Decisions of The Comptroller General of the United States

VOLUME 54 Pages 819 to 936

APRIL 1975

UNITED STATES
GENERAL ACCOUNTING OFFICE

PCN 45300106900

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price $1.40 (single copy); subscription price: $17.75 a year; $4.45 additional for foreign mailing.

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[B-173882]

Leases—Agreement to Execute Lease—Federal Project Status—Relocation Expenses to "Displaced Persons"—Effective Date of Entitlement

Tenants of Temple Trailer Village who vacated village prior to June 30, 1971, date of "acquisition" of lease-hold interest in property by General Services Administration are not entitled to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Government was not committed to acquire property, tenant moves were not result of Government's acquisition, and Government did not take an active role in encouraging tenants to move.

Housing—Displacement—Relocation Costs—Effective Date of Entitlement

Holding in 51 Comp. Gen. 660 (1972) that General Services Administration (GSA) lease dated June 30, 1971, was "lease-construction" project entitles only tenants of Temple Trailer Village displaced after that date to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 but does not extend to persons vacating village prior to that date.

In the matter of relocation assistance for some former tenants of Temple Trailer Village, April 3, 1975:

In a letter from the General Counsel of the General Services Administration (GSA) we have been asked for our views as to the propriety of payments of certain relocation expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Public Law 91-646, January 2, 1971, 84 Stat. 1894, 42 U.S. Code § 4601 (1970). Specifically, former tenants of Temple Trailer Village, of Alexandria, Virginia, who moved from premises before June 30, 1971, the date on which the Government entered into a lease with the owners of the premises, have made claim to benefits under the Act. In addition to the views of GSA, the attorney for the claimants has supplied us with his views as to the entitlement of his clients for the benefits of the Act.

The specific factual context in which this issue arises was brought to our attention in an earlier request for decision. As described in that decision, 51 Comp. Gen. 660 (1972), to the Administrator of the General Services Administration, the essential facts in this matter are:

> * * * On June 30, 1971, GSA accepted an offer made by the joint venture of Hubert N. Hoffman and the American Trailer Company, Inc., to lease about 480,000 square feet of space in a building located in Alexandria, Virginia. The offer was made in response to a solicitation for offers (SFO) for space in the general area of Alexandria. The space offered by the joint venture is in a building which, you state, meets the criteria prescribed in the SFO for qualifying as a building under construction, although actual construction had not started. The site of the building is a 12½ acre area owned by American Trailer Company, Inc., which for several years has been operated as a mobile home or trailer park identified as Temple Trailer Village. The trailer company entered into a joint venture agreement on October 6, 1967, with Hubert N. Hoffman to develop this 12½ acres, along with an adjoining 12½ acres of land owned by Hoffman, for commercial office buildings and other rental space. The building in which the leased space is offered is in furtherance of that agreement. GSA states that the Government's

lease will cover only the office space in the building and that the owner publicly announced that the remaining space in the building will be available for commercial tenants. Mr. Krevor states, however, that that space not being used by the Government for offices, will be used for services to support the Government employees, such as a cafeteria. Prior to GSA's acceptance of the offer, the offeror advised that although construction of the building had not yet started, site preparation work had begun on April 1, 1971. GSA was also informed that the owners of trailers in the Temple Trailer Village were notified in early July that the trailer park would be closed and utilities discontinued after August 31, 1971. *Id.*, 660, 661.

We held in that case that those village tenants who did not vacate until after the Government, on June 30, 1971, signed an agreement to lease the building to be constructed on the land to be vacated, were "displaced persons" as a result of a Federal program within the contemplation of the Relocation Act and entitled to the benefits thereof.

The issue presently before us concerns the applicability of the Act to those persons who moved from the trailer village between January 2, 1971, the effective date of the Act, and June 30, 1971, the date the Government entered into the lease agreement. This issue was not addressed in our prior decision.

The benefits of the Relocation Act extend only to "displaced persons" who are required to vacate their properties as the result of the acquisition of the property or as the result of the written order of the acquiring agency to vacate. In our decision in 51 Comp. Gen. 660, we held, in effect, that the particular lease entered into on June 30, 1971, was effectively a lease-construction contract and hence an acquisition within the meaning of the statute and its legislative history. We held that those who vacated their property on or after that date were displaced by the acquisition.

The claimants allege that it was suggested to the tenants that the village would likely be closing and that they would be wise to move as the opportunities arose. It is further alleged that the services in the village were allowed to deteriorate. The attorney for the claimants states that the rumors of impending closure of the village were in no way dispelled by GSA, leading to a " 'get-while-the-getting-is-good' atmosphere to the considerable injury of the people involved." He contends, among other things, that due to its erroneous interpretation of the Act, GSA failed to advise those tenants leaving prior to June 30, 1971, of their possible rights and benefits under the Act if they were to remain.

Inasmuch as there was no written order from GSA advising the tenants of Temple Trailer Village to vacate, in order for us to find that the present claimants are entitled to the benefits of the Act, we must determine that they were displaced by the acquisition of the property.

We note that prior to its entering into the lease on June 30, 1971, GSA had not legally committed itself to occupying any building the

village owner might decide to erect on the premises. If Temple Trailer Village, in effect, constructively evicted its tenants prior to receiving a firm lease agreement from the Government, it appears to us that it did so at its own risk. That is, it could have been left without trailer tenants and without a Triple-A rated lessee (i.e., the Government) upon which it could rely to apply for construction financing for erecting an office building. Further, there does not appear to be any evidence that GSA intervened in the matter in order to induce the tenants to leave. Also, it does not seem that GSA would have had any special interest in having these tenants vacate prior to its entering into the subject lease since, prior to our decision, it had never considered the project as subject to the Relocation Act. Thus on the basis of the record before us, it seems that GSA's actions in this case were not designed to avoid or evade the requirements of the Relocation Act, but rather were in consideration of certain restrictions Congress had placed in the then applicable GSA appropriation act. 51 Comp. Gen. 660, 663, 665.

On the facts here involved, we find it difficult to conclude that those tenants who, between January 2 and June 30, 1971, vacated Temple Trailer Village [as a result of its activities] were displaced by the Government's "acquisition" of that property [precipitated] under a lease signed on June 30, 1971. Moreover, it does not appear that GSA took any active role in encouraging the tenants to vacate. Hence, we cannot conclude in this situation that tenants of Temple Trailer Village who vacated that property prior to June 30, 1971, did so as a result of "acquisition" by the Government so as to entitle them to the benefits accorded "displaced persons" under the Relocation Act.

We might note that in reaching this conclusion we are aware that GSA officials had engaged in lengthy negotiations over this property incident to entering into the subject lease. We are also aware of the publicity which surrounded the impending lease which emphasized the prospective plight of the tenants if they were to be required to vacate to make way for the construction of a building which would be rented to the Government. However, the Relocation Act does not, as suggested by the claimants, require that the Government inform tenants that their landlord has responded to a solicitation either for leased space or for the sale of space.

We recognize, of course, that the effect of this decision is that those moving after the lease was entered into are eligible for benefits under the Act while their neighbors who moved prior to that date will not be so entitled. However, in our view, the issue of whether those persons should be covered is, in light of the particular circumstances here involved, a matter of policy for congressional determination. In this

regard we are aware that the instant situation had been brought to the attention of the Congress.

On December 21, 1973, the House Committee on Public Works reported on S. 261, 93d Cong., 1st Sess., entitled "AN ACT To amend the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to provide for minimum Federal payments for four additional years, and for other purposes." Sections 2 and 3 thereof state:

SEC. 2. Notwithstanding any other provision of law, no person who is eligible for assistance under the Uniform Relocation Assistance Property Acquisition Policies Act of 1970 shall be denied such eligibility if he moved from facilities he was occupying due to his anticipation of General Services Administration Lease Project GS-03-B-5960 in Alexandria, Virginia.

SEC. 3. Notwithstanding any other provision of law, any person who moves or relocates his place of business currently located at 57 Kneeland Street, Boston, Massachusetts, as a result of a National Cancer Institute Research Center Grant 1-PO2-CA12924-01, awarded to Tufts University, shall be deemed to be a displaced person and eligible for assistance under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Similar provisions were not contained in the Senate passed version of S. 261.

The Committee's report on those sections states:

Two projects have come to the attention of the Committee in which the original intent of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is being violated. Sections 2 and 3 of the amendment reiterate the intent of Congress to insure that all persons displaced by these projects after January 2, 1971, shall receive the benefits of the Act.

The first involves General Services Administration Lease Project GS-03-B-5960 in Alexandria, Virginia. The action of the General Services Administration in denying relocation benefits to some displaced persons is contrary to the intent of the Act. This amendment reaffirms what was intended by the Act.

The second case involves the National Cancer Institute Research Center Grant 1-PO2-CA12924-01, awarded to Tufts University, Boston, Massachusetts, where long time tenants of the University are being displaced to make room for a federally assisted program. Section 3, like section 2, is a simple clarification of the congressional intent.

Report H. 93-747, 93d Cong., 1st Sess. 2-3 (1973). After receiving the report, the house took no further action on S. 261 during the 93d Congress.

Notwithstanding S. 261 and its legislative history, we do not believe that the benefits afforded under the Relocation Act are available to persons who vacate property in the mere anticipation or expectation that there may be an acquisition by the United States. We would point out that even if section 2 of S. 261 were enacted into law it would apply only to the so-called Temple Trailer Village acquisition, i.e., GSA Lease Project GS-03-B-5960. Moreover, the cited Committee report, coming some 2 years after enactment of the Relocation Act is, according to generally accepted principles of statutory construction, not determinative, on interpreting that Act. Whatever its value in interpreting the Relocation Act, it is clear that the enactment of a provision

comparable to section 2 of S. 261 as reported by the House Committee on Public Works would afford the benefits of the Relocation Act to those former tenants of Temple Trailer Village who vacated the village between January 2 and June 30, 1971, and who can demonstrate that the move was in anticipation of GSA entering the subject lease and not for some other purpose.

In the absence of the enactment of such legislation, it is our view that the claimants in this matter are not entitled to the benefits of the Relocation Act.

[B-183100]

Set-Off—Contract Payments—Tax Debts

Right of United States to collect tax indebtedness of contractor by offsetting obligation against retainages under Government contract is superior to claim of payment bond surety or contractor.

In the matter of Reliance Insurance Compaines, Inc.; Eastern Construction Corporation, April 3, 1975:

This matter concerns a request for an advance decision by the Department of the Air Force on the disposition of the final payment on a construction contract between itself and Eastern Construction Corporation (Eastern). Contract No. F44600-73-C-0280 was issued by the Base Procurement Office, Langley Air Force Base, Virginia, on June 22, 1973, for repair of steam and condensate pipes between certain buildings on the base. The contract has been completed and all progress payments made by the Air Force, except for the final payment of $5,143.88 which the Air Force has retained.

Reliance Insurance Companies (Reliance), a Miller Act payment and performance surety on the contract, has requested that no further payments be made to Eastern and that final payment be made to it since it has paid claims by Eastern's laborers and materialmen amounting to $13,364.61. Eastern has also submitted a claim for the final progress payment. However, the Internal Revenue Service (IRS) has claimed the final payment in partial satisfaction of an outstanding tax lien levied against Eastern in the amount of $47,298.55.

Since the contract has been satisfactorily completed and the job accepted, the Air Force, as a mere stakeholder, requests our advice as to whom it should pay.

The record reflects that Eastern completed the contract on its own. Although Reliance requested a letter of default from the Air Force on February 12, 1974, the Air Force refused to provide it since Eastern was not in default and was satisfactorily completing the project. The surety has confirmed that it did not complete the contract and that its sole involvement was to pay the obligations of the contractor. There-

fore, we conclude that Reliance paid claims against Eastern pursuant to its payment bond.

By paying claims of laborers and materialmen of Eastern, Reliance succeeded by right of subrogation to Eastern's claim for the unpaid $5,143.88. *Fireman's Fund Insurance Company* v. *United States*, 421 F. 2d 706, 708; 190 Ct. Cl. 804 (1970). However, it is well settled that the right of the United States to collect taxes or other debts of the contractor by offsetting the obligations against retainages under a Government contract is superior to the claims of the payment bond surety. *United States Fidelity & Guaranty Company* v. *United States*, 475 F. 2d 1377, 1383; 201 Ct. Cl. 1 (1973); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947) and *Pacific Insurance Company, Limited*, B-180333, April 2, 1974.

Accordingly, the balance remaining under the contract should be paid to the IRS in partial satisfaction of the tax lien levied against the contractor.

[B-168106]

Appropriations—Availability—Expenses Incident to Specific Purposes—Necessary Expenses

Government agency may, within appropriation limits, assume risk of loss for contractor-owned property which is used solely in performance of Government contracts since reimbursement for loss of property arising during performance of Government contract is necessary and proper expense chargeable to appropriation supporting Government contract. B-168106 dated July 3, 1974, modified.

Property—Private—Damage, Loss, etc.—Contractor's Property—Government Liability

Where amount of contractor's commercial work is insignificant when compared to amount of Government work and Government as practical matter is bearing entire risk of loss of contractor's property in that Government is, in essence, paying full insurance premium under its cost-type contract, no compelling reason is seen why the Government may not, within appropriation limits, agree to assume such risk of loss. B-168106 dated July 3, 1974, modified.

Appropriations—Obligation—Contracts—Contractor's Equipment—Damage or Loss—Government Indemnification

Because of statutory prohibitions against entering into obligations in excess of appropriations contract may not provide for Government's assumption of risk of loss of Government contractor's equipment and facilities unless available appropriations are sufficient to cover Government's maximum liability under contract or unless contract limits indemnity payments to available appropriations and provides that nothing therein may be considered as implying that Congress will appropriate funds to meet any deficiency. 42 Comp. Gen. 708, overruled, in part.

In the matter of proposed assumption of property risk on real and personal property owned by certain contractors, April 4, 1975:

The Department of the Navy (Department) requests reconsideration of our decision of July 3, 1974, B-168106, in which we held that

we could not concur in the Department's proposal to assume complete risk of loss of contractor-owned real and personal property at facilities where practically all contractor's work is done for the Government.

