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of the United States

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bound volume.

[B-201286]**Checks—Substitute—Replacement of Lost or Stolen Checks—
Waiting Period Requirement**

General Accounting Office agrees with Army that 3-day waiting period for issuance of duplicate checks is satisfactory in most cases. Modifies 62 Comp. Gen. 91 (1982) and 62 Comp. Gen. 476 (1983).

**To the U.S. Army Finance and Accounting Center, May 1,
1984:**

This is in reply to your letter of January 7, 1983, in which you responded to comments in our decision B-201286 (62 Comp. Gen. 91, 97-98 (1982)). In that decision we expressed our concern that the Army's practice of replacing checks 3 days after the original date of issuance did not appear to us to allow sufficient time to justify a determination that the payee had not received the original check. *See also* 62 Comp. Gen. 476, 481 (1983).

We have considered the explanation for your policy and are in general agreement with it. Our comments at 62 Comp. Gen. 98 were not necessarily directed toward the detection of fraud, but were largely the result of our concern that a 3-day waiting period may not allow enough margin for possible delays in the mail. As a result, allowing payees to claim nonreceipt of their checks 3 days after issuance may often be premature. We are, however, willing to accept your judgment that the 3-day period is justified in most cases due to the possible hardship to individuals where payments are delayed.

We do not understand you to say, nor could we agree if you did, that the issuance of a substitute check 3 days after issuance of the original will never be a factor to be considered in determining whether a disbursing officer has exercised due care in issuing a substitute check. We believe all circumstances that may lead one to question a particular transaction may be relevant to the question of due care; however, we will not raise a question in the future solely on the basis of application of the 3-day waiting period by disbursing officers.

Finally, you note that Department of Treasury, Fiscal Service Bulletin No. 82-27, changing Vol. 1 Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies 4-7000, gives the Army, along with other agencies, discretion in the timing to be used in recertifying payment where payees have not received the original check. This Bulletin, however, concerns the recertification procedure which permits payment by a second check bearing a different serial number. As specifically stated in Bulletin No. 83-17, substitute check procedures covering checks bearing the same serial number remain unchanged. Army regulations only authorize Army disbursing officers to issue substitute checks. AR 37-103, paragraph 4-160. Accordingly, the policy decision on timing of re-

certification delegated to the Army has no necessary relationship to the substitute check cases where we have questioned the 3-day practice.

[B-213466]

**General Accounting Office—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.

**Contracts—Discounts—Prompt Payment—Delay in Making—
Caused by Government**

Although the Treasury Department's negligence caused another department of the Government to improperly take a prompt payment discount, as there was no contractual relationship between the Treasury Department and the Government contractor, and the Federal Tort Claims Act does not apply to claims arising from the fiscal operations of the Treasury, the contractor can recover only from the Government agency with whom it had a contractual relationship, and not the Treasury Department.

**Matter of: Claim of Commercial Transfer Systems, Inc., May 1,
1984:**

The Department of Commerce's Patent and Trademark Office and a Government contractor, Commercial Transfer Systems, Inc., have asked us whether Commerce or the Treasury Department should pay \$1,043.95 to Commercial Transfer Systems, a sum equivalent to a prompt payment discount the Government allegedly should not have taken. For the reasons given below, it is our view that, if the amount claimed is owed to the contractor, the Department of Commerce, rather than the Department of the Treasury, should make the payment.

I. Background

The facts show that the Department of Commerce contracted with Commercial Transfer Systems, Inc., for rendering of various services. The services were performed between September 20 and October 1, 1982. The bills for the services, described on four invoices, show total amounts for the periods in which the services were rendered. None of the invoices breaks down the amounts charged for each of the days worked.

The contract between Commercial Transfer and the Commerce Department provided that Commerce could take a 5 percent prompt payment discount if payment was made within 20 days. The invoices covering the services were presented to the Government no later than October 15, 1982. On November 1, 1982, the Treasury Department's Washington Disbursing Center received

from the Patent and Trademark Office a voucher calling for payment of \$19,835.05 to Commercial Transfer Systems, Inc. A check for this amount was processed on November 2, in time for the prompt payment discount. Due to a hardware malfunction on the Disbursing Center's scanning equipment, however, the check that was mailed did not bear the payee's city, state or zip code. Accordingly, the check was returned to the Disbursing Center as undeliverable.

After the check was returned, the Disbursing Center credited the proceeds to the Patent and Trademark Office.¹ On November 17, Patent and Trademark submitted a second voucher for the same amount, even though the discount period had expired for all the invoices covered by the voucher. When Commercial Transfer received payment it concluded that the discount was improperly taken and charged back the discount on another invoice. The Patent and Trademark Office decided that the charge for the discount was not its responsibility and forwarded the invoice to the Treasury Department which, in turn, referred the matter to the Legal Counsel for its Bureau of Government Financial Operations. The Legal Counsel concluded that Treasury was not liable for any amounts owed to Commercial Transfer Systems, since the Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85, 31 U.S. Code 1801 note, neither imposed liability on the Treasury Department for prompt payment discounts lost as a result of Disbursing Center errors, nor expanded the purposes for which Disbursing Center appropriations are available to include payment of amounts under other agencies' contracts.

Subsequently, Commercial Transfer Systems, Inc., asked this Office to resolve its \$1,043.95 claim. It is not seeking any interest on the claim. Commerce also has asked us to rule on the claim.

Legal Discussion

The Contract Disputes Act states that "[a]ll claims by a contractor against the Government relating to a contract shall be * * * submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). As stated, the provision contemplates that Government contractors will submit their claims to contracting officers of the agencies with whom they are contracting. These officials will then decide their claims. Thus, the General Accounting Office is not the proper tribunal for resolving contract disputes between contractors and Government agencies. *E.g.* B-213383, November 7, 1983; 61 Comp. Gen. 114 (1981).

In this instance, however, we interpret Commerce's letter as a request for our decision as to whether Commercial Transfer's claim,

¹ Returning the proceeds to the agency rather than determining that an error was made in the Disbursing Center and reprinting the check appears to be the standard procedure when checks are returned as undeliverable.

assuming it is valid, should be paid by the Patent and Trademark Office or by the Department of the Treasury. We are the proper tribunal for resolving this issue.

We have held that where delay in making payment to a Government contractor is caused by the Government's negligence, and is not attributable to the negligence of the contractor, taking of a discount after expiration of the discount period is unauthorized. B-192145, July 7, 1978. It is not disputed that the malfunction of the Disbursing Center's scanning equipment caused the check to be undeliverable. Moreover, we do not agree, as the Treasury Department suggests, that the Patent and Trademark Office's delay in reprocessing the voucher after it learned of the problem with the original check was a contributing factor in the Government's failure to make payment within the 20-day period allowed for taking the prompt payment discount. The 20-day period for taking the discount ended on or about November 4 or 5, 1982—only 2 or 3 days after the first check was mailed by the Treasury Department. Certainly by the time Patent and Trademark discovered that the check had not been delivered the 20-day period had already expired. Thus, we think the failure to make a timely payment was due to the fault of the Treasury Department.

Notwithstanding that the Treasury Department was at fault, we are unaware of any statute or regulation providing a legal basis for the Treasury Department to pay the claim. Since Commercial Transfer Systems had a contractual relationship only with the Patent and Trademark Office and not the Treasury Department, it could not properly present a contract claim to Treasury. Moreover, as regards a claim based on negligence or other tort, section 421(i) of the Federal Tort Claims Act, 28 U.S.C. § 2680(i), states that the provisions of that Act shall not apply to "any claim for damages caused by the fiscal operations of the Treasury * * *." We have been unable to find any interpretation of this provision within the context of this case. In our opinion, the section would bar the bringing of tort actions resulting from breakdowns in fiscal operations equipment.

While we were processing this case, the Patent and Trademark Office submitted comments to us maintaining that "liability for the forfeited discount rests primarily with the disbursing officer, and that it is a matter for the Treasury Department to determine whether to seek relief pursuant to 31 U.S.C. 3527." Section 3527 is an accountable officer relief statute which covers, among other things, relief of disbursing officers for deficiencies resulting from illegal, improper or incorrect payments. As this case does not involve such a deficiency, section 3527 would not apply.²

² Several parties raised a question about the applicability of the Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85, to this case. As the Act applies to Government acquisition of property or services on or after October 1, 1982, and most of the services were acquired before that date, we do not think it necessary to discuss the Act here.

Accordingly, even though the Treasury Department was responsible for the Patent and Trademark Office losing its prompt payment discount, we think the claim, if otherwise proper,³ can be paid only by the Patent and Trademark Office.

[B-212663]

Leaves of Absence—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.

Matter of: Appellate Leave Pay, May 2, 1984:

The question to be decided in this case is whether under the provisions of 10 U.S.C. § 706 a military member convicted by court-martial, whose sentence includes confinement and forfeiture of pay and allowances, may upon release from confinement be paid for leave accrued prior to the effective date of sentencing while he is awaiting the completion of appellate review of his case.¹ We conclude that under the statute such a member may be paid for accrued leave.

Background

The Military Justice Amendments of 1981, Public Law 97-81, November 20, 1981, 95 Stat. 1085, added article 76a (10 U.S.C. § 876a) to the Uniform Code of Military Justice, and section 706 to the leave chapter of title 10, United States Code. Under 10 U.S.C. § 876a military personnel who have been sentenced by court-martial may be required to take leave pending completion of appellate review, or until such leave is otherwise terminated, if the sentence includes an unsuspended dismissal from the service or an unsuspended dishonorable or bad conduct discharge. Under 10 U.S.C. § 706 if a member is required to take leave under 10 U.S.C. § 876a, that leave is to be charged against accrued leave to the member's credit on the day immediately preceding the day the required (appellate) leave begins. Alternatively, a member may elect to be paid in lump sum for the accrued leave based on the rate of basic pay to

³Based on the information presented to us, we have no reason to think that the claim is not otherwise proper.

¹This question was submitted by Major Patrick T. Shine, the Finance and Accounting Officer at Fort Leavenworth, Kansas. The request was approved by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-A-1425.

which he was entitled on the day before such leave begins. If the member elects to charge his accrued leave, he is entitled to pay and allowances during the period of appellate leave to the extent that it is covered by his accrued leave. To the extent the period of required appellate leave is not covered by the member's accrued leave, or if he elects to be paid in lump sum for his accrued leave, appellate leave is to be charged to excess leave.

In his submission of several questions concerning this law, the accounting officer says that:

* * * statements in the text of * * * [52 Comp. Gen. 909 (1973)] indicate that any sentence to forfeiture of all pay and allowances results in the loss of any accrued leave to the member's credit as of the effective date of the sentence to forfeiture of all pay and allowances. * * *

The accounting officer states further that unless the provisions of Public Law 97-81 regarding pay for accrued leave supersede conclusions reached in 52 Comp. Gen. 909, it appears that a member whose sentence includes forfeiture of all pay and allowances could only be credited with (and paid for) leave accrued if and when he returned to full duty status following the effective date of his sentence. Otherwise, he would have no accrued leave to his credit when required to take appellate leave or at the time of his separation.

In view of these observations, the accounting officer has raised the questions discussed below concerning the application of 10 U.S.C. § 706.

Forfeiture of Leave Pay

The accounting officer's first question is whether, on the effective date of a convicted member's sentence to forfeit all pay and allowances, the member's accrued leave is forfeited. He also asks whether, in the alternative, the convicted member's forfeiture of accrued leave applies only to his entitlement to a lump-sum leave payment upon separation, but for his forfeiture sentence, or is the member's accrued leave available for use as chargeable leave or a lump-sum leave payment, whichever he elects, when he is placed on appellate leave.

In the decision 52 Comp. Gen. 909, referred to above, we considered several questions regarding the pay entitlements of a Marine Corps Reserve officer who had been sentenced to dismissal from the service and forfeiture of all pay and allowances. Only that portion of his sentence providing for total forfeiture of pay and allowances was approved and ordered executed. He was subsequently released from active duty and transferred to a Reserve unit.

Concerning the question of the proper action in regard to the member's accrued leave at the time of his discharge, we held that a sentence to forfeit all pay and allowances precluded his entitlement to compensation for unused leave to his credit "at the time of his release from active duty." 52 Comp. Gen. 909, 911. That conclu-

sion was based on the finding that a lump-sum payment for unused accrued leave at the time of discharge is a part of a member's compensation for active military service. See 37 U.S.C. § 501. Thus, it was held that if a member has been sentenced to forfeiture of all pay and allowances that become due on and after the date the sentence is approved, that member's unused accrued leave is forfeited at the time he is discharged or dismissed. The question in the present case then is whether payment for a member's accrued leave, which would otherwise be made under 10 U.S.C. § 706 at the time the member is placed on appellate leave, is forfeited if his court-martial sentence includes, unsuspended, forfeiture of all pay and allowances.

Prior to the enactment of Public Law 97-81, a member who was sentenced by court-martial to dismissal or to a punitive discharge, but who was held over by the service following his release from confinement pending completion of appellate review, could return to active duty and receive pay and allowances (usually at a reduced level),² or he could take a leave of absence without pay and allowances.³

Because of morale and disciplinary problems often caused when accused persons chose to return to active duty while awaiting appellate review, Public Law 97-81 was enacted to give military commanders the authority to compel court-martialed service members to take leave of absence while awaiting the completion of appellate review of their cases. *Matter of Committee Action Number 557*, 63 Comp. Gen. 25 (1983). The statute eliminates the option of the accused to choose to return to active duty with pay and allowances since he may be required to take leave.

Under Public Law 97-81 the services have discretion to order a convicted member having an unsuspended sentence to dismissal, or dishonorable or bad conduct discharge, who is awaiting completion of appellate review, to take leave until the reviewing action is completed or until some time prior thereto. Whenever a member is required to take leave under this statute, that leave "shall be" charged to unused accrued leave the member has to his credit, and he is entitled to a lump-sum payment for the leave or pay and allowances during the period for which he has accrued leave to his credit. In authorizing payment for leave it appears to have been the intent of Congress to allow these individuals a financial cushion to facilitate their return to civilian life while awaiting appeal results. (See H. Rep. No. 306, 97th Cong., 1st Sess. 2-3.)

Neither 10 U.S.C. § 876a nor § 706 specifically addresses the situation where the member's sentence includes, unsuspended, total forfeitures of pay and allowances. However, as previously noted,

² See 37 Comp. Gen. 591 (1958).

