to the protection of protesters and other parties. *Informatics, Inc.*, 58 Comp. Gen. 750 (1979), 79-2 CPD 159, *aff'd*, B-194322, December 3, 1979, 79-2 CPD 387. Therefore, it is imperative that protests be filed here within 10 working days after the initial adverse agency action.

Since Mil-Air did not protest here within 10 working days of the date of the initial adverse agency action, its protest was untimely under 4 CFR § 21.2(a) (1981). Accordingly, since Mil-Air has presented no evidence warranting modification or reversal of the prior decision, the October 26, 1981, decision is affirmed.