One of the contractors for which the Department is considering such proposal is the Electric Boat Division of General Dynamics Corporation. Over the past 5 years the Electric Boat Division has received payment of $212,000 from the Government for insurance premiums to cover property risks in connection with contractor-owned real and personal property, such as plant and equipment, located at the Groton, Connecticut, Shipyard. According to the Department approximately 99 percent of the Electric Boat Divisions' sales are to the Government so that the Government is, in effect, paying the entire insurance bill.

Our understanding of the Department's proposal was that it intended to assume the complete risk of loss to General Dynamics property at the shipyard facility irrespective of whether the property was being used in connection with the contractor's Government work or in its other commercial activities. In denying concurrence to that proposal we stated:

> * * * that an appropriation is properly chargeable with all expenses necessary to accomplish the object for which made, unless particular items of expense are specifically provided for by some other appropriation or specifically provided for by law. * * * Although the property in question is used for commercial activities only one percent of the time, we fail to see how reimbursement for loss occurring during commercial activities would be an expense necessary to accomplish any of the company's Government contracts or, consequently, an expense properly chargeable to the appropriations supporting the corporation's Government contracts.
>
> Consequently, and since we are not given any advice as to the specific appropriations that are contemplated for payment of such loss, we cannot concur in the proposal to assume the complete risk of loss to the corporation's property in the absence of express statutory authority authorizing such assumption.
>
> *Absent express statutory authority, we find no basis for the assumption by a Government agency of the risk of loss for a contractor's property not being used in connection with Government business.* [Italic supplied.]

The Department believes it may not have sufficiently described (in its prior letter) the factual circumstances which would prompt it to assume the risk of loss of a contractor's property. In its request for reconsideration the Department indicates that it is not proposing to assume the risk of loss of contractor-owned property which is being used strictly for non-Government commercial contracts but is limiting its assumption of risk to the following:

> * * * first, contractor-owned property used solely in the performance of Government contracts; and second, contractor-owned property used in the performance of work which is indistinguishable as being Government or commercial and where the amount of the commercial work is insignificant in comparison to the amount of the Government work.

In support of its proposal, the Department states:

> We both agree that there is no legal bar to the Government's assumption of the risk of loss of contractor-owned property where the facility is devoted entirely to the performance of Government contracts. Moreover, we are in full agreement

that the Government may not assume the risk of loss of contractor-owned property used solely in the performance of commercial business. We have no intention of assuming such a risk.

On the other hand, there are instances where certain contractor property is used in the performance of *both* Government and commercial work. Obviously, to the extent that such work is separable the Government may not assume the risk of losses which occur during the performance of commercial contracts. But where the Government work is overwhelmingly preponderant and it is not possible to segregate the commercial work from the Government work, i.e., the loss could not be identified as chargeable to either a Government or commercial contract, we feel there is no bar to Government assumption of the total risk of loss. As a practical matter under these circumstances we presently are bearing the total risk of loss. Insurance premiums and losses which are deductible under the contractor's insurance policies are included in his overhead. Due to the overwhelming proportion of Government work to commercial work (i.e. 99% Government to 1% commercial in the case of the Electric Boat Division of General Dynamics Corp), the contractor's overhead is almost entirely allocated to Government contracts. Since the Government is, in essence, paying for the full insurance premium there appears no sound business reason why we should not assume the total risk of loss. On the contrary, under these circumstances, we think we would be remiss if we failed to do so. Moreover, in the limited circumstances which we have described there is no legal objection, in our opinion, to the Government assumption of the risk.

Thus, in the two situations set forth above the Department urges that "reimbursement for losses is surely an expense necessary to accomplish the Government contract."

Subject to what is hereinafter set forth, we agree that the Government properly may assume the risk for contractor-owned property which is used solely in the performance of Government contracts, if it is administratively determined to be in the interest of the Government to do so, and in such a circumstance, reimbursement for loss of property arising during performance of a Government contract would be a necessary and proper expense properly chargeable to the appropriation supporting the Government's contracts.

Also, after careful reconsideration of our above-cited decision of July 3, 1974, it is now our view that where the amount of a contractor's commercial work is so insignificant when compared to the amount of the contractor's Government work that the Government as a practical matter is bearing the entire risk of loss of contractor-owned property by in essence paying the full insurance premiums, the Government may assume the risk of such loss, if it is administratively determined to be in the interest of the Government to do so, subject, however, to what is set forth below. To the extent that B–168106, July 3, 1974, may be contrary to the holding herein it will no longer be followed.

As you no doubt are aware, we have in a number of cases disapproved of agreements to indemnify usually on the bases of 31 U.S. Code 627, 31 U.S.C. 665 and 41 U.S.C. 11, for the reason that the agreements would subject the United States to a contingent liability in an indeterminate amount which could exceed the appropriation. *See* 7 Comp. Gen. 507 (1928) and 16 *id.* 803 (1937). While in the situations referred to in the Department's letter the maximum indemnity liability is apparently determinable (the fair market value of the contractor's prop-

erty), it is of course conceivable that the indemnity payments could be of such magnitude as to exceed available appropriations. In such case there would be need for deficiency appropriations to fully cover property losses. However, the Department may not assume obligations to meet such losses because of the prohibition against entering into obligations in excess of the funds available. *See* 31 U.S.C. 665(a) and 41 U.S.C. 11. Accordingly, any contracts providing for assumption of risk by the Government for contractor-owned property must clearly provide that: (1) in the event that the Government has to pay for losses, such payments will not entail expenditures which exceed appropriations available at the time of the losses; and (2) nothing in the contract may be considered as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies. Absent inclusion of provisions along these lines, the Department will have to obtain legislative exemption from the application of the statutory prohibitions against obligations exceeding appropriations. *See* 31 U.S.C. 627. *Cf.* 10 U.S.C. 2354. To the extent our answer to question three in 42 Comp. Gen. 708 (1963) is contrary to what is set forth in this paragraph, it is overruled.

[B–179659]

Officers and Employees—Transfers—Relocation Expenses—Finance Charges—Reasonableness

Transferred employee may be reimbursed only for those portions of a "finance or service charge" that are listed as excludable charges under Federal Reserve Regulation Z. Determination of Reasonableness of amount of individual items is a factual determination to be made by the certifying officer after examination of entire record and after consultation with appropriate regional office of Department of Housing and Urban Development.

In the matter of real estate expenses—finance charges, April 4, 1975:

This matter is before us based upon a request for an advance decision submitted by an Authorized Certifying Officer of the Chicago Operations Office of the Atomic Energy Commission.

Under the authority of Travel Authorization No. CHG–371–72 dated November 4, 1971, Mr. Robert A. Zich was transferred from Germantown, Maryland, to Argonne, Illinois. On February 5, 1972, the settlement for Mr. Zich's new home was held. Included on the Settlement Statement was a charge against Mr. Zich in the amount of $490, labeled "La Grange Federal Savings & Loan Association Service Charge." No further explanation or breakdown of this amount is given on the Settlement Statement. By letter of January 24, 1974, Mr. Zich requested that the bank provide an itemization of the charges included in the

$490 service charge. The bank, over the signature of Howard M. Lipsey, Loan Officer, provided the following breakdown:

Appraisal Fee	$70
Credit Report/Investigation	30
Preparation of Legal Documents	150
Processing of Loan	150
Closing of Loan	90
	$490

Next to Mr. Lipsey's signature the words "Estimate Only" (underlined twice) were written.

This matter was forwarded for our consideration based upon the following paragraph which appeared in our letter B–179659, May 1, 1974, which was sent to the certifying officer who submitted the case at hand:

> If you should get a claim in the future which includes no better evidence that the charges were bona fide and reasonable in amount than has been submitted here in connection with the Zirin case, we suggest that you submit it to the Comptroller General for determination.

The intent of that paragraph was to suggest that when the evidence was so sketchy as to raise doubts that the charges in question were permissible under the applicable regulations, the certifying officer might wish to ask for a ruling from this Office. We did not intend to suggest that we, rather than the certifying officer, would make determinations as to the reasonableness of each reimbursable charge. Therefore, we will attempt to set forth sufficient guidelines for the use of the certifying officer, so that it will not be necessary to submit each claim of this type for our consideration.

At the time Mr. Zich purchased his home, the reimbursement of real estate expenses was governed by the provisions of Office of Management and Budget Circular No. A–56 (1971), specifically section 4.2d which provided, in pertinent part, that:

> * * * Notwithstanding the above, no fee, cost, charge, or expense is reimbursable which is determined to be a part of the finance charge under the Truth in Lending Act, Title I, Public Law 90–321, and Regulation Z issued pursuant by the Board of Governors of the Federal Reserve System * * *

Regulation Z, which is substantially the same as the above-cited provisions of the Truth in Lending Act (15 U.S. Code 1601 note), is published as 12 C.F.R. Part 226 (1972), and provides, in pertinent part, that:

> § 226.4 Determination of finance charge.
>
> (a) General rule. Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any

other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

(1) Interest, time price differential, and any amount payable under a discount or other system of additional charges.

(2) Service, transaction, activity, or carrying charge.

(3) Loan fee, points, finder's fee, or similar charge.

(4) Fee for an appraisal, investigation, or credit report.

* * * * * * *

(e) Excludable charges, real property transactions. The following charges in connection with any real property transaction, provided they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this part, shall not be included in the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, abstract of title, title insurance, or similar purposes and for required related property surveys.

(2) Fees for preparation of deeds, settlement statements, or other documents.

(3) Amounts required to be placed or paid into an escrow or trustee account for future payments of taxes, insurance, and water, sewer, and land rents.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

In determining the reasonableness of any charge involved in the reimbursement of real estate expenses, it is important to note that OMB Circular No. A–56, section 4.2d, also sets the standard for such a determination when it provides that expenses are reimbursable, "* * * to the extent they do not exceed amounts customarily paid in the locality of the residence * * *." Section 4.3c provides that when determining the reasonableness of a charge, and the custom in the area, the local offices of the Department of Housing and Urban Development (HUD) should be consulted since they maintain and can furnish current schedule of closing costs applicable to the area. With regard to the use of the schedules, the same section provides that:

* * * For the purpose of determining whether expenses claimed are reasonable and may be approved for reimbursement, these closing costs should be used as guidelines and not as rigid limitations * * *.

Applying all of the above to Mr. Zich's claim, it is clear that there may be no reimbursement of the charges for "Processing of Loan" and "Closing of Loan." These two charges fall within the definition of a service charge under Regulation Z, and are not within any of the excludable items. *See* B–176775, October 25, 1972, and B–181037, July 16, 1974.

The other three charges, the Appraisal Fee, Credit Report/Investigation, and the Preparation of Legal Documents are excludable from the finance charge and are reimbursable if bona fide and reasonable. *See* B–176481, August 11, 1972. However, the record is not sufficient on the issue of reasonableness to allow us to render a definitive decision. The itemization was obtained approximately 2 years after the settlement took place, and the bank official providing the breakdown specifically stated that the amounts set forth were estimates. Included in the record is a copy of a HUD schedule of closing costs, but it is

dated July 16, 1973, which was approximately 17 months after the settlement. Therefore a schedule of the closing costs for the time of Mr. Zich's closing must be obtained. We also note that $150 is allocated to "Preparation of Legal Documents," with no statement as to what documents were prepared, making it impossible to determine whether the fee charged was in line with the prevailing charges in the area for comparable work. All of these issues must be resolved before the voucher may be certified for payment. It is the duty of the certifying officer to resolve the issue of reasonableness after consulting with the appropriate office of HUD, considering the customary charges in the area for similar services, and examining the entire record along with appropriate regulations and cases.

Therefore, after a determination has been made by the certifying officer regarding the reasonableness of the charges, the voucher may be paid in accordance with this decision and the determination of the certifying officer.

[B-180769]

Vessels—Sales—Price Determination

While General Accounting Office will not question manner of computing minimum acceptable bid price nor reasonableness of such price for the purchase of surplus vessels because of discretion vested in Secretary of Commerce, it is recommended in future sales of surplus vessels that such minimum price be included in invitations so that bidders will be aware of basis on which bids will be evaluated. Further, vessels that must be sold without regard to minimum acceptable price should be appropriately identified in invitation.

Maritime Matters—Vessels—Sales—Minimum Acceptable Bid Price

Maritime Administration should consider ballast and equipment of vessel in setting minimum acceptable bid price rather than setting one minimum price for all types of vessels under the same invitation as 46 U.S.C. 864b requires that ballast and equipment be taken into account during appraisement.

Vessels—Sales—Bids—All or None

All or none bid, which offers highest aggregate price on six vessels, should be accepted notwithstanding other bid offered higher price on two of the six vessels.

In the matter of Nicolai Joffe Corporation, April 4, 1975:

On January 17, 1974, the Maritime Administration (MarAd) issued invitation for bids No. PD-X-971 for the sale of various types of merchant vessels for scrap from the National Defense Reserve Fleet which vessels had been declared surplus by the Secretary of Commerce.

The protest involves six, 3,900 ton C1-B type vessels offered for sale under the invitation, located at Suisun Bay, California. The following three bids (on a per ton basis) from Mr. Max Wender, Nicolai Joffe Corporation (Joffe) and Union Minerals and Alloys Corporation (Union) were opened on February 20, 1974:

Vessel	Wender	Joffe	Union
Cape Edmont	$19.77	$19.52	$23.19
Cape Elizabeth	19.77	21.09	----------
Cape Greig	19.77	21.08	23.19
Cape May	19.77	18.75	----------
Cape San Diego	19.77	18.75	----------
Fred Morris	19.77	19.52	----------

American Ship Dismantlers, Inc., submitted a token bid of $1 per ton on each vessel. Joffe also bid in the alternate in the amount of $21.42 per ton if awarded all the vessels.

The award and rejection provision of the invitation states:

VIII. *Award and Rejection of Bids.* The Contracting Officer reserves the right to reject any and all bids, call for new bids, waive any informality in any bid and make such award or awards as he may deem most advantageous, or will best serve the purposes and policy of the Merchant Marine Act, 1936, as amended, or other applicable law.

After review of the bids received, MarAd determined to reject all bids for the six named vessels because they were unreasonably low in light of its determined minimum acceptable price per ton of $30. This determination was made after the receipt and examination of bids and, hence, was not disclosed in the invitation.