³ See H. Rep. No. 306, 97th Cong., 1st Sess. 1, reprinted in 1981 U.S. Code Cong. and Ad. News, 1769-70; Department of Defense Directive 1327.5; and *Matter of Committee Action Number 557*, 63 Comp. Gen. 25 (1983).

prior to the enactment of those statutes, the return of a member to full duty status operated to effectively suspend the forfeiture provisions of the sentence until appellate review was completed. See 54 Comp. Gen. 862 (1975); 37 Comp. Gen. 591, 593 (1958); B-192082, December 21, 1978. We recognize that placing a member on appellate leave is not returning him to a full duty status. However, in view of the purpose of the new statutes, it is our opinion that even though a member is sentenced to forfeiture of all pay and allowances he is entitled to be paid for his accrued leave if he is required, under the authority of 10 U.S.C. § 876a, to take leave pending completion of appellate review. In view of the leave payment authority in 10 U.S.C. § 706, that portion of the sentence which would have required forfeiture of accrued leave pay is to be treated as suspended. However, if a member sentenced to forfeiture of all pay and allowances has any unused accrued leave remaining to his credit at the time of discharge, payment for this leave is forfeited. 52 Comp. Gen. 909.

Rate of Pay

The accounting officer also asks whether a convicted member has a rate of pay upon which payment for accrued leave may be based, even though the member's sentence to forfeit all pay and allowances was in effect on the day prior to the day appellate leave began. Under the provisions of 10 U.S.C. § 706(b) a member who is required to take leave under 10 U.S.C. § 876a is entitled to payment for accrued leave to his credit based on the rate of pay to which he was entitled on the day before the day appellate leave began. See also Department of Defense Pay Manual, para. 40401b. We have held that the rate of pay applicable to such leave payment is the pay rate of the grade the member held on the day before appellate leave begins, even though the member is in a nonpay status at that time. If the member was reduced in grade by the court-martial sentence, it is the rate to which the member was reduced. *Matter of Committee Action Number 557*, cited above.

The questions which were asked are answered accordingly.

[B-213870]

Contracts—Protests—General Accounting Office Procedures— Timeliness of Protest—Significant Issue Exception—For Application

General Accounting Office (GAO) considers protest that firm that submitted incomplete bid bond with sealed bid in combined sealed bid-auction timber sale should have been permitted to cure the defect before the oral auction to come within the significant issue exception in GAO's Bid Protest Procedures for considering untimely bid protests.

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.

Matter of: Stimson Lumber Company, May 3, 1984:

Stimson Lumber Company protests the rejection of its sealed bid as nonresponsive under a combined sealed bid-auction timber sale conducted by the Forest Service, Siuslaw National Forest, Carvallis, Oregon. The bid was rejected because a power of attorney was not attached to the bid bond accompanying the bid. Although admitting that it did not submit its surety's power of attorney as required by the conditions of the sale, Stimson nonetheless urges that the Forest Service should have afforded it a reasonable opportunity to obtain an alternate form of acceptable bid guarantee. We deny the protest.

Sealed bids were opened on November 15, 1983. Under the combined sealed bid-auction procedure, which (apparently based on tradition) generally is used in western areas of the country, see Forest Service Manual (FSM) § 2431.55 (February 2, 1981, amend. 123), the submission of an acceptable sealed bid is a prerequisite to participation in the auction. After the submission of sealed bids, which bind the bidders just as in any advertised procurement, FSM § 2431.59, the bids are publicly opened and posted. The oral bidding then begins at the highest posted sealed bid price. *Id.*

Stimson submitted the high sealed bid of \$150 per million board feet (MBF) of timber, followed by Fort Hill Lumber Company's sealed bid of \$115/MBF. If Stimson's bid had been acceptable, then the subsequent oral bidding would have started at \$150/MBF. However, the Forest Service rejected Stimson's sealed bid as nonresponsive because the firm had failed to attach its surety's power of attorney to the bid bond. In that regard, the advertisement for sale instructed bidders that all sealed bids had to be accompanied by an "acceptable bid guarantee"¹ in the form of cash, a bid bond, an irrevocable letter of credit, certified check, bank draft, cashier's check or bank money order in the amount of 5 percent of the bid. Bidders were cautioned that failure to submit an acceptable bid guarantee would require rejection of the bid as nonresponsive unless there was no other acceptable bid. The advertisement instructions further cautioned bidders that bid bonds "must be ac-

¹The term "bid guarantee" refers to any firm commitment accompanying a bid as assurance that a bidder will, upon the Government's acceptance of its bid, execute the necessary contract documents and submit any required performance bonds. *Elektor Electric Corporation*, B-213245, Oct. 25, 1983, 83-2 CPD ¶ 503; Federal Procurement Regulations § 1-10.102-2 (1964 ed.).

accompanied by a power of attorney indicating that the person signing the bond for the surety has the power to do so."

According to the record, Stimson's representative at the sale was informed before the start of the auction that the firm's sealed bid was nonresponsive, thereby disqualifying the firm from participation in the oral bidding and any chance to receive the award, because the required surety's power of attorney was missing. The representative was apparently uncertain as to the nature of a power of attorney document. After the bidding officer showed him a power of attorney accompanying the bid bond of another bidder, the representative made a statement to the effect that it was too late for him to go back to his vehicle to look for it. Fort Hill's offer of \$115/MBF was the remaining high qualifying bid because of Stimson's rejection. Fort Hill made the same bid during the auction, and because no higher oral bids were received, the Forest Service determined Fort Hill the awardee.

Timeliness

The Forest Service contends that Stimson's protest, filed in our Office on December 6, 1983, was untimely filed and therefore should be dismissed without consideration, because it was not filed within 10 working days of the oral auction, when the basis for protest arose. See section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 21 (1983). In response, Stimson points out that it sent a letter dated November 23 to the Forest Service Supervisor of the Siuslaw National Forest complaining that "[t]wo things bother us about what was done." Stimson suggests that this expression of dissatisfaction with what the agency had done was sufficient to constitute a timely protest to the contracting agency. In that event, the protest to our Office would have to have been filed within 10 working days after the Forest Service took adverse action on the November 23 letter, see section 21.2(a)(1) of our Procedures; in fact, the Forest Service only responded to Stimson's November 23 letter by letter dated December 7, setting forth its reasons for rejecting the firm's sealed bid.

We need not resolve the matter. Under section 21.2(c) of our Procedures, we will consider even an untimely protest on the merits if it raises an issue "significant" to procurement practices and procedures. In view of the nature of the procurement practices used in these types of timber sales, and in order to provide guidance to Forest Service officials in connection with future sales, we believe that exception to our timeliness rules should apply in this case.

Merits

Stimson protests that it was improper for the Forest Service to reject its bid as nonresponsive without affording the firm a reasonable opportunity to cure the defect by substituting another accepta-

ble form of bid guarantee.² Stimson asserts that it could have secured a cashier's check from a local bank in the required amount within 15 minutes if indeed it had been given such an opportunity. Stimson points out that by not being allowed to participate in the auction, the Government stands to lose \$329,000 in a sale involving 9,400 MBF of timber, representing the difference between its sealed bid of \$150/MBF and Fort Hill's successful oral bid of \$115/MBF.

In support of its position, Stimson principally relies on our decision in 51 Comp. Gen. 182 (1971), wherein we held that a high bidder's failure to submit a bid bond with its sealed bid under a combined sealed bid-auction timber sale was a minor informality which properly could be corrected before the oral bidding began. Stimson urges that the same rationale applies to the firm's situation in the present circumstance.

We agree with Stimson that our 1971 decision establishes that a defective bid guarantee in this type of sale can be cured before the oral bidding begins. In that decision, the high bidder did not submit any bid guarantee with its sealed bid; however, when this defect was made known to the bidder's representative, "he immediately produced a check which he gave to the Forest Service officer in charge of the oral bidding." *Id.* at 183. The bidding officer then called a brief recess to determine the acceptability of the check as a substitute bid guarantee. After the bidding officer made a positive determination to that effect, the high bidder was allowed to participate in the auction, eventually making the high oral bid as well.

That decision, however, was not intended to suggest that a contracting officer is obligated to delay the oral auction indefinitely to permit the negligent bidder to cure the bidding irregularity. As stated above, the bidder in the cited case, once the lack of a bid bond was noted, immediately produced an acceptable bid guarantee. Here, in contrast, Stimson's representative did not immediately furnish the omitted power of attorney, or request a recess to secure the document or an acceptable substitute for the incomplete bond. In fact, the Forest Service has furnished our Office with statements from three individuals present at the sale that Stimson's representative, when advised of the consequences of the missing power of attorney, simply said that he did not think he had time to go to his truck and look for it, and then took a seat. In this regard, we think it is immaterial for Stimson now to allege in hindsight that it could have secured a cashier's check³ if given 15 minutes to do so—the fact is that the firm's representative made no

²In that regard, the Forest Service stated in its December 7 response:

"If your representative had provided the power of attorney when notified it was missing, the Forest Service would have included it with your bid."

³We note that Stimson does not contend that the power of attorney was left behind in the representative's vehicle.

such indication at the sale, and did not request a delay in starting the auction.

We have stated, in connection with the actual conduct of the auction, that a contracting officer should hold the auction open as long as any bidder expresses a desire to bid, since the underlying policy in the Forest Service regulations governing timber sales requires that every effort be made to secure for the Government the best possible price. See *Louisiana-Pacific Corporation*, B-210904, Oct. 4, 1983, 83-2 CPD ¶ 415. The same policy supports the bidding officer's decision in 51 Comp. Gen. 182, *supra*, to include the bidder in the oral bidding. See *Dickson Forest Products, Incorporated*, B-191906(1), Nov. 1, 1978, 78-2 CPD ¶ 314. It does not, however, require that an agency afford the bidder an unrequested opportunity to cure a bidding defect that the bidder himself does not indicate is curable in any reasonable time period.

Under the circumstances, we believe the contracting officer acted reasonably in proceeding with the auction without Stimson's participation. The protest is denied.

[B-214556]

Bids—Responsiveness—Failure to Furnish Something Required—Prices

Mere acknowledgment of receipt of amendment that adds option work, the prices of which are to be evaluated for award, is not sufficient to constitute a bid for the additional work. Bid that does not include prices for the option work therefore is properly rejected as nonresponsive, even though the cost of the option work is less than 1 percent of the total contract price. Furthermore, bidder's subsequent offer to perform option work at no charge does not make bid responsive, since responsiveness must be determined at bid opening.

Bids—Preparation—Costs—Noncompensable—Nonresponsive Bid

Claim for bid preparation costs is denied where there is no showing that Government acted arbitrarily or capriciously in rejecting claimant's bid.

Matter of: E. H. Morrill Company, May 3, 1984:

E. H. Morrill Company protests the rejection of its bid as nonresponsive under U.S. Army Corps of Engineers invitation for bids No. DACA05-84-B-0039, covering hazardous waste management at Vandenburg Air Force Base, California. Although acknowledging receipt of amendment 0003 to the IFB, Morrill's low bid was rejected because it did not contain prices for two options listed in amendment 0003 which were to be evaluated for award. After bid opening, but before award, Morrill notified the contracting officer that if the Government exercised any or all of the options, it would perform the work at no additional charge. Morrill maintains that its failure to provide option prices is a minor informality and that it is entitled either to the award of the contract or to its bid preparation costs and anticipated profit.

We summarily deny the protest.

Amendment 0003 included a new bidding schedule page on which new line items 2a. and 2b., representing the option tasks (removal and replacement of unstable soils below the limit of contract excavation), were included. Morrill, however, submitted its bid price on the original page, which contained no mention of optional requirements. While Morrill does not state why it used the old page or did not submit a price for the options, it argues that its failure to do so should be excused as a minor informality or irregularity under Defense Acquisition Regulation (DAR) § 2-405 (Defense Acquisition Circular 76-17, September 1, 1978), because the total cost of the option items is approximately \$4,000, or less than $\frac{1}{10}$ of 1 percent of the overall contract price.

The IFB warned bidders "If any of the [IFB] Amendments furnished amended bid pages, the *amended bid pages must be used* in submitting your bid." (Italic in original.) In addition, the bidding schedule sheet included in amendment 0003 stated that:

[b]id evaluation will be by adding *all* non-option and option items on the bidding schedule to obtain a total estimated amount price. * * * Bids must be submitted on all individual items of this bidding schedule; otherwise, the bids for this bidding schedule will be considered nonresponsive and will be rejected.

Where, as here, a solicitation includes an explicit requirement that bidders insert prices for all items and warns that failure to do so may result in rejection of the bid, a bid which has such an omission generally must be rejected as nonresponsive. *Pensacola Engraving Company*, B-200712, February 27, 1981, 81-1 CPD 139. This rule is applicable to option items to be evaluated at the time of award, *Lyon Shipyard, Inc.*, B-208978, September 27, 1982, 82-2 CPD 287, *JBS, Inc.*, B-201207, March 18, 1981, 81-1 CPD 211, and reflects the legal principle that a bidder who has failed to submit a price for an item generally cannot be said to be obligated to provide that item. *Goodway Graphics of Virginia, Inc.*, B-193193, April 3, 1979, 79-1 CPD 230.

Here, Morrill's bid does not permit the conclusion that Morrill committed itself to provide the work required by line item 2. Although Morrill acknowledged receipt of amendment 0003, which added the option requirement, the mere acknowledgment of amendment 0003 cannot be taken as sufficient to show that Morrill intended to furnish the option services without charge. See 38 Comp. Gen. 372 (1958); *Ventura Manufacturing Company*, B-193258, March 21, 1979, 79-1 CPD 194; *Vanbar*, B-184800, December 10, 1975, 75-2 CPD 385. While a bidder can bind itself to the contents of some amendments merely by acknowledging receipt thereof, when a bidder does not insert a price for additional item quantities or for additional work added by an IFB amendment, doubt is created as to whether the bidder has bound itself to perform the additional work, and if so, at what price. The existence of this doubt

requires rejection of the bid. *Ventura Manufacturing Company, supra*.

As for Morrill's minor informality assertion, where the IFB contains an explicit requirement that bidders insert prices for all items and warns that failure to do so could result in the bid's rejection, a bid omitting a price of even a trivial amount generally is to be rejected as nonresponsive. 51 Comp. Gen. 543 (1972); *Goodway Graphics of Virginia, Inc., supra*. This rule is predicated on the realization that when the Government intends to obtain its total requirement from one source and is evaluating bids on the basis of prices for all items, the omission of a price for an item cannot be viewed as a minor informality which may be waived or corrected after bid opening because the Government, on the basis of the bid as submitted, would be deprived of something it needs. Inherent in this realization is the fact that the need is a material one. For example, in *Goodway Graphics* we held that a bid which did not include a price for one item that was worth \$48 out of a total contract price exceeding \$141,000, but which item was "significant," was properly rejected as nonresponsive. Here, we think the need to have the contractor responsible for whatever additional excavation would be required if unstable soil were encountered is an important and material part of overall contract requirements. Therefore, we see no basis for considering Morrill's omission as a minor informality.

