Decisions of The Comptroller General of the United States

VOLUME 63 Pages 391 to 464

JUNE 1984
WITH
INDEX DIGEST
APRIL, MAY, JUNE 1984

UNITED STATES
GENERAL ACCOUNTING OFFICE

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1984

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

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Cite Decisions as 63 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in permanent bound volume.

[B-212976]

Contracts—Payments—Past Due Accounts—Payment Date Determination—Rule in *Foster* Case—Applicability to Late Payment Cases

Under the Department of Agriculture's payment policy guidance, a debt owed to the Department by Government contractors and others is not considered to be paid until the check is actually received by the Department. A trade association with whom the Department does business insists that the payment policy should be changed on equitable grounds because under the Prompt Payment Act, when the Government is the debtor, a payment is considered made as of the date on the payment check tendered. Agriculture's payment policy when it is the creditor is consistent with the Treasury Fiscal Requirements Manual, which reflects prevailing commercial practice. There is no reason to change the policy nor does General Accounting Office consider it inequitable.

Matter of: Assessment of interest by or against Federal agencies on past due debts, June 6, 1984:

The Assistant Secretary for Administration of the Department of Agriculture has requested our decision concerning an alleged inequity in the Government's policies with regard to late payment charges for past due amounts owed *to* the United States, as compared with the requirements of the Prompt Payment Act, Pub. L. No. 97-177, May 21, 1982 (31 U.S. Code 3901 note), for late payment charges on past due amounts owed *by* the United States.

According to Agriculture, a trade association which represents grazing permittees contends that late payment charges should be assessed in the same manner, whether the United States is debtor or creditor. The inequity arises, according to the trade association, because Treasury regulations require Government agencies to include in contracts for goods or services sold to an organization outside the U.S. Government the following minimum payment terms and provisions:

> Specify when the payment will be due.
> Require that payment be *received* [by the Government] no later than the due date.
> Provide that charges be applied, accrued, and collected for payments *received* [by the Government] after the due date in the form of interest, penalty, and administrative charges. 1 TRFM § 6-8020.10 (TL No. 320) [Italic supplied.]

On the other hand, the Prompt Payment Act provides that "a payment [owed by the Government] is deemed to be made on the date a check for the payment is dated." 31 U.S.C. § 3901(a)(5).

The trade association thus believes that private business concerns alone are being held financially responsible for "mail time," both when receiving payments from and when making payments to the Government. The association has urged USDA to amend its payment requirements to allow its members to consider a debt to USDA to be paid as of the date on the checks they mail. USDA asks whether it is required to make this accommodation. The answer is no.

We see nothing inequitable in whatever differences there may be between the two payments policies, nor are we aware of any legal requirement that they be interpreted in exactly the same way.

The Treasury regulations reflect prevailing private sector practices; namely, unless otherwise provided by contract, a debt is not considered to be paid until the date on which payment is *received by* the creditor. *See* 61 Comp. Gen. 166, 168-69 (1981) citing *The Foster Co.* v. *United States,* 128 Ct. 291 (1954); B-107826, July 29, 1954.

The Prompt Payment Act, on the other hand, reflects a congressional determination that the statutory requirement for the Government to pay "interest penalties" should be:

> * * * as easy to administer as possible. Therefore, recognizing that brief delays may follow the date a government check is dated for payment or leaves the government's payment office, the Committee decided that the government's obligation to make payment would nonetheless be considered fulfilled as of the date the government's check is dated for payment. Only in this way is it possible for the government to assess its interest penalties before a check is issued. * * *

S. Rep. No. 302, 97th Cong., 1st Sess. 11 (1981).

However, this does not mean that the Government was authorized by the Prompt Payment Act to routinely date and mail its payment checks to contractors on the day the payment is due, which would result in late payments in every case because of normal mail delivery delays. The legislative history shows that the Congress:

> * * * intends that this Act be administered in such a way as to provide for payment on the date payment is due. In accord with general business practice where payment is made by mail, the Committee anticipates that checks will be dated for payment and mailed five days before the date payment is due. However, in the event a check is dated for payment on the date payment is actually due, no interest would be payable even though the check might not reach a contractor until three or five days later. In the event a check is dated for payment a day late, one day's interest would be charged against the government, and so forth. The Committee will be carefully assessing agency performance under the Act. Agencies should not expect to make a practice of using this provision of the Act to sanction late payments. Every effort should be made to see to it that payment is made [on or before the date that it is due].

S. Rep. No. 302, *supra,* at 11.

Thus, it is clear that when properly implemented, the Prompt Payment Act contemplates that agencies will take every reasonable step to assure that payments owed by the Government are normally delivered to contractors on or before the date they are due. While interest penalties will accrue against the Government under the Prompt Payment Act only if the check is not dated before the date due, as a practical matter, contractors will not normally be inconvenienced by "mail time" on debts owed by the United States. It should also be noted that in instances when application of the normal payment policy would cause undue hardship, the parties are free to provide for a deviation as one of the contract terms.

Accordingly, we find that there is no legal requirement that late payment charges be assessed in an identical manner whether the

Government is a creditor or a debtor. Moreover, the late payment charge policies being followed by Agriculture are consistent with the requirements of the law, and there is no requirement to change them at the request of a trade association.

[B-213209]

Contracts—Authority—Agency Director

Where statute vests authority in agency Director to award contracts, Director may exercise his contracting authority over lower level contracting officials and make the award selection whenever he believes that such action will further the agency's statutory functions.

Contracts—Negotiation—Technical Evaluation Panel—Function

Although decision of agency Director acting as a selection official must be consistent with the solicitation's evaluation criteria and requirements and must have a rational basis, such official is not bound by recommendations of an evaluation board even though such board may be composed of working level officials who normally have the technical expertise required for technical evaluations.

Contracts—Negotiation—Offers or Proposals—Evaluation—General Accounting Office Review

In a dispute between the protester and the contracting agency over the technical superiority of the awardee's proposal, which is in essence a difference of opinion concerning the relative merits of the protester's and the awardee's technical approaches, General Accounting Office (GAO) will not disturb the agency's decision as to which of the two proposals is better suited to complete the project contemplated by the request for proposals (RFP) where the protester has not shown that decision to be unreasonable or in violation of the procurement statutes or regulations.

Contracts—Negotiation—Offers or Proposals—Evaluation—Level of Effort

Where the RFP estimate placed offerors on notice regarding the appropriate level of effort to operate a School Technology Center and the protester proposed a level of effort almost 50 percent below that estimate while the awardee proposed a level of effort much closer to the RFP's estimate, the selecting official could reasonably conclude that the awardee's proposal was superior in this respect.

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—Varying Degrees of Discussions—Propriety

Where an offeror's proposed level of effort was considered acceptable, the agency was not required to discuss this subject with the offeror during competitive range discussions, nor was it required to do so later when the selection official decided he preferred a greater level of effort proposed by another offeror.

Contracts—Negotiation—Offers or Proposals—Evaluation—General Accounting Office Review

Where the RFP required the successful offeror to investigate the application of non-computer technologies to facilitate mathematics and science learning, GAO has no basis to question the selection official's determination that the awardee offered a more innovative approach to studying a broader mix of these technologies than did the protester.

Contracts—Negotiation—Offers or Proposals—Evaluation—Criteria—Application of Criteria

Awardee's plan to work with three or four local school districts during the first 3 years of the Center's operation satisfied the RFP's requirement that local schools be significantly involved in the Center's activities. Moreover, the selection official could reasonably conclude that the awardee—having executed cooperative agreements with the local schools and joined them as part of its consortium—was more likely to be able to expeditiously establish a presence in the schools, as required by the RFP, than was the protester who did not propose to execute any cooperative agreements until after contract award.

Contracts—Negotiation—Offers or Proposals—Evaluation—Administrative Determination

Whether the awardee's proposed management and organizational structure is better suited to the tasks to be performed under the RFP than the protester's is a question calling for the informed judgment of the selection official whose determination will not be disturbed where it is not shown to be unreasonable.

Contracts—Negotiation—Awards—To Other Than Low Offeror

Award of a cost-reimbursement contract to a higher-cost, technically superior offeror is not objectionable where award on that basis is consistent with the RFP's evaluation criteria and the agency determined that the higher cost was justified by the awardee's higher proposed level of effort and its eclectic and more costly research approach.

Contracts—Negotiation—Cost, etc. Data—Disclosure

Contracting officer's failure to follow internal agency policy guidance regarding disclosure of Government cost estimates is not subject to objection by GAO in a bid protest. It is not improper for an agency to disclose during discussions the agency's cost goal in order to reach a fair and reasonable cost so long as no offeror's competitive standing is divulged. Moreover, it was not unfair treatment of offerors for the agency to discuss the Government's cost estimate with the awardee and one other offeror but not with the protester since the purpose of the discussion was to encourage those offerors to lower their proposed costs; the protester's proposed costs were already below the Government estimate.

Matter of: Bank Street College of Education, June 8, 1984:

Bank Street College of Education protests the award of a contract to Harvard University under request for proposals (RFP) No. NIE-R-83-0009 issued by the National Institute of Education (NIE). The RFP sought offers for a cost-type contract to create a School Technology Center that would perform research and provide technical assistance to increase achievement of students in elementary and secondary schools through technology.

Bank Street complains that the NIE Director substituted himself for the contracting officer and the proposal evaluators and improperly made award to Harvard, the highest-cost, second-ranked offeror. Further, the protester contends that the Director, in making the selection, relied on factors outside the solicitation evaluation criteria and requirements, and complains that the NIE negotiator revealed the agency's cost estimate to Harvard but not to Bank Street.

We find that the Director's actions were proper and that his selection decision was consistent with the solicitation's requirements and is reasonably supported by the record. We therefore deny the protest.

BACKGROUND

The agency issued the solicitation on June 6, 1983, seeking proposals for a 5-year effort to establish and operate the Center. The RFP specified that the Center would engage in five major tasks:

(1) Develop a research agenda to improve educational achievement through technology and update it annually.

(2) Conduct a program of subject-oriented research and related activities which focus on (a) the use of technology for instruction in math and science and (b) computers as an object of study in such topics as computer literacy, computer programming and computer science.

(3) Conduct a program of basic and applied research having clear long-range implications for enhancing and stimulating advances in technology's capacity to increase student learning and achievement.

(4) Provide graduate-level training to increase the number of experts in educational technology.

(5) Develop and implement a dissemination strategy designed to meet the needs of teachers, school administrators, researchers, policymakers and parents in all subject areas covered.

The RFP stated that in considering proposals for negotiation and award, technical quality would be given greater priority than cost, and it set forth the following major criteria along with their relative weights, against which the technical proposals would be evaluated:

Criteria	Points
a. General Understanding	10
b. Technical Approach	35
c. School-Based Activities	20
d. Structural, Organization and Management Factors	15
e. Staffing	20

The agency convened a Project Review Board (PRB), consisting of five NIE evaluators and five evaluators from outside NIE to evaluate the technical proposals. The PRB reviewed the six proposals received and ranked them as follows:

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Offeror	Average technical score	Proposed cost
MIT	88.5	$10,963,161
Bank Street	86.6	4,498,028
Harvard	80.3	9,182,480
University of Massachusetts	62.1	7,641,498
University of Lowell	47.3	17,100,803
University of Oregon	34.3	[1] 885,803

[1] First year effort only.

The PRB found the proposals of MIT, Bank Street, and Harvard to be technically acceptable and it recommended that these three offerors be included in the competitive range. The contracting officer accepted the PRB's recommendation and commenced negotiations with these offerors.

NIE sent written questions to the three offerors in the competitive range concerning both technical and cost aspects of their proposals. The negotiation letter to Harvard stated that its cost proposal exceeded the Government estimate by approximately $2 million and its proposed first-year cost exceeded the available funds by 50 percent. The letter suggested that Harvard attempt to reduce its proposed costs. The letter to MIT contained similar statements regarding costs. The record shows that the contracting officer orally suggested to Bank Street that its travel costs were too low. In addition to asking for written responses, the negotiation letters requested that each offeror make an oral presentation of its tentative responses to the PRB.

After receipt of the best and final offers, including the offerors' responses to the negotiation questions, the PRB rescored the final proposals with the following results.

Offeror	Average technical score	Proposed cost
Bank Street	88.4	$4,478,855
Harvard	80.9	7,681,534
MIT	82.1	7,188,030

Of the ten evaluators, five ranked Bank Street first, four ranked Harvard first and one evaluator ranked MIT first.[1] The PRB recommended award to Bank Street.

On September 16, the Director met with the contracting officer and the PRB chairman to discuss the PRB's recommendation. At the conclusion of the meeting, the Director requested that the PRB chairman provide him with an analysis of certain aspects of the proposals, including an analysis of why Bank Street's costs were lower than the Government's estimate of $7,200,000. The chairman subsequently reported that Bank Street's lower cost was primarily due to its lower staffing levels, less travel, use of consultants, and cost sharing. After further meetings between the Director, his staff and the contracting officer, the Director concluded that Harvard's proposal was technically superior. On September 29, Bank Street protested this determination to the agency and to this Office. On September 30, the agency awarded the contract to Harvard.

NIE DIRECTOR'S CONTRACTING AUTHORITY

Bank Street contends that the Director undermined the integrity of the procurement process by intervening in this procurement and awarding the contract to Harvard in spite of the PRB and contracting officer recommendations that Bank Street receive the contract. It argues that the procedures for selecting a contractor contemplate the appointment of a contracting officer with the overall authority to bind the Government and who, with the assistance of the agency program staff and a technical review group, is to conduct a business and technical assessment of the proposals and reach a decision as to the award. Bank Street contends that the Director's role in this process is supervisory only. Consistent with this role, he may only intervene in the procurement process when the standard procedures have not been properly followed. Bank Street argues that since the standard procedures were being followed up

[1] This ranking is based on technical considerations only. When asked to take cost as well as technical merit into consideration, seven ranked Bank Street first and three ranked Harvard first.

to the point of the Director's intervention, his actions were improper.

While it may be true that in most procurements the contracting officer ultimately makes the award decision, the contracting officer derives the power to bind the Government from the general grant of contracting authority to the agency head. 41 U.S.C. § 251 *et seq.* (1976). Here, 20 U.S.C. § 1221e(1) (1982) authorizes the Director to conduct educational research in order to carry out NIE's objectives of improving education in the United States. Further, 20 U.S.C. § 1221e(f)(1) vests authority in the Director to, among other things, enter into contracts to carry out NIE's functions.

We do not agree with Bank Street's contention that the Director may only exercise his contracting authority when the "standard contracting procedures have not been properly followed." Rather, as NIE's ultimate contracting authority, the Director has the discretion to exercise his contracting authority whenever he thinks that it will further NIE's statutory objectives. See *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD 325 (agency official's authority to direct and supervise all agency functions necessarily encompasses the procurement operations, including the evaluation of proposals and the award of contracts, of lower echelon components). Thus, we have no basis to object to the Director's participation in the selection process.

SELECTION DECISION

The PRB recommended that the contract be awarded to Bank Street based on its high technical rating (88.4 for Bank Street; 80.9 for Harvard) and low cost. Specifically, the PRB found that Bank Street's proposal was strong in its practical approach to school-related technology topics, its clear presentation of the tasks to be performed, the excellence of its Director and senior staff and its integration of diverse talents into one Center. On the other hand, the PRB did find fault with Bank Street's proposal in its relatively narrow orientation to substantive issues in science and math education and its vagueness regarding the location of its school-based research. While the PRB noted Bank Street's relatively low cost estimate, it perceived "no difference in the overall level of technical work" proposed by Bank Street and Harvard.

The PRB found that second-ranked Harvard's [2] greatest strengths lay in its depth of understanding of current issues in math, science and computers, the quality of its staff and leadership, the innovative nature of its proposal, its use of television, its "long term" outlook and its particular New England identity. The Board found weakness, however, in Harvard's highly centralized organization, its proposal to initially conduct school-based research

[2] While MIT received a higher numerical score than Harvard, more evaluators ranked Harvard as their choice for award.

in only three school districts adjacent to Boston and the possible lack of a long-term commitment of its proposed co-director, a visiting professor at Harvard.

The Director reviewed the PRB's numerical ratings and the evaluators' narrative comments and, in spite of the PRB's recommendation, found the PRB ranking of the Bank Street and Harvard proposals to be close and inconclusive. The Director also independently reviewed the Harvard and Bank Street proposals and concluded that Harvard's proposal was superior.

In general, the Director found that Harvard's proposal set forth a strong integrated program of activities providing a cohesive framework for long-range research in educational technology and struck a good balance between basic and applied research. According to the Director, Bank Street's proposal offered a narrow approach relying on quick solutions based on existing technology and general learning theory. Further, the Director stated that while Bank Street focused its technology activities almost exclusively on computers, Harvard's approach was broader, involving work in video-disks and television as well as computers. The Director also felt that Harvard proposed a more comprehensive dissemination plan and concluded that its plan for working with local schools was better, as Harvard had identified those schools with which it intended to work and included them in its consortium, while Bank Street proposed to identify those schools after award. Further, the Director noted that Harvard's proposed centralized organization based on existing working relationships among its consortium institutions was superior to Bank Street's proposed team structure involving newly associated members. He also pointed out that Harvard's consortium was far more diverse and prestigious than Bank Street's more limited arrangement. Finally, the Director found that Harvard was proposing substantially greater staff effort than Bank Street. The greater level of effort proposed by Harvard for all program years and at virtually all staff levels was, in the Director's view, more in keeping with the intent of the RFP and more likely to result in a true national Center. Based on these factors, the Director decided that Harvard's technical superiority justified award to it despite its higher proposed costs.[3]

The selection official, here the Director, is not bound by the recommendation of evaluators, and as a general rule our Office will defer to such an official's judgment, even when that official disagrees with an assessment of technical superiority made by a working level evaluation board or individuals who normally may be expected to have the technical expertise required for such evaluations. *Boone, Young & Associates, Inc.*, B-199540.3, November 16, *1982, 82-2 CPD 443.* The selection decision and the manner in

[3] The Director noted that Harvard's higher cost was due in large part to its greater proposed level of effort.

which such an official uses the results of the technical and cost evaluations and the extent, if any, to which one is sacrificed for the other are governed only by the tests of rationality and consistency with established evaluation factors.[4] *Grey Advertising, supra; BDM Corporation,* B-211129, August 23, 1983, 83-2 CPD 234.

Bank Street contends that the Director's evaluation was irrational and inconsistent with the terms of the RFP. Specifically, Bank Street argues that the Director improperly emphasized differences between its and Harvard's proposed levels of effort; inaccurately and unfairly downgraded Bank Street for its alleged failure to deal with multiple technologies; failed to consider Harvard's allegedly inadequate plan for working with local schools and improperly downgraded Bank Street for failing to identify the local schools with which it would work; incorrectly concluded that Harvard's proposed dissemination plans were superior to those offered by the protester, and erroneously found that Harvard's consortium was more desirable because it was allegedly better organized, larger and more prestigious.

In considering protests such as this, we do not conduct a *de novo* review of the technical proposals or make an independent determination of their acceptability or relative merit. *Cadillac Gage Company,* B-209102, July 15, 1983, 83-2 CPD 96. That is the function of the selection official, who is to exercise informed judgment and sound discretion. *Macmillan Oil Company,* B-189725, January 17, 1978, 78-1 CPD 37. Our review is limited to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. *Cadillac Gage Company, supra.* We will question a contracting official's determination concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. *Piasecki Aircraft Corporation,* B-190178, July 6, 1978, 78-2 CPD 10. The fact that the protester or the evaluators disagree with the selection official's conclusion does not in itself render the evaluation unreasonable. *Kaman Sciences Corporation,* B-190143, February 10, 1978, 78-1 CPD 117. As far as consistency with the evaluation criteria is concerned, while the selection official may not judge the merits of proposals based on criteria that offerors were not advised would be considered, the official may properly take into account specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated criteria. *Science Management Corporation,* B-207670, September 23, 1983, 83-2 CPD 362.

[4] Despite Bank Street's arguments to the contrary, this principle clearly governs this case where the Director selected a proposal rated lower technically by the PRB and costing more than the proposal originally chosen. Here, the Director concluded that the Harvard proposal was technically superior and that superiority justified the additional cost. That conclusion must pass these tests.

At the outset, Bank Street contends that since the grounds for the Director's decision are contained in his September 28 decision memorandum, we should consider only this document in determining whether the Director's decision was reasonable and should not consider any rationale prepared in response to Bank Street's protest. We do not agree. In reviewing procurement actions we look to see if the procurement action is supportable, not whether it was properly supported at the time it was taken. See, *e.g., Honeywell Information Systems, Inc.—Reconsideration,* B-193177.2, January 19, 1981, 81-1 CPD 26; *EMI Medical Inc.; Picker Corporation,* B-195487, February 6, 1980, 80-1 CPD 96. Thus, we will consider all of the agency's arguments in support of its selection.

Level of Effort

The Director selected Harvard in part because the level of effort in the Harvard proposal was more closely in line with the estimates included in the RFP than was the lower level proposed by Bank Street. The Director concluded that Harvard's greater proposed level of effort made it more likely that Harvard would develop the type of Center envisioned by the RFP.

Section I(4) of the RFP provided in part:

> Estimates for the level of effort required to carry out the work in each of the first three years are given below. Funding for the fourth and fifth year is estimated to be equal to that for the third. *The government presents this description of the level of effort as only one example of how to carry out the scope of the work.* Offerors are expected to make their own independent assessments of the resources required to perform the stated tasks.
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> * * * * * * *
>
> *All estimates below are stated in terms of fulltime (12 month) positions* . . . . Offerors may adapt these estimates to their own needs. For example, they may propose a different mix of staff types and/or full-time and part-time staff as desired. [Italic in original.]