Joffe protests the rejection of its bid and requests that its bid be reinstated and award made under PD–X–971.

Before consideration of Joffe's protest, we believe several points other than those specifically raised warrant consideration.

This sale was conducted under the authority of section 508 of the Merchant Marine Act of 1936 (46 U.S. Code § 1158) which reads as follows:

If the Secretary of Commerce shall determine that any vessel transferred to the Department of Commerce, as the successor to the United States Maritime Commission, or hereafter acquired, is of insufficient value for commercial or military operation to warrant its further preservation, the Secretary is authorized (1) to scrap said vessel, or (2) to sell such vessel for cash, after appraisement and due advertisement, and upon competitive sealed bids, either to citizens of the United States or to aliens: * * *

MarAd has adopted the guidelines contained in sections 5 and 6 of the Merchant Marine Act of 1920 (46 U.S.C. §§ 864 and 865) in its disposal of these vessels. These statutes involve the sale of vessels that will be used in commerce, not scrapped. Section 864 provides:

In order to accomplish the declared purposes of this act, and to carry out the policy declared in section 861 of this title, the Secretary of Commerce is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 865 of this title, all of the vessels acquired by the commission under former sections 862 and 863 of this title or otherwise. Such sale shall be made at such prices and on

such terms and conditions as the Secretary may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The Secretary in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. * * *

Section 865 requires that a preference be given to United States citizens in such sales.

Our Office has ascertained that MarAd has no written procedures for setting a minimum acceptable price; nor have regulations been promulgated governing sales procedures.

MarAd, in its initial brief submitted to our Office, relies on an August 13, 1971, decision of our Office (B-169094(3)) to justify the agency's actions under the surplus sales program. In that decision, we stated that the Secretary of Commerce was vested with considerable discretion in the disposal of surplus vessels under the applicable statutes. (46 U.S.C. §§ 864 and 865 and 46 U.S.C. § 1158 (1970)).

A substantial majority of the ships offered for sale in a solicitation are not sold because all bids received on a given ship are regarded too low. For example, in the instant sale only 4 of 13 vessels offered were sold with the high bids on 9 rejected as too low or below MarAd's minimum acceptable bid, a 70 percent rejection rate. The immediately preceding sale (PD-X-970) had a 63 percent rejection rate. This continuing high rate of rejection must discourage competition since bidders will be reluctant to expend the time and money to prepare and submit a bid when it is likely that most of the ships offered for sale will, in fact, not be sold. We believe that competition will be enhanced if the solicitation includes the "knockdown" or minimum price per ton at which each ship will be sold. In this way a prospective bidder will know in advance whether submission of a bid at a given price will be more than a useless gesture. At the same time the strong competition which can be expected will tend to insure bids in excess of the minimum.

We recognize that because of particular circumstances, MarAd may be willing to sell a given ship at a price per ton lower than would ordinarily be regarded as acceptable. A memorandum of the meeting during which the minimum acceptable price under PD-X-971 was established shows that the minimum acceptable bid under the prior invitation (PD-X-970) was $30.24. It was noted that the value of scrap in the open market had increased since issuance of the earlier invitation. Based upon these factors it was determined, as to the bids received under PD-X-971, that the bids of Luria Brothers & Co., on

the LT. BERNARD J. RAY AND PVT. CHARLES N. DEGLOPPER in the amount of $35.40 per ton and the bid of Northern Metals Co., of $40.38 per ton on the PACHAUG VICTORY should be accepted as reasonable. Further it was recommended that the $28.13 per ton bid of Ships, Inc., on the GREAT SITKIN be accepted, even though it was below the minimum price, because (1) the Navy needed the pier space where the vessel was located; (2) this was the second offering of the vessel; (3) it would not be practical to offer this vessel alone on a world invitation; and (4) it was not economically feasible to move the vessel from the Philadelphia Naval Facility to the James River Reserve Fleet.

Under the prior solicitation (PD–X–970), a similar situation occurred. While the lowest acceptable bid or the minimum price was determined to be $30.24 per ton, the bid of Union of $22.61 per ton for the TS BAY STATE was accepted because the vessel had been stripped and dredging work was to begin soon where the vessel was located. Therefore, it was determined to be in the best interest of MarAd to award the TS BAY STATE at that price while rejecting another bid of $23.19 per ton on another vessel as unreasonably low.

In addition, under PD–X–970, the BLANCHE F. SIGMAN was awarded to Mr. Max Wender for $145,115. We have been advised by MarAd that the tonnage of this vessel is 8,798 tons and, therefore, Wender's bid price amounted to $16.49 per ton. However, in the memo concerning the award of this vessel the bid price of Wender was incorrectly computed to be $30.24 per ton. Thus, the vessel was awarded at almost half of the minimum acceptable bid price while other bids between $16.49 per ton and $30.24 per ton were rejected.

We believe that the foregoing did little to enhance bidder confidence in the competitive system. A bidder who, by chance, happens to bid on a vessel that must be promptly disposed of for various reasons, is awarded the vessel while other bidders who bid a higher price per ton on another vessel under the same invitation may have their bids rejected as too low. In PD–X–971, protested here, bids of $28.99 per ton and three bids of $28.42 per ton were rejected while the GREAT SITKIN was awarded at a bid price of $28.13 per ton. In PD–X–970, the bid of $22.61 per ton on the TS BAY STATE was accepted while bids of $23.19, $24.38 and $25.18 per ton were rejected as unacceptable.

In our judgment the foregoing circumstances indicate that competition would be served by establishing in advance the minimum acceptable price per ton for each ship and providing that information in the invitation for bids. The price per ton established should take into consideration the current market and any particular circumstances which would warrant a minimum price above or below the market such as those set out above.

Joffe contends that each type of vessel should have its own minimum price because bidders are willing to pay more for certain types of vessels than for other types. This is because, according to Joffe, some vessels, due to their manner of construction, lend themselves more easily to breaking up for scrap purposes. Joffe points to numerous bids received by MarAd from the same bidder under the same solicitation wherein the bidder bids lower on one type of vessel than another.

MarAd responds to this argument by stating that there is no significant difference between different types of vessels within the Reserve Fleet as a source of scrap metal and, therefore, a single "upset" price is justified for all vessels under the same solicitation.

Joffe cites numerous instances of sales by MarAd where a bidder will bid twice as much per ton for one type of vessel as compared to another type under the same invitation because, in the opinion of Joffe, some types of vessels are easier to scrap than others. MarAd does not agree with this opinion. While we are not in a position to make a recommendation in this respect, we feel that MarAd should consider whether it would be beneficial to study the bidding histories on various types of vessels for the purpose of ascertaining whether vessel type should be considered in cost appraisements included in future sales invitations.

Further, Joffe contends that the minimum acceptable price of $30 per ton was unreasonable because MarAd did not include costs unique to a shipbreaker in its calculations but did include the current prices paid in the Far East scrap market in these computations, which, because of export controls, are not available to shipbreakers. Upon review, we find no basis to challenge the manner in which the minimum acceptable bid was established in view of the statutory discretion vested in the Secretary of Commerce. *Overseas Navigation Corporation* v. *United States*, 129 F. Supp. 206, 131 Ct. Cl. 70 (1955); B–169094(3), August 13, 1971. Therefore, and since we cannot say that the exercise of that discretion was grossly abused, this point of protest is denied.

Finally, Joffe contends that its "all or none" alternate bid, in the amount of $501,134.44 or $21.42 per ton on the six vessels, must be accepted as the high bid. MarAd responds to this argument by stating that it properly could reject the "all or none" bid of Joffe because a higher bid was received on two of the vessels from Union on the CAPE EDMONT and the CAPE GREIG, in the amount of $23.19 per ton.

"All or none" bids were not precluded by the invitation; rather, such bidding was permitted by paragraph II(A) of the sales invitation. When the "all or none" bid of Joffe ($501,134.44) is compared to the total of the high individual bids on the six vessels ($494,449.44), Joffe's bid was the high aggregate bid. Absent the legal insufficiency

of the invitation, the high "all or none" bid should have been considered for award. *See* 47 Comp. Gen. 658, 661 (1968), where we held that an "all or none" bid must be accepted if it offers the lowest [here the highest] aggregate price.

Because of the failure of the protested solicitation to meet the requirements for competitive bidding, that is, vessel appraisal determination and disclosure before bidding, we conclude that the six vessels involved in the protest should be readvertised under an invitation which comports with the above recommendations.

The protest of Joffe for reinstatement of its bid and award under the invitation is denied. However, by letter of today, we are bringing to the attention of the Secretary of Commerce the shortcomings of the instant solicitation and our recommendation for corrective action.

[B-182814]

Equipment—Automatic Data Processing Systems—Supplies—Procurement—Limitation for Prior GSA Approval

When procurement for automatic data processing equipment is less than $50,000, agency need not get prior approval from GSA and delegation to procure carries with it delegation to determine its own requirements, including type and extent of warranty as procurement policy within own agency discretion.

Equipment—Automatic Data Processing Systems—Selection and Purchase—Warranties and Damages

Allegation that warranty used in invitation for bids for automatic data processing equipment is unreasonable in general business practice is refuted by extent of competition that did not except to warranty requirements.

Contracts—Protests—Procedures—Interim Bid Protest Procedures and Standards—Compliance Requirement

Guideline in section 20.5 of our Interim Bid Protest Procedures and Standards (4 CFR) requiring that statement of reasons why report on protest not filed within 20 days be signed by appropriate officer above contracting officer's level does not extend to actual report and, in any event, there is no sanction for failure to comply with section 20.5.

In the matter of Kenneth R. Bland, April 4, 1975:

Kenneth R. Bland (Bland) protests against the inclusion by the Federal Power Commission (FPC) in its invitation for bids (IFB) FP-9474 of the warranty provision applicable to item 001, 56 disk packs, IBM type 3336-11, or equivalent. Bland maintains that the contracting officer did not have the authority to use the warranty because it was (1) nonstandard; (2) outside the scope of the Federal Procurement Regulations (FPR); (3) contrary to prior Comptroller General decisions and decisions of the courts; and (4) unreasonable in general business practice.

The warranty provided:

a. In addition to any other warranty provisions pertaining to the Solicitation, Offer and Award, a proposal, GSA term contract, or any company's commercial warranty, the Contractor warrants to the Government that supplies delivered under this contract are manufactured, inspected and tested to the specifications of the Original Equipment Manufacturer (OEM) of the ADP equipment/accessory identified in the contract schedule, and that all such supplies are free from defects in materials and workmanship. This warranty shall run for 36 months from the date that the supplies are delivered to, and receipted for, the Government.

b. Should any supply item warranted under Paragraph 1a above fail, or be found by the Government to be defective, the Contractor shall:

(1) Replace the failed or defective item within 72 hours after the Contractor receives written notice of such failure or defect; and

(2) Promptly reimburse the Government the full amount of all reasonable repairs and replacements to OEM equipment which is damaged solely as a result of proven failure of, or defect in, Contractor's supplies.

c. Should any supply item warranted under Paragraph 1a above fail, or be found by the Government to be defective, the Government shall:

(1) Dispatch written notice thereof to the Contractor within 72 hours after the failure or defect is found;

(2) Provide the Contractor access to the site where Contractor's supplies are used and/or stored, during the sponsoring agency's normal working hours, for purpose of on-site inspections;

(3) Employ and use Contractor's supplies, and all related ADP equipment/supplies, in accordance with manufacturer's instructions and accepted industry practices (should failure of, or defect in, Contractor's supplies be proven to be caused by faulty employment or use, or by employee negligence; the Government waives its warranty rights thereby); and

(4) Make no changes in, or alterations to, Contractor's supplies.

d. Subject to remedies under the General Provisions clause hereof entitled "Disputes," the Contractor shall timely and efficiently replace supplies determined by the Contracting Officer to have failed, or to be defective. If, after replacement, the Contractor is of the opinion that the supplies are not defective, and/or are not the cause of damage to OEM equipment, the Contractor shall, within 30 days of such replacement, notify the Contracting Officer, in writing, as to the Contractor's findings and any claim for an equitable adjustment. Upon receipt of such a written notice, the Contracting Officer shall, within 30 days, make a determination whether to negotiate the Contractor's claim, or to deny the claim. The Contracting Officer shall timely notify the Contractor of his determinations. If the determination is a denial of the claim, or if an equitable adjustment cannot be agreed upon, the Contractor may seek relief under the "Disputes" provision.

Generally, the policies, procedures and guidelines pertaining to the Government-wide management of automated data services, including procurement and contracting, are found at title 41 of the Code of Federal Regulations (C.F.R.), chapter 101, Federal Property Management Regulations (FPMR) part 101–32. Subpart 101–32.4 sets forth the policy governing procurement of all automatic data processing equipment (ADPE). ADPE is defined at FPMR 101–32.402–1 to mean—

* * * general purpose commercially available, mass produced automatic data processing components and the equipment systems created from them, regardless of use, size, capacity, or price, that are designed to be applied to the solution or processing of a variety of problems or applications and are not specifically designed (not configured) for any specific application. * * *

We understand that disk packs are considered ADPE within the meaning of this section.

FPMR 101-32.403-1 provides as pertinent:

> * * * agencies may procure ADPE without prior GSA approval provided:
>
> * * * * * * *
>
> (c) The value of the procurement does not exceed $50,000. This shall exclude attendant maintenance costs if purchase is the method of acquisition. * * *

From the foregoing, FPC was justified in conducting its own procurement for the ADPE under its own terms since the award price was $44,800. *See* FPMR 101-32.001.