Finally, we point out that Morrill's post-opening offer to perform the option work at no charge does not make its bid responsive, since responsiveness must be determined at bid opening and a non-responsive bid may not be corrected after that time. *Brod-Dugan Company*, B-212731, November 28, 1983, 83-2 CPD 619.

As an alternative to award of the contract, Morrill has claimed "damages including but not limited to" its bid preparation costs and anticipated profit. Bid preparation costs can only be recovered if the Government has acted arbitrarily or capriciously in rejecting a bid. In view of our conclusion that the Corps properly rejected Morrill's bid as nonresponsive, Morrill cannot prevail on its claim. See *MIMCO, Inc.*, B-210647.2, December 27, 1983, 84-1 CPD 22. Moreover, we point out that there is no legal basis for allowing a protester to recover anticipated profit. *M.L. McKay & Associates, Inc.*, B-208827, June 1, 1983, 83-1 CPD 587.

We have reached this decision on the basis of the protester's initial submission, which indicated, upon review, that the protest is without legal merit. Therefore, we have not requested a report from the Corps. See *American International Rent-A-Car*, B-211326, April 22, 1983, 83-1 CPD 452.

The protest is denied.

[B-212695]

Unions—Federal Service—Dues—Allotment for—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.

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.

Unions—Federal Service—Dues—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.

Matter of: Local 3062, American Federation of Government Employees, Recoupment of Erroneously Withheld Dues, May 7, 1984:

Local 3062, American Federation of Government Employees, AFL-CIO (AFGE), has requested a decision, pursuant to 4 C.F.R. § 22 (1983), concerning union dues recouped by the National Park Service from AFGE Local 3062 and paid to Gary R. Jensen. The agency was served with a copy of the union's submission but filed no response or comments. 4 C.F.R. § 22.4(c). We hold that certifying and disbursing officers, and other accountable officers should not recoup erroneously withheld amounts where an employee has left the bargaining unit and has failed to take the steps necessary to cancel voluntary dues withholding. In this case, the overpayment to the union is waived under 5 U.S.C. § 5584.

FACTS

AFGE Local 3062 is the exclusive bargaining representative of a bargaining unit of wage-grade employees at the Lake Mead National Recreation Area, Boulder City, Nevada. The employing agency is the National Park Service, Department of the Interior. Since 1971, a collective bargaining agreement between Lake Mead and AFGE Local 3062 has provided for dues withholding for bargaining unit employees. In November 1980, Mr. Gary R. Jensen, a member of

the bargaining unit, executed a Form 1187 for the voluntary allotment of union dues.

In April 1981, Mr. Jensen was transferred to the Crater Lake National Park in Oregon. Neither Local 3062 nor any other union has exclusive recognition at Crater Lake, and therefore, the collective bargaining agreement between AFGE Local 3062 and Lake Mead no longer applied to Mr. Jensen. Nonetheless, the Finance Office of the National Park Service in Washington, D.C. continued to withhold union dues from the paycheck of Mr. Jensen, and those dues were paid to AFGE Local 3062. Mr. Jensen never executed a Form 1188 to cease voluntary allotment of union dues, or otherwise acted to terminate his dues withholding or his union membership.

On November 23, 1982, the Finance Office stopped withholding dues from Mr. Jensen and paid him \$120, the amount of union dues that had been deducted from his salary since he had transferred to Crater Lake National Park. The Finance Office then deducted \$120 from the next remittance check to AFGE Local 3062.

The union filed an unfair labor practice charge with the Regional Office of the Federal Labor Relations Authority, Case No. 9-CA-30328, dated April 11, 1983. By letter dated June 29, 1983, the Regional Director refused to issue a complaint based upon *Department of the Air Force, 3480th Air Base Group, Goodfellow Air Force Base, Texas*, 9 FLRA No. 48 (1982). In that case, the Authority found that it was not an unfair labor practice to recoup dues erroneously withheld from employees who were no longer in the bargaining unit. The union advises that no appeal of the dismissal of the charge was filed.

The Union's Position

The union asks that the agency be required to pay the union the \$120 it recouped. The union relies on our decision in *Fort Stewart/Hunter Army Airfield*, 59 Comp. Gen. 710 (1980), in which we modified earlier decisions and held that, to the extent the proceeds of the erroneously withheld dues allotments inure to the benefit of the employee, there is no obligation on the agency to recoup the dues from the union.

The union also argues that only the employee, and no one else, may take action to terminate dues withholding. The record indicates that the union representatives involved were of the understanding that the union had no power or authority to terminate an individual's dues withholding.

Discussion

Discontinuance of Allotments

We first point out that the union is not correct in arguing that only Mr. Jensen had the right to terminate his dues allotment au-

thorization. While Mr. Jensen had the right to continue his union membership after he transferred out of the bargaining unit, the right to have his union dues paid through dues withholding terminated when he transferred out of the bargaining unit. Section 7115(b)(1) of Title 5, United States Code (1982), specifically provides that dues withholding with respect to any employee shall terminate when the agreement between the agency and the exclusive representative ceases to be applicable to the employee.

Since the statute is explicit in this regard, neither management nor the union should continue or permit dues withholding for an employee who they know is no longer in the bargaining unit. Both parties to the agreement should make a reasonable effort to insure the accuracy of dues allotments and alert certifying and disbursing officers, and other accountable officers, to employees whose dues withholding must be discontinued because they are no longer in the bargaining unit.

Where the parties cannot agree on whether or not an employee is in the bargaining unit, procedures are available under 5 U.S.C. Chapter 71 to resolve such issues. See, for example, 5 C.F.R. § 2422.2(c). When it has been determined that an employee is no longer in the bargaining unit, dues withholding should be stopped immediately.

Recoupment Action

As noted by the union, in *Fort Stewart*, cited above, we held that the agency was not required to recoup erroneously withheld dues where the proceeds inured to the benefit of the employees. The rationale at 59 Comp. Gen. 710, 712 (1980), is as follows:

We are particularly constrained to that view because employees may be members of a labor organization whether or not they are members of a bargaining unit covered by a written agreement. Therefore, when an employee leaves a unit covered by a bargaining agreement, only the right to have his union dues paid by voluntary allotment ends. His union membership continues until he takes some action to terminate it. If through administrative error the allotment continues to be paid to the union, the employee is presumed to have knowledge of the fact his allotment has continued since in most cases the allotment is shown on Leave and Earnings Statements each pay period. Thus, the employee is or should be aware that his union dues are being paid by allotment, and he is in a position to know that such deductions are improper. In any case the employee does not lose the money in question since it is owed to the union. Further, the union is not being unjustly enriched, since it is entitled to dues from its members. See *Matter of Sergeant Richard C. Rushing, USA*, B-194692, July 24, 1979, in which it was held that the individual "would not be entitled to a refund [of an allotment] if he had an interest in, or the proceeds from the allotment inured to his benefit."

It is our position that, to the extent that proceeds of the allotments inured to the benefit of the employees in this case in that their union dues were paid, there is no requirement to reimburse the employees. Further, in view of the difficulties which such reimbursements cause, they should not be made unless an individual case presents facts which would justify such action.

As noted above, the Authority in *Goodfellow Air Force Base*, 9 FLRA No. 48 (1982), relying on our decisions prior to *Fort Stewart*, held that it was not an unfair labor practice to recoup erroneously withheld dues from the union. That case was reversed on appeal by

the U.S. Court of Appeals for the Fifth Circuit on the grounds that the agency had no right to recoup the overpayments from the current dues withholdings of other employees. The appeals court noted that the Authority had not considered our decision in *Fort Stewart. AFGE Local 1816 v. FLRA*, 715 F.2d 224 (5th Cir. 1983).

In a later case involving the same issue, the Authority's Administrative Law Judge considered our decision in *Fort Stewart*, and found that recoupment in those circumstances was an unfair labor practice. That holding was reversed by the Authority in reliance on *Goodfellow*, prior to the reversal of the latter by the Fifth Circuit. *Department of the Air Force, Griffiss AFB, New York, and AFGE Local 2612*, 12 FLRA No. 50 (1983). An appeal of the Authority's decision in *Griffiss* is now pending in the Second Circuit. *AFGE Local 2612 v. FLRA (Griffiss Air Force Base)*, Case No. 83-4145 (appeal filed August 11, 1983, and argument held February 10, 1984).

The issue of whether or not recoupment action in circumstances such as these is an unfair labor practice is for resolution by the Federal Labor Relations Authority and the courts. However, apart from that issue, certifying and disbursing officers, and other accountable officers, are advised of the following to insure proper management of the accounts for which they are responsible.

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 amounts if the employee failed to take the steps necessary to cancel his authorization for dues withholding. Since the employee in these circumstances is presumed to have voluntarily retained his union membership, and the union is entitled to dues from its members, the employee is not entitled to reimbursement of the erroneously withheld amount. As is the rule with other types of allotments, the employee is not entitled to repayment when the employee was at fault or benefited from the payment. *SP5 Neal B. Batts, Jr., USA*, B-185820, February 11, 1977; *Ollie N. Marshall*, B-193400, January 31, 1979; *Sergeant Richard C. Rushing, USA*, B-194692, July 24, 1979. See also 33 Comp. Gen. 309 (1954).

Accordingly, certifying and disbursing officers, and other accountable officers, are advised not to reimburse employees for erroneously withheld union dues in circumstances such as those presented in this case. Since the Government is not required to reimburse the employees, there should be no recoupment of the amounts erroneously withheld from the union.

Waiver

In the case before us, the National Park Service has recouped the \$120 amount of erroneously withheld dues by deducting that amount from a remittance to AFGE Local 3062 of other employees' dues.

We have held that where the union receives erroneously withheld dues in good faith and without fraud or misrepresentation, the erroneous payments to the union may qualify for waiver under 5 U.S.C. § 5584. *National Federation of Federal Employees, Local 1239*, B-201817, 61 Comp. Gen. 218 (1982).

In the present case, the record shows that AFGE Local 3062 received the dues of Mr. Jensen in good faith and without fraud or misrepresentation. Accordingly, collection of the \$120 from the union is waived under 5 U.S.C. § 5584 and the union may be reimbursed in that amount.

[B-214101]

Officers and Employees—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.

Matter of: Edward W. Aitken—Loan Assumption Fee, May 7, 1984:

ISSUE

The issue in this decision involves the claim of an employee for reimbursement of a loan assumption fee which he paid in connection with a transfer to a new duty station. Since the Federal Travel Regulations now permit reimbursement of loan origination fees and other fees or charges that are similar in nature, we hold that the employee may be reimbursed for a loan assumption fee which, in this case, was similar in nature to and was charged instead of a loan origination fee.

BACKGROUND

This decision is in response to a request from Kathryn E. Mitchell, a certifying officer with the Bureau of Reclamation, Department of the Interior, concerning the claim of Mr. Edward T. Aitken, an Interior employee.

Mr. Aitken was transferred from Port Mugu, California, to Loveland, Colorado, effective May 6, 1983. In connection with this transfer he purchased a residence in Loveland on August 18, 1983. Mr. Aitken assumed the existing mortgage of \$53,642.05 on the residence, and he was charged an assumption fee or a loan transfer fee of \$268.21 which represents one-half of one percent of the balance of the loan.

The agency denied the claim for the loan assumption fee on the basis that it is a finance charge under the Truth in Lending Act,

Title I, Public Law 90-321, May 29, 1968, 82 Stat. 146, as amended, 15 U.S.C. §§ 1601-1667 (1982), as implemented by Regulation Z, 12 C.F.R. § 226.4 (1983), and therefore is not reimbursable under the applicable regulations governing relocation expenses. Mr. Aitken claims that this fee is the same as a loan origination fee which is now reimbursable under the applicable relocation regulations. In support of his position, he has submitted a letter from the First National Bank in Loveland stating that an assumption/loan transfer fee is the same as an origination fee.

OPINION

Under the provisions of 5 U.S.C. § 5724a(a)(4) (1982) and the implementing regulations, the Federal Travel Regulations, FPMR 101-7 (September 1981) (FTR), an employee may be reimbursed for certain real estate expenses incurred when he transfers to a new duty station. Paragraph 2-6.2d of the FTR lists various miscellaneous expenses related to the real estate transactions which may be reimbursed.

Our decisions have previously held that a loan origination fee constituted a finance charge under Regulation Z and could not be reimbursed under para. 2-6.2d unless the fee was broken into specific charges which were excluded from definition of a finance charge. *Stanley Keer*, B-203630, March 9, 1982. The same principle applied to loan assumption fees. *Dean E. Taylor*, B-184626, February 12, 1976.

However, in *Robert E. Kigerl*, B-211304, July 12, 1983, 62 Comp. Gen. 534, we noted that the General Services Administration (GSA) had amended the Federal Travel Regulations, through GSA Bulletin FPMR A-40, Supplement 4, effective October 1, 1982, to specifically authorize reimbursement for loan origination fees 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.

- (a) FHA or VA fee for the loan application;
- (b) Loan origination fee;
- (c) Cost of preparing credit reports;
- (d) Mortgage and transfer taxes;
- (e) State revenue stamps;
- (f) Other fees and charges similar in nature to those listed above, unless specifically prohibited in (2), below;

* * * * *

(2) *Nonreimbursable items.* Except as otherwise provided in (1), above, the following items of expense are not reimbursable.

* * * * *

(e) No fee, cost charge, or expense determined to be part of the finance charge under the Truth in Lending Act, Title I, Pub. L. 90-321, and Regulation Z issued in accordance with Pub. L. 90-321 by the Board of Governors of the Federal Reserve System, unless specifically authorized in (1), above; * * *.

We held in *Kigerl* that although a loan origination fee may constitute a finance charge within the meaning of Regulation Z, GSA has now authorized reimbursement under the provisions of FTR para. 2-6.2d, quoted above. We concluded that this amendment was consistent with the authorizing legislation and would be followed by this Office. See also *Patricia A. Grablin*, B-211310, October 4, 1983.

The question presented in this case is a claim for reimbursement of a loan assumption fee which is not specifically listed as a miscellaneous expense in the current version of FTR para. 2-6.2d(1) and which has been previously treated as a finance charge, reimbursement of which has been precluded by earlier versions of FTR para. 2-6.2d. *Taylor*, cited above. We note that FTR para. 2-6.2d(1)(f) allows reimbursement of "other fees and charges similar in nature" to those listed in para. 2-6.2d(1)(a-e) unless specifically prohibited in para. 2-6.2d(2). Thus, Mr. Aitken claims reimbursement for a fee which we have characterized as a finance charge under Regulation Z but which is similar in nature to a loan origination fee that may be reimbursed.