The RFP's estimated level of effort, and Harvard and Bank Street's proposed levels of effort were as follows:

	Year				
	1	2	3	4	5
NIE estimate					
Director	1.0	1.0	1.0	1.0	1.0
Total Professional staff [1]	8.0	13.0	29.0	29.0	29.0
Harvard					
Director	1.2	1.4	1.4	1.4	1.4
Total Professional Staff [1]	6.0	9.65	19.89	20.63	20.63
Bank Street					
Director	0.6	0.6	0.75	0.75	0.8
Total Professional Staff [1]	7.0	8.18	10.89	11.91	12.35

[1] Director, Senior Researchers and Research Associates/Assistants.

Bank Street contends that the Director's conclusion was improper because the RFP merely suggested certain staffing requirements which the Director changed into hard guidelines against which Bank Street's proposed level of effort was compared. The protester argues that this procedure was defective because the RFP's estimates were "based on uneducated guesswork by the NIE staff," and the Director failed to relate his comparative assessment of the offerors' proposed levels of effort with their ability to perform the Center's functions and failed to indicate his basis for concluding that Bank Street could not perform those functions within its proposed level of effort. Bank Street also contends that if NIE believed that its proposal reflected an insufficient level of effort, NIE should have informed Bank Street of this deficiency and allowed it an opportunity to modify its proposal.

NIE responds that based on its past experience in supporting research and development centers, it arrived at its level-of-effort estimate by first creating a cost estimate and then developing an illustrative model of how the level of effort might be divided based on these estimated costs.[5] The agency further states that while NIE encouraged flexibility in the offerors' proposed staffing, the RFP's estimate signaled NIE's expectations regarding the overall size of the Center. NIE points out that Bank Street proposed a level of effort almost 50 percent below the Government estimate.

The RFP placed offerors on notice of what the agency considered an appropriate level of effort for the Center and, we believe, adequately informed offerors that their proposals would be evaluated against these estimates. While the RFP clearly contemplated that the proposed level of effort could deviate to some extent from the RFP estimates, Bank Street's decision to propose an extremely "lean" lower cost model for the Center was a business judgment from which it assumed the risk that its proposal would be found not as advantageous to the Government as one which proposed a level of effort for the Center more in line with that set forth in the RFP, at least in the absence of an explanation in the proposal as to why Bank Street believed it could meet all requirements with a significantly lower level of effort. Moreover, contrary to the protester's argument, the record shows that the Director did indicate how he believed Bank Street's low proposed level of effort would affect

[5] In view of the inherent imprecision of cost estimates and the great weight accorded the agency's judgment as to the methods in developing a cost estimate, we find NIE's development of the estimate here to fall within the range of discretion permitted a contracting agency. *Prospective Computer Analysts,* B-203095, September 20, 1982, 82-2 CPD 234.

its ability to operate the Center. In this regard, the Director concluded that Bank Street's approach of proposing less than a full-time effort for the Center director raised doubts as to the Center director's ability to effectively direct the substance of the work and manage the consortium. Further, it is implicit in the Director's conclusion here that he simply believed that Bank Street's proposed staffing was not adequate to carry out the tasks it promised to complete.

In view of the significant difference between Bank Street's proposed level of effort and the RFP estimates, we find that the Director could reasonably conclude that the Harvard proposal (which contained a proposed level of effort much closer to the RFP estimate) was superior to Bank Street's proposal in this regard and thus that the Harvard proposal was more likely to meet the RFP requirements.

With respect to the alleged requirement for NIE to discuss with Bank Street its concern about Bank Street's proposed level of effort, in general, agencies are required to hold discussions with all offerors in the competitive range and this mandate can only be satisfied by discussions that are meaningful. *Union Carbide Corporation,* 55 Comp. Gen. 802 (1976), 76-1 CPD 134. We have specifically rejected the notion, however, that agencies are obligated to afford offerors all-encompassing negotiations. The content and extent of meaningful discussions in a given case are a matter of judgment primarily for the determination by the agency involved and not subject to question by our Office unless clearly arbitrary or without a reasonable basis. *Information Network Systems,* B-208009, March 17, 1983, 83-1 CPD 272. Where a proposal is considered to be acceptable and in the competitive range, the agency is under no obligation to discuss every aspect of the proposal receiving less than a maximum ranking. *Gould Defense Systems, Inc., et al.,* B-199392.3; B-199392.4, August 8, 1983, 83-2 CPD 174.

Bank Street was not informed during discussions of NIE's views regarding its level of effort simply because at the time the agency held discussions, the PRB was not concerned about Bank Street's proposed level of effort. It was not until after the submission of best and final offers that the Director concluded that he preferred Harvard's proposal, in part because its proposed level of effort was closer to the RFP estimate than was Bank Street's. Selection officials are expected to consider the various aspects of competing proposals when deciding on which proposal to accept, and there simply is no obligation on the part of the agency at that point in time to

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reopen negotiations to discuss an aspect in one proposal which the selection official sees as relatively less desirable.

Investigation of Non-Computer Technologies

In support of his choice of Harvard, the Director also stated that Harvard's proposal exhibited a better general understanding of the Center's purposes—*i.e.,* to explore and exploit a wide range of technological applications and approaches—by proposing to study a broad mix of technologies to facilitate mathematics and science learning. By contrast, the Director noted, Bank Street proposed a narrower mix of technologies focusing almost exclusively on microcomputers.

Task 3 of the RFP required the successful offeror to "conduct a program of basic and applied research which has clear long-run implications for enhancing and stimulating technology's capacity to increase student learning and achievement." Included as examples of types of projects under this task were "human factor research aimed at improving the motivational qualities and other characteristics of child-machine interactions (*e.g.,* touch-screen displays, natural language interaction) or research on reactive learning environments, expert systems, computer coaches, etc." It is clear, therefore, that the RFP contemplated investigation of other technologies in addition to computer technology. Consequently, we think that it was proper for an evaluator to rank a proposal favorably because of the proposal's strengths in this area.

Harvard proposed four projects under Task 3 designed to explore "what technologies or combinations of technologies show particular promise for improvement of education" and "what strategies seem best suited to the development of effective technology of and for education." The four projects were:

(1) Exploration of the potential use of school as a way of enhancing existing, demonstrably effective science television programs;

(2) Investigation of the ways in which inexpensive highly-reliable microcomputer-based speech recognition systems can contribute to the use of computers for early reading;

(3) Exploration of the use of different word-processing software to facilitate reading and writing instruction; and

(4) Assessment of the potential uses of high-cost devices used in industrial training programs (involving a microcomputer, a high-resolution video screen responsive to touch or light pens and an addressable videodisc player) in schools.

Bank Street proposed under Task 3 to study for the first 18 months "three classes of state-of-the-art software that have major educational potential" by surveying the field in each class, choosing an exemplary program, and investigating its educational use. While it expects that in investigating these software systems it will use sophisticated hardware, Bank Street stated that it prefers "to

investigate software systems that use sophisticated hardware, rather than studying complex devices per se" because the study of hardware innovations outside the context of their use in a software system is unlikely to lead to useful assessments. Under Task 2, subject-oriented research, Bank Street also proposed a study of science learning at home and in school involving integration of computers, interactive videodiscs and television. Finally, under this same task Bank Street proposed a study of an electronic mail network as an aid to class-work learning.

It appears from the Bank Street proposal that it did indeed intend to study a variety of technologies in conjunction with its study of software systems, science learning and the use of electronic mail networks. The Director nevertheless believed that Harvard's proposal was more innovative, intensive and involved a broader mix of technologies. While we think the Director's statement that the Bank Street proposal was focused "almost exclusively on its microcomputers" may be somewhat exaggerated, we have no basis upon which to question his judgment that Harvard's proposed studies in this area were more innovative and presented a greater potential to increase the state of knowledge regarding the application of technology to educational achievement.[6]

School-Based Activities

Another reason cited by the Director for his selection was that Harvard was more responsive to the RFP requirement of thoroughly involving school personnel in the work of the Center than Bank Street since Harvard included school districts and teachers in its consortium and in the Center's budget while Bank Street did not demonstrate an effective plan for the involvement of local schools. In this regard, the Director noted that Harvard's proposal identified three local school districts with which it had binding agreements while Bank Street had not specifically identified the schools with which it intended to work. Further, the Director cited as a weakness Bank Street's failure to include local schools in planning the Center's agenda.

The RFP placed significant emphasis on offerors' proposed school-based activities. It directed that the Center be structured so that "a significant part of the Center's structure will be school-based projects carried out cooperatively with local school systems." Specifically, it required that a minimum of 40 percent of the Center's programs per year be in the form of cooperative school-based activities and further specified that during the first 3 years of con-

[6] Bank Street also argues that any concern NIE had regarding the use of technology should have been raised by the agency during discussions. These matters were not raised by the agency because (as in the case of the proposed level of effort) they were not viewed as concerns at the time NIE held discussions. For the reasons cited in connection with Bank Street's argument regarding NIE's failure to discuss the offeror's proposed level of effort, NIE was not obligated to reopen negotiations to discuss these aspects of the Bank Street proposal.

tract performance school-based activities should be "limited in geographical scope to schools in the New England states." The RFP defined "cooperative" as meaning that "the school system has been made a partner with the Center in the work and is not simply furnishing students as research subjects."

Task 2 of the RFP stated that some of the school-based activities should begin within 3 months of contract award, "to establish a visible presence in the schools and also a pattern of school relevance in the Center's activities." Task 2 further provided that the contractor should have developed its agreements with cooperating school districts for the school-based activities.

First, Bank Street contends that the Director failed to strictly follow the RFP evaluation criteria when he selected Harvard because the RFP required that the Center serve all of New England in the first 3 years, yet Harvard proposed to work with only three Massachusetts schools in the first 3 years of the Center's operation.

NIE responds that Harvard intended to start with three or possibly four school districts in Massachusetts and expand to include seven other New England districts in the remaining 2 years. It argues that this model for involvement of the schools represented "a more comprehensive approach for promoting intensive interaction with an entire school system in the planning, conduct, and evaluation of research and development activities."

While the RFP contemplated significant involvement of local schools in the Center's activities, it did not specify a minimum number of schools required nor did it require that the schools be located throughout New England. Harvard's best and final offer stated that it chose to work with only three schools initially "to make sure that we understand fully the differences among these systems * * * and to make sure that we can devote enough attention to each relationship for it to succeed." Harvard also stated that it would add a fourth (rural) district if the agency deemed it advisable, and indicated the extent to which local school involvement would increase over the term of the contract. We think this approach met the RFP's requirements.

Bank Street next contends that the RFP did not require that local school personnel be included as part of the Center management or that participating schools be identified prior to 3 months after contract award. Thus, the protester concludes, the Director improperly emphasized the fact that Harvard in its proposal designated the schools it intended to work with and joined them as part of its consortium, while penalizing Bank Street for failing to do so. It argues that its proposal included letters from over 30 schools expressing their willingness to work with Bank Street. Bank Street also argues that it did include in its proposal a strategy for involving local schools in planning the Center's agenda.

We note that the RFP stated that cooperative agreements—preferably written—should be worked out with local schools prior to

implementing the school-based activities—some of which were to be started within 3 months after contract award. Although Bank Street states that it had expressions of willingness to cooperate from over 30 schools, it admittedly had not identified the specific schools with which it intended to work. While we agree with Bank Street that the RFP did not require these schools to be identified or agreements to be finalized prior to award, we believe that the Director could reasonably conclude that Harvard was more likely to meet the solicitation's objective of expeditiously establishing a presence in the schools because it had identified its cooperating schools, had executed the cooperative agreements with them and proposed to include the schools and teachers as paid members of its consortium.

Finally, regarding Bank Street's proposed involvement of local schools in writing the research agenda, while Bank Street argues that its proposal included a strategy for such involvement, the Director considered this strategy—to hold meetings with chief state school officers and New England teachers—as not as desirable a plan as that proposed by Harvard which involved teachers and schools in its consortium as collaborators in agenda-setting and research design. We have no basis upon which to question the Director's judgment on this matter.

Dissemination Plan

The Director found that Harvard proposed an innovative approach to dissemination of the Center's work while Bank Street proposed a more traditional "direct-contact" approach that was "unoriginal" and has proven to be "unproductive" in past NIE-supported projects. Bank Street disputes this finding based on the PRB's conclusion that its dissemination strategy met the RFP requirements.

The PRB had litle comment regarding either offerors' dissemination plans. While Bank Street clearly disagrees with the Director's conclusion that Harvard's dissemination plan was superior, it has not provided us with any basis upon which to question the Director's judgment that Harvard's plan would be more effective.

Organizational Management and Strength of Consortium

The Director concluded that Harvard's proposed management structure and the composition of its consortium were stronger than those proposed by Bank Street.

Regarding the management structure, the Director found that based on NIE's experience in managing research projects using many types of management approaches, Harvard's proposed hierarchical management structure (organized around institutional collaboration and relationships) would provide clear lines of authority and promote greater ease of management, as contrasted with Bank Street's matrix-like method of organization (organized around spe-

cific individuals and their roles on particular projects). Bank Street's method, according to the Director, "does not represent the most effective strategy to manage the time and effort of individuals from different organizations," and would make the Center highly vulnerable to staff changes.

Further, the Director stated that Harvard proposed an extremely comprehensive consortium involving ten major organizations, including three public school systems, a collaborative educational organization, an educational television organization, a national testing service, an educational development center, an educational foundation and a private high-technology firm. In contrast, the Director noted that Bank Street's consortium consisted of only two institutions of higher learning and one private firm and omitted educational practitioners as consortium members.

The protester objects to the Director's assessment, contending that Harvard's management plan was found by the PRB to be weak in several areas. For example, the PRB stated that the Harvard consortium might be too diverse to manage and that the role of each consortium partner was not spelled out. Further, Bank Street argues that its consortium consisted of members with greater experience in the fields relevant to the Center's functions and questions the Director's conclusion that Harvard's consortium was better just because it had more members and those members may be more well known.

Here, the protester does not question that differences did exist between the management structure and the make-up of the two competing consortia, but disputes the Director's judgment that Harvard's proposal was more advantageous in these areas. It is true, as Bank Street points out, that the PRB did have some misgivings regarding Harvard's proposed management structure and commented favorably on the members of Bank Street's consortium. Nevertheless, the Director's finding regarding the relative merits of these portions of the proposals is not unreasonable. The Director reasonably could weigh favorably Harvard's inclusion of local schools in its consortium or believe that Harvard's centralized organization of its consortium members, many of which had existing working relationships with Harvard, would run more smoothly than Bank Street's team approach. It is simply a matter of informed judgment as to which organization structure or which consortium is better suited for the tasks to be performed.

HIGHER COST JUSTIFICATION

Bank Street contends that the Director failed to justify awarding the contract to Harvard in light of the fact that Harvard's proposed cost was approximately $3 million more than Bank Street's cost estimate.

The record shows that the Director determined that the additional cost of the Harvard proposal was warranted by the quality of Harvard's proposed approach to the Center and by its greater proposed level of effort. The agency notes in this regard that while Harvard's higher proposed level of effort was responsible for much of the cost difference, a significant portion of that difference was due to Harvard's broad, eclectic and more costly research approach focused on a wide range of technological applications.

Bank Street responds that the Director's justification is inadequate to support a difference of the magnitude involved in this case and contends that while Harvard proposed a greater level of effort, this was not sufficient to justify the higher cost. It argues that some of the differences in cost can be accounted for by the fact that Harvard proposed to pay for teachers' services and research studies that Bank Street proposed to furnish at no cost. Thus, Bank Street concludes, the additional money "will not buy anything that Bank Street College did not offer."

The regulations state that when a cost-reimbursement type contract is to be awarded, estimated costs should not be controlling. Federal Procurement Regulations § 1-3.805-2. Further, in such negotiated procurements, selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with established evaluation factors. *Grey Advertising, Inc., supra.* The judgment of the procuring agency concerning the significance of differences in the technical merit of offerors is accorded great weight. Thus, we have consistently upheld award to technically superior, higher cost offerors so long as that result is consistent with the evaluation criteria, and the procuring agency has determined that the technical difference is sufficiently significant to outweigh the cost difference. *Asset Incorporated,* B-207045, February 14, 1983, 83-1 CPD 150.

Here, award to the higher cost, technically superior offeror is clearly consistent with the RFP's evaluation criteria which indicated that technical quality would be given greater priority than cost. Moreover, while Bank Street speculates that the differences in cost between the two proposals was because Harvard proposed to pay for what Bank Street proposed to provide at no additional cost, we have found that the Director reasonably determined that the Harvard proposal was technically superior in a number of areas, and thus represented the most advantageous proposal for the Government. We have no basis for disputing his determination that this superiority justified the higher cost of the Harvard proposal.

DISCLOSURE OF GOVERNMENT COST ESTIMATE

Finally, Bank Street contends that the contracting officer violated Department of Education procurement regulations by disclosing the Government's cost estimate to Harvard during discussions. It argues that once the contracting officer decided to share this information with Harvard it should also have disclosed it to Bank Street.

The agency's sole purpose in discussing the Government's estimate with Harvard was an attempt to have Harvard lower its proposed costs. Since Bank Street's proposed cost was below the Government's cost estimate, no useful purpose would have been served by discussing the estimate with Bank Street.

The record shows that in the course of discussions the agency informed Harvard [7] that the proposed cost in its initial proposal was approximately $2 million more than the Government's estimate. It also appears that the agency did not believe it was necessary to discuss the Government's cost estimate with Bank Street because Bank Street's proposed cost was below that estimate.

The contracting officer admits that he failed to follow the agency's regulations regarding disclosure of the Government's cost estimates. We believe, however, that those regulations are matters of internal policy guidance for the agency's personnel, and as such they do not create any legal rights or responsibilities such that actions taken in violation of their provisions would be subject to objection by our Office in protest cases. See *Westinghouse Information Services,* B-204225, March 17, 1982, 82-1 CPD 253; *Timeplex, Inc., General Datacomm Sytems and Bowman/ALI, Inc.,* B-197346; B-197346.2; B-197346.4, April 13, 1981, 81-1 CPD 280. Moreover, it is not improper generally for an agency to disclose, during discussions with an offeror, the agency's cost goal as a negotiation tool for reaching a fair and reasonable contract price provided an offeror's standing with respect to its competitors is not divulged. *Ikard Manufacturing Company,* B-213891, March 5, 1984, 63 Comp. Gen. 239, 84-1 CPD 266; 52 Comp. Gen. 425 (1973). Bank Street has not alleged that the agency disclosed any offeror's standing.

We also do not believe that the agency's discussion of the Government's cost estimate with Harvard without conducting similar discussions with Bank Street amounted to unequal treatment of offerors. An agency is not required to hold the same kind of detailed discussions with all offerors since the degree of weaknesses or deficiencies, if any, found in the acceptable proposals will obviously vary. *Pope Maintenance Corporation,* B-206143.3, September 9, 1982, 82-2 CPD 218. Thus, an agency can discuss costs with one of-

[7] NIE also informed MIT that its proposed costs exceeded the Government estimate.

feror without conducting similar discussions with another offeror, where, as here, it does not appear that the agency considers the other offeror's cost proposal to be deficient. *Tracor Jitco Inc.* B-208476, January 31, 1983, 83-1 CPD 98.

In any event, Bank Street was not prejudiced by the disclosure. It contends that had it been informed of the Government's cost estimate, it would have interpreted the RFP's level of effort estimate differently and would have proposed a greater effort. We believe, however, that the RFP adequately informed offerors of the level of effort the agency considered appropriate for the Center and the release of the Government's cost estimate to Bank Street would not have provided any offeror with additional information regarding the appropriate level of effort that had not already been included in the RFP.

The protest is denied.

[B-213350]

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison—Administrative Appeal Upholding Determination to Perform In-House—Reasonableness of Appeal Determination

Protest alleging that contracting agency failed to recognize past statistics and actual employment opportunities for Federal employees affected by contracting out under Circular A-76 is denied, since situation is largely judgmental matter and, while protester may disagree with contracting agency as to employment outlook, that does not mean that contracting agency's own forecast for its employees is wrong.

Contracts—In-House Performance *v.* Contracting Out—Cost Comparison

General Accounting Office will not consider allegation that agency made errors in calculating certain costs in Circular A-76 cost comparison where correction of alleged errors would not affect the evaluation result.

Matter of: Mercury Consolidated, Inc., June 11, 1984:

Mercury Consolidated, Inc. (Mercury), protests the Navy's decision, pursuant to an Office of Management and Budget (OMB) Circular A-76 cost comparison, to continue Government provision of public works services at the Naval Air Station (NAS), Brunswick, Maine, rather than contract out the services to Mercury, the low bidder, under invitation for bids No. N62472-83-B-0880. This protest is an appeal of a Navy review of its initial decision under Circular A-76.

We deny the protest.

Mercury contends that the Navy overestimated the amount of severance pay (payments to employees forced to leave Federal service) and retained pay (payments to employees forced to relocate to lower paying jobs within the Federal service) the Navy would incur in the event that the services were contracted out. Mercury further

asserts that, in calculating relocation costs, the Navy used unrealistic cost estimates. Mercury contends that it was assessed unjustifiably high one-time conversion costs. Mercury further alleges that the Navy understated the number of planner-estimators the Navy needs to perform planning, estimating and inspection services contained in the statement of work and that the Government's estimate must be adjusted upward to properly reflect the cost of this work. Finally, Mercury asserts the Navy significantly understated its direct labor and fringe benefit costs.

Essentially, Mercury objects to the Navy's assumptions underlying its conclusions regarding the effect of conversion to a commercial contractor on in-house personnel currently performing the work. Costs of the conversion are assessed to the contractor under OMB Circular A-76. Specifically, the protester alleges that the Navy failed to estimate the number of personnel who will be employed by the contractor and, thus, overestimated the amount of severance pay assessed to Mercury, that the Navy did not estimate properly the number of personnel who would be placed in other Federal positions in the event a contract was awarded, and that the Navy overstated relocation expenses based on inaccurate and inadequate investigation. According to the protester, a proper measure of the personnel costs would result in the reduction of the costs added to the contractor's bid by approximately $238,604, which, in combination with the correction of other parts of the costs, would reverse the decision to continue in-house operations.