It is contended that this warranty violates prior decisions of the Comptroller General and the courts. In 51 Comp. Gen. 609 (1972) our Office considered the matter of the extent to which the General Services Administration (GSA), under its authority to issue Government-wide guidelines for ADPE procurements (*see* 40 U.S. Code § 486(c)), could require warranties. There we stated:

> Although we have reservations in the matter, it must be recognized that the position taken by GSA regarding implied warranties and consequential damages is a matter of procurement policy. We are aware of no statutory or regulatory provision which requires GSA to disclaim implied warranties and exclude consequential damages, or to assert the existence of implied warranties and seek the recovery of consequential damages, or to assume some intermediate position on the extent to which it would hold its contractors liable for consequential damages. As a matter of policy, therefore, the position taken by GSA is within its discretion and, despite our reservations, not appropriate for a ruling by our Office in the context of a bid protest. We are not aware of any valid legal basis on which we could properly interpose a legal objection to the award of contracts under the instant solicitation. * * *

In view of the restriction GSA places upon itself to interpose its views in the formulation of its requirements by a procuring agency (FPMR 101-32.001), and the delegation of authority to agencies to procure ADPE without prior GSA approval (FPMR 101-32.403-1 (c)), it is our opinion that the discretion to formulate its own policy with regard to type and extent of warranty is also delegated to the procuring agencies. Therefore, we view FPC's actions as within its discretionary authority and consistent with our views on the matter.

Bland has not cited, nor are we aware of any court decisions to the contrary. In this regard, we are aware of no standard warranty provision in either the FPMR or FPR that is expressly applicable to ADPE procurements. It follows that since there is no standard warranty provision, any provision used will of necessity be a nonstandard warranty provision which is within FPC's discretion.

Bland's next substantive argument is that the warranty is unreasonable in general business practice. We note that of the six bidders that submitted prices for item 001, only one excepted to the warranty provision. While Bland chose not to bid, we are not persuaded, in light of the competition present here, that the warranty is unreasonable.

Finally, Bland notes that the December 20, 1974, report from FPC, submitted by the contracting officer, appears not to conform with sec-

tion 20.5 of our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)). This section provides that:

> Within 20 days after receipt by the agency of the complete statement of protest, it shall submit to the Office of the General Counsel, General Accounting Office a report on the protest or a written statement by an agency official at an appropriate level [1] above that of the contracting officer setting forth the reasons for the delay and the expected date of submission of the report.

Bland interprets this section, requiring that the report by the agency be submitted by an agency official at an appropriate level above that of contracting officer, to mean that we should not consider the report. We do not accord a similar interpretation. This section only requires that when the delay in submitting a report on a protest will exceed the 20-day timeframe, the written statement setting forth the reasons for delay and expected date of submission of the report should be made at an appropriate level above the contracting officer. This instruction does not attach to the actual report as well. Even if it did, our Office recognizes the limitation on our authority to impose time limts on contracting agencies. *See* Preamble to 4 C.F.R. part 20. A failure by the agency to meet the guideline stated in section 20.5 will not result in sanctions being imposed on the agency in the form Bland requests. *Matter of James J. Madden, Inc.*, B-181580, November 26, 1974; B-177557, July 23, 1973.

The protest is denied.

[B-181712]

Pay—Retired—Survivor Benefit Plan—Spouse—Remarriage After Age 60—Loss of DIC Eligibility

Where Survivor Benefit Plan (SBP) annuity is either terminated or reduced in accordance with 10 U.S.C. 1450(c) and (e) because of receipt by the survivor of Dependency and Indemnity Compensation (DIC) refunds or partial refunds of SBP deductions from retired member's pay are made to the survivor. A survivor having received such a refund who subsequently loses eligibility for DIC because of remarriage after age 60 would not be entitled an increase in or reinstatement of SBP but only to the SBP annuity on the basis of the coverage paid for and not refunded since nothing in the law or legislative history thereof shows that Congress intended to provide cost-free coverage.

Pay—Retired—Survivor Benefit Plan—Reinstatement—After Loss of DIC Eligibility

Where deductions from retired pay under the Survivor Benefit Plan (SBP) are refunded pursuant to 10 U.S.C. 1450(e) because the survivor is receiving Dependency and Indemnity Compensation, then the portion of SBP annuity which is represented by that refund has been permanently terminated and repayment of that refund for the purpose of acquiring increased SBP coverage when DIC is lost due to remarriage after age 60 is not authorized in the absence of specific legislative authority.

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[1] To be determined by agreement between the agency and the Comptroller General on an agency-by-agency basis.

In the matter of the Survivor Benefit Plan, April 7, 1975:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision on several questions concerning Survivor Benefit Plan (SBP) coverage in the case of widows of retired members whose SBP annuities had been terminated entirely or reduced because of entitlement to Dependency and Indemnity Compensation (DIC) payments and who have received appropriate reimbursement of SBP costs deducted from the retired pay of their spouses. The questions and a discussion thereof are set forth in the Department of Defense Military Pay and Allowance Committee Action No. 505.

The questions are as follows:

1. Can the SBP annuity be reinstated in the full amount upon remarriage after age 60 and forfeiture of DIC?
2. If question 1 is answered in the negative, would the answer be the same if the annuitant repaid the cost previously refunded to her?
3. If question 1 is answered in the affirmative, must recoupment of the refund of SBP cost be made?

The discussion contained in the Committee Action refers to 10 U.S. Code 1450(c) which provides as follows:

"(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation."

It is noted in the discussion that unlike DIC which is lost upon remarriage after age 60, 10 U.S.C. 1450(b) provides that an annuity payable under 10 U.S.C. 1448 would terminate only when the annuitant remarries before reaching age 60. The discussion in the Committee Action also refers to the legislative history of the SBP and indicates that numerous references are contained therein to the fact that the Congress intended that the surviving spouse of a retired member would at all times receive no less than 55 percent of the base amount on which the annuity is computed. It is also stated that, in view of this concept, it would appear that when DIC is lost, the SBP annuity should be reinstated or increased to 55 percent of the base amount.

It is also indicated in the discussion in the Committee Action that current Department of Defense regulations (DOD Directive 1332.27, January 4, 1974), specify that entitlement under the SBP terminates permanently when DIC exceeds the amount that would have been paid as an annuity under the SBP. However, the regulations are silent as to whether loss of SBP entitlement is permanent when DIC is less than the amount of the SBP annuity. It is also indicated that while no statutory provision specifically addresses this point, the view that SBP terminates permanently when DIC exceeds the amount that

would have been paid as an SBP annuity is apparently based on the provisions of 10 U.S.C. 1450(e), which provide as follows:

"(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower."

It is noted in the discussion that the legislative history is silent as to the specific purpose of subsection 1450(e) and to the intent of Congress regarding the refund of deductions or reinstatement of SBP to the full amount when DIC entitlement is lost. It is stated in the discussion that if it was intended by Congress that loss of entitlement to SBP under the circumstances is permanent, then logic and consistency dictate that if there is a permanent loss of entitlement to SBP when DIC exceeds the amount of the annuity, there should also be a permanent loss of partial entitlement when DIC is less than the SBP annuity.

Under the provisions of 10 U.S.C. 1450(c), a widow or widower who is entitled to DIC compensation may be paid an annuity under the SBP, but only in an amount that the annuity otherwise payable would exceed the DIC payments. The first sentence of subsection 1450(e) of the same title provides that if no annuity is payable because the DIC payment exceeds the SBP coverage chosen, any amounts deducted from the retired or retainer pay of the deceased under section 1452 shall be refunded to the widow or widower. The second and third sentences of subsection 1450(e) provide that if because of subsection (c) of the same section, the annuity payable is less than the amount of the annuity established under the Plan, the annuity payable under the Plan will be recalculated and the amount of deductions from the member's retired pay needed to provide that recalculated annuity will be determined and the difference between that amount and that actually paid by the member for SBP coverage will be refunded to the widow.

It appears that Congress, in establishing the SBP, presumed that, for the purpose of initially reducing retired pay, the SBP annuity payable would provide all of the dependent's income at the level of participation chosen by the member. In the final analysis, however, it was recognized that where DIC payments would be made, a member who provided survivor annuity coverage for his spouse should only be required to pay through deductions from retired pay, that cost of the SBP coverage which his survivor actually receives. Thus, when a

member has provided coverage for his spouse under 10 U.S.C. 1448(a) but upon the death of the member his survivor receives DIC payments, thereby reducing the SBP annuity elected and paid for by the member, or eliminating it altogether, such survivor would be entitled to receive a refund of part or all of the member's contribution to the Plan. Since there is nothing in the law or legislative history to show that Congress intended to provide cost-free coverage, except in the case of widows receiving an annuity under 10 U.S.C. 1448(d) when their spouses die on active duty, it is our view that in the situation where the surviving spouse loses eligibility for DIC payments by reason of remarriage after age 60, she would only be entitled to continue to receive an SBP annuity thereafter on the basis of the coverage paid for and not refunded. Question 1 is answered in the negative.

Question 2 poses the question of whether repayment by the widow of the refund made under 10 U.S.C. 1450(e) would operate to allow reinstatement to the SBP annuity.

While there is provision made in Public Law 92-425 for refund of SBP deductions made from a member's retired pay, there is nothing in that law which authorizes repayment of an earlier refund. In this connection, there is for noting the provisions of the survivor annuity plan of civilian employees of the Government. Subsection 8341(g)(2) of Title 5, U.S. Code, specifically provides for the reinstatement of a survivor annuitant under similar circumstances when repayment of amounts refunded are made.

We are aware of the fact that by design the SBP and the plan applicable to civilian retirees were meant to be similar in many respects. However, in the absence of specific statutory authority in the SBP such as that contained in 5 U.S.C. 8341(g)(2), it is our view that when part of the deductions for an SBP annuity has been refunded, the portion of such annuity which is represented by that refund has been permanently terminated and repayment of a 10 U.S.C. 1450(e) refund would not be authorized.

Question 2 is answered accordingly and in view of the answer to question 1 no answer is required for question 3.

[B-179973]

Property—Private—Acquisition—Relocation Expenses to "Displaced Persons"—No Entitlement

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Government or to federally assisted entity in open market transaction without threat of condemnation may not be considered "displaced persons" and hence are not entitled to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Government's

obtaining of leasehold interest in open market transaction is not an "acquisition of such real property" causing tenants to vacate the premises within meaning of section 101(6) of the act.

In the matter of relocation assistance in open market lease transactions, April 8, 1975:

At the suggestion of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, the Assistant Secretary for Administration and Management of the Department of Labor requested our views as to whether the benefits of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), Public Law 91-646, January 2, 1971, 84 Stat. 1894, 42 U.S. Code § 4601 (1970 ed.), are available to tenants of a building which has been rented by the Government on the open market without condemnation or the threat of condemnation.

The Assistant Secretary's letter indicates an inclination to the view that such tenants are entitled to benefits afforded by the Relocation Act. Shortly thereafter we received a letter from the Assistant Administrator and General Counsel of the Law Enforcement Assistance Administration (LEAA), Department of Justice, indicating a contrary point of view. To assist us in rendering a decision in this matter we requested the views of the Administrator of the General Services Administration (GSA) and, at the suggestion of the interagency Relocation Assistance Implementing Committee, we also requested the views of the Secretary of the Army, the Secretary of Housing and Urban Development and the Secretary of Transportation. We received replies from the Acting General Counsel, GSA, and from the Director of Real Estate, Army Corps of Engineers, taking the position that such persons are not covered by the Relocation Act and replies from the Acting General Counsel of Housing and Urban Development and from the General Counsel, Department of Transportation, expressing the view that such persons are covered.

As described in the submission, the facts of the particular case involved are:

The particular case before us arose in Cleveland, Ohio, where the Director of Job Corps, acting under authority delegated by the Secretary of Labor and pursuant to section 602m of the Economic Opportunity Act, rented a building located at 10660 Carnegie Avenue from Housing Associates, Inc., a wholly-owned subsidiary of Case Western Reserve University. The purpose of the Government's lease was to obtain a new site for the Cleveland Job Corps Center, which is operated by a women's sorority under a cost-reimbursement contract with the Labor Department.

The Government did not condemn the property or make any threat of condemnation. Rather it obtained the building by responding to an offer from the lessor who was making the property available on the open market. The Labor Department had no direct dealings with the Process Machine and Tool Company, which is the claimant, or with any of the numerous other tenants in the building.

The claimant advises that it (and presumably the other tenants) was given notice by its landlord to move because the building had been rented to the Government. Claimant had a month-to-month lease, and advises that it had been a

tenant in the building for 22 years and intended to remain indefinitely. It further advises it sought and obtained the help of a Relocation Advisory Assistance Service authorized under section 205(a) of the Act, and thereby found new premises at 3091 Mayfield Road, also in Cleveland, to which it has moved and where it is now conducting business. The company has submitted its bill for $2,318.03 to cover moving expenses.

The question presented is whether tenants of a building which has been rented to the Government in an open market transaction, without condemnation or threat thereof, are entitled to the various benefits provided by the Relocation Act. To be eligible one must qualify as a "displaced person." A "displaced person" as defined in pertinent part by section 101(6) of the Act, 42 U.S.C. § 4601(6), is any person "who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, *as a result of the acquisition of such real property*, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance * * *." [Italic supplied.] The crucial legal issue is whether, in situations where a tenant's lease (or period of occupancy) is not renewed by his landlord so that the latter may enter into a lease of the premises with the Government, there has been an "acquisition" of the property by the Government which displaces that person.

The arguments in support of entitlement center largely around the basic congressional purpose, expressed in section 201 of the Relocation Act (42 U.S.C. 4621), that all persons required to move from buildings because a public facility would replace them should be reimbursed in order that "such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." The relocation provisions (title II) of the Act turn solely on the acquisition of an interest in real property by a Federal or federally assisted program or project designed to benefit the general public and, it is argued that the obtaining of a leasehold constitutes the acquisition of an interest in real property.

In commenting on the definition of "displaced person" and the then United States Post Office Department's option procedure, the House Committee on Public Works stated:

(3) The term "displaced person" means any person who, on or after the effective date of the act, moves from real property, or moves his personal property from real property as a result of the acquisition of such real property, or as the result of the written notice of the acquiring agency or any other authorized person to vacate such property, for a program or project undertaken by a Federal agency, or by a State agency with Federal financial assistance. If a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property actually is acquired.