Although a loan assumption fee may be characterized as a finance charge, we conclude that this loan assumption fee may be reimbursed under FTR para. 2-6.2d(1)(f) as a fee or charge similar in nature to a loan origination fee. We believe the intent of para. 2-6.2d(1)(f) is to permit reimbursement of fees which are similar to those listed in para. 2-6.2d(1)(a-e) and which are charged instead of one of the enumerated fees.

By way of contrast, we considered a claim for reimbursement of a Veterans Administration (VA) funding fee which is a loan fee of one-half of one percent and constitutes a user charge which is deposited into the U.S. Treasury as a miscellaneous receipt. We held that the VA funding fee is a finance charge under Regulation Z and is not reimbursable under the amended version of FTR para. 2-6.2d, quoted above. B-209945, June 9, 1983, 62 Comp. Gen. 456. What is crucial for our purposes is that the VA funding fee considered in B-209945 is charged *in addition* to a loan origination fee which compensates the lender for expenses incurred in originating the loan, preparing documents, and related work. In the case before us, the loan assumption fee was charged *instead of* a loan origination fee, and it appears to represent similar expenses incurred by the lender.

It should also be noted that, under an earlier regulation, Bureau of the Budget Circular No. A-56 (October 1966), which was in force until 1969, loan origination fees were reimbursable. In B-164906, August 12, 1968, we considered whether a loan assumption fee was sufficiently similar to a loan origination fee to be reimbursable, and we held that it was.

We believe it would be anomalous to reimburse one employee for a loan origination fee while denying another employee reimburse-

ment for similar charges and fees paid to the lender merely because the second employee assumed an existing mortgage on a residence rather than obtaining a new mortgage on the property.

Accordingly, we hold that where a loan assumption fee involves similar charges and fees to those covered by a loan origination fee and where the loan assumption fee is assessed instead of a loan origination fee, it may be reimbursed under FTR para. 2-6.2d(1) as a miscellaneous expense. Therefore, Mr. Aitken's claim may be paid consistent with the limitations contained in the FTR.

[B-213925]

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.

Matter of: Master Gunnery Sergeant Edward W. Lord, USMC, May 8, 1984:

The question is whether a member of the uniformed services is entitled to receive per diem while he was assigned to a temporary duty station for retirement processing when the temporary duty station was also his home of selection and his permanent residence.¹

Per diem is not payable when temporary duty is performed within the limits of the permanent duty station. When the temporary retirement processing duty station, permanent residence and ultimate home of selection are all in the same vicinity, the permanent residence has the effective status of a permanent duty station and payment of per diem is precluded.

Master Gunnery Sergeant Edward W. Lord, USMC, who was then stationed in Okinawa, Japan, received permanent change-of-station orders dated February 17, 1983, detaching him from his overseas station in June 1983 and transferring him to Camp Pendleton, California, for temporary duty in connection with retirement processing. The orders were modified on March 11, 1983, to authorize Sergeant Lord to travel to Kansas City, Missouri, as the processing center of his choice for the purpose of retirement on September 1, 1983. The orders were again modified on March 18, 1983, to include the designation of Sergeant Lord as a "JUMPS

¹ This question was presented by the Disbursing Officer, Marine Corps Finance Center, Kansas City, Missouri, and forwarded to us by the Per Diem, Travel and Transportation Allowance Committee, Alexandria, Virginia. The matter has been assigned PDTATAC Control No. 83-22.

Comback Tape Courier," to deliver pay data tapes and other documents to the Marine Corps Finance Center, Kansas City, on May 16, 1983.

Sergeant Lord was detached from Okinawa on May 15, 1983, and reported to the Finance Center in Kansas City on May 20, 1983, for temporary duty while awaiting retirement processing. His orders were endorsed to show that Government quarters and dining facilities were not available to him at the Finance Center during the period he was awaiting retirement processing.

Sergeant Lord's detachment from Okinawa was originally scheduled during June to allow for 10 days processing and 75 days terminal leave prior to his scheduled retirement date of August 31, 1983. However, he was detached a month early for the convenience of the Marine Corps. He apparently performed duty at the Finance Center until July 25 at which time he was placed on leave until August 31, the date of his retirement.

Upon his initial assignment to Okinawa on a restricted tour (that is, without dependents), Sergeant Lord's family remained in Kansas City, and maintained a household there. Upon reporting to the Finance Center in Kansas City, he resided in the same household with his dependents and commuted from that residence to work. Sergeant Lord's ultimate home of selection upon retirement was Kansas City.

Under regulations prescribed by the Secretaries concerned, a member of the uniformed services is entitled to travel and transportation allowances for travel performed under orders upon a change of permanent station, which includes travel from his last duty station to his home upon release from active duty or retirement. 37 U.S.C. § 404(a). The Joint Travel Regulations, Volume 1 (1 JTR) contain the regulations promulgated pursuant to that authority.

Sergeant Lord's orders show that although he was used as a courier in returning to the United States, he was completely detached from his overseas assignment and his transfer to the Marine Corps Finance Center, Kansas City, was a temporary assignment for the primary purpose of retirement processing. See *Matter of Vickers*, B-206299, November 15, 1982, and 53 Comp. Gen. 44 (1973).

While Sergeant Lord's assignment at Kansas City was temporary, he had no other permanent station at that time since it was contemplated that he would be retired and proceed to his home of selection, also Kansas City. While these circumstances are not specifically covered, the regulations do provide that no per diem is payable for temporary duty performed within the limits of the permanent station, or at a temporary duty station to which the member commutes daily from his permanent quarters. 1 JTR para. M4201-5 and M4201-14. And, we have held that when the permanent residence and the ultimate home upon retirement or separation are within the same metropolitan area, as the temporary re-

tirement processing station, or separation station, the member is not entitled to per diem because the temporary duty is performed within the limits of the effective permanent station, his home. See *Matter of Vickers*, cited above; B-134839, April 25, 1958, and 33 Comp. Gen. 55 (1953).

The purpose of per diem is to reimburse a member for meals and lodging while on temporary duty, while he also maintains a residence at his permanent duty station. In this case the rationale for per diem does not exist. Accordingly, Sergeant Lord is not entitled to per diem for the period of his assignment to the Finance Center.

In addition, the question is raised as to whether the same response would be made had the member made a home of selection after the time of retirement, or selected a home at a location outside the metropolitan area of the processing station.

In these circumstances where the member returned to Kansas City for retirement processing and resided with his family in the residence which they had previously established, no per diem would be payable even if he delayed selecting Kansas City as his home upon retirement until after he retired, or he ultimately (within the prescribed time limit) selected somewhere else as his home upon retirement. That is because at the time he was on duty at Kansas City, he was residing in his permanent residence from which he was commuting to his duty station. However, in those cases in which the home of selection is outside the metropolitan area of the separation processing station and the member's family had not established in advance a permanent residence in the area of the processing station, per diem would ordinarily be payable provided that station was not the member's last permanent station. See 53 Comp. Gen. 44, cited above, and 47 Comp. Gen. 166 (1967). This may be considered general guidance and the actual facts of each case must, of course, be considered in determining whether per diem is authorized.

[B-212781.2, B-212781.3]

Bids—Responsiveness—Descriptive Literature—Indication That Item Offered Failed to Meet Specifications

When descriptive literature, required to be submitted with a bid for evaluation purposes, indicates that word processing system does not meet mandatory requirement in the manner specified, contracting agency's rejection of bid as nonresponsive is proper. To be responsive, bid must be an unequivocal offer to conform to specifications in all material respects. However, bid may not be rejected for failure to meet unstated or ambiguously defined requirements.

Bids—Responsiveness—Descriptive Literature—Clarification of Pre-Printed Literature—Bid Responsive

When descriptive literature, preprinted for use in promoting sales to the public, indicates that specifications are subject to change, bid need not be rejected as nonresponsive if there are other indications in the bid itself that the bidder intends to comply with Government specifications. However, successful completion of a live

test demonstration 3 weeks after bid opening cannot be used as evidence of intent to comply, since responsiveness must be determined at bid opening.

Matter of: Syntrex Inc.; Managed Information Systems, May 15, 1984:

This decision responds to two protests against the Department of Education's award of a more than \$2 million contract for "stand-alone" word processing systems and related services to Compucorp.

Managed Information Systems, Inc., believes that its low bid was improperly found nonresponsive, while Syntrex Incorporated argues that Compucorp's second-low bid also was nonresponsive because descriptive literature indicated that Compucorp's specifications were subject to change without notice. We deny both protests.

Background

The Department of Education determined that it could replace and upgrade word processors installed at various locations in and near Washington, D.C. by using formal advertising procedures, since no special or unique production was required, adequate competition was anticipated, and award could be made on the basis of price. The agency therefore issued invitation for bids No. 83-002 on July 15, 1983, planning to award a fixed price contract for hardware, software, and conversion, and a fixed price requirements contract for maintenance and training. The invitation covered an initial quantity of 150 terminals and 102 printers in three configurations, with an option for an additional 150 terminals and 90 printers. Prices for the option quantities were to be considered in determining the low bidder.

The invitation contained a 12-page, detailed checklist on which bidders were to indicate whether their equipment met mandatory technical specifications and to cross-reference that portion of the descriptive literature, required to be submitted with bids, that supported their compliance with these specifications. Before award, the invitation stated, the apparently successful bidder would be required to conduct a live test demonstration on each of the configurations that it offered.

At opening on August 22, 1983, 14 bidders responded; of these, 12 were asked to verify their bids due to suspected mistakes and a number were allowed to make corrections. As corrected, the bids at issue here were as follows:

Managed Information Systems.....	\$2,302,750.40
Compucorp.....	2,382,997.58

Syntrex No. 2.....	3,736,425.33
Syntrex No. 1.....	3,762,856.33

Managed Information Systems' low bid was found nonresponsive, making Compucorp the apparently successful bidder. The next eight bids and Syntrex No. 2 also were found nonresponsive, making Syntrex No. 1 second in line for award.

On September 15, 1983, Compucorp successfully completed a 9-hour live test demonstration. By this date, three protests had been filed with our Office: Managed Information Systems challenged the decision that its bid was nonresponsive, while Syntrex alleged that all bids lower than its own were nonresponsive.¹

Notwithstanding these protests, on September 26, 1983, the Department of Education awarded Compucorp a \$2,101,192 contract, covering all equipment and services through September 30, 1984, and immediately exercised the option.²

Managed Information Systems' Protest:

Shortly after bid opening, the Department of Education advised Managed Information Systems that it could not determine from the firm's descriptive literature whether it met a number of mandatory requirements. In a protest to our Office, Managed Information Systems addressed each of the alleged deficiencies, providing specific references to and extractions from its descriptive literature. The Department of Education reviewed its evaluation and concluded that it had been mistaken in finding Managed Information Systems nonresponsive with regard to three mandatory requirements; it still contended, however, that the firm did not meet 11 others.

GAO Analysis of Managed Information Systems' Protest:

We find that a number of the Department of Education's mandatory requirements are either unstated or so ambiguously defined that rejection of Managed Information Systems' bid solely on the basis of failure to meet them would have been improper. However, since the record also indicates that Managed Information Systems' word processors do not meet at least one clearly stated, apparently material requirement, we do not dispute the ultimate determination of nonresponsiveness.

In the first category, the Department of Education asserts, for example, that Managed Information Systems did not meet specification No. 1.3.1.2.3, which required bidders to "Provide editing keys to implement the following functions: (1) Erase display, (2) Delete, (3) Insert, (4) Copy, and (5) Move." According to the agency report, literature submitted shows that Managed Information Systems sup-

¹ The third protester, Wang Laboratories, Inc., had complained before bid opening of unduly restrictive specifications. The firm did not bid and subsequently failed either to comment on the agency report or to request our decision on the existing record. In accord with our Bid Protest Procedures, 4 C.F.R. § 21.3(d) (1984), we therefore closed our file on Wang's protest.

² The Department of Education did not, however, furnish a report on the protests to our Office until December 9, 1983, so that delivery—required within 90 days after award—was virtually complete before the protesters had an opportunity to comment.

ports these functions but does not provide "specific, dedicated editing keys."

Since the solicitation nowhere requires specific keys to be dedicated to these particular functions, rejection for failure to provide them clearly was improper. See *Alanthus Data Communications Corp.*, B-206946, Feb. 10, 1983, 83-1 CPD ¶147.

The Department of Education also found that Managed Information Systems did not meet specification No. 1.4.3.2.9, which required underscoring to be "viewable on the screen." The agency argues that Managed Information Systems delineates underscoring by caret marks before and after the character, word, or phrase to be set off, and therefore is not responsive to this requirement. In our opinion, the requirement is ambiguous, and it is just as reasonable to find caret marks that appear on the screen to be "viewable" as it is to find text that is literally underscored "viewable." When a specification is not stated with sufficient particularity to insure a common understanding of the agency's needs, a bid or offer should not be rejected for failure to meet it. *Id.*

The same objection applies to specification No. 1.4.3.4.1, covering mathematical processing, which requires, among other things, "Percents, rounding." The solicitation does not state to what place figures must be rounded, and in our opinion is even unclear as to whether rounding and calculating percentages are two separate, required capabilities. Failure to demonstrate them therefore would not have provided a basis for rejecting Managed Information Systems' bid as nonresponsive.

Our review of Managed Information Systems' descriptive literature, however, reveals that its system did not meet at least one clearly stated, apparently material requirement. Specification No. 1.3.2.14 required two workstations to be able to share one letter-quality printer, and stated that the "printer sharing interface must be operational within a maximum distance of 100 feet from a workstation."

Managed Information Systems offered a system in which an interface device known as a "Diplomat Spooler" is placed between workstations and the printer. Its function, the firm's literature indicates, is to "buffer" data transmitted from workstations to the printer, so that printing and pagination can be performed at the same time that other documents are being created or edited.

The firm states that it provides industry standard cabling, which certifies transmission of up to 50 feet, between the "Diplomat Spooler" and workstations and between the "Diplomat Spooler" and the printer; it suggests that in cases where operation up to 100 feet is required, the "Diplomat Spooler" should simply be placed equidistant from the workstation and the printer.

The Department of Education found, and we agree, that a system with only 50-foot cabling does not meet the requirement for a printer-sharing interface that can operate up to 100 feet from a

workstation. The equidistant arrangement would achieve a maximum distance of 50 feet between a workstation and the interface device and between the printer and the interface device, but this is clearly not the arrangement specified. Assuming that the 100-foot operating distance between printer sharing interface and workstation is a material requirement (and Managed Information Systems does not dispute that it is), the Department of Education's rejection of the bid on this basis appears proper. In order for a bid to be responsive, there must be an unequivocal offer that conforms in all material respects to the Government's specifications. *Raymond Engineering, Inc.*, B-211046, July 12, 1983, 83-2 CPD ¶ 83. We therefore deny Managed Information Systems' protest.