We generally do not review an agency decision to perform work in-house rather than to contract out for the services because we regard the decision as a matter of policy within the province of the executive branch. *Crown Laundry and Dry Cleaners, Inc.,* B-194505, July 18, 1979, 79-2 CPD 38. Where an agency, however, utilizes the procurement system to aid its decision, specifying the circumstances under which a contract will or will not be awarded, we will review an allegation that the agency did not follow established cost comparison procedures, since a faulty or misleading cost comparison which would materially affect the decision whether or not to contract out would be abusive of the procurement system. *MAR, Incorporated,* B-205635, September 27, 1982, 82-2 CPD 278.

Initially, we do not find anything in the A-76 guidance that required the Navy to do any more than make an estimate of the impact that contracting out would have upon Federal employees. For example, while the cost comparison handbook in effect at the time of bid opening states that historical data from the agency or other agencies can be considered in arriving at the appropriate severance pay and retained pay, it does not make that consideration mandatory. Further, the Transmittal No. 6 modification of the cost comparison handbook only makes mandatory that an estimate be made of the number of employees who will retire, separate or be downgraded as a result of contracting out. It also provides that the

agency estimate the number of employees to be relocated and calculate the costs associated with relocation.

With regard to the protester's allegation that the Navy improperly estimated one-time conversion costs and based its information on a biased survey of personnel, and Navy contends that its cost projections are supported by its records and the survey it conducted was proper. The Navy challenges Mercury's contention that the Navy overestimated the impact on personnel of contracting out. For example, the Navy states that Mercury is not correct in assuming that there are positions at the NAS outside of the study to which those "bumped" by the contractor could be placed. The Navy advises there is a limited number of Navy jobs available. The Navy also states that a relatively high number of distant projected relocations would result because there is only one other major Federal employer in the area. Also, the Navy states that Mercury is incorrect in assuming that rather than relocate most displaced employees would choose to take a non-Federal position in the expectation of being placed back in Federal service when a position becomes available since an employee loses certain benefits when there is a break in service.

With regard to Mercury's argument that the relocation costs were overstated and based on inaccurate data and inadequate investigation, Mercury specifically contends its own investigation indicates the Navy estimates of average housing sale prices are inflated. The Navy explains that it computed permanent change of station costs in accordance with the joint travel regulations which set forth the allowable items and cost limits. The Navy states it properly based housing sale data on information obtained from base housing referral offices.

The record clearly indicates that Mercury and the Navy disagree as to the costs of a conversion regarding personnel. As we recognized in a recent decision, *Mercury Consolidated, Inc.,* B-213149, May 14, 1984, 84-1 CPD 519, the projection of personnel changes as a result of the decision to contract out is "largely a judgmental matter." The cost comparison procedures do not provide detailed objective standards to follow in calculating the costs of personnel changes which would result from a conversion to a contractor. For example, while Mercury may disagree with the Navy as to the employment outlook for Navy employees or the sale price of houses as a cost of relocation, that does not mean that the Navy's forecast or estimates are wrong. As indicated above, our review in these cases is directed largely to whether the agency has followed established cost comparison procedures. While there may be a disagreement in this case over the judgment exercised, we do not find that the cost comparison guidance was ignored. *Mercury Consolidated, Inc., supra.*

Mercury also protests that the Navy underestimated the number of planner-estimators needed to perform the work under the solici-

tation and understated Navy direct labor and fringe benefit costs. Mercury argues that corrections based on these errors would result in increasing the Government estimate by $205,089 and $116,612, respectively. However, since the difference after the Navy's cost comparison analysis between the Navy's and Mercury's total figure is $338,517 and the total figure for these alleged errors is $321,701, the two alleged errors would not affect the evaluation result. See *ARA Services, Inc.,* B-211710, January 23, 1984, 84-1 CPD 93.

[B-214024]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—New Issues—Unrelated to Original Protest Basis

New grounds of protest must independently satisfy timeliness requirements of General Accounting Office Bid Protest Procedures.

Contractors—Responsibility—Determination—Review by GAO—Affirmative Finding Accepted

General Accounting Office will only review contracting agency's affirmative determinations of responsibility where there is a showing of fraud on the part of the contracting agency, or where there are allegations that definitive responsibility criteria have been misapplied.

Contractors—Responsibility—Determination—Definitive Responsibility Criteria—What Constitutes

Protest contending that contracting agency misapplied definitive responsibility criteria (travel time requirement) is denied where contracting officer has objective evidence favorable to awardee (2 of 3 trips made in required time) to support the responsibility determination.

Matter of: Hatch & Kirk, Inc., June 11, 1984:

Hatch & Kirk, Inc. (H&K), protests the award of a shipboard diesel engine repair contract to Aquarius Marine Engines, Inc. (Aquarius), under invitation for bids (IFB) No. WASC-84-00025 issued by the Department of Commerce, National Oceanic and Atmospheric Administration (Commerce). H&K objects to the absense of Service Contract Act, 41 U.S.C. §§ 351, *et seq.* (1982), wage provisions and determinations in the IFB and to Commerce's affirmative determination of Aquarius' responsibility.

We dismiss in part and deny in part the protest.

Our Bid Protest Procedures require that a protest based upon alleged improprieties in an IFB be filed before the bid opening. 4 C.F.R. § 21.2(b)(1) (1983). For protests filed with us, the term "filed" means receipt in our Office. *Shell Computer Systems, Inc.,* B-203986, July 23, 1981, 81-2 CPD. Moreover, where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy these timeliness requirements. *Star-Line Enterprises, Inc.,* B-210732, October 12, 1983, 83-2 CPD 450. The bids

were opened on October 11, 1983, but H&K's allegations concerning the absence of Service Contract Act provisions were not received in our Office until March 7, 1984. Therefore, this aspect of the protest is untimely and will not be considered on the merits.

H&K questions whether Aquarius has the resources and ability to comply with a portion of the IFB entitled "Detailed Specifications for Diesel Engine Repair." H&K alleges that Aquarius lacks: (1) sufficient shop facilities; (2) required geographic location; (3) required special tools; (4) a sufficiently skilled staff large enough to handle the required workload; (5) a purchasing department, and (6) appropriate insurance.

H&K's allegations stem from the following portions of the specifications:

Contractor Facility Requirements:

The contractor shall possess shop facilities of sufficient size and equipped to allow all routine overhaul procedures to be carried out "in house." The contractor's shop facilities should be located no further away than a normal one-half (1/2) hour commute from the * * * [Commerce] ship base.

The contractor shall be required to possess all special tools, jigs, fixtures, etc., to carry out all normal overhaul procedures on the listed engines in a factory approved fashion.

Contractor Personnel Requirement:

The contractor shall be a specialist in the field of diesel engine repair. The term "Specialist" shall mean an individual or firm of established reputation (or, if newly organized, whose personnel have previously established a reputation in the same field), which is regularly engaged in and which maintains a regular force of workmen skilled in repairs required by this contract. The contractor's repair staff shall be such that under normal conditions at least two (2) [Commerce] repair jobs consisting of complete engine overhauls could be manned at one time and completed within a three (3) week period.

The contractor shall maintain a supervisory and office staff such that cost estimates, parts procurement, detailed cost returns and invoicing can be provided in timely fashion.

Parts Supply:

The contractor's organization shall include a purchasing department familiar with procurement of these parts. The purchasing department shall be expected to be diligent in procuring parts at the best possible prices.

Commerce's preaward survey found that Aquarius had the resources and ability to perform the contract. H&K asks us to review that determination.

As a general rule, GAO does not review contracting agencies' affirmative determinations of responsibility. See *Central Metal Products, Incorporated,* 54 Comp. Gen. 66, 67 (1974), 74-2 CPD 64. There are two exceptions to this rule: (1) where there is a showing of fraud on the part of the contracting agency and (2) where there are allegations that definitive responsibility criteria have been improperly applied. See *Data Test Corporation,* 54 Comp. Gen. 499, 501-503 (1974), 74-2 CPD 365. H&K argues that allegations (4) and (5) are definitive responsibility criteria. Commerce, on the other hand, takes the position that only allegation (2) is a definitive responsibility criterion.

In determining whether a contracting agency's application of a specific IFB responsibility provision is reviewable under the second exception, we distinguish between performance requirements which merely state how the work is to be accomplished and definitive responsibility criteria which the IFB presents as preconditions of award. Performance requirements do not become definitive responsibility criteria just becasue they are stated in detail. *Contra Costa Electric, Inc.,* B-190916, April 5, 1978, 78-1 CPD 268.

We find the IFB's "Contractor Facility Requirements," which underlie H&K's allegations (1) through (3), to be performance requirements which essentially require that all of the work be properly performed within the confines of the awardee's facility. The IFB's "Contractor Personnel Requirements" and "Parts Supply" requirement, H&K's allegations (4) and (5), are also performance requirements. The work is required to be performed by workmen known to be regularly engaged in the kind of work called for under the contract. Moreover, enough of these workmen shall be available to meet certain minimum levels of agency demand. Again, the requirement that personnel familiar with the procurement of diesel parts (a purchasing department) be used to purchase required parts is a description of how the work is to be performed and not a precondition to award. Since there is objective evidence relevant to the definitive responsibility criterion favorable to Aquarius, we find Aquarius meets the criteria. As to allegation (6), we will not consider H&K's argument that Aquarius is not responsible because it does not have required insurance coverage because the insurance requirement is not a definitive responsibility criterion. See *Triple "A" South,* B-193721, May 9, 1979, 79-1 CPD 324.

However, having a facility within the required travel time, allegation (2), is a precondition of award and, consequently, a definitive responsibility criterion. *Oceanside Mortuary,* B-186204, July 23, 1976, 76-2 CPD 74. As noted above, the applicable solicitation provision requires that the contractor's "facilities should be located no further away than a normal one-half (½) hour commute from the . . . base." The record shows that on two of three attempts, the trip was made by agency personnel within the required travel time. Since the determination whether a bidder complies with a definitive criterion of responsibility is a matter within the reasonable discretion of the contracting officer, we find no basis to conclude that the contracting officer abused his discretion on this evidence. *DOT Systems, Inc.,* B-193153, March 7, 1979, 79-1 CPD 160.

Accordingly, the protest is dismissed in part and denied in part.

[B-214671]

Appointments—Above Minimum Step of Grade—Grade GS-11 and Above—Office of Personnel Management Approval Requirement

Employee of EEOC was hired with the understanding she would be appointed at step 3 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective, approval of higher step placement by OPM, a claim for retroactive increase in that pay is made here. Claim is denied. Under 5 U.S.C. 5333, 5 C.F.R. 531.203(b), and General Accounting Office decisions appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior OPM approval. Since such an appointment is discretionary and not a right, employee may not receive a retroactive increase.

Matter of: Susan E. Murphy—Retroactive Salary Increase, June 12, 1984:

This decision is in response to a request from the Director, Financial Management Services, Equal Employment Opportunity Commission, concerning the entitlement of Ms. Susan E. Murphy to receive a retroactive adjustment in her step-placement and backpay. We conclude that she is not so entitled for the following reasons.

FACTS

In March 1983, an employment offer was made by the Commission's Office of General Counsel to Ms. Murphy to become a Special Assistant to the General Counsel. On the basis of a finding that she had superior qualifications for the position, her entry salary was established at the rate of step 3 of grade GS-14. However, due to an administrative error, the Commission failed to request that the Office of Personnel Management (OPM) approve the higher step of grade GS-14. Thus, when Ms. Murphy entered onto duty on April 11, 1983, her rate of pay was established at step 1 of that grade.

Following discovery of the error, the necessary approval from OPM was sought. In their notice approving the higher rate, OPM advised that the earliest date that the action could be made effective was August 18, 1983.

Because OPM admitted that they would have approved the request had it been submitted earlier, but could not make it retroactive because they have no authority to grant backpay, the matter has been submitted here for resolution.

DECISION

Section 5333 of Title 5, United States Code (1982), provides in part that new appointments shall be made at the minimum rate of the grade to which appointed. Notwithstanding that limitation, it also authorizes OPM to prescribe regulations which would permit

the head of an agency to appoint an individual to a position in grade GS-11 or above at a rate above the minimum rate for that grade, based on such considerations as existing salary, unusually high or unique qualifications of an appointee, or a special need of the Government. It goes on to provide that an agency's authority to so appoint requires the approval of OPM in each case.

The applicable civil service regulation governing this matter is found in 5 C.F.R. § 531.203(b) (1983). That section states that an appointment to a step above the minimum rate for a grade requires the prior approval of OPM.

As a general rule, a retroactive administrative change in salary may not be made in the absence of a statute so providing. 26 Comp. Gen. 706 (1947); 39 Comp. Gen. 583 (1960); and 40 Comp. Gen. 207 (1960). However, we have permitted retroactive adjustments in cases where an administrative error has deprived the employee of a right granted by statute or regulations. See 21 Comp. Gen. 369, 376 (1941); 37 Comp. Gen. 300 (1957); 37 Comp. Gen. 774 (1958); and 55 Comp. Gen. 42 (1975). We have also permitted retroactive adjustments of salary rates where administrative errors occur as a result of failures to carry out nondiscretionary administrative regulations or policies. See 34 Comp. Gen. 380 (1955); 39 Comp. Gen. 550 (1960); and 54 Comp. Gen. 263 (1974).

In contrast to the foregoing, we have held that the failure of an agency to request approvals in a timely manner under 5 U.S.C. § 5333 and 5 C.F.R. § 531.203(b) is neither a deprivation of a right granted by statute or regulation, nor a violation of a nondiscretionary administrative regulation or policy. *Harriet B. Marple,* B-188195, January 3, 1978, and *John P. Corrigan,* B-191817, February 5, 1979.

Accordingly, since the action to appoint Ms. Murphy to a position at a rate above the minimum rate was discretionary and approval was not secured at the time of her appointment, there is no proper basis to allow her a retroactive increase in pay for the period prior to August 18, 1983.

[B-212288]

Debt Collections—Waiver—Civilian Employees—Compensation Overpayments—Position Qualification Requirements Invalidated

The propriety of compensation payments to contracting officers at Fort Monmouth, New Jersey, is questioned since the employees have not met a condition subsequent mandatory training requirement after promotion as set forth in a Department of Defense civilian career program manual. Office of Personnel Management (OPM) regulations mandate that agency-established position qualification requirements must be promulgated so that an evaluation can be made before an employee is appointed to a position. Since the position qualification training requirement did not have to be met at the time of appointment, it is invalid as inconsistent with OPM requirements and there is no basis for ordering recoupment of compensation from the employees involved.

Matter of: Compensation Recoupment—Promotions Subject to Subsequent Mandatory Training Requirement, June 14, 1984:

INTRODUCTION

By a letter dated November 21, 1983, Representative Peter H. Kostmayer—in cooperation with his constituent Saul Lefkowitz—requested a Comptroller General decision on the propriety of compensation payments to certain civilian employees at Fort Monmouth, New Jersey, alleged to be holding positions for which they are not qualified.

The issue here is whether compensation payments to contracting officers who have not met a condition subsequent mandatory training requirement set forth in a DOD civilian career program manual must be recouped because they are/were not qualified for the positions to which promoted. We conclude that compensation payments to these contracting officers were not improper since the training requirement does not conform to Office of Personnel Management (OPM) requirements.

Our review is undertaken pursuant to our authority to settle accounts set forth in 31 U.S.C. §3526 (1982). Representative Kostmayer and his constituent, as well as the DOD, provided us with their views in this matter. In arriving at our decision, we considered all of the materials submitted to us.

BACKGROUND

The condition subsequent mandatory training requirement found in DOD 1430.10-M-1, "DOD Civilian Career Program for Contracting and Acquisition Personnel," December 7, 1982, page 4-1, states that: "The mandatory courses [listed elsewhere] * * * shall be completed before promotion to the next higher level [of 3 contracting officer career levels] or within 12 months after promotion." The record, including an Army Inspector General letter dated September 30, 1983, substantiates that there are contracting officers at Fort Monmouth, New Jersey, who have not completed these mandatory courses prescribed for their positions, either before promotion, or within 12 months after promotion. The DOD submission does not deny this.

THE ARGUMENTS

Essentially, Mr. Lefkowitz argues that our decisions require the recoupment of compensation paid to employees while in positions for which they are not qualified, where there is bad faith or fraud on the part of the employees or the administrative officials involved. To derive this rule, Mr. Lefkowitz cites to our decision 28 Comp. Gen. 69 (1948), for a quotation to the effect that an employee not having the qualifications necessary for the position to which

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appointed must refund all compensation received because of such erroneous action without regard to the bona fides of the administrative officials involved. He then cites to our decision 28 Comp. Gen. 514 (1949) for a modification of that rule to the effect that, in recognition of "honest errors," recoupment would be required only if there was bad faith or fraud either on the part of the employee or the administrative officials involved. He then refers to the condition subsequent mandatory training requirement of DOD 1430.10-M-1. Since the record discloses agency knowledge of the violation of that requirement, he concludes that thereafter there is bad faith or fraud by administrative officials involved. Therefore, recoupment should be undertaken against the affected employees from that time.

The DOD position, essentially, is that OPM establishes the minimum qualification standards for positions. Therefore, as long as incumbents of positions meet OPM minimum qualification standards, they are qualified and may not be removed from those positions on the basis of not being qualified. It is stated that the condition subsequent mandatory training requirement of DOD 1430.10-M-1 is an agency-established training "objective"—not an OPM minimum qualification requirement. Therefore, failure to meet that objective would not make the incumbents of these positions unqualified to hold these positions.

DISCUSSION

As a jurisdictional matter, we have no authority to order the removal of employees from positions. The jurisdiction of our Office is statutorily limited to the settlement of monetary claims. 31 U.S.C. §§ 3526 and 3702 (1982). Presumably, Mr. Lefkowitz recognizes this, since he suggests that compensation recoupment would be appropriate.

More recently, our decision *Victor M. Valdez, Jr.,* 58 Comp. Gen. 734 (1979), modified the rule as to retention of compensation by employees serving in a de facto status under an unauthorized personnel action. We stated in *Valdez* at 735:

> [I]n those cases where a person has been appointed to a position by an agency and the appointment is subsequently found to have been improper or erroneous, the new rule is that the employee is entitled to receive unpaid compensation and to credit for good faith service for purposes of accrual of annual leave and to lump-sum payment for unused leave upon separation, unless—
>
> (1) The appointment was made in violation of an absolute statutory prohibition, or
> (2) The employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.
>
> Our earlier decisions in conflict with this rule will no longer be followed.

As the above quotation indicates, our decision 28 Comp. Gen. 514, cited by Mr. Lefkowitz as a basis for recoupment, has been signficantly modified. Thus, we would no longer seek recoupment unless one of the factors shown were present, and if the record shows that

the promotions were made in violation of an absolute statutory prohibition, or that the employees were guilty of fraud. Further, erroneous overpayments of pay and allowances where there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employees involved are subject to waiver. See 5 U.S.C. § 5584 (1982), and 55 Comp. Gen. 109 (1975). However, for the reasons set forth below, we find that the promotions were not in error and it is unnecessary for us to reach the issue of recoupment.

The granting of promotions is a discretionary matter primarily within the province of the administrative agency involved. However, by promulgation of a regulation or a nondiscretionary policy, an agency may limit its discretion to promote employees, so that under specific conditions that agency must make a promotion on an ascertainable date, or must defer a promotion until after the occurrence of a specified event. *Doris Brissett,* B-207129, August 26, 1982. In B-189002, February 8, 1978, we recognized that an agency could impose a requirement that certain training be completed prior to a promotion. There, a Navy civilian employee's promotion was delayed approximately 2 weeks due to his inability to complete required training until he had returned from military leave. We recognized the agency's interest in establishing such requirements, since in many instances the lack of training in a specific element could have serious consequences, such as the failure of a nuclear power plant, or of a critical aircraft or missile component. We upheld the agency's own promotion requirement as a valid basis upon which to delay a promotion.

Here, the condition subsequent mandatory training requirement in DOD 1430.10-M-1 states that certain mandatory courses shall be completed before promotion to the next higher level, or within 12 months after promotion. However, no one has questioned whether the employees here involved were qualified at the time of their appointments. Thus, the question is whether a condition subsequent mandatory training requirement can disqualify an employee after he or she has served competently in a position for 12 months, but without having completed required training. In our opinion it cannot. Under FPM, ch. 335, § 1-4 (Inst. 262, May 7, 1981), each agency must establish procedures for promoting employees which are based on merit. Qualification requirements are among those to be undertaken under a promotion plan. Methods of evaluation for promotion, and selection for training which leads to promotion, must be consistent with FPM Supp. 335-1, which prescribes evaluation procedures and methods. Under FPM Supp. 335-1, S2-1 (June 1969), the process for evaluating employees must be designed to determine basic eligibility as well as to identify highly qualified and best-qualified eligibles. Further, FPM Supp. 335-1, S4-1 (June 1969), states that an employee's training and experience should be evaluated in terms of the knowledge, skills, and abilities needed for success in the job to be filled. Thus, agency-established qualifica-

tion requirements for a position must be promulgated so that an evaluation can be made before an employee is promoted to that position. Since DOD's condition subsequent mandatory training requirement imposes a position qualification requirement, and a later subsequent evaluation after the employee has been appointed to a position, it is invalid as inconsistent with OPM's requirements. We therefore agree with DOD that its training requirement is more of a desired objective than a mandatory requirement.

Accordingly, since a mandatory subsequent training requirement is inconsistent with OPM requirements, we find no basis for ordering recoupment of compensation.

[B-213137]

Appropriations—Defense Department—Honduras Military Exercises—Operation and Maintenance Funds—Availability

Department of Defense's (DOD) operation and maintenance (O&M) appropriations may not be used to finance construction activities in support of joint combined exercises in Honduras, except to the extent that such activities fall within the specific statutory authority of 10 U.S.C. 2805(c) (minor construction projects under $200,000).