It is immaterial whether the real property is acquired before or after the effective date of the bill, or by Federal or State agency; or whether Federal funds contribute to the cost of the real property. The controlling point is that the

real property must be acquired for a Federal or Federal financially assisted program or project. For example:

* * * * * * *

(b) Post Office Department witnesses before the committee called attention to the fact that although the Department's construction requirements involve about 1,000 buildings annually, the postal building program, as such, accounts for only a few construction starts each year. Occasionally, the Department acquires the site and transfers it to the successful bidder for construction and lease back to the Department. In most cases, however, building sites are obtained through the Department's leasing authority. Usually, these sites are controlled through an option procedure with title neither vesting in or passing through the Post Office Department. Instead, the option is assigned to a successful bidder who becomes the owner of the land, and the Department's long-term lessor. Some of these sites are for large postal facilities to be constructed in metropolitan areas where the only available and suitable land is occupied by numerous low-income individuals and families, and by small businesses.

It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title of the property. Since the end result is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is entitled to the benefits of this legislation. H. Rept. No. 91-1656, 91st Cong., 2d Sess. 4-5 (1970).

The General Counsel of the Department of Transportation notes:

The Government taking of a leasehold interest in a parcel of realty certainly constitutes an acquisition of the exclusive right to occupy all of the realty for a term of years. While no reference is made in the Act to "title" to realty, nothing in the language or legislative history of this Act would appear to justify discrimination between tenants requiring to move out because of the Government moving in, merely on the basis of the quantum of title being acquired by the Federal agency or by a State agency with Federal financial assistance. The effect on the tenant is the same in any event * * *.

He and others point out that the Relocation Act encourages all acquisitions to be made by negotiation and the avoidance of condemnation whenever possible and they suggest that there is no indication that the benefits to dislocated persons depend upon which method of acquisition is used.

This position has some support in the House Committee on Public Works' report on H.R. 104881, 92d Cong., which in amended form became the Public Buildings Amendments of 1972, Public Law 92-313, June 16, 1972, 87 Stat. 216. While not entitled to be considered as "legislative history" of the Relocation Act, since it was issued well after the Act was enacted, it is of interest in considering this matter. The report states in pertinent part:

RELOCATION ASSISTANCE

The Committee emphasizes that the broad range of relocation benefits mandated by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646, 84 Stat. 1894), is available for persons displaced as the result of purchase contracts and lease construction agreements to the same extent as if displaced for GSA public buildings construction projects under the Public Buildings Act of 1959, or other Federal programs and projects. The Uniform Relocation Act was enacted as a humanitarian program that would relieve the impact of forced moves on persons displaced as the result of activities of the Federal Government and federally aided activities of state and local governments. It makes no difference to a person required to move as the result of

the Federal Government's need for space which method the Government may use to obtain the space. If, in fact, a person is required to move as the result of the Government's to him [sic]. *The Committee did not intend to, and indeed it did not, exempt [sic] activity, the provisions of the Uniform Relocation Act are applicable [sic] any GSA leasing program activity from the provisions of the Act.* The Uniform Relocation Act is remedial legislation and comprehensive in scope. The Committee intends that the Act be administered in the spirit of the Congressional objective to translate that broad authority into equitable and satisfactory conditions for the people affected. [Italic supplied.] H. Report No. 92-989, 92d Cong., 2d Sess. 9-10 (1972).

Hence, at that time while speaking specifically to purchase contracts and lease construction agreements the House Public Works Committee seemed to indorse the application of the Act to any displaced tenants in the underscored portion.

The proponents of the view that the Act does not apply in the subject situations set forth several arguments in support of their opinions. They point out that a decision favorable to the claimants would have a very significant impact on Government (and federally assisted) leasing programs. For example, in fiscal year 1973, GSA entered into over 1,800 leases in both existing buildings and new buildings, either constructed specifically for lease to the Government (lease construction projects) or constructed for rental in the open market. LEAA states that over a 2 year period, leases were entered into by State planning agencies (i.e., LEAA grantees) which required the relocation of 115 businesses, 63 families, two farms and nine nonprofit corporations. It estimates that if the Relocation Act was applicable, about 1 million dollars in relocation costs might have been incurred.

It is further noted by GSA that an interpretation favorable to the claimants will necessitate a major modification of existing procedures by which space is leased for use by Federal agencies. Presently leases are awarded to those proposing to furnish space meeting the Government's minimum requirements at the lowest cost. However, it is stated that if relocation payments are to be made, it will generally not be possible to determine which offers would be the lowest in cost since relocation costs could not be determined until well after award, at which time eligibility is established and claims considered. This would appear to place landlords with occupied properties—even if they offer the lowest bid or have the most desirable properties—at a competitive disadvantage with respect to those with newly constructed buildings or buildings vacant by chance.

It is further contended that the Congress did not intend the Relocation Act to cover mere succession in tenancy. GSA notes that prior to enactment of the Act, section 112 of the Senate passed version of S. 1, 91st Cong., 1st Sess., defined the term "real property" to include acquisition of any interest in real property, which would have included a leasehold interest. GSA objected to the definition and suggested the

section be amended specifically to exclude leasehold interests acquired by the Government under voluntary agreements with private parties. The House of Representatives extensively amended S. 1 and deleted the proposed definition entirely. With this background GSA contends that, had the Congress wished coverage to extend to the subject class of cases, it could (and would) have either retained the definition or specifically so provided. Whatever the merits of this position the fact remains that language initially included in S. 1 would have covered leasehold interests and, as finally enacted, did not.

Floor statements by Members of Congress and other portions of the legislative history of the Relocation Act are also frequently cited by both LEAA and GSA to indicate that the Congress did not intend to have the Act apply to succession in tenancy situations.

Taking the statute and its legislative history together, we tend to agree with this position. Section 101(6) requires there to be an "aquisition of such real property." An acquisition is generally, though not exclusively, thought of as accomplished by transfer of title. The bill was discussed and considered in relationship to the public's "taking" of private lands, through condemnation or the threat thereof. See, for example, Senator Mundt's statement at 115 Cong. Rec. 31534 (1969); Congressman Cleveland's speech at 116 Cong. Rec. 40169 (1970); and the statement of the manager of the bill on the Senate floor, Senator Muskie, at 116 Cong. Rec. 42137 (1970). Also of direct importance is the report of the House Committee on Public Works, H. Report No. 91–1656 (1970), quoted in pertinent part above, in which the Committee states that the legislation was intended to apply to lease construction projects of the kind undertaken by the former Post Office Department. No reference is made to the type of lease transaction where the Government becomes a tenant by succession. As GSA states:

> * * * Obviously, if Congress intended that all lease transactions should be subject to the Act, it would not have been necessary, as indicated in the legislative history, to draw the singular project distinction as being the lease construction type. Further, we believe that the omission of any reference to lease transactions, other than lease construction projects, was not inadvertent.

Further, it is obvious that persons leasing property to the Government on a voluntary basis, without threat of coercive action, do so because it is to their advantage, financially or otherwise. While the tenants whose leases are not renewed are not in a position to make such a choice, the lessor may not require them to vacate the premises in the absence of a legal right to obtain possession thereof.

Hence, based on our reading of the statute and its legislative history as well as the other factors discussed above, when a lessor exercises his legal right to possession in order to lease the property voluntarily

to the Government, we do not feel that the Government may be said to have made an acquisition of real property within the meaning of the Relocation Act. This, of course, is entirely different from the situation where the Government, regardless of outstanding lease agreements, acquires the leasehold interest by eminent domain or the threat thereof.

Accordingly, it is our position that tenants whose leases are not renewed or whose tenancies from period to period (i.e., month to month tenancies, etc.) are terminated by their landlord in order that the premises may be leased to the Government (or to a federally assisted entity) in an open market transaction, without threat of condemnation, are not entitled to the benefits of the Relocation Act inasmuch as they were not required to vacate by either a written order of the Government or by the acquisition, as that term is used in the Relocation Act, of the property by the Government.

[B-181402]

Husband and Wife—Travel and Transportation Matters—Transportation of Household Effects—Two Movements—Dual Rights

Where military member and wife each were entitled to shipment of household goods from Germany, wife's entitlement on termination of teaching contract with Army was to Detroit, Michigan, area, and husband's entitlement on release from active duty was not to exceed distance from Germany to Hailey, Idaho, and goods were shipped at Government expense on wife's orders from Germany to warehouse at Lincoln Park, Michigan, and later member had goods shipped from Lincoln Park to Boise, Idaho, reimbursement for this shipment is not authorized as Government's obligation is limited to the greater entitlement and with payment of constructive drayage plus shipment to Lincoln Park, that entitlement resulted in a greater payment.

In the matter of reimbursement for shipment of household goods, April 10, 1975:

This is a request for reconsideration of the settlement by the Transportation and Claims Division, General Accounting Office, on March 14, 1974, which determined that Captain Michael M. Mallory, USAR, was not entitled to the cost of shipping his household effects from Lincoln Park, Michigan, to Boise, Idaho, incident to his release from active duty in the United States Army.

The record shows that by Special Orders Number 105, dated April 13, 1972, Captain Mallory was released from active duty in the Army, effective April 18, 1972, at Augsburg, Germany. At that time his wife was employed as a Department of the Army teacher under a contract due to expire in June 1972. After the member's release from active duty he remained in Germany as his wife's dependent, for the remainder of their stay in Germany. In June the couple's household

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goods were shipped at Government expense from Augsburg, Germany, to Lincoln Park, Michigan, Mrs. Mallory's place of hire, under her orders dated May 10, 1972. The household goods remained in storage at Lincoln Park, Michigan, until September 21, 1972, when they were shipped to Boise, Idaho, at Captain Mallory's personal expense.

Captain Mallory has said that the household goods were shipped back to the United States under his wife's orders in order to avoid the necessary paper work in having them shipped under his separation orders. In a letter to the Finance Center, U.S. Army, dated July 7, 1973, he said that he did not initially return to Idaho because he was awaiting an appointment with the Internal Revenue Service, and was informed that his employer would pay the cost of shipping his household goods to his place of employment. On September 15, 1972, the member was hired; however, the Internal Revenue Service did not pay the costs of shipment of his household goods to Boise, Idaho, his place of employment.

The member indicates that since he had entitlement to shipment of his household goods from Augsburg, Germany, his place of separation from active duty, to Hailey, Idaho, his home of record, that he should be reimbursed for the cost of shipment of the goods from Lincoln Park to Boise. Captain Mallory paid $1,184.10 for shipment of the goods to Boise; however, since in addition to Government payment for the cost of the shipment to Lincoln Park, Mrs. Mallory was allowed $279.72 based on the constructive cost of drayage from the warehouse to a residence in the local area, his claim is for $904.38 ($1,184.10 less $279.72).

Section 406 of Title 37, U.S. Code (1970) provides that in connection with a change of permanent station, a member of a uniformed service is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, subject to such conditions and limitations as may be prescribed by the Secretaries concerned.

Paragraph M8259–1, Volume 1, Joint Travel Regulations (1 JTR) promulgated pursuant to that authority, provides in pertinent part that a member on active duty who is separated from the service or relieved from active duty is entitled to shipment of household goods to the place elected by the member for his travel allowance under para. M4157, 1 JTR (home of record or place from which ordered to active duty) from whichever of the following is applicable: the last or any previous permanent duty station; a designated place to which transported at Government expense; or a place of authorized storage. Shipments may be made between places other than the places

stated subject to the member's payment of all costs of shipment in excess of shipment from the place of authorized origin to the place elected by the member for his travel allowance. In such event, his payment to the Government for excess costs will be computed on the basis of the cost that would have been incurred by the Government for shipments of a like weight of household goods in one lot from the last permanent duty station or the actual location of the household goods, whichever would result in a lower cost to the Government, to the place to which the member elects to receive travel allowances. Additionally, para, M8007–2, 1 JTR, provides that the Government's maximum transportation obligation is the cost of a through household goods movement of a member's prescribed weight allowance in one lot between authorized places.

In the present case, Mrs. Mallory as a Government employee was entitled to shipment of household goods at Government expense from Augsburg, Germany, to the Detroit, Michigan, area. Consequently, the Government paid $1,877.23 (6,216 lbs. @ $30.20 per 100 lbs.), and paid $279.72 for estimated drayage cost from the warehouse in Lincoln Park to a residence in the Detroit area, for a total cost of $2,156.95. In accord with paras. M8259–1 and M8007–2, 1 JTR, Captain Mallory incident to his release from active military service was entitled to shipment of household goods at Government expense not to exceed the cost to the Government of one through shipment from Augsburg to Hailey, Idaho. The cost is computed to be $1,982.90 (6,216 lbs. @ $31.90 per 100 lbs.).

In decision B–157413, October 13, 1965, the member, who was released from active duty and appointed to a civilian position, elected to move his goods under the authority pertaining to his military status. He was required to reimburse the Government for excess distance and weight in moving his goods from the area of his last permanent duty station to his place of employment rather than to his home of record. It was indicated that the household goods transportation entitlements of military members and those of civilian employees are not suspectible of being added when there is a single shipment but that the individual is entitled to the larger of the two allowances or benefits. In such cases the Government has but a single basic obligation.

In accord with the foregoing rationale, Captain and Mrs. Mallory could choose to ship their 6,216 lbs. of household goods under either of their entitlements. However, after utilization of Mrs. Mallory's entitlement as an employee, her husband's entitlement to shipment of the same goods, as a military member, may not be added to hers in order to increase the Government's obligation in regard to those goods.

However, an additional payment could be allowed to the extent that the entitlement not used was greater than the entitlement used.

Since the Government already has paid $2,156.95 under Mrs. Mallory's entitlement, and the cost of shipment from Augsburg to Boise under her husband's entitlement would have been $1,982.90, there being no indication that drayage would have been required at Boise, it appears that the greater of the two entitlements has been paid. While it is regrettable that circumstances at the time of shipment of goods from Augsburg, including uncertainty regarding Captain Mallory's obtaining employment at Boise, and the expectation that transportation of household goods would be authorized in that connection, resulted in shipping the goods to the Detroit area, such events provide no legal basis for reimbursement to Captain Mallory for the subsequent transportation of the goods from there to Boise.

Accordingly, the disallowance of claim presented must be sustained.