Syntrex's Protest

Syntrex initially protested that all bidders lower than itself were nonresponsive; however, since the Department of Education agreed as to all except Compucorp, Syntrex's further allegations are directed solely to that firm. Syntrex argues that the "subject to change" legend in Compucorp's descriptive literature renders the bid nonresponsive. If it had known that specifications subject to change would be acceptable, Syntrex continues, it would have bid on a new, less expensive word processing system that would have been available before the required delivery date.

In addition, Syntrex alleges that Compucorp failed to submit required references and a list of Government facilities at which its word processors were used; that Compucorp's bid was materially unbalanced because identical charges were proposed for maintenance of different configurations; and that Compucorp's training equipment would be different than that actually installed.

The Department of Education responds that it did not intend to use the descriptive literature submitted with bids as the sole basis for determining responsiveness and that it also used the live test demonstration for this purpose. Compucorp's "subject to change" legend, according to the agency, was interpreted as meaning that Compucorp would offer any enhancements to its word processing systems that became available during contract performance to the Government; it was not read as qualifying the bid or permitting Compucorp to substitute nonconforming hardware or software.

When, before award, Syntrex protested to the Department of Education concerning the legend, the agency considered as further evidence of responsiveness the fact that Compucorp stated in a cover letter that all products and services met or exceeded the agency's requirements; indicated on the bidder's checklist that it met all mandatory specifications; and accepted all solicitation terms and conditions, including an Order of Precedence clause giving specifications precedence over the bid in case of inconsistency. The agency concluded that, considering the bid as a whole, if Compucorp delivered word processors that did not meet specifica-

tions, the "subject to change" legend would not prevent termination of its contract for default.

GAO Analysis of Syntrex's Protest

Our examination of Compucorp's bid reveals that two different legends are used in its descriptive literature. On the pages describing Compucorp's Models 700 and 775 information processors, as well as those on which its paper feeder, printer, and acoustical cabinet are described, the statement "Specifications subject to change" appears. On the descriptive literature for software packages that automatically write letters, fill in forms, spell and proofread, edit and format, and calculate is the statement that "All information contained herein is subject to change without notice." In addition, the cover of the operators's manual for Compucorp's Database Management System features a disclaimer stating that because the software is subject to continuing refinements before its release, Compucorp assumes no responsibility for the correct operation of functions and their descriptions in the manual.

The issue here is whether the above statements qualified the bid and provided Compucorp with a unilateral option to deviate from invitation requirements. We think they did not.

We previously have held that in an advertised procurement, when the Government requires descriptive literature to be submitted with a bid and uses such literature to determine precisely what the bidder is proposing and will be bound to furnish if awarded a contract, any statement in that literature that specifications are subject to change is a material deficiency, rendering the bid nonresponsive. See, e.g., *Professional Material Handling Co.*, B-211722, Oct. 11, 1983, 83-2 CPD ¶ 435; *Dobbs Detroit Diesel, Inc.*, B-182992, May 29, 1975, 75-1 CPD ¶ 236. Compare *Arista Co.*, 53 Comp. Gen. 499 (1974), 74-1 CPD ¶ 34 (when descriptive literature is not required for evaluation purposes, the bidder is merely required to agree to the specifications, and a "subject to change" legend does not necessarily render the bid nonresponsive). We also have held that the deficiency generally is not overcome by a blanket offer to comply with specifications, which at best renders the bid ambiguous. *Big Joe Manufacturing Co.*, B-182063, Nov. 14, 1974, 74-2 CPD ¶ 236.

We have made exceptions only when it was reasonably clear that a "subject to change" legend was not intended to reserve the right to change the product offered or to deviate from any of the Government's material requirements. See *Burley Machinery, Inc.*, 55 Comp. Gen. 592 (1975), 75-2 CPD ¶ 411 (regular dealer's bid may be accepted when it clearly indicates that stock items will be furnished and that "subject to change" legend on manufacturer's literature refers only to items that will be produced in the future); *IFR, Inc.*, B-203391.4, Apr. 1, 1982, 82-1 CPD ¶ 292 (bid may be accepted when "subject to change" legend appears on literature submitted

solely to establish that commercial item will be furnished, and has been crossed out on literature submitted to establish technical characteristics of item); *Waukesha Motor Co.*, B-178494, June 18, 1974, 74-1 CPD ¶ 329 (bid may be accepted when cover letter submitted with it discusses descriptive literature and specifically states that all equipment and tests will be completed and will meet specifications).

In this case, we think there was sufficient indication in Compucorp's bid that it intended to meet all contract requirements notwithstanding the "subject to change" legend and the disclaimer. The bid was not only accompanied by Compucorp's letter, specifically prepared for purposes of this procurement and stating that the Government's needs will be met or exceeded, but also contained Compucorp's affirmative responses to each mandatory requirement in the bidder's checklist. Thus, while the letter alone might have been insufficient to resolve the ambiguity regarding Compucorp's intentions, we think, in light of the checklist, that it would be unreasonable to read Compucorp's bid as reserving the right for Compucorp to deviate from the specifications. Therefore, we think the bid properly was viewed as responsive.

We note, however, that Compucorp's live test demonstration could not have been used as evidence of an intent to comply with the specifications, since it is well settled that responsiveness must be determined at the moment of bid opening. *Raymond Engineering, Inc.*, B-211046, July 12, 1983, 83-2 CPD ¶ 83. Rather, since it was conducted nearly 3 weeks after bid opening, the demonstration could only have been used to establish, before award, Compucorp's ability to produce a word processing system that met the Department of Education's requirements. As such, it would have involved Compucorp's responsibility. *Id.*

As for Syntrex's other allegations, the references and list of Government facilities at which Compucorp's word processors are used also involve responsibility and could have been submitted at any time before award; according to the Department of Education, the required information was provided. As for the firm's allegedly unbalanced bid, Compucorp included maintenance costs for printers in its price for maintenance of the word processors, resulting in the same overall cost for different configurations. Finally, the Department of Education states that Compucorp's training equipment was the same as that which was installed. These bases of protest therefore are without merit.

Syntrex's protest is denied.

[B-213035.2]**Contracts—Grant-Funded Procurements—Procedures—
Irregularities—No Prejudice**

Specifications are not rendered materially defective by an addendum which called for deletion of an item identified as being on one page when, in fact, the item was on another page since (1) item was correctly identified by item number, and (2) all but one of the bidders deleted the item and that bidder failed to comply with any of the changes called for in the addendum. Therefore, since none of the bidders was prejudiced by the error, error is immaterial.

**Contracts—Grant-Funded Procurements—Bids—Correction—
Pricing Response**

Where bid had description portion of item crossed through by a single line, but "quantity" and "unit price" portions were not crossed out and total amount of bid on item was accounted for in total project bid price, bid need not be rejected, since it can reasonably be concluded that bidder intended to cross out the next item which was *required* to be deleted and bidder there crossed out not only description portion of that item, but also crossed out "quantity," "unit price" and "total price" portions of item.

**Contracts—Grant-Funded Procurements—Bids—Correction—
Pricing Response**

Where unit price for item was erased or changed, but there is no doubt as to the intended bid price, there is a legally binding offer, acceptance of which would consummate a valid contract which the bidder would be obligated to perform. Therefore, bid need not be rejected.

**Office of Management and Budget—Circulars—No. A-102—
Attachment O—Protest Procedures**

Language in Office of 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.

**Constitutionality—Administrative Actions—Procurement
Matters—Due Process Right**

Interest in having bid protest considered is not of such a nature as to entitle bidder to "due process" hearing.

Matter of: Krygoski Construction Co., May 15, 1984:

Krygoski Construction Co. (Krygoski) complains against the award of contract No. FM55-C27 by the Menominee-Marquette Twin County Airport Commission to the Bacco Construction Company (Bacco). The contract is for the construction of runways and taxiways at the Twin County Airport in Menominee, Michigan. This project is substantially funded by the Federal Aviation Administration (FAA). We consider such complaints pursuant to our public notice entitled "Review of Complaints Concerning Contract Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975.

We find Krygoski's complaint is without merit.

By way of background, the FAA administers a grant-in-aid program under the provisions of the Airport and Airways Improvement Act of 1982, Pub. L. No. 97-248, title V, September 3, 1982, 96 Stat. 671, 49 U.S. Code 2201 note, and title 14, part 152, of Code of Federal Regulations (CFR).

Under this agreement with the FAA, the grantees are permitted to follow local procurement procedures so long as they meet the minimum requirements of attachment "O" to Office of Management and Budget (OMB) circular A-102. According to the FAA, it does not conduct procurement actions for the sponsors, but does monitor the procurement to assure itself that all required Federal stipulations, rules, regulations and laws are followed. The sponsors are responsible for the establishment and implementation of procurement standards and procedures in accordance with Federal, state and local laws.

Bid opening was on July 20, 1983, and five bids were received. Bacco was the apparent low bidder, while Krygoski was the second low bidder. By letter of August 5, 1983, Krygoski lodged a protest with the FAA. By memorandum dated August 25, 1983, the Michigan Attorney General's office ruled despite Krygoski's assertions, it was aware of no legal impediments to the award of a contract to Bacco. By letter dated September 9, 1983, received by our Office on September 14, 1983, Krygoski lodged a timely complaint with our Office. See *Brumm Construction Company*, 61 Comp. Gen. 6 (1981), 81-2 CPD 280, and *Bradley Construction Inc.*, 62 Comp. Gen. 138 (1983), 83-1 CPD 76.

Krygoski contends that (1) addendum No. 1 to the specifications, issued on July 14, 1983, included a clear error which called for the deletion of an item on the wrong page, (2) the apparent low bidder, Bacco, deleted an item of work in its bid amounting to 8.6 percent of the project, (3) a unit price entry by Bacco contains an "overwrite" which does not comply with section 20-08 of the specifications, and (4) the grantees have no formal administrative appeal procedures to challenge bidding procedures or contract awards. Krygoski argues that these irregularities violate the procedures set forth by the FAA. In 14 CFR §§ 151, 152, requiring competitive bidding pursuant to public advertising. Krygoski also requested a hearing on the propriety of the bidding procedures utilized in the above solicitation.

In regard to Krygoski's first contention, addendum No. 1 called for the deletion of an item on page 9 of the specification when, in fact, the item to be deleted was on page 10. Krygoski contends that this is an ambiguity which is inconsistent with the Federal requirement contained in part 11b(2)(b) of OMB circular A-102, August 15, 1970, which states:

(b) The invitation for bids, including specifications and pertinent attachments, shall clearly define the items or services needed in order for the bidders to properly respond to the invitation.

Krygoski contends that the amendment did not "clearly define the item or services needed."

We do not agree. We concur in the view expressed by Michigan's Office of Attorney General that the error is not a material error. The item to be deleted was correctly identified by item number, which sufficiently informed the bidders which item was to be deleted. All but one of the bidders correctly deleted the item and the bidder who did not delete the item also failed to comply with other changes set forth in addendum No. 1 and was the high bidder. Neither Krygoski nor any of the other bidders was prejudiced by the error. We have held that where none of the bidders is misled as a result of the error, the error is immaterial. See *Zinger Construction Company*, B-202198, December 28, 1981, 81-2 CPD 497. Also, see *United States Contracting Corporation*, B-210275, August 22, 1983, 83-2 CPD 222.

Concerning Krygoski's second contention, that Bacco deleted an item of work in its bid amounting to 8.6 percent of the project, a single line was drawn through the description part of item 2090512, but a "unit price" and "total amount" bid were inserted. Krygoski argues that by striking an item of work without authorization from the grantee in violation of section 20-07 of the specifications, Bacco has submitted an irregular bid as defined by section 20-08(b)(4) of the specifications. Section 20-08(b)(4) of the specifications provides:

b. Proposals will be considered irregular and may be rejected for any of the following reasons:

4. If there are irregularities of any kind which may tend to make the proposal incomplete, indefinite, or ambiguous as to meaning.

We find no reason to question the decision by the grantee not to reject Bacco's bid because of the above irregularity. While Krygoski argues that Bacco deleted item No. 2090512, we note that on the item following item No. 2090512, item No. 4120626, which was required to be deleted by addendum No. 1, Bacco crossed out not only the description but the "quantity," "unit price" and "total price" blanks and inserted no prices. Moreover, more than a single line was used to cross out this item. It would appear that had Bacco intended to delete item No. 2090512, it would have done so in the manner that it deleted item No. 4120626. The grantee is of the view that Bacco, intending to cross out item No. 4120626, as required by addendum No. 1, erroneously started to cross out item No. 2090512, which is directly above item No. 4120626, and, realizing its error, stopped after drawing the one line and then initialed it. Moreover, the grantee does not believe that Bacco deleted this item because, as mentioned above, Bacco did not cross out the "unit price" and "total amount" and the price bid on item No. 2090512 is accounted for in Bacco's total project bid price. We are unable to conclude that the above interpretation of this irregularity is unreasonable or that the decision not to reject Bacco's bid was as abuse of discretion.

Also, in regard to item No. 2090512, Krygoski contends that the unit price for this item contains an "overwrite" which does not comply with section 20-08(b)(1) of the specifications and which provides that a bid may be rejected "if the form is altered or any part thereof is detached." Where, as in the present case, there is a change or erasure made prior to bid opening and there is no doubt as to the intended bid price, there is legally binding offer, acceptance of which would consummate a valid contract which the offeror would be obligated to perform at the offered price. Even assuming that the "3" in the \$13.81 unit price for item No. 2090512 was altered, if you multiply \$13.81 by the required quantity of 19,504 cubic yards, the result is \$269,350.24, which was the total price offered for this item. See 49 Comp. Gen. 541 (1970); *Werres Corporation*, B-211870, August 23, 1983, 83-2 CPD 243.

Also, Krygoski contends that the lack of a formal administrative appeal procedures to challenge bidding procedures or contract awards is a material irregularity in the bidding process. In this regard, we were informally advised that neither the FAA, the grantor, nor the Twin County Airport Commission, the grantee, has formal administrative appeal procedures.

Section 2, OMB circular A-102, attachment "O," provides:

b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistant Programs conform to the standards set forth in this Attachment and applicable Federal law.

We do not interpret this provision as mandating that the grantee promulgate formal administrative procedures, but instead we view this provision as merely requiring the grantee to follow local procurement procedures which cannot conflict with the standards set forth in attachment "O" or applicable Federal law. There is no evidence of record that the review procedures followed by the grantee in this case did not reflect local procurement procedures or that it was in conflict with attachment "O" or applicable Federal law. See *Appex Corporation*, B-184562, October 6, 1976, 76-2 CPD 311. Nor is there any evidence that the procurement was not conducted in an open and competitive manner since five bids were received. See *Copeland Systems, Inc.*, 55 Comp. Gen. 390 (1975), 75-2 CPD 237. Moreover, we note that Krygoski and its attorney had a meeting on August 16, 1983, with the grantee to present its complaint and supporting arguments.