Appropriations—Defense Department—Honduras Military Exercises—Operation and Maintenance Funds—Availability

Facilities constructed by DOD in Honduras are not so clearly "minor and temporary" that they would qualify, under previous General Accounting Office decisions, for funding as operational expenses charged to O&M appropriations.

Appropriations—Defense Department—Honduras Military Exercises—Operation and Maintenance Funds—Availability

DOD's O&M funds may not be used for training of Honduran soldiers as part of, or in preparation for, joint combined exercises. Such expenses should have been financed with security assistance funds.

Appropriations—Defense Department—Honduras Military Exercises—Operation and Maintenance Funds—Availability

DOD's O&M funds may not be used for the provision of civic action or humanitarian assistance to Honduras. DOD has no separate authority to conduct such activities except, on a reimbursable basis, under the Economy Act, 31 U.S.C. 1535.

To The Honorable Bill Alexander, U.S. House of Representatives, June 22, 1984:

By letter dated January 25, 1984, you requested that we provide you with a formal legal decision regarding the propriety of funding methods used by the Department of Defense (DOD) in its recent joint combined exercises in Honduras. This letter responds to your request. We would emphasize that the sole concern of our legal review relates to DOD's use of appropriations in carrying out its activities in Honduras, and not to the policy implications of those activities.

On the question of DOD's use of exercise operation and maintenance (O&M) funds, we found the following:

—DOD may use O&M appropriations, under authority of 10 U.S.C. § 2805(c), to finance minor military construction projects under $200,000. Thus, to the extent that DOD's construction activities in Honduras fell within this $200,000 limit, use of O&M funding was proper. Apart from this specific authority, however, DOD's construction expenses may not be charged to O&M as operational costs, but must be charged to funds available for military construction (or, in some cases, security assistance). Consequently, O&M funding of construction activities in Honduras in excess of that permitted under 10 U.S.C. § 2805(c) was improper.

—Site preparation and installation costs of establishing radar facilities in Honduras, if under $200,000 per project, may also be charged to O&M as minor military construction under 10 U.S.C. § 2805(c). Again, however, O&M funding of such activities in excess of that permitted under 10 U.S.C. § 2805(c) was improper. Costs of operating these facilities were properly chargeable to O&M.

—Costs pertaining to training of Honduran armed forces during, or in preparation for, the Ahuas Tara II exercise should have been financed as security assistance to Honduras. Use of O&M funds for such activities was unauthorized.

—DOD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as AID) through the Economy Act, 31 U.S.C. § 1535, or (for minor projects) as incidental to the provision of security assistance. Such activities conducted in Honduras during the course of Ahuas Tara II were improperly charged to DOD's O&M appropriations.

The grounds for our conclusions as to proper funding sources are set out in detail in the classified appendix.

Regarding your further questions as to possible violations of the funding purposes restrictions of 31 U.S.C. § 1301(a) and the Antideficiency Act, 31 U.S.C. § 1341(a), it is our conclusion that expenses for training Honduran forces, and for the provision of civic and humanitarian assistance, have been charged to DOD's O&M funds in violation of 31 U.S.C. § 1301(a). We cannot make a similar determination with regard to DOD's use of O&M funds to finance exercise construction activities, as such funds may properly have been used under authority of 10 U.S.C. § 2805(c) (minor military construction projects under $200,000). By letter of today's date, however, we are requesting DOD to reexamine its accounting for construction expenses to verify that the conditions of 10 U.S.C. § 2805(c) have been met. To the extent that that authority was exceeded, use of O&M funds for construction activities violated 31 U.S.C. § 1301(a).[1]

[1] Costs of several construction projects in Honduras have been reported elsewhere as being in excess of $200,000. *See, e.g.,* our report GAO/C-NSIAD-84-8, March 6, 1984, App. II, p. 57. The accounting method used to calculate such costs, however, may differ from that used under 10 U.S.C. § 2805(c). *See, e.g.,* DOD Directive 7040.2, January 18, 1961, *as amended* March 5, 1964, at p. 6 (funded project costs exclude military labor).

Although 31 U.S.C. § 1301(a) does not specify the consequences (or remedies) for its violation, it is clear that such an expenditure is subject to disallowance by this Office. *See* 32 Comp. Gen. 71 (1952). In actual practice, GAO's treatment of such violations has varied. *See* 36 Comp. Gen. 386 (1956), 17 Comp. Gen. 1020 (1938) (admonishing agency to discontinue the improper practice); 14 Comp. Gen. 103 (1934) (adjustment of accounts); 17 Comp. Gen. 748 (1938) (taking exception to applicable account). In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (i.e., security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities, and, to the extent that O&M funds were not available under 10 U.S.C. § 2805(c), military construction funds for exercise-related construction).

Where adjustment of accounts is not possible (i.e. because alternate funding sources are already obligated), expenditures improperly charged by DOD to O&M appropriations were made in violation of the Antideficiency Act, 31 U.S.C. § 1341(a). Not every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act. *See* B–208697, September 28, 1983. Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible.

As the above indicates, a final determination as to whether DOD's activities in Honduras violated the Antideficiency Act depends upon the availability of alternate funding sources. After-the-fact determinations as to available alternate funding, however, are more properly the responsibility of DOD. We are therefore transmitting to DOD our attached analysis of the funding of combined exercises in Honduras, with a request that DOD make funding adjustments, where feasible, and where not feasible, report Antideficiency Act violations and take appropriate administrative action under 31 U.S.C. § 1349.

Funding adjustments made by DOD in light of our conclusions here must, of course, be consistent with the ordinary rules governing the use of appropriated funds, including fiscal year limitations. The latter requirement is particularly important with respect to adjustments in the present case because some of the exercise activi-

ties that we have addressed took place in the previous fiscal year. Unless funds remain available from that previous fiscal year (most likely, unexpended multi-year authority), adjustment of accounts may be impossible. Security assistance funds, for example, are generally available only for one fiscal year. *See, e.g.,* Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Thus, new security assistance agreements, which must be funded with current-year appropriations, could not be used to "cure" funding violations with respect to obligations incurred in the previous fiscal year.

We are also recommending to DOD that it examine its funding of current activities in Honduras under the present exercises (Granadero I) in light of this decision, and make funding adjustments as required. Finally, as we have under similar circumstances where DOD has incurred obligations in excess of its authority, we are recommending to DOD that it seek specific funding authorization from the Congress if it wishes to continue performing such a wide variety of activities under the aegis of an O&M-funded exercise. *Compare* 62 Comp. Gen. 323 (1983).

We hope that the above, and our analysis under separate cover, is of assistance to you.

Appendix

(This unclassified appendix is provided in lieu of an appendix containing classified national security information.)

Funding of Joint Combined Military Exercises in Honduras

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I. BACKGROUND

On August 3, 1983, the Defense Department commenced Ahuas Tara (Big Pine) II, the second in a recent series of joint combined military exercises in Honduras.[1] During the exercise, which lasted until February 8, 1984, some 12,000 American troops participated in joint maneuvers with members of the Honduran military. In addition, over the 6 month course of the exercise, participating American units constructed one 3500-foot dirt assault (or "hasty") airstrip, expanded one 4300-foot dirt airstrip to 8000 feet, expanded a 3000-foot asphalt airstrip to 3500 feet, installed or constructed nearly 300 wooden huts to serve as barracks, dining, and administrative facilities, deployed two radar systems, provided medical assistance to nearly 50,000 Honduran civilian patients, provided veterinary services to approximately 40,000 animals, built a school, and provided artillery, infantry, and medical training to hundreds of Honduran military personnel. These numerous activities, all carried out as a part of Ahuas Tara II, have raised questions, both within DOD and in the Congress, as to the scope of the authority under which such activities take place. This decision is intended to resolve some of these questions.

In connection with our investigation of DOD's activities in Honduras, we requested, on November 28, 1983, that DOD provide us with an explanation of funding sources used for each of 7 categories of Ahuas Tara II activities, authority for such use of funds, permanency of facilities, and, where appropriate, existence of reimbursement agreements. A related letter, sent on December 1, 1983, asked DOD to explain its authority to conduct humanitarian/civic activities in Central America.

DOD's detailed response, dated March 8, 1984, identified the O&M appropriations of the participating military departments as the funding source of most of the activities about which we had inquired.[2] The Department justified all "engineering work," civic action, radar installations, etc., as incidental to the exercise program. According to DOD, no formal training of Honduran troops took place, and any support services provided to Honduran soldiers would have been incurred in the absence of Honduran participation. DOD also described all exercise construction projects as tem-

[1] The first exercise, Ahuas Tara I, took place during three weeks in January and February of 1983 and involved activities by some 1,600 U.S. troops. The current exercise, Grenadero I, began on April 1, 1984, will continue through the summer, and will involve the deployment of over 3,500 U.S. troops.

[2] According to DOD, it is standard practice in joint exercise programs for the costs of exercise activities for each military service to be funded from the O&M appropriation of that service (other than airlift, sealift, inland transportation and port handling costs, paid from O&M funds available to the Joint Chiefs of Staff (JCS)). Thus, airstrip construction by Seabees is charged to Navy O&M, and that by Army engineers is charged to Army O&M. DOD has stated that O&M appropriations of the Army, Air Force, Navy, and Marine Corps were each used to finance activities of Ahuas Tara II.

porary in nature. Finally, DOD stated that reimbursement agreements for any of its exercise activities were unnecessary as "all O&M funds usage is considered correct and proper." In its separate response to our question concerning its authority to carry out humanitarian assistance, however, DOD's General Counsel stated that "DOD has no separate statutory authority to perform humanitarian or civic action programs [except] under the authority of the Economy Act or other similar authority * * *." The apparent conflict between these statements was not explained.

In addition to DOD's formal comments to us, we have also reviewed an Army Judge Advocate General (JAG) staff analysis of exercise activities in Honduras, prepared during the planning stage of Ahuas Tara II. That analysis, transmitted to the U.S. Southern Command (SOUTHCOM, the command responsible for planning and carrying out the exercises), as the U.S. Army position,

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DOD's formal comments and the Army JAG's analysis will be addressed at further length where relevant to the discussion that follows.

II. DISCUSSION

Operations and maintenance appropriations are typically provided for "expenses, not otherwise provided for, necessary for the operation and maintenance of" the applicable service or agency. *See, e.g.,* Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, 97 Stat. 1421, 1423 (1983). This particular category of appropriations has been described as a "murky world which does not easily lend itself to clearcut conclusions." *Hearings on TAKX Pre-Positioning Ship Program, Before the Subcommittee on Readiness, House Committee on Armed Services,* 97th Cong., 2d Sess. 2 (1982) (statement of Chairman Daniel). Because they are used for such a wide variety of activities in support of the operation of each military department, and because they are not subject to the same line-item scrutiny as are other types of appropriations, DOD's O&M funds are considered by many to be more discretionary than other types of defense appropriations. *See id.* The Department of Defense, however, clearly does not have unlimited discretion in determining which activities may be financed with O&M funds.

This Office has identified three factors to be considered in determining whether a certain expense is necessary or incidental to the proper execution of the object of an appropriation (here, those expenses necessary for the operation and maintenance of the various military departments). First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made. *See* 42 Comp. Gen. 226, 228 (1962). Second, the expenditure must not be prohibited by law. 38 Comp. Gen. 782, 785 (1959). Fi-

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nally, the expenditure must not fall specifically within the scope of some other category of appropriations. *Id.* This last requirement applies even if the more appropriate funding source is exhausted and therefore unavailable. B-139510, May 13, 1959.

Case-by-case decisions as to which appropriations may be used for a particular expenditure are left to the agency involved and, so long as such determinations are made in general conformity with the above three rules, they have not been generally questioned by this Office. *See* 18 Comp. Gen. 285, 292 (1938). In certain cases, either of two appropriations may reasonably be construed as available for an expenditure not specifically mentioned under either appropriation. In such cases, it is within the discretion of the agency to determine which appropriation is to be used for the activity in question, although once the determination has been made, it cannot later be changed. *See, e.g.,* 59 Comp. Gen. 518 (1980).

The following discussion constitutes a review, in light of the factors discussed above, of each category of O&M-funded activities carried out by DOD in Honduras under the Ahuas Tara II joint combined exercise.

A. *Ahuas Tara II Construction Activities*

1. *Facts:* As described in our February 8, 1984 briefing to Representative Alexander, Ahuas Tara II construction activities centered around the establishment of four base camps, designed to house and/or support approximately 3,000 U.S. troops. Base camps were constructed at the following locations:

Palmerola/Comayagua. Exercise O&M funds were used to construct Joint Task Force-11 (JTF) headquarters at Palmerola Air Base near the central Honduran town of Comayagua. The camp was also the site of a mobile field hospital, aviation battalion, and support group. Army engineers and line troops constructed 132 "Central American Tropical" (CAT) huts [3] (or their equivalent) to serve as barracks, offices, a post exchange, mess halls, and latrines. Part of the camp was tied into public electrical and sewage systems. Army engineers also constructed an unpaved road network, unspecified vertical security structures, and fuel storage berms.

According to DOD's March 8, 1984, comments to us, the Palmerola camp was specifically intended to be used after completion of the Ahuas Tara II exercises. It has in fact continued in use as command headquarters for later combined exercises,

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The exercise-constructed camp at Palmerola has become an integral part of the air base at the same location. The air base at Pal-

[3] CAT huts are 16 foot by 32 foot wooden structures with corregated tin roofs, built from locally purchased materials.

merola is a separate $13 million military construction project approved by the Congress in 1982. The completed facility, as currently proposed by DOD, will include a 8,000-foot jet-capable airfield and parking apron, and (as separately funded projects) air munitions storage facilities, and a "semipermanent" operations facility (including living quarters for 100 men). A similar project ($8 million in military construction funds) was approved for La Cieba Air Base in northern Honduras, although in 1983 the Congress prohibited DOD from obligating funds for that project pending the provision of an overall military construction plan for the region. *See* Pub. L. No. 98-116, 97 Stat. 795, 796 (1983).

Trujillo/Puerto Castilla: The second base camp was constructed near Trujillo, several miles south of the northern Honduran port of Puerto Castilla, and about 10 miles west of the Regional Military Training Camp (RMTC), a security assistance-funded project presently used for formal training of Honduran and Salvadoran troops. Near Trujillo, Navy Seabees constructed "Camp Sea Eagle," a complex of barracks, offices and messhalls built from 40 "South East Asia" (SEA) huts.[4] Camp Sea Eagle was used to house the 3/319 Infantry Battalion, which participated in field artillery exercises in the area. Seabees also constructed a 16-hut encampment nearby for their own use.[5]

About a mile from Camp Sea Eagle, Seabees helped to extend an existing asphalt airstrip from C-47 to C-130-capable length (from 3000 feet to 3500 feet). Seabee engineers performed grading and filling, and supervised paving operations performed by a Honduran firm. The paving contract cost about $120,000, charged to exercise O&M funds. According to DOD, C-130 use of the airstrip has left the surface "rutted and cracked," to an extent that it will soon be unusable. Honduras has sought compensation from DOD for repair of the damage.

In addition to camp and airstrip facilities at Trujillo, Navy Seabees constructed a "soil-cement" helicopter pad and concrete port off-loading ramp at Puerto Castilla, and built more than 5 miles of roads in the vicinity.

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At or near the RMTC security assistance project, Seabees constructed guard towers and roads, dug wells, repaired culverts, and constructed 10 CAT huts. An additional 17 CAT huts, also financed with exercise O&M funds, were contructed at the RMTC by Hondu-

[4] SEA huts are 16 foot by 48 foot wooden structures, built from pre-cut materials brought from the U.S.

[5] Camp Sea Eagle was inadvertently built in a swamp, which flooded during the exercise period, causing some huts to be damaged. At one time the Honduran government was considering purchasing the facility for 10 pecent of the cost of materials; we understand AID is currently considering acquiring the structures for use in other parts of Honduras.

ran troops, who had received instruction from Navy Seabees. According to DOD's March 8, 1984 comments, the CAT huts at the RMTC were constructed to house members of the 3/319 Artillery Battalion moved due to flooding at Camp Sea Eagle. Our own investigation showed, however, that huts were not used by members of that battalion, but were used to house Honduran RMTC security guards immediately upon construction.

Although improvements constructed in the Trujillo/Puerto Castilla area were used extensively during Ahuas Tara II, it is clear that a more extended use was also contemplated by DOD. For example, the exercise plan for Ahuas Tara II proposed the expansion of the Trujillo airfield

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U.S. Southern Command, Joint Task Force-11, Ahuas Tara II Exercise Plan (draft), August 3, 1983, p. 3 (emphasis added). In addition, Army officials have stated that the Trujillo airfield was extended specifically to support the nearby RMTC.

As of April 1984, the airstrip at Trujillo, although damaged, was still C-130 capable.

Aguacate: A third base camp was constructed by engineers of the 46th Army Engineering Battalion at Aguacate in eastern Honduras. The camp included an airfield facility and 8 CAT huts (or their equivalent), used as dining and administrative buildings. Engineers also installed a piped water system for the camp, consisting of over 13,000 feet of 3 inch pipe.

The airfield at Aguacate was 4300 feet in length prior to the commencement of Ahuas Tara II, and thus already capable of handling the largest aircraft used in-country during the exercise, the C-130 transport (which requires a 3500-foot runway). Army engineers, however, expanded the runway to 8000-feet and upgraded it with 30,000 cubic yards of local gravel. Construction also involved installation of cement drainage culverts, which, according to DOD, have been paid for by the Honduran government. Once paved, as apparently is planned by Honduras, the facility will be able to accommodate

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The airfield at Aguacate was used as a take-off point for two exercise events during Ahuas Tara II. According to DOD's March 8, 1984 comments, expansion of the airfield was necessary to accommodate parking for "transient aircraft" during the exercise, and was done in lieu of constructing a parking apron. DOD states that the airfield expansion was thus intended to fulfill exercise requirements. In addition, DOD notes that construction activities at Aguacate corresponded to DOD-established training requirements for participating combat engineers. While its justification for airfield

construction at Aguacate is founded on these exercise and training benefits, DOD does acknowledge that its construction activities contributed to a "longstanding" plan by the Honduran Armed Forces to make the Aguacate airfield usable for forward-basing of Honduran

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aircraft.

Ahuas Tara II planning documents show construction at Aguacate to have been conducted as part of an exercise activity to

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See Cable from JCS, Washington, to U.S. Commanders-in-chief, July 19, 1983. According to an August 10, 1983, cable from the U.S. Southern Command,

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As of April 1984, the airfield at Aguacate was still C-130 capable. Buildings were occupied by Honduran military personnel.

San Lorenzo/Choluteca: The fourth base camp constructed during Ahuas Tara II was at the southern port town of San Lorenzo. San Lorenzo was the headquarters of the 46th Army Engineering Battalion, as well as base for about 120 Special Forces personnel. The camp consisted of a C-130-capable dirt airstrip (expanded from an existing facility), and 94 CAT huts used for barracks, administrative facilities and mess halls. Other construction in the area included road-building and ammunition shelters. In addition, as part of anti-armor exercises, the 46th Engineers constructed 11 miles of earthen tank traps near Choluteca, just east of San Lorenzo. The Southern Command had initially planned to construct concrete tank traps in the Choluteca region, but amended its plans after Army JAG lawyers indicated that concrete structures would have to be military construction- or security assistance-funded.

Although facilities constructed at San Lorenzo were given substantial use during Ahuas Tara II, exercise planning documents show that the fulfillment of exercise requirements was not the only purpose for such construction. The original exercise plan for Ahuas Tara II contained the following background information:

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Ahuas Tara II Exercise Plan (draft), *supra,* p. 2 (emphasis added).

The exercise plan further explains that

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Id. The exercise plan specifically included, in support of an anti-armor field training exercise in the Choluteca area, the construction of a 3500-foot C–130 capable airstrip at nearby San Lorenzo, thus fulfilling the need specified by the Honduran General Staff.

The airfield facility at San Lorenzo was also used by U.S. troops during post-Ahuas Tara II exercises in March and has been used to support the current Grenadero I exercises.

As of April 1984, the airfield at San Lorenzo was still C–130 capable, and had been regraded by Honduran forces. We have been informed that the camp, although unoccupied, is in good condition. According to a Defense Property Disposal Office official in Panama, huts at San Lorenzo will be sold to the Honduran government for 20 percent of cost. Some huts, in the meantime, have been used by U.S. Army Engineers during the current (Grenadero I) exercise.

2. *Analysis:* Construction activities during the course of Ahuas Tara II were charged to O&M appropriations as operational expenses of the exercise. Although 10 U.S.C. § 2805(c) (1982) provides separate authority for financing a minor military construction project with up to $200,000 of O&M funds, this authority was apparently not the basis for DOD's use of O&M funds for its construction activities in Honduras. Consequently, the principal question to be addressed here is whether DOD has authority apart from 10 U.S.C. § 2805(c) to use O&M funds for its construction activities in Honduras.

It is a basic premise in appropriations law that expenses which are not necessary to carry out the purposes of a particular appropriation may not be funded from that source. As indicated previously, there are three factors to consider in applying the necessary expense rule: whether the expenditure reasonably relates to the object of the appropriation, whether it is otherwise prohibited by law, and whether it falls within the scope of another appropriation. *See* p. 427 *supra.*

Because military construction activities are generally performed in furtherance of specific operational requirements of the various military departments, we do not question whether expenditures for such activities are "reasonably related" to the purposes of O&M appropriations, the first of the three factors discussed above. Nonetheless, it is clear, based upon the two remaining factors, that O&M funds are not generally available for military construction activities, first because of a specific statutory prohibition contained in 41 U.S.C. § 12 (1982), and second because specific appropriations are made by the Congress for such purposes.

Section 3733 of the Revised Statutes, codified to 41 U.S.C. § 12, provides:

> No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

This provision is applicable to all executive departments, including the Department of Defense. *Sutton* v. *United States,* 256 U.S. 575, 579 (1921). It has been interpreted by this Office to require that funding for DOD construction projects be specifically authorized by the Congress; other, more general, appropriations are not ordinarily available for such projects. *See* 42 Comp. Gen. 212, 214-15 (1962); B-165289-O.M., October 22, 1968.