[B–123029]

Travel Expenses—Military Personnel—Circuitous Routes—Payment Basis

Navy member on permanent change of station from Antarctica to Bainbridge, Maryland, instead of normal route (Christchurch to Auckland, New Zealand, by foreign carrier, and by Category "Z" American air to Travis Air Force Base, California), traveled circuitously for personal reasons using foreign air for overseas travel except from Lima, Peru, to Miami, Florida. Since American air was available via the direct route from Auckland to Travis, reimbursement not to exceed Government cost from Christchurch to Travis may be paid for cost of travel from Christchurch to Auckland and from Lima to Miami but not for costs of other foreign air travel.

Mileage—Military Personnel—Ports of Embarkation and Debarkation—Payment Basis

Navy member on permanent change of station from Antarctica to Bainbridge, Maryland, instead of normal route to Travis Air Force Base, California, and by POV from there to Bainbridge, traveled circuitously for personal reasons to Miami, Florida, and from there to Bainbridge. While the Joint Travel Regulations provide that member is entitled to allowance for official distance between port of debarkation serving new station and the new station, in view of circuitous travel, the member may be paid only for the distance by direct travel from the port of debarkation actually used to the new station, not to exceed distance by the nomal route.

In the matter of reimbursement for circuitous travel, April 11, 1975:

This decision is in response to a request for advance decision from the Disbursing Officer, U.S. Naval Training Center, Bainbridge, Maryland, dated May 17, 1974, regarding the travel entitlements of Lieutenant George H. Kain, III, USN, incident to permanent change of station travel during the period from October 1973–January 1974. This request which was forwarded to this Office by endorsement of

August 19, 1974, by the Per Diem, Travel and Transportation Allowance Committee has been assigned PDTATAC Control No. 74–33.

By orders dated August 13, 1973, Lieutenant Kain was detached from Naval Support Force Antarctica and directed to proceed to Naval Training Center, Bainbridge, Maryland, for duty. Travel via Government aircraft was directed outside the continental United States where available. Where Government aircraft was unavailable, travel via commercial aircraft was directed. By endorsement dated October 25, 1973, the member was authorized circuitous travel. It was stated that normal travel would have been by "Deep Freeze" aircraft to Christchurch, New Zealand, and Category "Z" to Auckland, New Zealand, and San Francisco, California, and by privately owned vehicle from there to Bainbridge, Maryland. Also, it was stated in the endorsement that member would be entitled to reimbursement only for what normal travel would have been.

On October 25, 1973, the member commenced travel. He utilized Government transportation to Christchurch, New Zealand, and then traveled via New Zealand Airways and automobile to Auckland. From there he utilized foreign air for travel to Australia, Indonesia, Singapore, Malaysia, Thailand, Nepal, India, Kenya, South Africa, Brazil and Peru. He traveled from Lima, Peru, to Miami, Florida, via American flag airline, and then traveled via Kentucky and Pennsylvania, arriving at Bainbridge, Maryland, on January 4, 1974.

Prior to departure from Antarctica Lieutenant Kain was given a travel advance of $169.26, representing the mileage allowance from Travis Air Force Base, California, to Bainbridge, Maryland (2,821 miles @ $.06 per mile). In addition, Lieutenant Kain claims $304.40 for the normal travel by foreign air from Christchurch to Auckland, New Zealand, and Category "Z" travel from Auckland to San Francisco.

The disbursing officer is in doubt as to whether the member is entitled to a mileage allowance from Travis Air Force Base to Bainbridge since his actual port of debarkation was Miami, Florida, and the closest port of debarkation serving Bainbridge is McGuire Air Force Base, New Jersey.

Additionally, in endorsing the request for advance decision, the Executive, Per Diem, Travel and Transportation Allowance Committee refers to 35 Comp. Gen. 31 (1955), involving travel for personal convenience over a circuitous route by foreign carriers, and concludes that proper reimbursement for the member appears to be the actual cost of transportation from Christchurch to Auckland, New Zealand, and the actual cost of transportation from Lima, Peru, to Miami, Florida, not to exceed the Category "Z" cost from Auckland to San Francisco, and mileage allowance from Miami to Bainbridge.

The member has expressed the opinion that he is entitled to the full amount it would have cost the Government had he traveled the usual way from Antarctica to Bainbridge because (1) his orders indicated he would be entitled to reimbursement for what his normal travel would have been, (2) his orders did not prohibit travel on foreign carriers, and (3) Volume 1, Joint Travel Regulations (1 JTR), para. M4159–1, indicates that he is entitled to mileage for the official distance between the appropriate port of debarkation in California and the new permanent station, Bainbridge.

Section 404 of Title 37, U.S. Code (1970), provides that, under regulations prescribed by the Secretaries concerned, a member of the uniformed services is entitled to travel and transportation allowances for travel performed upon a change of permanent station.

Regulations issued pursuant to the above statutory authority are contained in 1 JTR. Paragraph M4159–5c thereof provides that reimbursement may not be authorized for travel at personal expense on vessels or aircraft of foreign registry except when the use of carriers of United States registry is impractical, or carriers of United States registry are not available. Further, 1 JTR para. M2150 provides that a determination of impracticality made by a transportation or other appropriate officer may not be based on mere inconvenience in securing transportation or short delays in awaiting transportation on vessels or aircraft of United States registry, the desire to arrange circuitous routes for the convenience of the traveler, or for any other similar reasons.

Where members travel by foreign vessels or aircraft pursuant to orders permitting circuitous travel for personal reasons, reimbursement has been denied for such travel where American vessels or aircraft are available on the direct route. 35 Comp. Gen. 31, *supra;* B–178847, August 28, 1973. In such circumstances, reimbursement for part of circuitous travel by American carrier has not been questioned. *See* decision B–153931, June 23, 1964.

In accord with the foregoing, no reimbursement may be authorized for Lieutenant Kain's circuitous travel for personal reasons by foreign registered aircraft from Auckland, New Zealand, to Lima, Peru. Since foreign flag travel was authorized from Christchurch to Auckland, New Zealand, the record indicating that no Category "Z" (American commercial air) travel was available, and the member traveled by American commercial air from Lima to Miami, Florida, reimbursement for such travel may be authorized not to exceed the $304.40 cost to the Government for the travel from Christchurch to San Francisco (Travis Air Force Base) (1 JTR para. M4159–4a, change 235, September 1, 1972, currently subpara. 5a).

Where a member travels under permanent change of station orders to the United States, which do not specify group travel or direct travel by a specific mode of transportation, 1 JTR para. M4159–1, item 3, provides he will be entitled to allowance for the official distance between the appropriate aerial or water port of debarkation serving the new station and the new permanent station. However, where there has been circuitous travel from the member's overseas station for the member's personal convenience, the member may be paid for the distance (by direct travel) from the port of debarkation actually used to the new permanent duty station, not to exceed the official distance from appropriate port of debarkation by the normal direct route to the new permanent duty station. 47 Comp. Gen. 440, 444 (1968); decision B–166105, April 8, 1969.

Consequently, reimbursement to Lieutenant Kain for travel in the United States is limited to the direct distance from Miami, Florida, his actual port of debarkation, to his new permanent station, Bainbridge, Maryland. Accordingly, the excess mileage allowance paid to the member should be deducted from the amount otherwise due him as reimbursement for overseas travel.

[B–182323]

Bidders—Qualifications—Defaulted Contractor—Replacement Contract

Defaulted contractor may properly compete on reprocurement, since Government owes paramount duty to defaulted contractor to mitigate damages, and award to such contractor-bidder is proper if its bid is low and not in excess of its defaulted contract price.

Contracts—Default—Reprocurement—Government Procurement Statutes—Not for Consideration

Where reprocurement is for account of defaulted contractor, principles governing formal advertising are not applicable. And award to low responsive, responsible bidder—the previously defaulted contractor—is proper since award price is not in excess of its defaulted contract price.

In the matter of the R. H. Pines Corporation, April 14, 1975:

The R. H. Pines Corporation (Pines) protests the awards made to another firm by the Defense Construction Supply Center, Defense Supply Agency (DSA), under invitations for bids Nos. DSA700–75–B–0292 and –0801. Both invitations were issued in order that reprocurements, necessitated by the termination for default of requirements contract No. DSA700–74–D–0009, might be made. The defaulted contractor, Ohio Pipe, Valves and Fittings, Inc. (Ohio Pipe), received both awards as low bidder under each solicitation.

Invitation –0292, issued July 25 for opening on August 15, 1974,

covered fixed quantities of steel pipe. Although Ohio Pipe was originally not solicited, a copy of the invitation was subsequently sent to it with advice that it could not receive award if its bid price exceeded the defaulted contract price and if it was unable to prove itself a responsible bidder. At bid opening, the Ohio Pipe bid was found to be low. However, when the value of the Government-furnished zinc—not previously provided for in the defaulted contract—was added to the Ohio Pipe bid price, its bid became higher than the defaulted contract price. Ohio Pipe thereafter confirmed that it did not expect to be furnished the zinc under any resultant contract and that the value of the zinc ($10,559.42) should not be added to its bid. It also agreed to a 30-day discount period as opposed to the 20-day period it inadvertently offered in its bid. On the basis of these changes, the price offered by Ohio Pipe did not exceed the price of its defaulted contract, and Ohio Pipe was advised by letter of September 20, 1974, that IFB -0292 would be canceled and the award would be made to it. Award of a fixed-price contract was made to Ohio Pipe on October 16, 1974.

Invitation -0801, issued August 29 and opened September 19, was also for fixed quantities of steel pipe. The bid submitted by Ohio Pipe was the lowest received, did not exceed the prices offered in the terminated contract, and provided for equalization of all other cost factors such as price escalation, which was restricted to 10 percent, and Government-furnished zinc that was not required by Ohio Pipe. As was the case under invitation -0292, Pines protested any award that might be made to Ohio Pipe under invitation -0801.

Pursuant to paragraph 2-407.8(b)(3) of the Armed Services Procurement Regulation (1974 ed.) it was concluded in a Determination and Findings, dated October 8, 1974, from the Acting Deputy Director of Procurement and Production to the Director of the Defense Supply Agency, that awards to Ohio Pipe should be made since the items to be procured were urgently required and delivery or performance would be unduly delayed by a failure to award promptly. As regards invitation -0292, it was noted that the price of Pines, the next low bidder, was considered to be unreasonable as it represented a markup of 45 percent over the mill pricing.

Pines' principal contention is that Ohio Pipe was ineligible for award as a defaulted contractor and that the contracting officer's attempt to mitigate damages was carried further than was reasonable under the circumstances.

In support of this argument, Pines asserts that whereas the activity feigned legal procedures by mock negotiation under invitation -0292, it did not even put on such a charade under invitation -0801, but rather simply made award with nothing more. In this context, *Appeal*

of Royal-Pioneer Paper Box Manufacturing Co., Inc., ASBCA No. 13059, 69–1 BCA § 7631, is cited for the proposition that:

> * * * The Government, in using formal advertising for the reprocurement, is bound to accept the lowest responsible bid. * * * When it utilizes the formal advertising procedures, it has the obligation to maintain the integrity of the bidding system by applying the regulations relevant to that procedure. * * *

We have no difficulty in accepting this principle, for in Royal-Pioneer the ASBCA was concerned with the Government's attempt to mitigate damages in soliciting and dealing only with third parties, and not with the defaulted contractor. Here the Government's effort to mitigate damages was necessarily governed by the fact that the defaulted contractor, Ohio Pipe, had submitted low bids and was found to be responsible for purposes of these procurements.

Although it is an established principle of procurement law that a reprocurement contract may not be awarded to a defaulted contractor at a higher price than the price in the defaulted contract, 27 Comp. Gen. 343 (1947), there is no prohibition against the defaulted contractor being considered for award if it is otherwise responsible. B–165884, May 28, 1969. Such consideration is consistent with the Government's obligation to mitigate damages.

Therefore, and since Ohio Pipe was the lowest, responsive, responsible bidder under the reprocurements the protest is denied.

[B–178342]

State Department—Employees—Home to Work Transportation—Government Vehicles

22 U.S. Code 1138a and 2678, which authorized designated State Department officials to permit use of Government vehicles for home to work transportation of Government employees, apply only to vehicles owned or leased by the State Department.

Vehicles—Government—Home to Work Transportation—Government Employees—Overseas

Although use of Government vehicles for home to work transportation of Government employees is generally prohibited by 31 U.S.C. 638a(c)(2), this prohibition does not apply where such use is necessary for protection of overseas employees from acts of terrorism. Such use may be regarded as in Government interest, although specific legislative authority to use Government vehicles for this purpose should be sought and interim provision of vehicles to this end should be limited to most essential cases.

In the matter of use of Government vehicles, April 15, 1975:

This decision to the Secretary of Defense responds to a request by the General Counsel of the Department of Defense (DOD) for our opinion on the use in foreign countries of Government-owned or leased motor vehicles for home to work transportation with specific reference

to the applicability of sections 1138a and 2678 of Title 22, U.S. Code, to military and civilian personnel of DOD.

The General Counsel explains that with the rise of political unrest and terrorist activities, there is concern about the safety of DOD military and civilian personnel stationed in certain foreign countries traveling from their domicile to place of work and return. Enclosed with his request are a number of materials which illustrate, in greatly varying degree of apparent seriousness, potential dangers to the security of personnel in specified countries.

In several of the countries covered by this material the Ambassador or Head of Mission has authorized State Department funded domicile to duty transportation for Defense Attache Office personnel. It is assumed that the DOD personnel here involved are not Defense Attache personnel.

The General Counsel points out that the problem stems from the prohibition in section 638a of Title 31, U.S. Code, against the use of Government-owned vehicles in the transportation of officers and employees between their domiciles and places of employment with limited exceptions, none of which includes personnel safety. 31 U.S.C. § 638a (c) (2) (1970) provides in part as follows:

> Unless otherwise specifically provided, no appropriation available for any department shall be expended—
>
> * * * * * * *
>
> for the maintenance, operation, and repair of any Government-owned passenger motor vehicle or aircraft not used exclusively for official purposes; and "official purposes" shall not include the transportation of officers and employees between their domiciles and places of employment, except in cases of medical officers on out-patient medical service and except in cases of officers and employees engaged in field work the character of whose duties makes such transportation necessary and then only as to such latter cases when the same is approved by the head of the department concerned. * * *. The limitations of this paragraph shall not apply to any motor vehicles or aircraft for official use of the President, the heads of the executive departments enumerated in section 101 of Title 5, ambassadors, ministers, charges d'affaires, and other principal diplomatic and consular officials.