Also, in this regard, section 5, OMB circular A-102, attachment "O," provides that the grantor agency may develop an administrative procedure to handle complaints or protests regarding grantee selection actions with reviews being limited to (1) violations of Federal law or regulations and (2) violations of grantee's protest procedures or failure to review a complaint or protest.

Due to the discretionary language of section 5, we cannot conclude that grantor agencies are required to establish formal admin-

istrative procedures and, as already mentioned, FAA has chosen not to do so. Since FAA has no formal administrative procedures to handle Krygoski's complaint, the matter was appealed to our Office where the issues in question were handled under a Federal frame of reference since we are unaware of any State law covering the issues in question. See *Griffin Construction Company*, 55 Comp. Gen. 1254 (1976), 76-2 CPD 26.

Finally, Krygoski contends that since the State has no formal bid protest procedures, Federal minimum standards must apply. Krygoski contends that under these standards it was entitled to a hearing, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) as authority. The *Goldberg* case held that, as a matter of procedural due process, a welfare recipient is entitled to a predetermination evidentiary hearing.

The Supreme Court has recognized that procedural due process affords the right to a hearing in various situations where the interest of the affected party is tantamount to a property right. *Goldberg, supra*. However, we are not aware of any authority for the proposition suggested by Krygoski that its interest in having its bid protest considered is of the same nature as that in *Goldberg* so as to entitle Krygoski to an evidentiary hearing. See *Wallace and Wallace Fuel Oil Company, Inc.*, B-182625, July 18, 1975, 75-2 CPD 48. It is well settled that no firm has a property right in a Government contract. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Navajo Food Products, Inc.*, B-202433, September 9, 1981, 81-2 CPD 206. Of course, firms do have the right to have their bids or offers considered fairly. See *Sciences Corporation—Claim for Proposal Preparation Costs*, 60 Comp. Gen. 36 (1980), 80-2 CPD 298. We are unable to conclude that Krygoski was treated unfairly.

Krygoski's complaint is denied.

[B-213160]

Bids—Mistakes—Responsiveness Determination

Low bid which contained no exception on its face to the specification that building shall be occupied during construction should not have been rejected as nonresponsive to the requirement; however, since low bidder and only other bidder made a mistake in not preparing their bids on the basis of the requirement, their bids should have been rejected for that reason.

Bidders—Unsuccessful—Anticipated Profits

Even if claimant is wrongfully denied a contract, lost profit and cost of pursuing a protest are not recoverable.

Matter of: Donald Owen & Associates, Inc., May 15, 1984:

Donald Owen & Associates, Inc. (Owen), protests the rejection of its bid and the award of a contract to Cree Construction Co., Inc. (Cree), under Department of the Navy invitation for bids (IFB) No. N62474-83-B-4817 for repairs and alterations to Naval Submarine Base building 1006, Bremerton, Washington.

We deny the protest against the rejection and sustain the protest against the award.

Two bids were received under the IFB. Owen submitted a bid price of \$149,950; the Cree bid price was \$171,000. Subsequently, contracting agency officials met with each of the bidders to discuss their bids. During the separate discussions, each of the bidders, supported by corroborating statements from the same two subcontractors who were to perform for each of them, stated that its bid was based upon the building being unoccupied. This was contrary to IFB specifications paragraph 01011.15(a), which stated that the building shall be occupied during construction.

During the discussions, Owen refused to perform the asbestos removal work with the building occupied. Owen's bid was rejected subsequently as nonresponsive. On the other hand, during the discussions with Cree, Cree agreed to perform in accordance with the specifications. Cree's bid was accepted.

Owen's bid should not have been rejected as nonresponsive. A bid is responsive where it offers on its face to perform without exception the exact thing called for in the IFB. *Boskind Development, Inc.*, B-213679, December 2, 1983, 83-2 CPD 639. Owen's bid contained no exception on its face to the occupancy requirement and, therefore, it was responsive.

However, neither Owen's bid or Cree's bid should have been accepted. Both bidders made a mistake in not preparing their bids on the basis of the necessary requirements in the IFB and their bids should have been rejected for that reason. 51 Comp. Gen. 423, 424 (1972). In making an award to Cree without receiving bids prepared on the basis of the necessary requirements, there was no assurance that the Cree bid represented the best price for the work.

Given the fact that the contract was awarded in September 1983 and that it called for completion within about 5 months, no corrective action would appear to be possible at this time.

Since we have decided that Owen's bid should not have been accepted, it is not necessary for us to consider its claim for lost profits and attorney's fees based upon its failure to receive award. However, we note parenthetically that, even if the claimant is wrongfully denied a contract, compensation for lost profit and the cost of pursuing a protest is not recoverable against the Government. *Keco Industries, Inc. v. United States*, 428 F.2d 1233 (1970); *Robert Swortzel*, B-188764, April 22, 1977, 77-1 CPD 280; *Kent Uniform Company*, B-188931, July 25, 1977, 77-2 CPD 46.

[B-213789]

Leaves of Absence—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 as-

signed 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.

Matter of: Jack L. Hamilton—Restoration of Sick Leave, May 18, 1984:

Mr. Jack L. Hamilton, a former Veterans Administration (VA) employee, appeals our Claims Group's denial of his claim for backpay and recredit of 2 days' sick leave used while he was placed on involuntary leave. For the following reasons, we affirm our Claims Group's denial of Mr. Hamilton's claim.

FACTS

During his career with the VA, Mr. Hamilton sustained a succession of on-the-job injuries. In 1982, as a result of these injuries, Mr. Hamilton was suffering from problems with his back. At that time, he was working as a painter, WG-9, at the VA Medical Center in Salem, Virginia. Following his most recent injury, which occurred on July 26, 1982, he was reassigned to temporary light-duty work in the Medical Center's laundry plant. On December 8, 1982, a fitness-for-duty examination was performed on Mr. Hamilton by an agency physician because of increased absenteeism from injuries and illness. On January 4, 1983, the VA personnel office received the results of this examination which showed limiting conditions to Mr. Hamilton's continued employment in his assigned duties as a painter. According to the administrative report submitted to this Office by the VA, the agency filed an application for disability retirement for Mr. Hamilton on January 5, 1983. The next day, two officials from the personnel office met with Mr. Hamilton to discuss the results of the examination. The agency contends that because of Mr. Hamilton's inability to perform the duties of a painter, his pending application for disability retirement dated January 5, 1983, and the lack of a temporary light-duty assignment, he was placed on involuntary sick leave for the next 2 work days. On January 11, 1983, the agency was able to reassign Mr. Hamilton to a temporary light-duty assignment in the Medical Center's pharmacy. On May 20, 1983, Mr. Hamilton retired on disability.

Mr. Hamilton contends that at the time he was placed on involuntary sick leave, the agency had not filed an application for disability retirement. Further, he contends that there were light-duty assignments available on the 2 days he was forced to use sick leave.

DISCUSSION

Our Claims Group denied Mr. Hamilton's claim for backpay and recredit of 2 days' sick leave he was forced to use. The denial was based on decisions of this Office which hold that an agency may place an employee on involuntary leave while an agency filed application for disability retirement is pending when administrative

officers determine, on the basis of competent medical evidence, that an employee is incapacitated for the performance of his assigned duties. See [REDACTED], B-184522, April 21, 1977.

Mr. Hamilton appeals the denial of his claim by contending that the VA had not filed an application for disability retirement before he was placed on involuntary sick leave. Further, he contends that there were light-duty assignments available on the days he was placed on leave. The agency report, on the other hand, states that an application for disability retirement was filed by the agency on January 5, 1983, 2 days before Mr. Hamilton was placed on involuntary sick leave. The record also discloses that the agency made attempts to reassign Mr. Hamilton to light-duty positions. From August 3, 1982, until January 6, 1983, he was reassigned to a light-duty assignment in the Medical Center's laundry plant. According to the agency report, temporary light-duty work diminished in the laundry after the Christmas holidays to the point where Mr. Hamilton's services were no longer needed. After being placed on involuntary sick leave for 2 days, another light-duty assignment was found for him in the pharmacy. Apparently, the agency was able to accommodate him in that position or other light-duty assignments until he retired on disability on May 20, 1983.

We decide cases involving claims against the Government on the basis of the written record. The claimant has the burden of proof of establishing the liability of the United States and the claimant's right to payment. 4 C.F.R. § 31.7 (1984). Therefore, if the written record before us presents a material dispute of fact that cannot be resolved without an adversary hearing, we are required to deny the claim because the claimant has failed to establish his claim.

Furthermore, regardless of whether the agency filed an application for disability retirement before placing Mr. Hamilton on involuntary sick leave and whether temporary light-duty assignments were available, the agency acted within its discretion to place Mr. Hamilton on involuntary sick leave.

An employee may be placed on annual or sick leave or in a non-duty nonpay status when he is not "ready, willing, and able to work." Federal Personnel Manual, Ch. 751, § 1-3c (Inst. 237, December 21, 1976). In addition, according to the VA Manual, MP-5, Part 1, Ch. 630, § 11h (August 22, 1979), an employee who is unable to perform his duties because of illness may be placed on involuntary sick leave. Finally, the general rule applied by this Office is that an employee may be placed on leave without his consent when administrative officers determine, upon the basis of competent medical findings, that the employee is incapacitated for the performance of his assigned duties. *Laudis B. Patterson*, B-206544, July 7, 1982; *William O. Garrison*, B-193559, April 27, 1979. Under such circumstances, the involuntary leave does not constitute an unjustified or unwarranted removal or suspension without pay within the meaning of the backpay provisions of the applicable

statutes. *Laudis B. Patterson*, B-193559, *supra*; 41 Comp. Gen. 774 (1962).

The agency placed Mr. Hamilton on involuntary sick leave based on the agency physician's finding that there were limiting conditions to his ability to perform his assigned duties as a painter. No contrary medical evidence was presented during the period of time Mr. Hamilton was on involuntary sick leave which shows that he could have performed his duties during that time. There is no indication that the medical advice in the first instance was improper or not based on good judgment. On the contrary, the evidence indicates that the medical advice was proper since Mr. Hamilton retired on disability a few months later.

For the foregoing reasons, we affirm the denial of Mr. Hamilton's claim by our Claims Group.

[B-213558]

Bids—Qualified—Default Provisions—Nonresponsive

"Conditions of Sale" provision incorporated into bid which conflicts with, among others, a solicitation's termination for convenience and default clauses renders the bid nonresponsive.

Contracts—Awards—Erroneous—Effect on Subsequent Actions

Improper award in one or more procurements does not justify repetition of the same error in subsequent procurements.

Matter of: Giant Lift Equipment Manufacturing Company, Inc., May 22, 1984:

Giant Lift Equipment Manufacturing Company, Inc. (Giant), protests the determination of the National Aeronautics and Space Administration (NASA) that Giant's bid, submitted in response to invitation for bids (IFB) No. 3-503528, was nonresponsive.

We deny the protest.

Giant's low bid was determined to be nonresponsive because the firm's own quotation sheet was submitted with the bid. That sheet expressly incorporated numerous "Conditions of Sale," including one entitled "*Cancellation*":

This contract may not be cancelled, except with the seller's written approval and upon terms and conditions which will indemnify the seller against any loss.

NASA rejected Giant's bid because the above condition created at the very least an ambiguity concerning the Government's right to terminate the contract for convenience under the following IFB clause:

The performance of work under this contract may be terminated by the government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government.

The "Conditions of Sale" clauses were viewed by NASA to be incorporated into Giant's bid because the face of the quotation sheet stated that items listed would be furnished subject to the "Conditions of Sale."

In its protest, Giant states that it has been contracting with the Government for 12 years and never before have its bids been rejected when submitted on the forms used in bidding on this procurement.

A bid is responsive if the bidder unequivocally offers to provide the requested items in total conformance with the specification requirements and the conditions of the invitation. *Free-Flow Packaging Corporation*, B-204482, February 23, 1982, 82-1 CPD 162. "Terms and conditions of sale" submitted with a bid generally will be considered as a part of the bid for purposes of determining the bid's responsiveness unless the bid itself expressly states that they are not intended to apply. See *Searle CT Systems*, B-191307, June 13, 1978, 78-1 CPD 433.

Giant's "Conditions of Sale" must be considered part of the bid. See *Searle CT Systems*, *id.* The sheet was addressed to the contracting office, referenced the solicitation by number, contained a product description, repeated several key parts of the accompanying bid (e.g., price) and was signed by the bid signer. Therefore, those conditions which conflict with any material IFB clauses do not constitute an unequivocal offer to perform the contract in total conformance with the terms and conditions of the IFB. 36 Comp. Gen. 535 (1957); *Fluke Trendar Corporation*, B-196071, March 13, 1980, 80-1 CPD 196.

Although Giant's conditions conflicted in several respects with material IFB clauses, we agree with NASA that Giant's "cancellation" clause which requires Giant's consent before cancellation is a material deviation from the termination for convenience clause and, we note, default clause, in the IFB in that it affords the bidder immunity from liability and that it creates a corresponding restriction of the rights of the Government. See 36 Comp. Gen., *supra*; *Free-Flow Packaging Corporation*, *supra*; *Dubie-Clark Company*, B-186018, August 26, 1976, 76-2 CPD 194. Accordingly, the bid was properly rejected.

Giant's allegation concerning prior procurements does not alter the fact that its bid was properly rejected as nonresponsive in this procurement. Improper award in one or more procurements does not justify repetition of the same error in subsequent procurements. 36 Comp. Gen., *supra*; *Wright Tool Company*, B-212343, October 12, 1983, 83-2 CPD 457.

[B-212967]

**Officers and Employees—Transfers—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.

Matter of: Stephen A. Bartholomew, May 23, 1984:

The sole issue for resolution is whether the \$50 statutory limitation on per diem is applicable to claims for temporary quarters subsistence expenses when the employee occupies temporary quarters in a high rate geographic area.¹ The employee argues that the limitation should be the \$75 authorized under 5 U.S.C. § 5702(c)(2) for the high rate geographic area where the temporary quarters are located. The agency maintains that the allowance must be limited to the \$50 maximum per diem rate set by 5 U.S.C. § 5702(a). We hold that the \$50 maximum per diem rate must be applied to reimbursement for subsistence while occupying temporary quarters.