In addition to the restrictive statutory language of 41 U.S.C. § 12, such activities fall clearly within the scope of appropriations provided by the Congress for those purposes. Where construction is carried out for the use of a military department or defense agency, funding is provided under annual military construction appropriation acts, which typically provide funds to each military department or agency for:

> acquisition, construction, installation and equipment of temporary or permanent public works, military installations, facilities and real property * * *. *See* Military Construction Appropriations Act, 1984, Pub. L. No. 98-116, 97 Stat. 795 (1983).

Where such activities are conducted for the benefit of a foreign nation, funding is ordinarily provided under annual security assistance appropriations, such as those "for necessary expenses to carry out sections 23 and 24 of the Arms Export Control Act." *See* Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Sections 23 and 24 of the Arms Export Control Act authorize the President to finance the procurement by foreign countries of, *inter alia,* military "design and construction services." 22 U.S.C. §§ 2763-64 (1982). *See also* 22 U.S.C. § 2769 (1982), relating to Foreign Military Construction Sales.

Based, therefore, on the statutory prohibition of 41 U.S.C. § 12, as well as on the existence of other more specific appropriation categories, we conclude that military construction activities, except as specifically permitted under 10 U.S.C. § 2805(c), may not be financed from general appropriation categories such as O&M. This office has reached the same conclusion in previous cases. For example, in a 1961 report on DOD's misuse of O&M funds for military construction activities, we stated:

> Ordinarily, because of the restrictions in section 3678, Revised Statutes (31 U.S.C. § 628) [now codified to 31 U.S.C. § 1301(a)], and section 3733, Revised Statutes (41 U.S.C. § 12), use of operation and maintenance funds to finance construction or construction-type projects, constituting public improvements under section 3733, would have to be specifically authorized unless [under the predecessor to 10 U.S.C. § 2805(c)] the projects were urgently needed and did not exceed $25,000. B-133316, January 24, 1961 (airfield construction at Ft. Lee, Virginia, and other unauthorized construction).

Having stated our opinion that military construction activities, as a general rule, must be financed from funds specifically appropriated therefor, it is necessary to determine whether that rule applies to the present case. In its March 8, 1984 response to our request for comments, DOD justified its use of O&M funding of exercise construction activities on three grounds: the temporary nature of the facilities constructed, the fact that facilities constructed were used to fulfill various exercise needs, and the training benefit to engineers involved in the construction. The last two factors relate to whether the activities in question have a readiness or operational benefit, an aspect of construction that we have already acknowledged, but which does not eliminate ordinary military construction funding requirements.[6] The first factor, however, is one that may in fact be determinative in the present case. Although military construction appropriations are provided for both "temporary and permanent" facilities (*see* Military Construction Appropriation Act, 1984, *supra,* p. 433), both DOD regulations and the decisions of this Office recognize that certain types of temporary structures or facilities need not be considered to be public works for purposes of determining proper funding sources for construction activities.

Defense Department regulations define three categories of permanency of construction: "permanent" (expected to last more than 25 years), "semi-permanent" (to last from 5 to 25 years), and "temporary" (to last less than 5 years). *See* DOD Instruction 4164.14, December 21, 1966. Army regulations governing the conduct of joint exercises provide guidance as to which activities are properly chargeable to O&M exercise funds. *See* Army Regulation (AR) 350-28, App. J, December 15, 1983 (replacing AR 220-55, ¶ 23, July 1, 1978). These regulations provide the following example of obligations *not* properly chargeable to Army exercise O&M funds:

[6] For example, in its March 8, 1984 comments to us, DOD justified engineer construction activities at the Aguacate airfield on grounds that the project "enabled engineers to train on 84 Army Training Evaluation Program Tasks" by undergoing "training in construction management and equipment maintenance in [a] remote area for small field engineer elements." The Army Training and Evaluation Program (ARTEP) is a battalion-specific "reference document" for trainers and training managers, specifying training objectives and guidance. As DOD stated, the Engineer Combat Battalion (Heavy) ARTEP specifically includes as an assigned battalion task (at the company level) the construction of forward tactical landing strips. Nonetheless, in our view, the fact that an engineering unit performs tasks listed in the ARTEP does not mean that the performance of such activities may automatically be charged to O&M training or exercise funds. If DOD were to use Army engineering units to construct a new Honduran port complex, including administrative and storage buildings, piers, fuel storage tanks and pipelines, together with an associated all-weather airfield (all corresponding to ARTEP tasks), it is clear that military construction or security assistance funds would have to be used, no matter how beneficial the work would be from a training viewpoint. *Compare* Army Regulation (AR) 415-32, June 23, 1967, which provides guidelines covering the proficiency training of Army Engineer construction units through assignment to established military construction-funded projects.

Permanent or semipermanent construction. Costs of certain minor and temporary construction required for an exercise may be charged under special circumstances when authorized by the exercise directive. (An example is temporary latrines.) AR 350-28, App. J-2(k), December 15, 1983.

The regulation clearly does not specify that *all* temporary construction may be charged to exercise O&M funds, although this appears to be the interpretation made by those officials responsible for carrying out Ahuas Tara II. The sole reference to "temporary latrines" in AR 350-28 is in sharp contrast to barracks and support structures for 3000 troops, construction or expansion of three airfields, and other miscellaneous construction activities carried out under Ahuas Tara II and funded with exercise O&M appropriations.

The decisions of this Office also indicate that the "temporary structure" exception to ordinary military construction funding requirements is extremely limited in scope. In 42 Comp. Gen. 212 (1962), the Comptroller General addressed the question of whether funds appropriated to the Department of Defense (from property-disposal proceeds) for the operation of DOD's property-disposal program could be used to pay for minor temporary construction ("transitory shelters, concrete segregation bins and other work") in connection with that program. The Comptroller General held that construction of the facilities in question could not be funded as operational expenses of the program, based upon the requirement of 41 U.S.C. § 12 that construction of public improvements be authorized by specific appropriations. 42 Comp. Gen. at 215.

In interpreting 41 U.S.C. § 12, the Comptroller General stated:

The terms "public building" and "public improvements" as used in the foregoing statute likewise have been the subject of numerous decisions of the accounting officers over a long period of time. The decisions uniformly have been to the effect that any structure in the form of a building not *clearly of a temporary character* is such a public building or public improvement, the expenditures for which must be authorized by specific appropriations. Also, such structures as temporary sheds for the shelter of farm animals; portable houses for temporary use of employees; temporary portable buildings for use in the detention and treatment of aliens; barns, sheds, cottages, etc., of frame construction of a temporary nature with dirt floors and contemplated to be destroyed; hangars, shops and storehouses; and quonset huts, have been considered as being such public buildings or public improvements. *Minor structures clearly of a temporary nature* and intended to be used for only a temporary period have been held not to be public buildings or public improvements (26 Comp. Dec. 829), but the structures and improvements involved generally in your disposal program are clearly not of this nature. The mere fact that the buildings are prefabricated, movable, and accounted for as personal property, in itself, is immaterial as to whether they are public buildings or public improvements within the contemplation of section 3733, Revised Statutes. It is common practice today to construct both temporary and permanent structures with prefabricated material which may be dismounted and moved, but the structures are nevertheless public buildings or public improvements. 42 Comp. Gen. at 214-215. [Citations omitted and italic supplied.]

See also 30 Comp. Gen. 487 (1951) (Quonset huts); 6 Comp. Gen. 619 (1927) (frame shed). Although these and other cases involve only the construction of vertical structures, we believe that the same principles may be considered to apply to other types of public improvements as well, including roads and airstrips. Those principles,

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applied to the present case, prohibit the funding of exercise-related construction not "clearly of a temporary nature" as operational expenses of the exercise program. Such expenses must be financed separately as construction.

DOD has stated its view that all facilities constructed during Ahuas Tara II were temporary in nature, and, as evidence of this, has cited deterioration of Camp Sea Eagle, near Trujillo. As we noted previously, however, that facility was inadvertently constructed in a swamp and we do not consider it to be at all typical of those facilities built during the exercises. On the contrary, our own investigations (as recently as late April 1984) show that the majority of these facilities remain in good condition, and in fact continue to be used, both by U.S. and Honduran personnel. Although DOD's March 8, 1984 comments to us state that airfields and facilities "will deteriorate if not maintained" and that "Hondurans do not have resources to maintain," U.S. Army engineers in Honduras informed GAO auditors that airfields could be used indefinitely with a minor amount of maintenance. Facilities remaining in U.S. custody continue to be maintained by the U.S. military; those under Honduran control, we have observed, are being maintained by the Hondurans. In addition, as described previously, planning documents for the exercise clearly indicate DOD's intention that

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It is apparent to us that the majority of facilities constructed during Ahuas Tara II are substantially less "temporary" than many of those which we described in 42 Comp. Gen. 212 as requiring specific funding as public improvements. *See* 42 Comp. Gen. 212, 214 (1962). Consequently, it is our view that the majority of construction activities could not be funded out of O&M as ordinary operational expenses of the joint exercise.

This conclusion does not resolve the question of what appropriation sources could properly have been used for exercise construction activities. In our view, DOD could have chosen from one of several funding sources. We stated previously that two principal categories of appropriations are specifically provided by the Congress for military construction activities. When construction relates to facilities intended for use by a defense agency or military department, funds are ordinarily provided in the annual military construction acts; when facilities are provided for the benefit of a foreign government, construction is ordinarily provided through security assistance programs (such as the Foreign Military Construction Sales Program).

The 4 base camps and associated facilities constructed during Ahuas Tara II were used by U.S. forces during those exercises and, to a large degree, after their conclusion.

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Ahuas Tara II construction, it is our conclusion that most construction activities could properly have been financed by DOD as either military construction or security assistance: this Office would not have objected to DOD's selection of either category for any particular project. *See* 59 Comp. Gen. 518 (1980).

As indicated earlier, our discussion here has concerned DOD's authority to charge construction costs to O&M appropriations apart from the authority provided under 10 U.S.C. § 2805(c). Where DOD has charged construction expenses in Honduras to O&M as operational costs of Ahuas Tara II, we would not object to those obligations (so long as they did not exceed $200,000 per project) because they could properly have been charged to O&M as minor military construction costs under 10 U.S.C. § 2805(c). To the extent, however, that DOD has charged it, O&M appropriations with the costs of any individual construction project in Honduras in excess of $200,000, the excess charge was made in violation of the purposes-restriction of 31 U.S.C. § 1301(a). When adjusting its accounts to remedy any overcharge, O&M appropriations may be reimbursed from any military construction funds available for such readjustment (and which were available at the time of the original obligation). Alternatively,

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in adjusting its accounts, charge the entire construction cost component of any particular project to security assistance funds (again, subject to ordinary availability requirements).[7] If neither of these two adjustment alternatives are available, DOD should report excess charges to O&M as having been made in violation of the Antideficiency Act, 31 U.S.C. § 1341(a).

3. *Conclusion:* Apart from the specific statutory authority of 10 U.S.C. § 2805(c), DOD has no general authority to charge costs of construction activities to O&M appropriations. To the extent, therefore, that O&M funding was not available under 10 U.S.C. § 2805(c), exercise construction expenses charged to O&M were made in violation of 31 U.S.C. § 1301(a), which prohibits the application of appropriations to objects other than those for which they were made. In addition, to the extent that § 2805(c) funding was unavailable and alternate funding (either military construction or security as-

[7] DOD does not, however, have the option of charging project costs up to $200,000 to O&M under 10 U.S.C. § 2805(c) and charging costs in excess of $200,000 to security assistance funds, as it must elect between financing a project as security assistance or as military construction. *See* 59 Comp. Gen. 518 (1980).

sistance) was also unavailable, exercise construction projects charged to O&M were in violation of the Antideficiency Act, 31 U.S.C. §1341(a), which prohibits the incurring of obligations in excess of or advance of available appropriations.

DOD, in light of our conclusions here, should make adjustments, where feasible, to those appropriation accounts to which construction activities during Ahuas Tara II were charged; where adjustments are not feasible, DOD should report such obligations as being in violation of the Antideficiency Act.

B. *Radar Facilities*

The Defense Department has established two radar installations in Honduras, each originally deployed as part of joint combined exercises, but used extensively (both during and after exercises) for general support to both U.S. and Honduran military

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activities. All costs pertaining to these two radar systems have been paid from O&M funds.

In August of 1982, in response to a Honduran government request for U.S. assistance, the Secretary of Defense directed the Joint Chiefs of Staff to assess Honduran radar requirements. In October of the same year, a JCS staff study concluded that

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The TPS-43 radar system was initially installed at La Mesa Air Base in western Honduras, during the Ahuas Tara I exercise in February 1983. After that exercise, the system was placed in storage (in Honduras) until May 1983, at which time it was installed in a facility at Cerro la Mole, in southern central Honduras. The system, manned by 65 U.S. Air Force personnel, provides tracking data to a Honduras Air Force Operations Center at Tegucigalpa. The site at Cerro la Mole was prepared by the Honduran military with some assistance from U.S. troops. American units also installed trailers for living quarters.

A second radar system, a Marine Corps AN-TPS-63/65, was installed during August 1983 on Tiger Island, in the Bay of Fonseca. The Bay of Fonseca is located between El Salvador, Honduras, and Nicaragua, and has been cited as a major arms route between Nicaragua and Salvadoran insurgents. The installation, which supplements the one at Cerro la Mole, was manned and secured by about 100 U.S. Marines. Site preparation including construction of a small (C-7 capable) dirt airstrip, well-digging, and earthwork construction was performed by U.S. military personnel as part of the Ahuas Tara II exercise. Flight tracking data from Tiger Island were relayed to U.S. personnel at the Honduran Air Force Oper-

ations Center at Tegucigalpa. The Tiger Island installation finally closed down in May 1984.

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There are two principal cost components relating to the two radar facilities in question: installation costs and operational costs. Installation costs for both radar systems were relatively minimal, generally because extensive facilities are not necessary for such installations, and because some construction services (particularly at Cerro la Mole and including clearing, roadbuilding, installation of power lines) were provided by the Honduran government (although with some U.S. assistance). Nonetheless, as with other facilities constructed or installed in Honduras either as part of joint exercises or for other purposes, construction costs incurred by DOD cannot be regarded as mere operational expenses unless the facilities involved are clearly of a temporary nature. *See* discussion *supra,* p. 435-36.

As with base camp construction in Honduras (including airstrips) it is not apparent to us that radar installations, when established by DOD, were "minor structures clearly of a temporary character" as that phrase is used in 42 Comp. Gen. 212 (1962). The Tiger Island facility, although in actuality only operational for eight months, had no specific removal date when originally deployed; it was used to provide tracking data well after completion of Ahuas Tara II. The Cerro la Mole facility, although deployed for only a two-year period (thus falling within the "temporary" facility category defined in DOD regulations) is certainly capable, if deployment is extended, of being used for a much longer period of time. Additionally, in our view neither of these facilities is a "minor" improvement comparable to those considered in our previous decisions. It is therefore our opinion that installation costs should either have been funded as military construction or security assistance.[8] At the same time, however, it is unlikely that installation and site preparation costs at either facility exceeded $200,000, and it is probable that DOD could properly have financed installation costs with O&M funds as minor military construction under 10 U.S.C. § 2805(c). On this basis, we would not object to DOD's use of O&M funds for radar site preparation and installation expenses, although DOD should verify that conditions of 10 U.S.C. § 2805(c) have been met.

The second cost component associated with radar installations in Honduras relates to operational costs. These types of expenses make up the bulk of costs associated with the two radar installa-

[8] Like other facilities,

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Because of this dual benefit, we would not object to DOD's choice of either funding method.

tions. Because such costs clearly fall within the scope of O&M appropriations, use of such funds by DOD was proper.

One additional issue that has been raised, particularly in connection with radar installations, is the use of exercise personnel and funding for non-exercise projects. "Exercise" personnel were used for support of radar facilities in Honduras, including installation and operation of the TPS-43 during Ahuas Tara I, installation/operation of the TPS-63/65 at Tiger Island during and after Ahuas Tara II, and other general support (transportation, medical assistance) as needed at each facility. Through this assistance, "exercise" O&M funds were used to support radar facilities, even though such facilities were primarily used for non-exercise requirements.

No separate appropriation is made for "exercise" expenses; rather, such expenses are paid from lump-sum O&M appropriations made to each military department or defense agency. *See* footnote 2, *supra,* p. 426. Consequently, once the availability of O&M appropriations has been established for a particular purpose or activity, it is not legally significant (from a funding standpoint) whether the activity is performed by exercise personnel or by other DOD units. Thus, it is our view that, so long as O&M funding for radar facilities was authorized (both for operational expenses, and for installation expenses under 10 U.S.C. § 2805(c)), the use of exercise personnel and "exercise" O&M funding was permissible.

C. *Training Activities*

According to DOD's March 8, 1984 comments to us,

> [t]here was no formal training of Honduran troops as part of the exercise, however, the U.S. and Honduran forces participated in integrated exercises which included familiarization and safety orientation at no additional cost to the U.S.

This view differs significantly from our own observations, as described in our audit report GAO/C-NSIAD-84-8, March 6, 1984, and as discussed below.

During October 1983, a GAO field team in Honduras identified 3 types of training being conducted by U.S. forces as a part of the Ahuas Tara II joint combined exercises:

1. U.S. military personnel assigned to the 41st Combat Support Hospital at Comayagua/Palmerola provided three 5-week combat medic training courses for approximately 100 Hondurans. DOD later acknowledged that such classes took place, but stated that they were performed by off-duty U.S. volunteers, provided "humanitarian" medical instruction to Hondurans, and contributed to U.S. readiness by exposing U.S. personnel to "indigenous methods of operation and culture."

2. In Puerto Castilla, members of the 3/319th Field Artillery Battalion provided 3-4 weeks of instruction on 105 mm artillery to two Honduran artillery battalions prior to combined field training exercises. DOD describes the activity as a "22 day combined operations

period" for interoperability and safety development, and states that each gun section had a U.S. and a Honduran section chief and integrated crew. Our personnel, however, observed gun crews of 8-12 Hondurans being supervised and instructed by teams of 2-4 U.S. servicemen, half of whom spoke Spanish. We were told that, about the time that these events took place, Honduras took delivery (under the Foreign Military Sales Program) of 105mm artillery, the first guns of this type in Honduras' arsenal. We were informed by personnel of the Military Assistance Group that, without training provided under the exercise, Honduras would had to purchase the services of U.S. military training teams at a cost of from $250,000 to $500,000.

3. U.S. Special Forces personnel in San Lorenzo provided basic and/or advanced classroom and field training to four Honduran battalions, on mortars, fire-direction, and counterinsurgency tactics. This training was similar to that provided by security assistance-funded military training teams at the Regional Military Training Camp in Trujillo. DOD describes these activities as: joint review and practicing of tactics and techniques for interoperability, including some "minor individual remedial preparation" for safety and standardization.

Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e. to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department, some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure "interoperability" of the two forces.

At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress. Where such extensive "interoperability" training is in fact necessary, combined exercises should not be conducted without the formal training needed to equalize the participating forces.

A view similar to that expressed above was put forth in an Army Judge Advocate General (JAG) staff review of the Ahuas Tara II exercise proposal. The JAG analysis emphasized that

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In addition, previous guidance in this area was set out in a February 24, 1977 memorandum from the Department of Defense General Counsel. That memorandum stated that

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Based upon our own observations of formal training provided to Honduran soldiers "in preparation for" exercise participation (and othewise), the previous DOD guidance was disregarded by the U.S. Southern Command in its execution of Ahuas Tara II. Training provided to Honduran troops during the exercise, although certainly related to exercise activities, was essentially the same as that ordinarily provided through security assistance, and consequently should have been funded as such: security assistance funds are specifically provided by the Congress to be used to train the military forces of friendly foreign governments, including formal or informal instruction provided as part of training exercises. *See, e.g.,* Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983), providing funds for fiscal year 1984 to carry out credit sales and guaranties for procurement of defense services by foreign countries, under sections 23 and 24 of the Arms Export Control Act, 22 U.S.C. § 2763-64; section 47 of that Act (22 U.S.C. § 2794) defines "defense services" to include all types of military training.

The Defense Department, in its March 8, 1984 letter, has put forward several justifications for its training of Honduran soldiers as part of exercise operations, in addition to the contribution to "interoperability." DOD emphasizes that training of Honduran troops contributes to the readiness of U.S. forces by exercising the U.S. role of "force multiplier," by permitting U.S. troops to improve their professional skills in a bilingual environment and by exposing U.S. forces to indigenous cultures. As we stated in connection with our examination of construction activities under Ahuas Tara II, however, the mere fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be financed with O&M appropriations. We previously acknowledged that facilities constructed during the Honduran exercises contributed significantly to U.S. military readiness in the region, but concluded that they must be financed as military construction or security assistance. *See* p. 434, *supra.* The same is true in the case of training of foreign troops. The fact that such training has a concurrent benefit to the readiness of U.S. forces does not remove it from the scope of security assistance.

Regarding the provision of combat medic training to Honduran troops, DOD's March 8, 1984 comments to us imply that there are no funding problems in connection with these activities because they were "humanitarian" services performed by "off-duty" U.S.

troops, on a voluntary basis. We cannot agree. The activities that we observed constituted combat medical training of foreign troops, activities which we categorize as military training rather than civic or humanitarian assistance. We would also note that active duty military personnel, unless in an approved leave status, are considered as being "on-duty" at all times. *See* B-203251, December 15, 1981. Although an active-duty member may, when not scheduled to perform official duties, engage in activities that are not inconsistent with his military status, it is our view that the provision of military training to foreign troops constitutes a military function that should properly be considered as part of the official duties of that member, even if performed on a "voluntary" basis. DOD cannot discharge its responsibility to ensure proper funding of its activities by saying that they are performed by "off-duty volunteers."