The General Counsel cites two statutes which are exceptions to 31 U.S.C. § 638a(c) (2) and asks whether they are applicable to military and civilian personnel of the Department of Defense. These two statutes read as follows:

22 U.S.C. § 1138a (1970):

> Notwithstanding the provisions of section 78 of Title 5 [now 31 U.S.C. § 638a (c) (2)], the Secretary [of State] may authorize any principal officer to approve the use of Government owned or leased vehicles located at his post for transportation of United States Government employees and their dependents when public transportation is unsafe or not available.

22 U.S.C. 2678 (1970):

> Notwithstanding the provisions of section 638(c) [sic] of Title 31, the Secretary of State may authorize any chief of diplomatic mission to approve the use of Government-owned vehicles or taxicabs in any foreign country for transportation

of United States Government employees from their residence to the office and return when public transportation facilities other than taxicabs are unsafe or are not available.

The term "United States Government employees" in the above-quoted provisions encompasses employees of any agency, including DOD. However, the history of this provision shows that it originated to afford transportation in State Department controlled vehicles of foreign service personnel who were U.S. citizens to recreation facilities, in section 12(d) of the Foreign Service Act Amendments of 1956, ch. 770, 70 Stat. 705 (22 U.S.C. 1139), and was later extended to authorize use of such vehicles for other transportation for both American and local employees and their dependents. See H. Report No. 646, 88th Cong., 40. Thus, it is our opinion that the application of these provisions must be considered limited to the use of vehicles controlled or leased by the State Department since it is difficult to believe the Congress intended to vest in the designated State Department officials any control over another agency's use of its vehicles. Accordingly, the Title 22 provisions cannot be used as a basis for expending DOD appropriations to furnish Government vehicles for home to work transportation of its employees, as is apparently contemplated by the General Counsel.

Notwithstanding the foregoing conclusion, we believe that the problem presented by the General Counsel merits further consideration in relation to 31 U.S.C. § 638a(c)(2). As noted previously, this statute constitutes a general prohibition against the use of Government vehicles for home to work transportation with certain exceptions dealing with specified officials and employees. Current DOD regulations apparently limit such use of vehicles to the excepted officials and employees expressly stated in the statute. See DOD Directive No. 4500.36, part IV–A, paragraphs 1–2 (July 30, 1974). In construing the specific restriction in this statute against employee use of Government-owned vehicles for transportation between domicile and place of employment, our Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of an employee. In this regard we have long held that use of a Government vehicle does not violate the intent of the cited statute where such use is deemed to be in the interest of the Government. We have further held that the control over the use of Government vehicles is primarily a matter of administrative discretion, to be exercised by the agency concerned within the framework of applicable laws. 25 Comp. Gen. 844 (1946).

In our view, the protection of DOD officials and employees stationed overseas from terrorist activities may clearly be regarded as involving a Government interest which transcends considerations of personal convenience. This conclusion is implicitly recognized in the Title 22

provisions discussed hereinabove, although such provisions are not directly applicable here. Thus, it is our opinion that DOD may exercise some discretion to protect the safety of its overseas employees from terrorist activities without violating 31 U.S.C. § 638a(c)(2) where there is a clear and present danger of such activities and assuming that the furnishing of Government transportation will provide protection not otherwise available. At the same time, the broad scope of the prohibition in 31 U.S.C. § 638a(c)(2), as well as the existence of specific statutory exceptions thereto,* strongly suggests that specific legislative authority for such use of vehicles should be sought at the earliest possible time, and that the exercise of administrative discretion in the interim should be reserved for the most essential cases.

Finally, it has already been indicated that the particular instances brought to our attention appear to vary considerably in terms of the circumstances said to justify the provision of home to work transportation. We recognize that assessment of the sufficiency of such justifications is essentially a matter of agency discretion. However, we believe that the provision of vehicles for officials stationed in countries where there is no clear and present danger of terrorist activities and the asserted dangers to employees seem highly speculative and remote, would constitute an abuse of discretion.

[B-180215]

Decedents' Estates—Compensation—Children—Paternity Status

Claim by deceased Federal Employee's children, who were not formally acknowledged in accordance with New York (State of domicile) inheritance laws, may nevertheless be allowed. Record establishes fact of paternity and other New York laws conferring analogous Governmental benefits do not require formal judicial order of paternity.

Decedents' Estates—Compensation—Children—Illegitimate—Effect of Court Decisions

Recent Supreme Court and lower Federal Court decisions, particularly those applying the Federal life insurance statute, indicate that distinctions between "legitimate" and "illegitimate" children for purposes of receipt of benefits should be abrogated. Therefore, State standard of proof which encourages such distinctions will not be followed. Prior Comptroller General decisions contra will no longer be followed.

In the matter of survivors' claim for unpaid compensation due deceased Federal employee, April 15, 1975:

This matter concerns an appeal from settlement action by our Transportation and Claims Division on October 4, 1974, which denied the

*See, in addition to the Title 22 provisions, 38 U.S.C. § 233(b) (1970), which authorizes the Administrator of the Veterans Administration to utilize Government vehicles for home to work transportation of employees in emergency situations.

claim of children for unpaid compensation payable to their natural father, deceased, who had been an employee of the Department of the Army in Watervliet, New York.

The controlling statute, 5 U.S. Code § 5582(b) (1970), provides that money due an employee at the time of death shall be paid in the following order of precedence:

> First, to the beneficiary or beneficiaries designated by the employee in a writing received in the employing agency before his death.
> Second, if there is no designated beneficiary, to the widow or widower of the employee.
> Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.
> Fourth, if none of the above, to the parents of the employee or the survivor of them.
> Fifth, if none of the above, to the duly appointed legal representative of the estate of the employee.
> Sixth, if none of the above, to the person or persons entitled under the laws of the domicile of the employee at the time of his death.

The member did not designate a beneficiary and was unmarried at his death. For the limited purpose of asserting this claim, the claimants have characterized themselves as "illegitimate" children of the decedent, who had no other known children.

Following many prior decisions of this Office, the claim of the children was initially denied on the basis that the meaning of "child or children" as used in the statute required a determination as to whether the claimants were eligible to inherit from the decedent under the intestate succession statutes of New York, the State where the member was domiciled at his death. Applying New York law to the facts of the case resulted in a finding that the claimants could not take because at the time of their birth, their mother was the lawful wife of another man; and an order of filiation to establish the legal paternity of the decedent was never issued under New York law, EPTL § 4–1.2 (a)(2) (McKinney 1965). The cited provision allows an illegitimate child to inherit from the father only if an appropriate State court issues an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within 2 years after birth of the child.

The record convincingly establishes that claimants are, in fact, the nautral children of decedent. Moreover, both the Civil Service Commission and the Office of Federal Employees' Group Life Insurance, relying on essentially the same evidence before us, determined that claimants are children of decedent and have paid sums in excess of $20,000 to them. The unpaid compensation here in question equals approximately $2,194.

Accordingly, the issue for determination is whether the phrase "child or children," as used in 5 U.S.C. § 5582(b) (1970), includes children of a deceased Federal employee who cannot inherit from

their natural father under New York law because his paternity has not been judicially determined in a filiation proceeding.

Since it is generally recognized that there is no body of Federal domestic relations law, issues of personal status arising under the cited statute are resolved with reference to relevant State law. Consequently, in prior decisions requiring our determination as to the definition of a decedent's "widow or widower," or whether adopted children and step-children are entitled to consideration as "children," we have relied on State law. Although there are a number of State laws which deal with such questions, we have in the past looked only to State laws of intestate succession to decide whether "illegitimate" children should take under the third order of precedence.

Most of our decisions on the illegitimacy question were rendered before *Levy* v. *Louisiana*, 391 U.S. 68 (1968), in which the Supreme Court first recognized the general right of illegitimate children to share equally with legitimate children in governmentally conferred benefits. The Court held that the Louisiana wrongful death statute made an invidious discrimination in violation of the Constitution when it created a distinction between legitimate and illegitimate children, barring the latter from recovering for the death of a parent.

In 1971 the Supreme Court declined to extend *Levy* to a State statute of intestate succession which allowed acknowledged illegitimate children to inherit from their father only if he was not survived by legitimate children, a wife, or other more remote relatives. See *Labine* v. *Vincent*, 401 U.S. 532 (1971). However, in *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), the Court distinguished *Labine*, and made it clear that *Levy* remained viable by holding that a State's denial of equal recovery rights to unacknowledged illegitimates, under its workmen's compensation laws, violated the Equal Protection Clause of the Fourteenth Amendment. The Court explicitly struck down the discriminatory classification since the decedent could not acknowledge the children in the manner prescribed by State law because he was lawfully married to another.

In a somewhat related case holding that a State must accord an "illegitimate" child equal rights to needed support from the father as it granted a "legitimate" child, the Supreme Court recognized--

> * * * the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but *neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.* [Italic supplied.] *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973).

In the only Supreme Court case after *Levy* concerning the eligibility of illegitimate children for Federal benefits, a portion of the Social Security Act, 42 U.S.C. § 416(h)(3)(B) (1970), which disqualified some categories of illegitimate children from eligibility for disability

benefits, was invalidated as a denial of "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment." *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974).

Without significant exception, numerous lower Federal Court decisions in the last 10 years construing the terms "child" and "children" in Federal statutes have held that children cannot be excluded from eligibility for Federal benefits on the basis of their status as "illegitimate" under State law, even where the exclusion is not an absolute bar. Recognizing that issues of personal status must be determined with reference to State laws, these cases have decided in favor of "illegitimates," notwithstanding State statutes of interstate succession which, by imposing onerous formal procedures for establishing paternity, operated to disqualify them as heirs. See *In re Industrial Transportation Corp.*, 344 F. Supp. 1311 (E.D. N.Y. 1972); see also *Miller* v. *Laird*, 349 F. Supp. 1034 (D. D.C. 1972); and cases cited therein.

Although there are no reported court decisions construing the terms "child or children" as used in 5 U.S.C. § 5582 (1970), we believe the line of decisions rendered in the Federal employees' group life insurance cases is closely analogous since the statutory distribution provisions, 5 U.S.C. § 8705 (1970), are virtually identical and were patterned after 5 U.S.C. § 5582 (1970). All such cases of which we are aware have held that "illegitimate" children are included in the statutory category of "child or children," and also that the natural parent of such a child (not adopted by another) may take under the statutory category of "parents." These decisions have consistently held for "illegitimate" children even where it was clear under relevant State laws of intestate succession that such children could not take as heirs at law. The leading insurance decision is *Metropolitan Life Insurance Company* v. *Thompson*, 368 F.2d 791 (3d Cir. 1966), *cert. denied*, 388 U.S. 914 (1967), *reh. denied*, 389 U.S. 891 (1967), which concerned the status of a child under the laws of New York and allowed the child to recover the life insurance proceeds, even though he was "illegitimate" and could not have inherited from his natural parent under New York law. The *Thompson* case has apparently settled all uncertainty on this issue for purposes of the Federal life insurance program. See *Metropolitan Life Insurance Company* v. *Buckley*, 278 F. Supp. 334 (S.D. Miss. 1967).

The cited Supreme Court cases do not appear to nullify all States statutes that prescribed various methods of formally establishing a parental relation where that relationship is relevant; however, they do signify the ongoing evolution, reflecting changes in social and political attitudes, of a judicial disposition to mitigate the legal incapacities and onerous burdens that still flow from "illegitimacy." The trend of the decisions prompts us to modify our past approach to

the following extent. In this, and future cases under 5 U.S.C. § 5582(b) (1970), if the relevant State's statute of intestate succession incorporates rigid procedural requirements (such as the New York filiation proceeding) for establishing paternity before "illegitimate" children can inherit, we will not consider ourselves precluded from considering other statutes in the same State which deal with receipt of governmental benefits—e.g., State wrongful death or workmen's compensation statutes—in determining what evidence of paternity may be accepted.

Applying the foregoing policy in this case we note that an appellate court in New York has held that the requirement for an order of filiation is unconstitutional when applied to bar the father of an "illegitimate" child from maintaining an action for the child's wrongful death under the New York wrongful death statute. *Holden* v. *Alexander*, 39 A.D. 2d 476, 336 N.Y.S. 2d 649 (Sup. Ct., App. Div. 1972). Furthermore, under section 2–11 of the New York Workmen's Compensation Law (McKinney 1965) the term "child" is defined to include an "acknowledged illegitimate child dependent upon the deceased." An order of filiation is not required to prove paternity; the claimant need only produce evidence to satisfy the Workmen's Compensation Board that the deceased acknowledged the claimant as his child.

In view of New York law pertaining to the eligibility of "illegitimate" children for wrongful death and workmen's compensation benefits notwithstanding the absence of a formal filiation proceeding, we are reversing our previous determination that such a filiation proceeding was necessary and will consider other probative evidence on the issue of paternity. In this case the uncontroverted evidence shows that the claimants are the natural children of decedent; therefore, payment to them in the proper amount is authorized and will be made accordingly.

[B–180768]

Pay—Active Duty—Status

"Full duty" for purposes of 10 U.S.C. 972 is attained when member, not in confinement, is assigned useful and productive duties (as opposed to duties prescribed by regulation for confinement facilities) on full-time basis which are not inconsistent with his grade, length of service and military occupational specialty (MOS). While placement in the same MOS is not essential, the decision to place a member in that MOS or to assign him available duties consistent with his grade and service is a question of personnel management best left to judgment of appropriate military commander.

Pay—Active Duty—After or in Lieu of Confinement

Full duty status for purposes of 10 U.S.C. 972, once attained, cannot be lost by virtue of restraint short of confinement; accordingly, assignment to useful and appropriate service either after release from confinement or in lieu of confinement pending trial could constitute full duty status for purposes of the statute.

Pay—Absence Without Leave—Return to Military Control—Periods of Confinement, etc.

Navy enlisted member, who voluntarily returned to military control from absence-without-leave status, was assigned appropriate full-time duties in lieu of confinement pending trial, convicted by court-martial, confined and reassigned to further duties after release until date of discharge, is entitled to pay and allowances for both pre- and post-confinement periods of duty, since assignment to full-time duties consistent with member's rank and service is deemed "full duty" for purposes of 10 U.S.C. 972 and implementing Department of Defense regulations.