Mr. Stephen Bartholomew transferred within the United States Department of the Interior effective November 28, 1982, from the National Park Service in St. Croix Falls, Wisconsin, to the Office of Surface Mining, in Greentree, Pennsylvania. He was authorized the usual relocation expenses incident to the transfer, including a temporary quarters subsistence allowance. He occupied temporary quarters for the full 30 days authorized, beginning December 13, 1983, and continuing beyond January 11, 1984, the last day for which he was entitled to reimbursement. Mr. Bartholomew submitted a voucher seeking, among other things, reimbursement for 30 days' temporary quarters subsistence expenses based on the high cost geographic area rate of \$75 per day applicable to the locality of the temporary quarters. The agency disallowed \$741.54 of the amount claimed on the basis that reimbursement for temporary quarters subsistence expenses is limited to the \$50 statutory per diem maximum.

Mr. Bartholomew submitted a reclaim voucher in which he argued that an amendment to the Federal Travel Regulations (FTR) (FPMR 101-7) permits the use of high cost geographic area rates in computing the temporary quarters subsistence allowance.

¹ Jutta Partyka, an authorized certifying officer of the Office of Surface Mining, United States Department of the Interior, has submitted a voucher on behalf of Mr. Stephen A. Bartholomew for an advance decision on this issue.

He quotes the following explanation of changes accompanying the amendment to the Federal Travel Regulations:

Paragraph 2-5.4c is revised to allow temporary quarters subsistence allowance reimbursement to the employee for the first 10-day period up to the *maximum per diem rate prescribed for the locality (e.g., conterminous United States or nonforeign area) in which the temporary quarters are located* instead of the current 75-percent limitation. [Italic supplied.] 47 Fed. Reg. 44565, at p. 44567 (October 8, 1982).

He contends that the underscored language authorizes reimbursement on the basis of rates authorized for high cost geographic areas. The agency counters that the sole purpose of the amendment to FTR paragraph 2-5.4c was to authorize the payment of expenses up to the maximum per diem rate for the first 10 days temporary quarters are occupied, whereas the regulations previously had limited reimbursement to 75 percent of the maximum per diem rate.

It appears that the basis for Mr. Bartholomew's arguments is that the phrase in FTR paragraph 2-5.4c "per diem rate prescribed for the locality in which the temporary quarters are located" refers to the high rate geographic areas listed in FTR, Appendix 1-A. Such an interpretation is precluded by the statute authorizing temporary quarters.

Reimbursement for subsistence expenses while occupying temporary quarters is authorized by 5 U.S.C. § 5724a(a)(3). That subsection provides for reimbursement of subsistence expenses of the employee and his immediate family for up to 30 days while occupying temporary quarters under certain conditions not relevant here. The subsection also provides for a ceiling on the amount payable:

* * * The regulations shall prescribe average daily rates for subsistence expenses per individual, not in excess of the maximum per diem rates prescribed by or under section 5702 of this title, for the location in which the temporary quarters are located. * * *

Note that the limitation is expressed in terms of per diem. Per diem is limited by section 5702(a) to \$50 per day. Under 5702(c), reimbursement of up to \$75 may be made for actual expenses. There is a basic distinction between the terms per diem and actual expenses. Per diem refers to a specified daily rate intended to cover expenses incurred while traveling on official business. Actual expenses relates to reimbursement on an itemized basis of actual and necessary expenses of official travel. The two terms are not interchangeable as each has a distinct meaning and originates in different subsections of 5 U.S.C. § 5702. Had the Congress intended to set the limitation for subsistence expenses while occupying temporary quarters at the actual subsistence rate, currently \$75, it could have used that term in section 5724a(a)(3). Instead, the phrase "maximum per diem rates" was used. Therefore, we hold that as a matter of law, reimbursement of subsistence expenses while occupying temporary quarters is limited by the maximum per diem rate established by 5 U.S.C. § 5702(a).

To the extent that others may have been confused by the language of subparagraph 2-5.4c the General Services Administration has amended that language to make it clear that the statutory per diem rate of \$50 is to be used for computing an employee's maximum temporary quarters subsistence expense entitlement within the continental United States. Subparagraph 2-5.4c(1) as amended by Supplement 10 (49 Fed. Reg. 13920) now specifically provides:

(1) *Applicable maximum per diem rates.* The maximum per diem rate to be used for computations under (2) through (4), below, shall be the maximum per diem rate prescribed for the locality in which the temporary quarters are located, as follows:

(a) For temporary quarters located in the coterminous [sic] United States, the applicable maximum per diem rate is \$50.

(b) For temporary quarters in applicable locations outside the conterminous United States, the maximum per diem rate is the rate prescribed for the locality by the Secretary of Defense or by the Secretary of State as provided in 1-7.2b or c.

Accordingly, we hold that the claim was properly denied.

[B-212675]

**Contracts—Negotiation—Offers or Proposals—Evaluation—
Point Rating—Significance of Differences**

Contracting officer's determination that there is no significant technical difference between proposals with a 14.4-percent difference in technical point scores is not unreasonable. This decision modifies B-208871, Aug. 22, 1983, and clarifies 57 Comp. Gen. 251.

**Contracts—Negotiation—Offers or Proposals—Evaluation—
Technically Equal Proposals—Price Determinative Factor**

Where solicitation states that technical factors will be weighted 70 percent and price 30 percent and award will be made to offeror with the highest combined point total, agency may properly award to lower technically rated, lower priced offeror with lower combined point total because contracting officer made a reasonable determination that there was no significant technical difference between proposals and award to lower priced offeror was most advantageous to Government. *RCA Service Company*, B-208871, August 22, 1983, 83-2 CPD 221 is modified to the extent that it is inconsistent with this decision.

**Contracts—Negotiation—Offers or Proposals—Discussion With
All Offerors Requirement—What Constitutes Discussion**

Protest that agency conducted negotiations, thus permitting awardee to improve its technical score, is denied because that is normal, proper conduct in negotiated procurements.

Contracts—Negotiation—Prices—Unrealistically Low

Protest that awardee has purposely underpriced its offer is dismissed, since that provides no legal basis for questioning award.

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

Issues raised after initial protest was filed are dismissed as untimely because they are new grounds of protest and were not raised within 10 working days of the pro-

tester's knowledge of them as required by General Accounting Office Bid Protest Procedures.

Matter of: Harrison Systems Ltd., May 25, 1984:

Harrison Systems Ltd. (Harrison) protests the award of a contract to Hamilton Communications Consultants, Inc. (Hamilton), by the Voice of America, United States Information Agency (USIA), for design and installation of a studio/control room and technical operations facilities under request for proposals (RFP) No. 19-23-3-EA.

Harrison argues that USIA did not follow the RFP's evaluation criteria in making the award and brought Hamilton up to a higher technical rating through discussions. Harrison also contends that Hamilton cannot do the work for the price it offered. Additionally, Harrison contends that USIA changed its budget limitation for this contract in order to accommodate Hamilton.

We deny the protest in part and dismiss it in part.

The RFP stated that technical proposals would be given 70 percent of the weight and the price proposals 30 percent of the weight in determining the award most advantageous to the Government. It stated further that award would be made to the offeror achieving the highest combined score. Harrison's combined score, after discussions and best and final offers, was 94.79 out of a possible 100; its price was \$1,392,293 and its technical score was 70. Hamilton's combined score was 89.88; its price was \$1,150,782 and its technical score was 59.88.

Notwithstanding Harrison's higher combined score achieved as a result of its higher technical rating, the contracting officer determined that Harrison's proposal was not technically superior in any meaningful way. The USIA Office of Engineering and Technical Operations concurred in this judgment. Consequently, USIA decided to award the contract to Hamilton because its lower price and technical equality made its offer more advantageous to the Government.

Harrison contends that USIA was required to award it the contract under the stated evaluation criteria, since it received the highest point total.

In support of its actions, USIA relies on the following statement from our decision in *RCA Service Company*, B-208871, August 22, 1983, 83-2 CPD 221:

Even where the RFP evaluation factors indicated that award would be made to that offeror with the highest point score, we have held that, before the contracting agency can award to the higher priced (or higher cost), technically superior offeror, the contracting agency is required to justify such award in light of the extra expenditure required. See *Todd Logistics, Inc.*, [B-203808, August 19, 1982, 82-2 CPD 157]; *Timberland-McCullough, Inc.*, B-202662; B-203656, March 10, 1982, 82-1 CPD 222]. Here not only was the contracting agency unwilling to make such a justification for award to the higher priced offeror, but the contracting agency actually determined that award to the lower priced, essentially technically equivalent offeror was in the government's best-interest. In view of the technical equality of the of-

feror, award to Talley at a cost-savings of approximately \$945,000 was reasonable even though cost-related factors account for only 10 percent of the evaluation.

We agree with USIA that the present case fits within the above-stated rule. However, in *Telecommunications Management Corp.*, 57 Comp. Gen. 251 (1978), 78-1 CPD 80, we indicate that where the solicitation sets forth a precise numerical evaluation formula including price and provides that the awardee will be selected on the basis of total score, the contracting agency must award to the highest scored offeror if the source selection official agrees with the scoring. However, we found that the solicitation did not state that the awardee would be selected on the basis of the highest total score, so the rule was not applied.

The statements in the two cases are somewhat inconsistent regarding the degree of discretion retained by the contracting agency to make cost/technical tradeoffs in awarding the contract when the RFP sets forth a precise evaluation formula including price or cost and states that award will be made to the offeror achieving the highest total point score. The *RCA* case holds that the agency retains the same degree of discretion in making cost/technical tradeoffs as it would have if the RFP did not state that award would be made on a total point score basis. In fact, the *RCA* case even requires a justification for awarding in accordance with the formula if award is to be made to a higher cost or priced offeror. On the other hand, the *Telecommunications Management Corp.* case implies that the contracting agency relinquishes that discretion, and may not deviate from point scores if the source selection official does not alter the scoring.

While we think both cases were decided correctly, the relevant statements went beyond what was necessary to decide the cases. We now think that both views are too extreme. The better view, which we adopt, is that when the RFP contains a precise numerical evaluation formula including cost/price and a statement that award will be made to the highest point scored offeror, the contracting officer or other source selection authority retains the discretion to examine the technical point scores to determine whether a point differential between offerors represents any actual significant difference in technical merit. If it does not, then award may be made to the lower cost or priced proposal, even though its total point score is lower. In effect, the contracting official would be re-scoring the technical proposals conceptually, but not mechanically, and would not really be altering the predetermined cost/technical tradeoff. If, however, the source selection official determines that the point difference represents actual technical superiority and he agrees with the scoring, then he must abide by the formula and award to the offeror with the highest total point score. He may not decide that the technical superiority is not worth the cost difference. That would alter the predetermined cost/technical tradeoff. Additionally, we think that if the award is to be made to a more

expensive higher total point scored offeror in accordance with the formula there is no necessity for the contracting agency to make a separate determination that the extra expense is justified, since that determination is made when the formula is devised.

To the extent that the *RCA* case and the cases cited therein are inconsistent with this decision they are modified. Moreover, the statement in the *Telecommunications Management* case is clarified.

Also, while using a precise numerical evaluation formula and stating in the RFP that award will be made to the offeror with the highest point total is not improper, we think it is unwise and, therefore, recommend that contracting agencies consider not using such a scheme. Using the scheme limits the contracting agency's flexibility and discretion, and provides no significant benefit to the agency or potential offerors. Additionally, even a well-supported and justified deviation from the formula in making the award gives the appearance of arbitrary action and possible impropriety.

In the present case we find that the evaluation and award to Hamilton was proper. The contracting officer determined that the technical proposals were essentially equal even though there was a 14.4 percent difference in technical point scores. In *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD 325, we found a determination of technical equality to be reasonable where the point difference was 15.8 percent. In light of that, and the fact that Harrison has not pointed to anything other than the point differential in asserting its technical superiority, we find the determination of technical equality to be reasonable. As we stated above, the contracting officer has conceptually rescored the technical proposals by finding them to be technically equal. Consequently, the award to Hamilton, the lower priced, technically equal offeror is in accordance with the stated evaluation criteria because the 70/30 technical/cost tradeoff has been preserved. We do not think that Harrison was misled in the preparation of its proposal by the deviation from a strict application of the total points award criterion because that does not provide guidance in proposal preparation. Only the 70/30 cost/technical tradeoff statement provides such guidance, and that tradeoff was preserved by the finding of technical equality.

Harrison contends that by conducting negotiations, USIA improperly permitted Hamilton to improve its technical score, thus "equalizing" the technical proposals.

Generally, in negotiated procurements, meaningful discussions must be held with all offerors in a competitive range. To be meaningful, discussions should include the agency's pointing out those areas of an offeror's proposal that it considers deficient and the opportunity for the offeror to correct those deficiencies by revising its proposal. *The Farallones Institute Rural Center*, B-211632, November 8, 1983, 83-2 CPD 540. USIA determined that there were deficiencies in all of the initial offers that were acceptable and, there-

fore, conducted discussions and permitted proposals to be revised. We see nothing improper in that action.

Concerning Harrison's allegation that Hamilton cannot perform the work for the price offered and is purposely submitting a low price, we have held that the offer of a price that a competitor feels is too low does not provide a legal basis for questioning a contract award. *Swiss-Tex Incorporated*, B-200809, B-200810, October 31, 1980, 80-2 CPD 333.

After filing its initial protest, Harrison raised two additional issues which we find to be untimely and, therefore, dismiss. Our Bid Protest Procedures, 4 C.F.R. part 21 (1983), do not contemplate piecemeal presentation of protests. Consequently, any new grounds of protest raised after the initial protest is filed must independently meet our timeliness standards. *Annapolis Tennis Limited Partnership*, B-189571, June 5, 1978, 78-1 CPD 412. On November 22, 1983, Harrison first alleged that, during discussions, USIA asked it a question which led it to increase its price to its detriment. Harrison knew the basis for this ground of protest at the time it filed its initial protest several months before it raised the issue. Since such protest must be filed within 10 working days of when the basis for the protest is known, it is untimely. 4 C.F.R. § 21.2(b)(2) (1983). Also, on November 22, 1983, Harrison argued that USIA tailored the budget for this project to accommodate Hamilton's price. This ground was based on information received by Harrison, pursuant to a Freedom of Information Act request, on October 20, 1983. Again, since more than 10 working days had elapsed, the issue is untimely.

[B-213916.2]

Contracts—Grant-Funded Procurements—Bids—Mistakes— Postaward Claims

Contractor's assertion that at the time it accepted a contract it reserved the right to file a claim for bid correction is not a basis for General Accounting Office (GAO) to consider a postaward mistake in bid claim under grant where the contractor has not submitted documentary evidence to support its reservation of right.