We do not dispute the fact that the level of training provided to Honduran forces was generally necessary to prepare them for the exercise events in which they participated. It should, however, have been apparent to DOD at the time the exercises were planned that substantial training would be required for adequate Honduran participation: for example, DOD scheduled combined field artillery exercises using 105mm guns with Honduran soldiers who had never been trained on such weapons. In our opinion, DOD should have carried out exercise activities in coordination with a security assistance-funded training program, rather than treating training as an integral part of the exercise operation.

Based upon the foregoing, it is our opinion that the Department of Defense engaged in the training of foreign military forces during the course of the Ahuas Tara II exercises in Honduras, and should have financed such training as security assistance. To the extent that these activities were financed from O&M appropriations as exercise operational expenses, the Department violated 31 U.S.C. § 1301(a), which requires that funds be applied solely to the purposes for which they were appropriated. It is also possible that such activities were performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based on the availability of alternate funding sources to make the improperly used account whole.

D. *Civic and Humanitarian Assistance*

The Defense Department has long carried out a wide variety of humanitarian assistance and civic action programs in Central America, both as a part of, and independent from, combined exercises such as Ahuas Tara II. In some cases, assistance has been provided through written agreements with the Agency for International Development (AID) under authority of the Economy Act, 31 U.S.C. § 1535. In other cases, however, U.S. forces have carried out

humanitarian and civic activities without reimbursement from AID or the host-country.

During Ahuas Tara II, civic action and humanitarian assistance activities took place on an almost-daily basis. According to DOD, personnel of the 41st Combat Support Hospital conducted MEDCAP's (Medical Civil Action Programs) throughout Honduras over the course of the exercises, resulting in the treatment of over 46,000 Honduran civilian medical patients, 7,000 dental patients, 100,000 immunizations, and the treatment, under a veterinary program, of more than 37,000 animals. Medicines utilized for these activities were taken from U.S. Government supplies nearing the end of their shelf-life, or were donated (by the Honduran government or charitable organizations). In addition to this comprehensive medical aid, U.S. forces transported U.S.-donated medical supplies, clothing, and food to various locations in Honduras. In one case, a team of 15-20 Navy Seabees constructed a 20 foot-by-80 foot schoolhouse at the Village of Punta Piedra, using AID-supplied materials.

Notwithstanding the broad range and scope of humanitarian and civic action activities recently carried out by DOD in Central America, there appears to be some question within DOD itself as to the authority of such activities. At the time that the Ahuas Tara II exercise was being planned, the Army JAG staff review of the exercise proposal

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The JAG view also appears to reflect that of DOD's General Counsel. On December 1, 1983, we requested DOD to provide us with an explanation of its authority to conduct humanitarian or civic action programs in Central America. The response, from DOD's General Counsel, was that DOD has no separate statutory authority to carry out such activities, but could do so on a reimbursable basis on behalf of the Department of State or AID "under the authority of the Economy Act or other similar authority." In response, however, to our separate request to DOD for a description of reimbursement agreements or arrangements covering any or all of the wide range of Ahuas Tara II exercise civic/humanitarian activities, we were informed by the Assistant Secretary of Defense for International Security Affairs (in DOD's March 8, 1984 comments) that no such agreements existed. Although exercise personnel consulted with AID officials (and occasionally utilized AID-supplied provisions or materials, such as for the schoolhouse built at Punta Piedra), costs of carrying out civic/humanitarian activities were, on the whole, borne by DOD, and charged to exercise O&M funds.

The Department of Defense has recently started to reexamine in detail its conduct of civic/humanitarian activities. On January 12, 1984, Secretary Weinberger established a DOD "Task Force on Humanitarian Issues," to explore DOD's current authority in the area,

to identify DOD requirements, and to determine if legislative or regulatory changes are necessary. In particular, the task force was to consider "[r]evising *USC* Title 10 to include 'humanitarian' missions within the definition of military missions * * * [to] enable DOD to use 'exercise' and Operations and Maintenance (O&M) funds for civic action and humanitarian efforts."

The task force was due to report on April 30, 1984, although we have not yet been provided details of its work.

We agree with DOD's General Counsel that the Department's authority to carry out civic/humanitarian activities is limited in scope. The principal authority, as noted by DOD, is through Economy Act transactions, i.e., under an order placed by another Federal agency (such as AID) ordinarily responsible for carrying out such activities. *See* 31 U.S.C. § 1535. Economy Act orders are placed on a reimbursable basis, and, when made, constitute an obligation of the ordering agency (charged to funds appropriated by the Congress to that agency—in this case, for example, AID).

Apart from the authority of the Economy Act, DOD may carry out civic action activities on a limited basis through its security assistance programs. Under section 502 of the Foreign Assistance Act of 1961, defense articles and services may be provided to a foreign country for, among other purposes:

> the purpose of assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the United States in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability of the military forces to perform their military missions and be coordinated with and form part of the total economic and social development effort. 22 U.S.C. § 2302 (1982).

Based upon this authority, DOD may, through the provision of defense articles and services to Honduras under security assistance programs, assist the Honduran government with civic projects and programs. The legislative history of this provision provides that:

> any civic action activity should be incidental to the performance of the usual duties of a military unit or a byproduct of the presence of such unit in a particular locality. The construction of a schoolhouse might qualify as well as a village access road, a small community sanitation project, or other activities that improve the relationship of the military to the local civilian population. The primary purposes of military assistance should be to meet military requirements. * * * The committee wants to make clear that civic action programs are to be neither extensive nor expensive. H.R. Rep. No. 321, 89th Cong., 1st Sess. 26–27 (1965).

Similar authority is provided under section 4 of the Arms Export Control Act, 22 U.S.C. § 2754 (1982), in connection with Foreign Military Sales.

Based upon DOD's March 8, 1984 comments to us, it does not appear that civic/humanitarian activities under Ahuas Tara II were performed either under authority of the Economy Act or as incidental to DOD's security assistance programs. Instead, DOD has justified such activities on the basis (1) that they were "ancil-

lary" to exercise events, (2) that in some cases, they provided training to participating U.S. units, and (3) that they contributed to U.S. regional readiness by improving relations with friendly foreign nations and by creating a positive image of the U.S. military among the indigenous population.

As was the case with exercise-related construction of facilities and training of Honduran forces, we do not dispute DOD's assertion that civic and humanitarian activities conducted during the course of Ahuas Tara II had distinct operational benefits (i.e. training experience of U.S. medical units) and contributed to U.S. regional readiness. Again, however, the fact that an activity carried out by DOD has a readiness or operational benefit does not mean that it may automatically be financed with O&M appropriations: that factor is but one of three that must be considered in making a determination as to proper funding source. Another source may be required if the activity is otherwise prohibited by law or falls within the scope of another category of appropriations. *See* p. 427 *supra.*

In this case, it is our view that civic/humanitarian assistance activities by DOD fall clearly within the scope of other appropriation categories and thus may not be financed with O&M funds. The types of civic and humanitarian assistance provided during the exercises are similar to those ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.,* administered by the U.S. International Development Cooperation Agency (of which AID is a part). *See* Executive Order 12163, September 29, 1977, as amended. Funds for such foreign assistance activities are specifically provided by the Congress in annual appropriations acts. *See e.g.,* Further Continuing Appropriations Resolution, 1984, Pub. L. No. 98-151, § 101(b)(1), 97 Stat. 964, 966 (1983). Alternatively, as noted above, minor assistance projects may be carried out where incidental to activities performed under authority of section 502 of the Foreign Assistance Act of 1961, 22 U.S.C. § 2302, or section 4 of the Arms Export Control Act, 22 U.S.C. § 2754. In either case, it is our opinion that DOD's operation and maintenance funds may not be used to finance such activities in light of the availability of other appropriations specifically provided therefor.

Based on the above, it is our conclusion that DOD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a). As with DOD's use of O&M funds for training of foreign forces (and military construction in excess of that permitted under 10 U.S.C. § 2805(c)), such activities may also have been performed in violation of the Antideficiency Act. DOD should make a final determination in this regard based upon the

availability of alternate funding sources to reimburse the improperly used account.

III. SUMMARY

We have attempted, in the foregoing analysis, to address separately a number of different categories of activities carried out by DOD during the course of the Ahuas Tara II joint combined exercises in Honduras, to determine the propriety of DOD's financing of such activities as incidental operational expenses of these exercises. Although we recognize that most, if not all, of the activities examined in some way contributed to exercise requirements and to regional readiness goals, our analysis has focused upon other factors relevant to a determination of funding availability, particularly whether the activities in question fall more properly within the scope of another appropriation category.

Based upon this analysis, we conclude:

—Exercise-related construction should not have been charged to O&M appropriations, except under authority of 10 U.S.C. § 2805(c), which permits the use of up to $200,000 of O&M funds for minor military construction projects.

—Operational expenses of radar installations in Honduras were properly charged to O&M funds. Site preparation and installation costs, however, should only have been funded with O&M if less than $200,000 per project, pursuant to 10 U.S.C. § 2805(c).

—In at least three instances, DOD provided training to Honduran armed forces in connection with the Ahuas Tara II exercises. Such training, comparable to that ordinarily provided through security assistance, should have been funded with security assistance appropriations.

—Civic action and humanitarian assistance activities carried out by DOD during Ahuas Tara II were improperly charged to O&M funds as operational expenses of the exercises. Such activities should have been carried out under a reimbursable order under the Economy Act, 31 U.S.C. § 1585.

[B-214231, B-214270]

Contracts—Requests for Quotations—Specifications—Brand Name or Equal—"Equal" Product Evaluation

In brand name or equal solicitations, the overriding consideration in determining the equality or similarity of an offered product to the named product is whether the "equal" product performs the needed function in a like manner and with the desired results, not necessarily whether certain design features of the named product are present in the "equal" product.

Contracts—Requests for Quotations—Specifications—Restrictive—Unduly Restrictive

Although an agency generally enjoys broad discretion in determining its needs, when a protester challenges a particular specification as being unduly restrictive,

the burden is then upon the agency to establish *prima facie* support for the restriction, a burden clearly not met here.

Matter of: Lista International Corporation, June 25, 1984:

Lista International Corporation protests certain alleged improprieties in the use of brand name or equal specifications for storge cabinets under request for quotations (RFQ) Nos. N62383-84-Q-3015 and N62383-84-Q-5045, issued by the Department of the Navy, Military Sealift Command, Pacific (MSCP). Lista complains that the RFQs' product purchase descriptions, which required quotations on either specific Stanley-Vidmar model number cabinets and accessories, or products which were "equal" or "similar," unduly restricted competition. We sustain the protests.

MSCP issued the solicitations on January 20, 1984, seeking quotations from three firms—Lista, Rack Engineering, and Stanley-Vidmar—who hold multiple award, mandatory Federal Supply Schedule contracts for the types of storage cabinets being procured. Lista did not respond to the RFQs but rather protested that the incorporation of Stanley-Vidmar design features in the descriptions unduly restricted competition. Because the cabinets were intended for use on two Navy vessels scheduled for imminent deployment to combat-ready duty stations, MSCP issued purchase orders to Stanley-Vidmar, which quoted the lowest price under both RFQs, despite the filing of Lista's protests.

Lista asserts that the product purchase descriptions were improper because, rather than stating the salient or performance characteristics of the Stanley-Vidmar cabinets desired by MSCP to fulfill its minimum needs, and which could be met by alternate manufacturers, they contained numerous features of design that were exclusive to the Stanley-Vidmar product. Lista asserts that certain design features required by the purchase descriptions were not performance characteristics which served to express the Government's minimum needs, but were merely verbatim Stanley-Vidmar product specifications not reasonably related to those needs. Lista urges that the incorporation of such Stanley-Vidmar design features into the purchase descriptions unduly restricted offers to that one product source. We agree.

The Defense Acquisition Regulation, § 1-1206.2(b), *reprinted in* 32 C.F.R. pts. 1-39 (1983), requires that brand name or equal purchase descriptions "set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government." We have held that failure of the solicitation to list the salient characteristics of the desired item is an improper restriction on competition that requires cancellation or amendment of that solicitation. 41 Comp. Gen. 242 (1961); *Lutz Superdyne, Inc.*, B-200928, Feb. 19, 1981, 81-1 CPD ¶114.

We concur with Lista's assertion that MSCP, for the most part, merely restated Stanley-Vidmar product specifications in the pur-

chase descriptions rather than stating only salient or performance characteristics of the named product deemed necessary to meet MSCP's needs. We find nothing objectionable in those specifications that are functional in nature, such as those that required offered cabinets conform to certain exterior dimensional limits (apparently because of the obvious space restrictions imposed by shipboard use) and that the drawers be able to support a specified load and be fully extendable. However, we agree with Lista that the purchase descriptions also contained requirements—such as that the cabinets have outer coverings welded to six interior columns, and that the drawers should have exact interior widths of 25⅛ inches—that were purely design features peculiar to the Stanley-Vidmar product and had little or no relation to the agency's needs.

The overriding consideration in determining the equality or similarity of another commercial product to the named product for purposes of acceptability in this type of procurement is whether its performance capabilities can be reasonably equated to the brand name product referenced, that is, whether the "equal" product offered can do the same job in a like manner and with the desired results, not necessarily whether certain design features of the named product are present in the "equal" product. 45 Comp. Gen. 462 (1966). It is inappropriate for an agency to use design specifications where the agency is capable of stating its minimum needs in terms of performance specifications that would be met by alternate designs. *Viereck Company,* B-209215, March 22, 1983, 83-1 CPD ¶ 287. Nothing in the record demonstrates that the incorporated design features were necessary to meet MSCP's basic requirements.

In this respect, although an agency generally enjoys broad discretion in determining its needs, when a protester challenges a particular specification as being unduly restrictive of competition, it is incumbent upon the agency to establish *prima facie* support for the restriction. See *Constantine N. Polites & Co.,* B-189214, Dec. 27, 1978, 78-2 CPD ¶ 437. Such support should consist of an explanation establishing a reasonable basis for the agency's determination that the restriction is needed to meet the agency's needs. *B.J. Sales Inc.,* B-213121, Jan. 25, 1984, 84-1 CPD ¶ 118. Since MSCP has offered no such rationale in its administrative reports on Lista's protests, we can only conclude that the incorporation of the numerous Stanley-Vidmar product design features into the purchase descriptions was an undue restriction on competition that effectively limited acquisitions under both RFQs to that one product source.

The purchases have been completed, so that no remedial action is possible. By separate letter, however, we are recommending to the Secretary of the Navy that the deficiencies noted by this decision be avoided in similar future procurements.

The protests are sustained.

[B-214927]

Bids—Guarantees—Bid Guarantees—Irrevocable Letter of Credit—Acceptability

Contracting officer properly rejected protester's bid on certain line items as nonresponsive and awarded contract for those items to another bidder where "irrevocable letter of credit" submitted by protester to comply with invitation for bids' (IFB) bid guarantee requirement is defective because letter of credit does not name protester as principal and, therefore, Government would not receive full and complete protection contemplated by IFB.

Matter of S & S Contracting, June 26, 1984:

S & S Contracting (S & S) has filed a protest under invitation for bids (IFB) No. R4-2-84-12 issued by the Forest Service, United States Department of Agriculture, for tree planting services in the Boise National Forest. S & S charges that the Forest Service improperly rejected its bid as nonresponsive for failure to provide an acceptable bid guarantee as required by the IFB.

The protest is denied.

S & S contends that, under the IFB, it could and did properly submit an "irrevocable letter of credit." S & S points out that the IFB contained a sample bid bond, but no sample letter of credit. Therefore, S & S contacted the contracting officer on several occasions to ascertain the proper form for an acceptable letter of credit. The contracting officer stated that there was no required format for a letter of credit and that a standard letter of credit from the protester's bank would be acceptable. The protester obtained a standard letter of credit from its bank and submitted it with its bid. When bids were opened on March 26, 1984, S & S was the low bidder on line items Nos. 1, 2, 4 and 9. As permitted by the IFB, S & S limited its bid to require it to accept award of only two of these four line items. By letter of March 28, 1984, S & S was notified that the contracting officer had rejected its bid as nonresponsive because of deficiences in its letter of credit. On that date, line items No. 1 and No. 4 were awarded to A & L Reforestation. Line items No. 2 and No. 9 were eventually canceled in accord with the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.404-1(b)(5) (1983).

The Forest Service reports that the letter of credit submitted by S & S was deficient for two reasons. First, the letter of credit did not contain any indication that it was drawn on S & S's account. Second, the letter of credit contained a qualifying statement which made payment contingent upon the sight draft presented to S & S's bank being accompanied by documentary proof that the contractor (which was not named in the letter of credit) had failed to accept award of the contract or had not performed according to the solicitation. Contrary to S & S's argument that the Forest Service should have waived these irregularities as minor, the Forest Service determined that these irregularities should not be waived. Since

the bid was nonresponsive, the contracting officer determined that S & S should not be given an opportunity to correct or explain its bid because that would give S & S an opportunity to accept or reject award after all bid prices had been revealed.

S & S contends that its bid was rejected solely because of the improper format of its letter of credit. S & S does not deny that its letter of credit did not name it as principal, but urges that the Forest Service could easily have ascertained that the letter of credit was issued on behalf of S & S by simply telephoning the bank. S & S also argues that, assuming that its letter of credit was deficient, it was in the Government's best interest to waive the deficiencies because award of line items 1 and 9 to S & S would save the Government a considerable amount of money. Other than suggesting waiver, S & S does not address the Forest Service's charge that the letter of credit was also deficient because it contained a requirement for documentary proof of nonacceptance of the contract or failure to perform properly.

A bid bond requirement is a material part of an IFB, and a contracting officer cannot generally waive the failure to comply, but must reject as nonresponsive any bid not accompanied by the required bond. See *Chemical Technology, Inc.,* B-192893, December 27, 1978, 78-2 CPD 438, and cases cited. The rationale for this rule is that waiver of the bid guarantee requirement would have the tendency to compromise the integrity of the competitive bid system since it would (1) make it possible for a bidder to decide after bid opening whether or not to have his bid rejected, (2) cause undue delay in effecting procurements, and (3) create inconsistencies in the treatment of bidders due to the subjective determinations contracting officers would have to make as a matter of necessity. See *Chemical Technology, Inc., supra.*

S & S has apparently misunderstood the basis for the contracting officer's rejection of its bid. There is no question that an irrevocable letter of credit complies with the IFB's bid guarantee requirement. Nor is any special form required by either the IFB or procurement regulations. See *Chemical Technology, Inc., supra.* However, before any instrument can be accepted as a letter of credit, it must meet certain general requirements. Here, the instrument which S & S offered as a letter of credit was not rejected because it was submitted in one form rather than another, but because the contracting officer concluded that it was not a valid letter of credit. We agree.

A letter of credit is essentially a third-party beneficiary contract by which a customer of a financial institution wishing to transact business induces the financial institution to issue the letter to a third party whose drafts or other demands for payment will then be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some entity other than the customer for

the credit of the customer. See *Chemical Technology, Inc., supra;* see, *generally, Juanita H. Burns and George M. Sobley,* 55 Comp. Gen. 587 (1975), 75-2 CPD 400.

The determinative question in judging the sufficieny of a letter of credit is whether the letter of credit could be enforced if a bidder does not execute the required contract documents. See *Truesdale Construction Co., Inc.,* B-213094, November 18, 1983, 83-2 CPD 591. Generally, suretyship arises only by the express agreement of the surety (the bank) to be bound on behalf of the principal (S & S). *Long's Air Conditioning, Inc.,* B-187566, January 6, 1977, 77-1 CPD 11. A bidder need not comply with the exact requirements relating to bid bonds in order to be considered responsive, so long as the surety would be liable notwithstanding any deviations. See *J. W. Bateson Company, Inc.,* B-189848, December 16, 1977, 77-2 CPD 472. However, in our opinion, since S & S was not named as principal in the surety agreement, it is doubtful whether the letter of credit could be enforced by the Forest Service, and we do not believe that the Government would receive the full and complete protection it contemplated in drafting the IFB. See *Juanita H. Burns and George M. Sobley, supra.* We have held that a bid bond which names a principal different from the named bidder is deficient and the defect may not be waived as a minor informality. *A. D. Roe Company, Inc.,* 54 Comp. Gen. 271 (1974), 74-2 CPD 194. Furthermore, S & S's suggestion that the contracting officer should have called the bank to ascertain that S & S was indeed the principal would not have been proper since a nonresponsive bid cannot be made responsive by actions taken after bid opening. See *Truesdalc Contruction Co., Inc., supra;* see *also A. D. Roe Company, Inc., supra.* Finally, although acceptance of S & S's bid might result in a monetary savings to the Government in this procurement, we have often observed that the maintenance of the integrity of the competitive bidding system is more in the Government's best interest than the savings to be obtained by acceptance of a nonresponsive bid. *A. D. Roe Company, Inc., supra.*

In view of the above, we conclude that the contracting officer properly determined that S & S was ineligible for award of a contract under this solicitation.

The protest is denied.

[B-213515]

Bids—Evaluation—Incorporation of Terms by Reference—*Christian* Doctrine

Where Army failed to delete late bid provision in paragraph 8 of standard form 22 and substitute section 7-2002.2 of the Defense Acquisition Regulation, inadvertent error may not be cured under the "Christian Doctrine" since the Christian Doctrine does not permit the incorporation of mandatory provisions into an invitation for bids (IFB) when they have been inadvertently omitted.

Bids—Late—Mail Delay Evidence—Certified Mail

A postage meter machine impression, whether imprinted by a postal employee, at a self-service post office, or by a private party, is not an acceptable "postmark" to establish the date of mailing of a late bid.

Bids—Late—Mail Delay Evidence—Certified Mail—Mail Receipt, But Not Envelope, Postmarked

Where IFB requires a "postmark" on both envelope and on original certified mail receipt and where hand-cancellation bull's eye postmark was only on receipt while envelope had United States Postal Service meter machine impression, agency consideration of bid was improper since acceptable postmark must be present on both the bid envelope and receipt in order to establish the date of mailing of a late bid.

Matter of: Rainbow Roofing, Inc., June 27, 1984:

Rainbow Roofing, Inc. (Rainbow), protests the award of a contract to AAA Roofing Co. (AAA), under invitation for bids (IFB) No. DACA67-83-B-0072 issued by the Department of the Army (Army) for roof and gutter work at Fort Lewis, Washington.

We sustain the protest.

Bids were opened at 1 p.m., September 21, 1983, and, at that time, the apparent low bidder was Rainbow. Shortly after bid opening, AAA telephoned the Army and requested the bid results. After being informed that the Army had not yet received its bid, AAA advised the Army that its bid had been mailed on September 16, 1983, by certified mail.

AAA's bid package arrived on September 23, 1983. The envelope bore a United States Postal Service metered machine impression date of September 16, 1983, but did not have a machine hand-cancellation bull's eye postmark. Subsequently, AAA submitted the original certified mail receipt, which has a hand-cancellation bull's eye postmark dated September 16, 1983.

The Army states that paragraph 8 of standard form (SF) 22 was part of the IFB. The paragraph provides, in part, as follows:

> (c) The only acceptable evidence to establish:
> (1) The date of mailing of a late bid, modification, or withdrawal sent either by registered or certified mail is the U.S. Postal Service postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service. If neither postmark shows a legible date, the bid, modification, or withdrawal shall be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. Postal Service. Therefore, offerors should request the postal clerk to place a hand cancellation bull's-eye "postmark" on both the receipt and the envelope or wrapper.)

The Army indicates that normally this paragraph is deleted and section 7-2002.2 of the Defense Acquisition Regulation (DAR) (1976 ed.) is substituted. Unlike paragraph 8 of SF 22, which requires a postmark on both the envelope or wrapper and on the original receipt, section 7-2002.2(c)(1) appears to accept as sufficient evidence of mailing the postmark on the wrapper or on the original receipt. The Army argues that its inadvertent error in not deleting para-

graph 8 of SF 22 is cured under the so-called "Christian Doctrine" and that DAR § 7-2002.2(c)(1) permits the consideration of AAA's bid. See *G.L. Christian and Associates* v. *United States*, 312 F.2d 418, 160 Ct. Cl. 1 (1963). Alternatively, the Army argues that AAA's bid satisfied the evidentiary requirements under the late bid provision set forth in the IFB. Rainbow argues that the late bid provision specified in the IFB controls and that provision requires a hand-cancellation bull's eye on both the envelope and the receipt in order to establish satisfactory evidence of mailing.

Initially, we note that the Army argues that Rainbow's protest to this Office is untimely since it was filed more than 10 working days after Rainbow had actual knowledge of the award to AAA. Under our Bid Protest Procedures, however, protests must be filed with either the contracting agency or this Office not later than 10 working days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1983). Here, Rainbow timely protested the September 30 award to AAA by letter dated October 5. Rainbow's subsequent protest to this Office, filed before the Army resolved Rainbow's initial protest, did not have to satisfy the same 10-day requirement and, therefore, will be considered on the merits. *Chemex Alaska,* B-212227, November 18, 1983, 83-2 CPD 586.

The Army acknowledges that our decisions have limited the Christian Doctrine to the incorporation of mandatory contract provisions into otherwise properly awarded Government contracts. The Christian Doctrine has never been extended to include the incorporation of mandatory provisions into an IFB when they have been inadvertently omitted. 47 Comp. Gen. 682, 685 (1968); *Mosler Systems Division, American Standard Company,* B-204316, March 23, 1982, 82-1 CPD 273. However, the Army recommends that we reevaluate our position based on the Court of Claims decision in *Condec Corporation* v. *United States,* 569 F.2d 753, 177 Ct. Cl. 958 (1966). In *Condec,* the Court of Claims incorporated into the solicitation an Armed Services Procurement Regulation (ASPR) provision permitting the telegraphic modification of a bid where that provision had been omitted from the IFB. The Army contends that the present factual situation is similar and that the evidentiary requirements of the DAR provision should likewise be incorporated into this solicitation.

We disagree. The *Condec* decision merely stands for the proposition that it is legally permissible for a bidder who has submitted an otherwise successful bid to reduce that bid after bid opening. *Park Construction Company,* B-190191, July 18, 1978, 78-2 CPD 42; *Mitchell Brothers General Contractors,* B-192428, August 31, 1978, 78-2 CPD 163. Condec had already submitted the low responsive bid and the issue was whether the Government could take advantage of a telegraphic modification lowering that bid. The consideration of the omitted ASPR provision did not conflict with any of

the stated provisions in the solicitation nor did it affect the propriety of considering Condec's bid.

Here, the Army is attemping to vary a stated term of the solicitation after bids have been opened. Bidders were specifically notified that late bids would be considered in accordance with paragraph 8 of SF 22 and we have held that the late receipt of a bid will result in a bid's rejection unless the specific conditions of the IFB for the consideration of late bids are met. *Intermed, Inc.*, B-213265, October 31, 1983, 83-2 CPD 522. Although the DAR provision was inadvertently omitted from the IFB, we cannot permit the Army to consider bids for award on a basis other than that specified in the IFB. See *Geronimo Service Co.*, B-209613, February 7, 1983, 83-1 CPD 130; *Emerald Maintenance, Inc.; The Big Picture Company*, B-209082, B-209219, March 1, 1983, 83-1 CPD 208. Accordingly, we find that the late bid provision specified in the IFB should be applied in determining whether AAA's bid may properly be considered.

The Army contends that under the late bid provision specified in the IFB, AAA's bid was properly considered. Although recognizing that in 60 Comp. Gen. 79 (1980), we held that a hand-cancellation bull's eye was required on both the envelope and the receipt under this provision, the Army argues that because AAA's bid envelope bore a United States Postal meter machine impression rather than a privately controlled postage meter machine impression, the evidentiary requirements of paragraph 8 of SF 22 are satisfied.

In 60 Comp. Gen. 79, *supra*, we found that because the United States Postal Service could not substantiate that a certified bid envelope was actually deposited in the mail on the date shown on the receipt, a bidder must obtain a hand-cancellation bull's eye on the envelope as well. Although in that case we were confronted by a postage meter machine impression made by a privately controlled meter machine, Federal Procurement Regulations (FPR) amendment 193, July 6, 1978, clearly states that the applicable FPR provision was modifed to:

> remove * * * a postage meter machine [postmark] (whether operated by a postal employee, at a self-service post office, or by a private party) from recognition as an acceptable indication of the time of mailing.

Consequently, even where the envelope bears a United States Postal meter machine impression, a hand-cancellation bull's eye is still required on both the envelope and the receipt. Since AAA's bid envelope did not have a hand-cancellation bull's eye evidencing the date of mailing, the bid was improperly considered. Accordingly, Rainbow's protest is sustained and we recommend that the Army consider the feasibility of terminating AAA's contract for the convenience of the Government.

[B-214018]

Officers and Employees—Transfers—Real Estate Expenses—Loan Origination Fee

A transferred employee who purchased a new residence incurred a 5 percent loan fee which was described in the loan agreement as a "loan origination fee." The agency allowed reimbursement for only 1 percent of the loan amount, based on HUD's advice that a 1 percent loan origination fee is customary in the local area, and the employee has reclaimed the additional 4 percent. The agency's determination to allow reimbursement for 1 percent of the loan amount is sustained, based on the advice provided by HUD. The employee's claim for the additional 4 percent is denied because that portion of the fee represents a nonreimbursable mortgage discount.

Matter of: Roger J. Salem—Real Estate Expenses Loan Origination Fee, June 27, 1984:

Mr. W. D. Moorman, an authorized certifying officer of the United States Department of Agriculture, requests our decision concerning the reclaim of Mr. Roger J. Salem, an employee of the Department's Office of Inspector General. The issue for our determination is whether Mr. Salem may be reimbursed for the full amount of the 5 percent loan fee he incurred when purchasing a residence at his new duty station, based on the lender's characterization of the entire fee as a "loan origination fee." We hold that the employee was properly reimbursed for only 1 percent of the 5 percent fee for the reasons stated below.

BACKGROUND

Effective May 1, 1983, Mr. Salem was transferred from Indianapolis, Indiana, to Chicago, Illinois. He purchased a new house in Chicago, entering into a loan agreement which required the payment of a "loan origination fee" of $4,500, representing 5 percent of a conventional loan of $90,000. Although the loan documents do not identify the purpose of the 5 percent fee, the loan agreement indicates that payment of the fee reduced the annual percentage rate from 11.042 percent interest to a "contract interest rate" of 10.4 percent.

The Department of Agriculture allowed Mr. Salem reimbursement for $900, representing 1 percent of the loan amount, based on advice from the Department of Housing and Urban Development (HUD) that lenders in the Chicago area customarily charge a loan origination fee of 1 percent. Mr. Salem reclaimed the additional 4 percent ($3,600), disputing the agency's determination that a 1 percent loan origination fee is customary in the Chicago area. He asserts that HUD does not determine the customary loan origination fee for each locality, but uses a nationwide figure of 1 percent based on the maximum fee which may be charged to a purchaser whose mortgage is insured by the Federal Housing Administration (FHA). See 24 C.F.R. § 203.27(a)(2)(i) (1983). Also, Mr. Salem has

submitted a clipping from the *Chicago Tribune,* dated October 23, 1983, which indicates that seven lending institutions in the Chicago area charge "loan origination points" ranging from 2 to 4 percent. Further, Mr. Salem claims that other Department of Agriculture employees transferring to the Chicago area have been reimbursed for loan origination fees which exceed 1 percent of the loan amount.

The Department of Agriculture states that, in its experience, HUD does determine the customary loan origination fee for a given locality. Further, the agency states that the "loan origination points" quoted in the *Chicago Tribune* survey appear to vary according to the type of financing obtained and the interest rate charged by the lender.

Against this background, the Department of Agriculture questions whether Mr. Salem may be reimbursed for an amount higher than 1 percent, based on the range of fees quoted in the *Chicago Tribune* survey. If not, the agency requests guidance concerning the type of documentation which would support payment of a loan origination fee higher than that which HUD has determined to be customary in the locality.

OPINION

The provisions of FTR para. 2-6.2d authorize reimbursement for various miscellaneous expenses associated with real estate transactions. Effective October 1, 1982, the General Services Administration (GSA) amended FTR para. 2-6.2d to permit reimbursement for loan origination fees. Prior to October 1, 1982, the reimbursement of loan origination fees was prohibited. The relevant part of the amended regulation provides as follows:

> d. *Miscellaneous expenses.*
> (1) *Reimbursable items.* The expenses listed below are reimbursable in connection with the sale and/or purchase of a residence, provided they are customarily paid by the seller of a residence in the locality of the old official station or by the purchaser of a residence at the new official station to the extent they do not exceed amounts customarily paid in the locality of the residence.
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> * * * * * * *
>
> (b) Loan origination fee;
> (2) *Nonreimbursable items.* Except as otherwise provided in (1), above, the following items of expense are not reimbursable.
>
> * * * * * * *
>
> (b) Interest on loans, points, and mortgage discounts; * * *.

In commentary accompanying the amended provisions of FTR para. 2-6.2d, GSA explained that the term "loan origination fee" refers to a lender's administrative expenses in processing a loan. 47 Fed. Reg. 44,566 (1982). Similarly, we have held that the term "loan origination fee," as used in FTR para. 2-6.2d(1)(b), refers to a fee which is assessed on a percentage-rate basis to compensate the lender for expenses of originating the loan, processing documents,

and related work. See B-209945, June 9, 1983, 62 Comp. Gen. 456; and *Robert E. Kigerl,* B-211304, July 12, 1983, 62 Comp. Gen. 534.

However, the term "loan origination fee" has also been used to refer to a mortgage discount or "points." See B-164812, September 3, 1970. Simply stated, a mortgage discount represents prepaid interest and is intended to compensate the lender for the fact that the interest rate on the mortgage is lower than that available from alternative investment opportunities. In line with the long-standing policy which prohibits payment of an employee's interest expenses, the provisions of FTR para. 2-6.2d(2)(b) expressly preclude reimbursement for interest, "points," and mortgage discounts. Based on this specific prohibition, we have consistently disallowed reimbursement for any charge which represents a mortgage discount. See *Erwin E. Drossel,* B-203009, May 17, 1982; and *Clarence O. Stout,* B-192186, October 23, 1978.

Accordingly, a lending institution's statement that a particular fee represents a "loan origination fee" cannot be accepted as the final legal characterization of the payment. See *Stanley Keer,* B-203630, March 9, 1982. We must examine the fee in light of the provisions of FTR para. 2-6.2d, as interpreted by decisions of this Office.

In Mr. Salem's case, it appears that the bulk of the lender's 5 percent charge represents a mortgage discount. As indicated previously, the loan agreement executed by Mr. Salem shows that the interest rate on the mortgage was adjusted downward after payment of the $4,500 fee. Furthermore, it is inconceivable that the lender's administrative expenses could have amounted to $4,500.

Although we presume that a portion of the 5 percent fee charged Mr. Salem was used to defray the lender's administrative expenses, we cannot identify the size of this portion from the available evidence. However, we find that the agency properly allowed Mr. Salem reimbursement for 1 percent of the loan amount, based on HUD's advice that lenders in the Chicago area customarily charge a loan origination fee of 1 percent. See FTR para. 2-6.3c. See also *Gary A. Clark,* B-213740, February 15, 1984.

By separate letter of today, we are advising GSA that fees which are characterized as "loan origination fees," and claimed as such under FTR para. 2-6.2d(1)(b), may actually represent mortgage discounts or points. The term "loan origination fee," as used in FTR para. 2-6.2d(1)(b), is not intended to include mortgage discounts or points, but since it is usually difficult or impossible to identify the exact amount of the lender's administrative expenses, we suggest in the letter that GSA amend the regulation to impose a specific percentage limitation on the amount which may be reimbursed for a loan origination fee. Pending such action, we will continue to determine claims for "loan origination fees" on a case-by-case basis.

For the reasons stated above, we hold that Mr. Salem's claim for an additional $3,600 as a loan origination fee may not be certified for payment.

[B-210620]

Federal Communications Commission—Participation in Trade Shows, etc.—Acceptance of Rent-Free Space, etc.

Acceptance by the Federal Communications Commission of offers of free exhibit space and appurtenant services at industry trade shows, expositions, conventions, and other similar events does not involve an "augumentation" of the Commission's appropriations, because no donation of funds has been made or accepted. The promoters of such events have the right to set the fees that are charged to exhibitors and the amount of the charge, if any, is up to the promoter.

Federal Communications Commission—Participation in Trade Shows, etc.—Acceptance of Rent-Free Space, etc.

Offers to the Federal Communications Commission of free exhibit space and appurtenant services at industry trade shows, exhibitions, conventions, and other similar events do not constitute "gifts" which it lacks authority to accept. The offers are not "gratuitous conveyances or transfers of ownership in property (made) without consideration." 25 Comp. Gen. 637 (1946). The Commission's participation in such events is a drawing card which results in increased admissions revenues for the promoters, and thus there is adequate consideration for the arrangement.

Federal Communications Commission—Participation in Trade Shows, etc.—Acceptance of Rent-Free Space, etc.

While dissemination of information to the public about radio technology is part of the Federal Communications Commission's mission, there is no statutory requirement that it be accomplished through participation in expositions, trade shows, etc. The Commission is free to decided to participate only if its resources will not be taxed through provision of free space and related services. *See* B-204326, July 26, 1982.

Matter of: Federal Communications Commission—acceptance of rent-free space and services at expositions and trade shows, June 28, 1984:

The General Counsel of the Federal Communications Commission has requested our decision on whether the Commission may legally accept offers of rent-free exhibition space (and other free services) in order to facilitate the Commission's participation in industry trade shows, expositions, conventions, and other similar events throughout the United States. For the reasons given below, we find that acceptance of such offers is permissible.

Periodically, the Federal Communications Commission is invited to participate in expositions, conventions, industry trade shows, and other similar events. The General Counsel mentions "boat shows" as examples of the events to which he refers. Participation by the Commission usually entails displaying and explaining the Commission's radio monitoring equipment and techniques, as well as responding to questions concerning the Commission's rules, licensing functions, enforcement, safety, and other matters relating

to the Commission's jurisdiction and activities. In participating in these events, the Commission sets up booths, dispatches knowledgeable staff members, and sometimes places mobile monitoring equipment on or near the convention grounds. The Commission participates in these events in order to inform the public about the efficient and effective use of radio technology.

Floor space at these affairs often commands premium prices. The General Counsel advises us that the Commission generally cannot afford to participate on a paying basis. However, many promoters recognize that the Commission's presence at these shows is an attraction. They actively solicit Commission participation and offer to provide floor or display space, together with necessary electrical power and appurtenances, at no charge to the Commission.

The General Counsel maintains that the Commission's participation in these events is proper and in furtherance of the functions that have been statutorily invested in it. Therefore, he argues, acceptance of these offers of rent-free space and related free services should not be deemed an impermissible augmentation of the Commission's appropriations.

As a threshold question, we do not object to the administrative determination by the Commission that participation in these events is directly relevant to its mission. Generally, appropriated funds are not available for participation by Government agencies in fairs or expositions without specific statutory authority. 2 Comp. Gen. 581 (1923). However, in this case, the Commission is charged by law with the duties to (i) investigate and study all aspects of radio technology (47 U.S.C. § 154(o)), (ii) promote safety of life and property through the use of radio technology (47 U.S.C. § 151), (iii) publish its reports and decisions in such form and manner as may be best adapted for public information and use (47 U.S.C. § 154), and (iv) to generally encourage the larger and more effective use of radio in the public's interest (47 U.S.C. § 303(g)).

The immediate question, however, is broader. Accepting the fact that the Commission's public information mission can be carried out, in part, through participation in these shows, may the Commission accomplish its mission by accepting donated space and services rather than by using its own appropriations to pay for them? We think the answer is clearly yes.

The concept of "augmentation" does not appear to be relevant in this case, because no donation of funds has either been made or accepted. Although there is no express statutory prohibition against augmentation of appropriated funds, the theory, propounded by the accounting officers of the Government since the earliest days of our nation, is designed to implement the constitutional prerogative of the Congress to exercise the power of the purse; that is, to restrict executive spending to the amounts appropriated by the Congress. *See,* for example, 9 Comp. Dec. 174 (1902).

Several implementing statutes further assure that agencies do not accept additional monies from sources other than the Congress itself. For example, 18 U.S.C. § 209 prohibits acceptance of any salary payment or other compensation for a Government employee from any source outside the Government. Funds may not even be transferred between separate Government appropriations without specific statutory authority. 31 U.S.C. § 1532. If contributions or donations from outside sources are made to Government agencies, in the absence of statutory authority to retain them, they must be deposited promptly in the general fund of the Treasury. 31 U.S.C. § 3302. Violations of any of the above statutes constitutes an illegal "augmentation" of the agency's appropriation and the funds must be disgorged and returned to the Treasury so that they can be appropriated as the Congress sees fit.

In the present case, however, no money changed hands, nor was money paid on the Commission's behalf to anyone else. A promoter who rents a designated amount of space in an exhibition hall owes the total rent to the owner of the hall, regardless of the number of individual occupants of the space. The promoter, of course, is free to recoup the amount expended by charging the various exhibitors for the space and any ancillary services provided to them. The amount of the charge—if any—is up to the promoter.

It might be argued that the offer of free space to the Government constitutes a "gift" which individual agencies are not authorized to accept, in the absence of statutory authority. In 25 Comp. Gen. 637 (1946), we defined "gifts" as "gratuitous conveyances or transfers of ownership in property without consideration." However, the provision of free space and ancillary services cannot really be characterized as a gift from the promoters made without consideration. The General Counsel states that the Commission's exhibit at one of these events is a drawing card which results in increased admissions revenues for the promoters. For this reason, it is to the advantage of the promoters to solicit the Commission's participation and to waive the usual fees. From the Commission's point of view, acceptance of the free space and services affords it with an additional opportunity to inform the public about radio technology at no increased cost to the agency. This mutually beneficial arrangement is neither an augmentation of appropriations nor an illegal retention of a gift.

We note further that the Commission has discretion to determine how to carry out its duty to inform the public, and is not required to participate in these events. According to the General Counsel, were it not for the offer of free space, the Commission would probably choose not to participate because of the high costs it would incur. *See* B-204326, July 26, 1982, in which we permitted the Army to accept free services from the American Association of Retired Persons in disseminating crime-prevention information. In that case too, the activity was generally within the agency's mis-

sion but it would not have had the resources to allocate to the extensive program which the Association felt was necessary.

For these reasons, we conclude that the Federal Communications Commission may legally accept offers of rent-free space and other free services in order to participate in conventions, trade shows, expositions, and other similar events to provide public information about radio technology and other related matters in accordance with its misssion.

[B-214152]

Travel Expenses—Advances—Unexpended Amounts Refund

To reduce his indebtedness for travel funds that this agency had advanced him, the employee submitted a claim for expenses he had incurred 11 years previously to ship his household goods incident to a permanent change of station. Even though his claim was barred by 31 U.S.C. 3702(b)(1) and his agency's salary deductions under 5 U.S.C. 5723(f) to collect the advance of funds were not barred, the employee's debt for the advance may be reduced to the extent of the allowable transportation expenses since the advance and allowable expenses involved the same transaction so that the employee had the defense of recoupment, which is never time-barred.

Matter of: Cullen P. Keough, June 28, 1984:

Mr. Cullen P. Keough, a Department of Labor employee, may have offset from his indebtedness for travel funds advanced to him the allowable expenses he incurred to ship his household goods incident to the permanent change of station on account of which the funds had been advanced.[1]

Mr. Keough transferred from Chicago, Illinois, to Kansas City, Missouri, in July 1972. He received an advance of funds in the amount of $1,537 in connection with his transfer and paid $1,710 to the shipper. Under the applicable law and regulations the Government would not reimburse him for the cost of additional insurance or for the cost of moving household goods exceeding 11,000 pounds. Therefore, he was entitled to reimbursement of only $1,170.32 from his employing office, or $357.68 less than it had advanced to him. At the time of his transfer, he did not submit to the employing office a voucher showing his payment of authorized transportation expenses. Ordinarily the amount of the advance would have been reduced by the authorized transportation expenses he paid, but his failure to submit a voucher left the entire advance recorded as his debt to the Government. The employing office did not detect the outstanding advance until some years later, but beginning in April 1983 it began deducting from his salary to recover the amount of the advance. Not until April 29, 1983, did Mr. Keough submit a claim for his payment of the household goods shipment in order to eliminate or reduce the amount of the recorded debt.