Contracts—Grant-Funded Procurements—Bids—Mistakes— Postaward Claims

Contractor asserting that since Federal forums (e.g., Claims Court) are unavailable to contractor under Federal grant, initial decision reliance on rules applicable to direct Federal procurements was improper does not provide basis for GAO to supply forum for postaward contract adjustment since it is not function of GAO to provide forum for every claim involving Federal funds and contractor has access to state court.

Contracts—Grant-Funded Procurements—General Accounting Office Review—Postaward

General Accounting Office's consideration of postaward protests against an agency's decision to permit bid correction does not require GAO to consider postaward mistake in bid claims since the two situations are legally different.

Matter of: M.G.M. Construction Co.—Reconsideration, May 25, 1984:

M.G.M. Construction Co. (MGM) requests that we reconsider our decision *M.G.M. Construction Co.*, B-213916, February 15, 1984, 84-1 CPD 208. In that decision, we refused to consider MGM's request for an upward price adjustment in its contract with the Central Marin Sanitation Agency (CMSA). The contract was awarded pursuant to an Environmental Protection Agency grant.

In MGM's bid price for schedule "A," it had inserted \$2,400,000 in longhand and \$2,450,000 in numerals. Based on a solicitation provision which stated that the written amount would control where there was a discrepancy between a written amount and a numerical amount, CMSA notified MGM that an award could be made to MGM only for \$2,400,000. MGM accepted an award at this amount and requested GAO to grant MGM an upward adjustment in its contract price. We refused to consider MGM's request because it was submitted after MGM accepted the contract.

MGM first alleges that our initial decision did not consider that MGM accepted the award under protest. To support its position that this requires our Office to decide MGM's claim, MGM relies on *Chris Berg, Inc. v. United States*, 426 F.2d 314 (Ct. Cl. No. 235-68, 1970), and *Lockheed Aircraft Corp. v. United States*, 426 F.2d 322 (Ct. Cl. No. 46-65, 1970).

These cases do support the proposition that a postaward mistake in bid claim may be considered where the contractor brought the mistake to the attention of the contracting officer before accepting an award and reserved the right to have its claim reviewed at the time it accepted the award. However, they do not support MGM's contention that we must consider its mistake in bid claim. In *Chris Berg Inc.*, at the time of signing the contract, the contractor included a written letter which reserved its right to have its contract price adjusted. In *Lockheed Aircraft*, the reservation was stated in the contract. See B-161024, July 3, 1967, and B-177281, January 23, 1973. Here, MGM has asserted that it accepted the award under protest and reserved the right to have its request for bid correction reviewed. However, MGM has submitted no evidence to support this statement. Consequently, these decisions do not require us to reverse our initial decision.

MGM next alleges that our initial decision is legally incorrect, because, in refusing to consider MGM's postaward request for bid correction, we indirectly relied on the Federal Procurement Regulations which apply to direct Federal procurements. MGM states that contractors under direct Federal procurements can submit postaward mistake in bid claims to the Board of Contract Appeals or the claims court. MGM reasons that since these forums are not available to contractors which have been awarded contracts under Federal grants, we may not rely on legal precedent applicable to

direct Federal procurements. MGM also alleges that our decision is legally incorrect because it was not applied prospectively.

While MGM argues that these bases of its request for reconsideration are legal errors contained in our initial decision, it is not the function of GAO to provide a forum for every claim raised in conjunction with procurements involving Federal funds. We note that MGM may bring its claim in the courts of the State of California. Thus, we are not persuaded that these arguments require us to consider MGM's request for a price adjustment in its contract.

Finally, in its initial request for a price adjustment, MGM relied on *Ideker, Inc.*, B-194293, May 25, 1979, 79-1 CPD 379, and *RAJ Construction, Inc.*, B-191708, March 1, 1979, 79-1 CPD 140, to support the position that this Office will consider postaward claims. We found that these cases did not support MGM because they concerned postaward protests against an agency's decision to permit a bidder to correct a mistake in its bid. MGM argues that this conclusion is legally incorrect because in protests and mistake in bid claims we must consider the same factors. MGM believes that the only thing distinguishing protests from mistake in bid claims is the firm requesting review.

There is, however, another major factor which distinguishes mistake in bid claims from protests. In protests, such as *RAJ Construction, Inc.*, *supra*, and *Ideker, Inc.*, *supra*, we are determining whether an award was made properly. The circumstances in those cases involved the agency permitting a bidder to correct its bid to an amount lower than that amount in the bid as opened and this agency action resulted in the protester being displaced as the low bidder. Thus, there, if the protester is correct, the protester rather than the awardee is entitled to the contract award. Where an awardee requests that we consider its request to have its bid adjusted, however, there is no question whether the award was made to the proper party. Rather, the requester is seeking to have his contract reformed. See B-176780, January 22, 1973. Accordingly, the same considerations are not present and the same procedures need not be followed.

Prior decision is affirmed.

[B-213883]

Military Personnel—Record Correction—Payment Basis— Calculation of Payment

When service members are restored to active duty by the Army Board for 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 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.

Matter of: Correction of Military Records—Claims Settlements, May 30, 1984:

This matter involves Army members who are restored to active duty as the result of proceedings before the Army Board for Correction of Military Records. The issue presented is whether, in those cases, active duty backpay claim settlements under 10 U.S.C. § 1552(c) should be based on the date of the Board's determination or the later date on which the member actually returns to duty.¹ We conclude that settlement should be based on the date of the member's actual return to duty.

Background

On April 30, 1982, the Army Board for Correction of Military Records found that a Reserve first lieutenant had been improperly separated from extended active duty several years earlier, on August 27, 1976. The Board consequently determined that the officer's records should be corrected to expunge the separation, to reflect continuation on active duty after August 27, 1976, and to show a promotion to the grade of captain. The officer did not actually return to active duty until October 15, 1982, nearly 6 months after the Board's action on the case.

After the officer was restored to duty in October 1982, Army finance and accounting officials prepared a claim settlement certificate covering the constructive active duty period from August 28, 1976, through April 29, 1982, showing that for this period the officer's net backpay entitlement was \$41,374.76. Interim civilian earnings from non-Federal employment totalling \$64,789.97 were, however, determined to be deductible from that amount, so that the officer was found to be due nothing in the settlement.

The finance and accounting officials then prepared a voucher in the officer's favor in the net amount of \$11,149.52, representing active duty backpay and allowances for the period from April 30 through October 14, 1982, that is, for the 6-month period of constructive active duty following the Correction Board's action when the officer's actual return to active duty was pending. The voucher was certified and paid, but doubts have now arisen concerning the propriety of that payment.

Essentially, the concerned finance and accounting officials note that under the applicable statutes and regulations, when an Army member is retroactively and constructively restored to active duty status by the Correction Board, the member becomes entitled to active duty backpay and allowances, but interim civilian earnings are deductible in the settlement of the member's backpay claim. They further note that the statutes provide authority to continue

¹ This action is in response to a request for a decision received from Colonel H. H. Gassie, FC, Director, Centralized Pay Operations, U.S. Army Finance and Accounting Center.

the pay of a member whose backpay claim has been settled if the corrected record supports continued entitlement to that pay. In this case, they indicate, the \$11,149.52 payment in question was based on the premise that the officer's backpay claim accrued on the date of the Correction Board's action, with the officer having a separate entitlement to continued pay during the 6-month period of constructive active duty that elapsed after that date. They also note, however, that the entire period of the officer's constructive active duty between August 1976 and October 1982 resulted directly from the records correction action. If the claim settlement had covered that entire period, they observe, the deduction of interim civilian earnings would have completely offset the officer's net military backpay entitlements, and the officer would not have been due any backpay at the time of actual restoration to duty. They ask whether claim settlements should cover the entire period of constructive active duty resulting from a correction of records in cases of this nature.

Applicable Statutes and Regulations

Subsection 1552(a) of title 10, United States Code, provides that the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Subsection 1552(c) further provides that the department concerned may pay—

* * * a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, *as a result of correcting a record* under this section, the amount is found to be due the claimant on account of his * * * service * * *. [Italic supplied.]

The implementing Army regulations direct that "Earnings received from civilian employment during *any period* for which active duty pay and allowances are payable will be deducted from the settlement." 32 C.F.R. § 581.3(g). [Italic supplied.]

In addition, subsection 1552(d) of title 10 provides that applicable current appropriations are available to continue the pay, allowances, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate.

Claim Settlements Under 10 U.S.C. § 1552(c)

1. *Determination of net backpay due.*

We have consistently held that net military backpay credit in a claim settlement concluded under 10 U.S.C. § 1552(c) is to be based solely on the lawful benefits and liabilities resulting from the facts as shown by the corrected record. See, e.g., *Major General Edwin A. Walker*, 62 Comp. Gen. 406, 408 (1983); and 34 Comp. Gen. 7 (1954).

2. Deduction of interim civilian earnings.

The deduction of interim civilian earnings from the net active duty backpay found due in a claim settlement is generally predicated on the concept that the concerned service member has a duty to mitigate the Government's obligations in the matter, and that the purpose of a correction of records is to restore the member—without awarding him an unearned windfall—to the same position he would have had if he had not been separated from military service.² Authority for the deduction of interim civilian earnings in administrative claim settlements is, however, based solely on the specific terms of the administrative directives and regulations which have been issued on the subject.³ Under the Army regulations, interim earnings are not recoupable in the full amount but are instead merely deductible from the net balance due, and this is consistent with the now well-settled principle that while service members are not to be allowed an unwarranted gratuity in a claim settlement, they also are not to be restored to active duty with a net indebtedness to the Government, as a result of record correction proceedings.⁴

Continuing Payments Under 10 U.S.C. § 1552(d)

As indicated, this provision of the records correction statute authorizes the continuation of pay and benefits following a claim settlement for any person "who, because of the correction of his military record, is entitled to those benefits." The provision is derived from the act of October 25, 1951, Public Law 220, 82nd Congress, ch. 588, 65 Stat. 655, and is designed to furnish "future payments of a continuing nature" to persons "whose claims have been paid."⁵ A requirement was included in the provision that certain claimants be reappointed or reenlisted within a year of the record correction action primarily to cover "exceptional" cases in which continuing future payments of retired pay would be made to persons who

² See 48 Comp. Gen. 580, 582 (1969); *Motto v. United States*, 175 Ct. Cl. 862, 865-869 (1966).

³ See *Yee v. United States*, 206 Ct. Cl. 388, 400-401 (1975); and *Bates v. United States*, 197 Ct. Cl. 35, 39-40 (1972). See also 48 Comp. Gen. 580, 583 (1969); and *Reynoldo Garcia*, B-207299, October 6, 1982.

⁴ See 57 Comp. Gen. 554, 560, 563-564; 56 Comp. Gen. 587, 591-592 (1977); and 49 Comp. Gen. 656, 662 (1970). See also *Craft v. United States*, 589 F.2d 1057, 1060, 1066-1068 (Ct. Cl., 1978).

⁵ See S. REP. NO. 788, 82d Cong., 1st Sess. 3 (1951); 97 CONG. REC. 7588 (1951); and *Payment of Claims Arising from the Correction of Military or Naval Records: Hearings on H.R. 1181 Before Subcommittee No. 3 of the House Comm. on Armed Services*, 82d Cong., 1st Sess. (1951).

would otherwise have no military status whatever, since it was concluded that those persons ought to acquire the status and responsibilities of retired military personnel who are for example, subject to involuntary recall to active duty.⁶

Analysis and Conclusion

When the Army Board for Correction of Military Records determines that an individual was wrongly separated from active service, a certain amount of time is necessarily required for that determination to be given effect. The record of the Board's proceedings must, for example, be reviewed by the Secretary of the Army, and the Board must then notify the individual of the action taken in the case. 32 C.F.R. § 581.3(f). In some cases the individual will need time to consider the options available, that is, whether to return to active duty or to enter retirement, etc. If the individual is eligible and elects to return to full-time Army service additional time will be required to arrange the actual return to active duty. The individual will be credited with the constructive performance of full-time active duty between the date of the Board's determination and the date of actual restoration to duty, but will in fact have been at liberty to engage in full-time civilian employment throughout that period.

Further, in terms of subsection (d) itself the claimant never lost the status as a Reserve officer and under the Correction Board's action was never released from active duty. Thus, there is no need to involve the provisions of that subsection to permit continued payments to someone who lacks an appropriate military status.

Our view is that the period of constructive active duty following the date of the Correction Board's action arises directly "as a result of correcting a record" under the records correction statute and, as such, should be included with other periods of constructive active duty covered by the claim settlement concluded under 10 U.S.C. § 1552(c), with appropriate deduction of all interim earnings received from civilian employment. We find this conclusion consistent with the rule that when Army members are restored to active duty by Federal court order, deduction of interim civilian earnings from active duty backpay is predicated on the date of actual restoration to duty rather than the date of the court's action. See *Captain Robert S. Colson, Jr.*, B-180371, October 2, 1974. We also find that when an Army member is actually restored to active duty as the result of action by the Correction Board, a claim settlement under 10 U.S.C. § 1552(c) predicated on the date of the Board's determination is artificial and unrealistic, and payment for constructive active duty subsequent to that date under 10 U.S.C. § 1552(d) is

⁶ 10 U.S.C. § 688. See H.R. REP. NO. 440, 82d Cong., 1st Sess. 3 (1951); and the records of the Congressional hearings referred to above (footnote 5).

unwarranted since no future payments of a continuing nature are actually involved.

Hence, we conclude that when Army members are restored to active duty as the result of proceedings before the Army Board for Correction of Military Records, active duty backpay claim settlements under 10 U.S.C. § 1552(c) should be predicated on the date of the member's actual return to duty rather than the earlier date of the Board's determination.

In the specific case presented, therefore, we find that the claim settlement under 10 U.S.C. § 1552(c) should have covered the entire period of constructive active duty from April 1976 to October 1982, with the deduction of all interim civilian earnings received from the net active duty military backpay credit accrued during that period. Since, as indicated, those interim civilian earnings exceeded the officer's net military backpay entitlements, we further find that the officer was due nothing in the settlement, and that the \$11,149.52 payment in question was erroneous. The officer is in debt to the Government because of that erroneous payment and is liable to make restitution in the full amount. The officer is, however, eligible to apply for a waiver of the claim for collection under the provisions of 10 U.S.C. § 2774. That statute authorizes the Comptroller General to waive claims arising out of overpayments of military pay and allowances in certain circumstances if collection action would be "against equity and good conscience and not in the best interests of the United States," provided that there is no indication of fault on the part of the concerned service member.⁷

The question presented is answered accordingly.

⁷ See 4 C.F.R. parts 91-93; *Price v. United States*, 224 Ct. Cl. 58 (1980); and 56 Comp. Gen. 943, 951-953 (1977).