[1] The Assistant Secretary for Administration and Management, Department of Labor, requested this advance decision.

The request for decision asks whether the Government has the right to recover by salary deductions the entire advance of funds because Mr. Keough's claim for allowable expenses to offset the advance is barred by the statute of limitations. On the other hand, there is no time-bar to the agency's collection of the advance by salary deductions under 5 U.S.C. §§ 5705 and 5724(f).[2]

If Mr. Keough were required to have a valid claim for expenses to offset the travel advance, no offset would now be available to him. His expense claim, since it is of the type cognizable by the General Accounting Office, should have been presented within 6 years. 31 U.S.C. § 3702(b)(1); 58 Comp. Gen. 738 (1979). Mr. Keough's claim accrued in July 1972 when he incurred the transportation expenses, and he delayed almost 11 years before presenting it.

The law is clear, however, that under 5 U.S.C. §§ 5705 and 5724(f) the employee is not required to assert a claim against the United States in order to eliminate or reduce his indebtedness for an advance of funds. The advance is in effect a loan obligation of the employee that is discharged to the extent of the allowable expenses incurred. When the advance and the expenses involve the same transaction the employee by incurring the expenses for which the advance was made has the defense of recoupment against collection of the advance despite the time-bar under 31 U.S.C. § 3701(b)(1). See *Thomas R. Hopkins,* B-195738, April 1, 1980.

Mr. Keough has submitted reliable documentation showing that he incurred allowable expenses for the transportation of household goods. The advance for this purpose was repaid to the extent of the allowable expenses. Accordingly, further salary deductions from Mr. Keough should not be made and he should be paid the amount which was collected from him for refund of the travel advance to the extent that the collections exceeded the travel advance remaining after deduction of the allowable expenses for transportation of his household effects.

[B-215530]

Contracts—Options—Evaluation

There is no legal or regulatory requirements that an agency evaluate options in a particular procurement.

Matter of: International Business Investments, Inc., June 28, 1984:

International Business Investments, Inc. (IBI), protests any award under invitation for bids (IFB) No. DABT01-84-B-4010

[2] Administrative setoff pursuant to 31 U.S.C. § 3716(c)(1) is now limited to 10 years after the Government's right to collect the debt accrues, but the 10-year limitation is not applicable when another statute explicitly provides for collection by offset, 31 U.S.C. § 3716(c)(2).

issued by the Department of the Army, Fort Rucker, Alabama, for security guard services. IBI argues that the Army's decision not to include option periods is not in the Government's best interests since more competitive bids could be obtained if option periods were evaluated.

We deny the protest summarily. We do so without obtaining a report from the contracting agency, since it is clear from the information furnished by IBI that the protest is without legal merit. *U.S. Air Tool Co., Inc.,* B-214519, Feb. 14, 1984, 84-1 C.P.D. ¶ 200.

Our bid protest function is reserved for considering whether the contract award process in a particular procurement complied with statutory, regulatory or other legal requirements. *See* 4 C.F.R. part 21 (1983). We are unaware of any law or regulation which would require the contracting agency to evaluate options in this case. We note that section 17.202 of the Federal Acquisition Regulation (FAR) merely indicates that the contracting officer may include options in a contract when it is in the Government's best interests. FAR, § 17.202, 48 Fed. Reg. 41,102, 42, 171 (1983) (to be codified at 48 C.F.R. § 17-202). See also *AMS Manufacturing, Inc.—Reconsideration,* B-203589.2, Nov. 2, 1981, 81-2 C.P.D. ¶ 371. As a result, we find that it is a discretionary determination on the part of the contracting officer and, accordingly, we see no merit to IBI's argument that option periods should be included in this procurement.

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Although an agency generally enjoys broad discretion in determining its needs, when a protester challenges a particular specification as being unduly restrictive, the burden is then upon the agency to

CONTRACTS—Continued Page
Requests for quotations—Continued
Specifications—Continued
Restrictive—Continued
Unduly restrictive—Continued
establish *prima facie* support for the restriction, a burden clearly not met here. 447

DEBT COLLECTIONS
Waiver
Civilian employees
Compensation overpayments
Position qualification requirements invalidated
The propriety of compensation payments to contracting officers at Fort Monmouth, New Jersey, is questioned since the employees have not met a condition subsequent mandatory training requirement after promotion as set forth in a Department of Defense civilian career program manual. Office of Personnel Management (OPM) regulations mandate that agency-established position qualification requirements must be promulgated so that an evaluation can be made before an employee is appointed to a position. Since the position qualification training requirement did not have to be met at the time of appointment, it is invalid as inconsistent with OPM requirements and there is no basis for ordering recoupment of compensation from the employees involved 418

DEFENSE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Defense Department)

EQUIPMENT
Physical fitness equipment
Appropriation availability. (*See* APPROPRIATIONS, Availability, Physical exercise equipment)

FEDERAL COMMUNICATIONS COMMISSION
Participation in trade shows, etc.
Acceptance of rent-free space, etc.
Acceptance by the Federal Communications Commission of offers of free exhibit space and appurtenant services at industry trade shows, expositions, conventions, and other similar events does not involve an "augumentation" of the Commission's appropriations, because no donation of funds has been made or accepted. The promoters of such events have the right to set the fees that are charged to exhibitors and the amount of the charge, if any, is up to the promoter. 459

Offers to the Federal Communications Commission of free exhibit space and appurtenant services at industry trade shows, exhibitions, conventions, and other similar events do not constitute "gifts" which it lacks authority to accept. The offers are not "gratuitous conveyances or transfers of ownership in property (made) without consideration." 25 Comp. Gen. 637 (1946). The Commission's participation in such events is a drawing card which results in increased admissions revenues for the promoters, and thus there is adequate consideration for the arrangement 459

FEDERAL COMMUNICATIONS COMMISSION—Continued Page
Participation in trade shows, etc.—Continued
Acceptance of rent-free space, etc.—Continued
While dissemination of information to the public about radio technology is part of the Federal Communications Commission's mission, there is no statutory requirement that it be accomplished through participation in expositions, trade shows, etc. The Commission is free to decide to participate only if its resources will not be taxed through provision of free space and related services. *See* B-204326, July 26, 1982 459

GENERAL ACCOUNTING OFFICE
Decisions
Effective date
Retroactive
Decisions in *Overtime Compensation for Firefighters,* 62 Comp. Gen. 216 and *Gipson,* B-208831, April 15, 1983, held that where a firefighter's overtime compensation under the Fair Labor Standards Act is reduced as a result of court leave or military leave, the firefighter is entitled to receive the same amount of compensation as he would normally receive for his regularly scheduled tour of duty in a biweekly work period. The decisions in *Firefighters* and *Gipson* are retroactively effective since they involve an original construction by this Office of the court leave and military leave provisions. 5 U.S.C. 6322 and 6323 301
Jurisdiction
Contracts
Disputes
Contract Disputes Act of 1978
As the Contract Disputes Act, 41 U.S.C. 605(a), provides that all claims by a contractor against the Government be submitted to a contracting officer for a decision, the General Accounting Office (GAO) is not the proper tribunal for resolving such disputes. However, GAO may decide whether the Commerce Department or the Treasury Department should pay the claim, assuming it is valid 338

GRANTS
Grant-funded procurements. (*See* **CONTRACTS, Grant-funded procurements**)

INTERNAL REVENUE SERVICE
Tax matters. (*See also* **TAXES, Federal**)

LEAVES OF ABSENCE
Administrative leave
Administrative determination
In lieu of holidays
Part-time employees are not covered by 5 U.S.C. 6103(b) and Executive Order 11582 which authorize designated and in lieu of holidays for full-time employees when an actual holiday falls on an employee's nonworkday. However, agencies have discretion to grant part-time employees administrative leave for these holidays 306

LEAVES OF ABSENCE—Continued Page
Military personnel
Payments for unused leave on discharge, etc.
Court-martial review pending
Appellate leave benefits
Computation
A military member, who has been convicted and sentenced by court-martial to dismissal, or dishonorable or bad conduct discharge, and, pursuant to 10 U.S.C. 876a, has been ordered to take leave pending the completion of appellate review of his case, is entitled to payment for accrued leave to his credit on the day before that leave began, even though his sentence included forfeiture of pay and allowances. That accrued leave is to be computed on the basis of the rate of pay applicable to the member on the day before the leave begins even though he may have been in a nonpay status at that time. 341
Sick
Recredit of prior leave
Involuntary leave
Employee was placed on involuntary sick leave after an agency physician found there were limiting conditions to the employee's continued employment in his assigned position. Claim for backpay and recredit of sick leave is denied since agency may place an employee on involuntary sick leave when medical evidence indicates that he is incapacitated for performance of his assigned duties. 372
Substitution for leave without pay
Retroactive substitution
Bought-back sick leave
A retired Federal employee seeks the substitution of bought-back sick leave for leave without pay (LWOP) for the period he spent on LWOP pending a decision on his workers' compensation application. Where the employee retired during the same year in which the LWOP was taken, and his request for the leave substitution was timely made, we conclude that the employee's agency may, in its discretion consistent with normal sick leave considerations, allow the retroactive substitution of his bought-back sick leave for his LWOP. *Interstate Commerce Commission,* 57 Comp. Gen. 535 (1978) 291

LETTER OF CREDIT
Bid guarantee
Deficiencies
Bid rejection. (*See* BIDS, Guarantees, Bid guarantees, Irrevocable letter of credit)

MILITARY
Per diem (*See* SUBSISTENCE, Per diem, Military personnel)

MILITARY PERSONNEL
Record correction
Payment basis
Calculation of payment
When service members are restored to active duty by the Army Board of Correction of Military Records, backpay claim settlements are by statute to cover all periods of constructive active duty arising "as a result" of the correction. The period of constructive active duty

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Payment basis—Continued
Calculation of payment—Continued
from the date of the Board's determination to the date of actual restoration to duty arises directly from the correction action and, as such, should be included with other periods of constructive active duty covered by the claim settlement, with appropriate deduction of all interim civilian earnings. Hence, claim settlements are to be predicated on the date of actual restoration to duty rather than the earlier date of the Board's determination 385

OFFICE OF MANAGEMENT AND BUDGET
Circulars
No. A-76
Application matters. (*See* CONTRACTS, In-house performance *v.* contracting out)
No. A-102
Attachment O
Protest procedures
Language in Office Management and Budget Circular A-102, attachment "O," to the effect that grantees shall have their own procurement procedures which reflect applicable state and local laws and regulations does not mean that grantee has to formulate formal administrative procedures, but means that grantee merely has to follow local procurement procedures..... 367

OFFICERS AND EMPLOYEES
Appointments. (*See* APPOINTMENTS)
Compensation. (*See* COMPENSATION)
Debt collections. (*See* DEBT COLLECTIONS)
Health insurance
Contributions
Employee liability
Nonpay status
The Department of Agriculture asks whether it may pay the employee share of health insurance for tobacco inspectors in nonpay status from the tobacco user fee fund. Such expenditures may not be made. User fees collected from tobacco producers to provide tobacco inspection, certification and other services under the Tobacco Inspection Act are considered appropriated funds and are subject to laws controlling expenditure of such funds. Expenditure of appropriated funds to pay the employee share of health insurance for tobacco inspectors while they are in nonpay status is prohibited by the Federal Employees Health Benefits Act, which places a 75 percent ceiling on agency contributions, and regulations implemented by the Office of Personnel Management 285
Household effects
Transportation. (*See* TRANSPORTATION, Household effects)
Leaves of absence. (*See* LEAVES OF ABSENCE)
Overseas
Retirement, separation, etc.
Return to other than place of residence
Under 5 U.S.C. 5722, civilian employees upon separation abroad are entitled to travel and transportation expenses to their place of

OFFICERS AND EMPLOYEES—Continued Page
Overseas—Continued
Retirement, separation, etc.—Continued
Return to other than place of residence—Continued
actual residence at the time of overseas assignment. We hold that such employees are entitled to those expenses to any alternate point of destination, within or outside the United States, provided, however, that the cost to the Government shall not exceed the constructive cost of travel and transportation to the actual place of residence. Since this represents a changed construction of the statute, it is for prospective application only, effective as of the date of this decision. 31 Comp. Gen. 389 and B-160029, Oct. 4, 1966, overruled 281
Sick leave. (*See* **LEAVES OF ABSENCE**)
Subsistence
Relocation expenses for transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Temporary quarters, Subsistence expenses**)
Transfers
Real estate expenses
Loan assumption fee
Employee transferred to new duty station and, upon purchasing a residence, he incurred a loan assumption fee. Federal Travel Regulations, as amended in October 1982, permit reimbursement of loan origination fee and similar fees and charges, but not items which are considered to be finance charges. Loan assumption fee may be reimbursed where it is assessed instead of a loan origination fee, and reflects charges for services similar to those covered by a loan origination fee 355
Loan origination fee
A transferred employee who purchased a new residence incurred a 5 percent loan fee which was described in the loan agreement as a "loan origination fee." The agency allowed reimbursement for only 1 percent of the loan amount, based on HUD's advice that a 1 percent loan origination fee is customary in the local area, and the employee has reclaimed the additional 4 percent. The agency's determination to allow reimbursement for 1 percent of the loan amount is sustained, based on the advice provided by HUD. The employee's claim for the additional 4 percent is denied because that portion of the fee represents a nonreimbursable mortgage discount 456
Prior to official notice of transfer
Employee entered into contract to sell his residence and vacated residence prior to his selection for position under competitive procedures and Agency's formal notice of transfer. The real estate expenses claimed may not be reimbursed since the sale was not incident to his transfer, and the house for which he claims reimbursement was not his residence at the time he was officially notified of his change of station 298
Relocation expenses
House purchase. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)
Nonreimbursable. (*See* **OFFICERS AND EMPLOYEES, Transfers, Nonreimbursable expenses**)
Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Temporary quarters
Subsistence expenses
Computation of allowable amount
Based on language in the 1982 amendment to the Federal Travel Regulations, paragraph 2-5.4c, referring to "maximum per diem rate prescribed for the locality," the employee argues that temporary quarters subsistence expense reimbursement should be based on the high cost geographic area rate used when reimbursement of actual costs while on temporary duty is authorized rather than the statutory per diem rate of $50. Although the regulation could be misinterpreted, the statute authorizing temporary quarters sets a ceiling on the amount payable by reference to the maximum per diem rate, not the actual subsistence rate. Therefore, reimbursement of temporary quarters subsistence expense is limited to $50 within the continental United States. Paragraph 2-5.4c has since been changed to make this clear 377

PAYMENTS
Contracts. (*See* CONTRACTS, Payments)
Discount on contract payments. (*See* CONTRACTS, Discounts)
Voluntary
No basis for valid claim
Exception
Public necessity
Payment in Government's interest
Employee who paid for equipment pending determination of whether purchase was authorized can be reimbursed since agency would have been authorized to pay for the equipment and was willing to do so, and the Government used and retained the equipment.... 296

QUARTERS
Temporary
Incident to employee transfers. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

RECORDS
Correction
Military personnel. (*See* MILITARY PERSONNEL, Record correction)

REGULATIONS
Constructive notice
Even if claimant was confused by form provided by Department of Treasury, it had legal notice of regulation since publication of regulations in accordance with Administrative Procedure Act provides such notice 293

SALES
Auction
Procedure
Propriety
Timber sales. (*See* TIMBER SALES)
Timber. (*See* TIMBER SALES)

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SUBSISTENCE
Per diem
Military personnel
Temporary duty
Awaiting release
A service member was transferred from a permanent unaccompanied tour overseas to a temporary assignment for retirement processing at Kansas City, Missouri, which was also his ultimate home of selection. His family had maintained their residence in Kansas City during his unaccompanied tour prior to his transfer, and he lived at the family residence while awaiting retirement, commuting from there to his duty station. He was not entitled to per diem after his arrival at the temporary duty station, since in these circumstances it had the effective status of a permanent duty station 358

TAXES
Federal
Income
Jurisdiction
Internal Revenue
Although the Comptroller General has jurisdiction to resolve questions relating to the computation of net military "disposable retired or retainer pay" under the Uniformed Services Former Spouses' Protection Act, revenue rulings concerning the withholding of Federal taxes from income, as well as rulings concerning the income tax liabilities and withholding credits of individual taxpayers, are reserved by statute for determination primarily by the Department of the Treasury, Internal Revenue Service. Thus, even though a retired Air Force colonel may not have the additional tax withholdings he requested included in the computation of disposable retired pay to be apportioned under the Act, the concerned revenue authorities may well determine that additional withholdings should be placed on the retired pay remaining to this credit following the apportionment 322

TIMBER SALES
Bids
Bid bond
Sealed bid-auction timber sale
The contracting officer in a combined sealed bid-auction timber sale, where only firms that submit acceptable sealed bids can participate in the subsequent oral auction, did not act unreasonably in excluding a bidder who submitted a defective bid bond with its sealed bid. While the officer could have delayed the oral auction to permit the firm to cure the defect, the firm never asked for a delay or suggested that it could cure in any reasonable time period 344

TRANSPORTATION
Household effects
Overseas employees
Election not to return to continental United States
A civilian employee of the Defense Intelligence Agency upon separation overseas shipped her household goods from Denmark to Scotland. The agency disallowed her expenses based on our prior deci-

TRANSPORTATION—Continued Page
Household effects—Continued
Overseas employees—Continued
Election not to return to continental United States—Continued
sions since she did not return to the United States. We hold that she is entitled to travel and transportation expenses incurred in her move to Scotland, not to exceed the constructive cost to her place of actual residence in the United States 281

TRAVEL EXPENSES
Advances
Unexpended amounts refund
To reduce his indebtedness for travel funds that his agency had advanced him, the employee submitted a claim for expenses he had incurred 11 years previously to ship his household goods incident to a permanent change of station. Even though his claim was barred by 31 U.S.C. 3702(b)(1) and his agency's salary deductions under 5 U.S.C. 5723(f) to collect the advance of funds were not barred, the employee's debt for the advance may be reduced to the extent of the allowable transportation expenses since the advance and allowable expenses involved the same transaction so that the employee had the defense of recoupment, which is never time-barred 462

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT
Retired or retainer pay
Apportionment
Tax withholdings
Propriety
In computing the amount of the net monthly military "disposable retired or retainer pay" which is subject to apportionment under the Uniformed Services Former Spouses' Protection Act, in the absence of specific directions in the Act or regulations, the deductions of regular and additional Federal income tax withholdings from gross retired pay may not be fixed at a combined percentage rate exceeding the retiree's projected effective tax rate, that is, the ratio of the retiree's anticipated total income taxes to his anticipated total gross income from all sources 322

If retired military personnel request additional income tax withholdings beyond the regularly required withholdings in the computation of the net or "disposable military retired pay which is subject to apportionment under the Uniformed Services Former Spouses' Protection Act, they are required by statute to present factual evidence demonstrating the existence of a tax obligation warranting the additional withholdings. Consequently, no additional tax withholdings may be allowed in the computation of disposable retired pay in the case of a retired Air Force colonel who gave only a rough estimate or opinion of his projected tax obligations and presented no financial records as evidence in support of the estimate 322

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UNIONS
Federal service
Dues
Allotment for
Agency failure to discontinue
Recoupment of payments
When dues are erroneously withheld from an employee who is no longer in the bargaining unit, that employee is not entitled to repayment of the erroneously withheld amount if the employee failed to take the steps necessary to cancel voluntary dues withholding. Certifying and disbursing officers, and other accountable officers, are advised not to take recoupment action against the union in such circumstances 351

Termination upon transfer, etc. required
Section 7115(b) of Title 5, United States Code, requires that union dues allotments terminate when an employee is no longer in the bargaining unit. Therefore, neither management nor the union should knowingly continue or permit dues withholding for an employee who is no longer in the bargaining unit 351

Overpayment
Government's right to recover
Waiver
Agency erroneously continued to withhold dues from an employee who was transferred to another location out of the bargaining unit. Upon discovery of the error, the agency recouped the erroneously withheld amount from the union and paid it to the employee. The union received the erroneously withheld dues in good faith and without fraud or misrepresentation, and therefore collection of that amount from the union is waived under 5 U.S.C. 5584 and the union may be reimbursed 351

VOLUNTARY SERVICES
Personal funds for unauthorized obligations. (*See* **PAYMENTS, Voluntary**)

WORDS AND PHRASES
***Christian* doctrine**
Where Army failed to delete late bid provision in paragraph 8 of standard form 22 and substitute section 7-2002.2 of the Defense Acquisition Regulation, inadvertent error may not be cured under the "Christian Doctrine" since the Christian Doctrine does not permit the incorporation of mandatory provisions into an invitation for bids (IFB) when they have been inadvertently omitted 452

Direct Electronic Deposit Program
Upon the death of recipients of electronically transferred Government civil service retirement payments, bank becomes accountable for all subsequent deposits into account unless it satisfies Treasury regulations limiting liability to payments received within 45 days of death. Bank failed to satisfy regulations when it did not provide Treasury with names and addresses of withdrawers from the deceased's account within the times specified in the regulations 293

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WORDS AND PHRASES—Continued

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"Gifts"

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"Loan origination fee"

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"Regularly scheduled" work

Night differential under 5 U.S.C. 5545(a) may not be paid to employees who worked occasional overtime at night during a regularly scheduled tour of duty, but not their own, on or after Feb. 28, 1983. Effective that date, regulations implementing 5 U.S.C. 5545(a) limit the payment of night differential for "regularly scheduled" work to nightwork performed by an employee during his own regularly scheduled administrative workweek 316

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