Pay—After Expiration of Enlistment—Confinement, etc., Periods—Pay Status

Enlisted member who returns to military control after deserting and whose term of enlistment had expired prior to his return to duty is not entitled to pay and allowances until he is officially restored to duty for the purpose of making good time lost during the period covered by the contract of enlistment.

Pay—Courts-Martial Sentences—Confinement, etc., Periods

Enlisted member who deserted, was returned to full duty, tried by court-martial, convicted and confined but whose court-martial conviction did not include a forfeiture of pay is entitled, in accordance with paragraph 10316b(4) of the Department of Defense Military Pay and Allowances Entitlements Manual, to pay and allowances for the period of confinement.

In the matter of arrears of military pay and allowances, April 15, 1975:

This action is in response to a letter dated February 5, 1974, from the Disbursing Officer, Navy Finance Center, Cleveland, Ohio (file reference CCX:DWJ:ekz 7220), requesting an advance decision as to whether ENFA Wayne S. Torbenson, USN, 542–58–8951, is entitled to receive pay and allowances for the periods April 12 to June 10, 1973, and August 1 to September 25, 1973, in the circumstances described, and has been assigned submission number DO–N–1219, by the Department of Defense Military Pay and Allowance Committee.

The submission states that the member went on unauthorized absence from the U.S.S. *Mobile* on August 15, 1972. On April 8, 1973, the member voluntarily surrendered to civilian authorities at Blaine, Washington, and was transfered on the same date to the Naval Support Activity, Seattle, Washington, and placed in an administrative hold status, without restraint, pending disciplinary action. His original expiration of active obligated service date (EAOS) was March 9, 1973, however, on April 12, 1973, shortly after the member returned to military control, a NAVPERS 1070/606 (Record of Unauthorized Absence) was prepared, extending his EAOS to October 31, 1973, in order that the member would make good the time he lost from his enlistment as a result of his unauthorized absence.

The submission states that the member's disciplinary action was trial by Special Court-Martial held on June 11, 1973, at which time he was found guilty of all charges and sentenced to be discharged from the

naval service with a bad conduct discharge, to be confined at hard labor for 3 months, and to be reduced to pay grade E–2. The confinement began immediately. On August 1, 1973, the Convening Authority approved the sentence and ordered it executed, but suspended for 6 months, unless sooner vacated, those portions thereof adjudging the bad conduct discharge and 60 days' confinement. Upon release from confinement on August 1, 1973, the member was assigned to the Training Aids Department as a general assistant until his discharge on September 25, 1973.

The submission indicates that up to June 11, 1973, the date of his trial, the member remained in an administrative hold status in Seattle. It appears that he was neither confined nor restricted and his liberty status apparently was the same as that of other service members assigned to that activity. His duty assignment at that activity consisted of full-time work as an assistant to the Security Department desk officer on duty and included filing forms, painting traffic markers, making coffee, and other miscellaneous duties normally performed by enlisted personnel assigned to that office.

In conjunction with the above, by second endorsement to the submission, the following additional questions were asked for the purpose of obtaining maximum guidance in developing suitable language for the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM):

a. Is full duty status attained when assigned to duties other than those of a soldier's assigned MOS or a Navy member's assigned NEC * * *?
b. Does the temporary assignment of MOS 097 (Duty Soldier) have an effect on full duty status?
c. What effect do varying degrees of restraint have on full duty status?
d. Does assignment to labor or administrative details comprise full duty status?
e. If in conjunction with specific MOS/NEC duties, how much of d, above, can be assigned without losing full duty status?
f. Who is authorized to determine "full duty status" as that term is used by the Comptroller General of the United States?

In connection with the questions presented, 10 U.S. Code 972 (derived from the act of July 24, 1956, ch. 692, 70 Stat. 631), provides as follows:

An enlisted member of an armed force who—
(1) deserts;
(2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;
(3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;
(4) is confined for more than one day under a sentence that has become final; or
(5) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his misconduct;
is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted.

In 37 Comp. Gen. 380 (1957), we considered the meaning of the term "full duty" as used in the 1956 act and stated therein that:

> The legislative history of the act of July 24, 1956, shows that its purpose was to extend to enlisted members of all the military services the liability previously imposed on enlisted members of its Army and Air Force to make up time lost for the enumerated causes. In recommending enactment of the bill which became the act of July 24, 1956, the Acting Secretary of the Navy said in a letter of January 4, 1956, to the Speaker of the House of Representatives that it "would permit all classes of prisoners to be considered in a rehabilitation program; would minimize the number of disciplinary cases in a nonpay status; would simplify the administration of personnel in this category; and would greatly contribute to reduction of absences, when offenders recognize that such time lost must be made good to complete their enlistments."
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> * * * * * * *
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> While the term "full duty" is not defined by the law, we perceive no reason for concluding that Congress intended such words to mean something other than was meant by the term "full-duty status" contained in the prior laws. * * *
>
> Reasonably, therefore, we believe that the term "after his return to full duty" as used in the act of July 24, 1956, is to be regarded as having reference to a period after release from confinement during which the enlisted member is required to perform the duties required of such a member.

Cf. 37 Comp. Gen. 488 (1958).

In 47 Comp. Gen. 487 (1968), we pointed out that an enlisted member restored to duty to make up lost time pursuant to 10 U.S.C. 972 "is, in effect, resuming his obligated service contract." Such duty would therefore constitute "active duty" as defined in 10 U.S.C. 101(22) and 37 U.S.C. 101(18), and would be creditable service for the purpose of entitlement to pay and allowances as prescribed in 37 U.S.C. 204 and 205.

In decision B–173065, July 7, 1971, we considered the case of an Army enlisted member who was apprehended and returned to military control from an absent-without-leave status subsequent to the normal expiration of his term of service. While awaiting trial, he was assigned to an Army Personnel Control Facility in a disciplinary status. The record in that case was not clear as to what duties the member may have performed during this time, but it appeared that such duties were limited to those prescribed in Army regulations governing detained prisoners. In holding that the member was not entitled to pay and allowances for the period spent in the Personnel Control Facility, we said:

> [T]he mere return of a man to military control after expiration of his term of enlistment without assignment to his former organization or another similar unit for the purpose of performing the full duties of an enlisted member of his grade and military occupational specialty does not, in our opinion, constitute a "return to full duty" for the purpose of making up lost time so as to entitle him to full pay and allowances while in confinement. * * *
>
> Accordingly, on the assumption that Corporal Turner has not actually been restored to a full duty status for the purpose of making good the time lost to complete the term of his reenlistment, there is no authority for payment of the voucher * * *.

Pertinent provisions of the DOD regulations which in part implement 10 U.S.C. 972 and our above-cited decisions are contained in the Department of Defense Military Pay and Allowances Entitlements Manual as follows:

> An absentee who surrenders or is apprehended after his term of enlistment has expired is not entitled to pay and allowances until he is restored to a full duty status. This is true whether he is retained solely for trial or discharge, whether trial is barred by the statute of limitations, or whether he will later be returned to duty. DODPM 10316b(3).
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> * * * * * * *
>
> An enlisted member, whose term of enlistment or induction terminates while he is in a status of absence without leave or desertion, is not entitled to pay and allowances upon his return to military control while confined awaiting trial and disposition of his case, if his conviction becomes final and his return to full duty has never been effected. If, however, upon his return to military control the member is returned to full duty for the purpose of making good lost time, pay and allowances accrue subject to any forfeitures which may be included in any sentence of court-martial. * * * DODPM 10316b(6).

Normally, a return to a full duty status for the purpose of making good the time which was lost implies duty consistent with the member's grade and military occupational specialty (MOS). (The term "MOS" as used herein shall be deemed to include the corresponding codes of the other branches of the armed services, e.g., Navy enlisted classification and Air Force Specialty Code.) However, in formulating the language quoted from B–173065, *supra*, it was not our intention to establish as the test of "full duty," that such duty be, in a strict sense, correlated exactly with the member's grade and MOS. It is recognized that, in many situations, strict adherence to MOS criteria may not be feasible or desirable, for example, in situations involving manning imbalance at a particular installation, where the additional time to be served is relatively brief, or where the member's specialty is somewhat uncommon. Also, as it is pointed out in the submission many Navy specialties are particularly adapted only to duty at sea and are not readily interchangeable with duties at a shore installation.

Further, there is nothing in the legislative history of the act of July 24, 1956, *supra*, to indicate that Congress intended the term "full duty" to mean duty strictly commensurate with the member's grade and MOS. In the letter from the Acting Secretary of the Navy to the Speaker of the House of Representatives, S. Report. No. 2549, 84th Cong., 2d sess. 3 (1956), to accompany H.R. 8407, which became the 1956 act, *supra*, the Secretary said:

> It is the policy of the Department of the Navy to permit court-martial prisoners who are suitable and evince a desire therefor, to be restored to duty upon completion of their full confinement or a portion thereof so as to earn the right to a discharge under honorable conditions through further *useful naval service.* * * * [Italic supplied.]

We believe, as a general proposition, that a member, not in confinement, who is performing useful service which is not inconsistent with

his grade and years of service is entitled to be paid therefor, except as may be forfeited by court-martial. We further believe that this view, when applied to the questions herein presented, would be consistent with our prior decisions and, since it would tend to minimize the number of disciplinary cases in a nonpay status, is calculated to best serve the goals sought to be achieved by 10 U.S.C. 972. *Cf.* 37 Comp. Gen. 228 (1957); B–171865, March 25, 1971.

While it is desirable that such assigned duties be commensurate with the member's MOS, we do not believe that placement in the same MOS is essential. The decision whether to so place the individual in question or to assign him to duties as may be available in another MOS is, in our opinion, more a question of sound personnel management than of law and is best left to the judgment of the appropriate military commander who is in a position to consider all relevant factors, including, but not limited to, the appropriate utilization of experienced manpower. Thus, it is our view that for the purposes of 10 U.S.C. 972, "full duty" is attained when a member, not in confinement, is assigned to perform useful and productive duties (as opposed to duties prescribed by regulation for confinement facilities) on a full-time basis, so long as such duties are not inconsistent with his grade and years of service.

Further, we see no reason for drawing a distinction between duty subsequent to release from confinement and duty while awaiting trial or other disciplinary action. *Cf.* 33 Comp. Gen. 281 (1953). In either case, the time required to be made up and the corresponding entitlement to pay and allowances resume when such military commander takes appropriate administrative action to restore the member to duty as defined herein. Question (a) is answered accordingly.

With respect to question (b), we are advised that MOS 097 was superseded by MOS 57A, which in turn has been discontinued by authority of DA Circular No. 611–32, May 22, 1974. Whether the performance of services which would be appropriate to a general MOS would be consistent with a return to full duty is for determination in the particular case under the criteria set forth in this decision.

In answer to question (c), it is our further view that, once full duty status as discussed above has been attained, it cannot be lost by virtue of restraint short of full-time confinement. See if this connection, for example, BUPERSMAN 3440100.2d, which recognizes that restriction in lieu of arrest is normally accompanied by the performance of "full military duties." *See also* 52 Comp. Gen. 317 (1972) and cases cited therein, in which we held that a member in civil confinement who was released to military authorities daily for the performance of military duties pursuant to a work release program was entitled to pay and allowances for each day of full-time military duty thus performed. It follows from the foregoing that assignment of such an

individual to useful and appropriate service, either after release from confinement or in lieu of confinement pending trial, could constitute full duty status for purposes of 10 U.S.C. 972 which would in turn create entitlement to pay and allowances.

The extent to which the assignment to labor or administrative details is consistent with full duty status is for administrative determination under the criteria heretofore stated. See answer to question (b), *supra*. Questions (d) and (e) are answered accordingly.

In response to question (f), the person authorized to determine full duty status would be the "appropriate military commander" referred to in response to question (a). This would appear to be either the installation commander of the installation at which the member is being held while awaiting disciplinary action, or the commander of the unit to which the member is assigned after release from confinement.

With regard to the specific case of ENFA Torbenson, there are factors involved therein which are not discussed in connection with the Committee questions.

It is a rule of longstanding that a member who deserts or is absent without leave and whose term of enlistment expires during such time is not entitled to pay and allowances until he is restored to duty for the purpose of making good time lost during the period covered by the contract of enlistment. *See* 9 Comp. Gen. 323 (1930); 11 *id.* 342 (1932); 23 *id.* 786 (1944); 33 *id.* 196 (1953); 33 *id.* 281 (1953); and B–142822, June 10, 1960.

While the before-quoted provisions of 10 U.S.C. 972 provide that the member upon return to military control is liable to make good any time lost, it is our view that even though the service may hold him for disciplinary action, it has the option not to require that such time be made up. Thus, until an official determination is made to restore him to a duty status to make good such time and he is so returned, pay and allowances would not accrue.

In the present case, the member came back into military control on April 8, 1973. However, official action restoring him to duty to make good lost time did not occur until April 12, 1973. Therefore, the earliest date that the member could be deemed as performing "full duty" was that latter date. Since it appears from the submission that the duties assigned him subsequent to April 12, 1973, were consistent with his then grade and years of service, he became entitled to pay and allowances effective that date.

In this regard, it is noted that the submission and the voucher enclosed therewith indicate nonentitlement to pay and allowances for the period June 11, 1973, to July 31, 1973, while the member was in confinement. The conditions under which an enlisted member is entitled to pay and allowances during confinement while making up lost

time is set forth in paragraph 10316b(4) of the DODPM, which provides in part:

* * * If confined while in a status of being held in the service to make up lost time, an enlisted member continues in a pay status, except to the extent that his pay may be forfeited by court-martial, the same as during his regular enlistment period. * * *

Accordingly, it is our view that since the member's court-martial conviction did not include a forfeiture of pay, he would be entitled to pay and allowances for the entire period from April 12, 1973, when he was restored to full duty, until September 25, 1973, when he was discharged from the service, if otherwise correct.

[B–182387]

Transportation—Dependents—Military Personnel—Vessel and Yard Changes—Same Port

Navy member was transferred from one vessel to another vessel, both homeported in New York City, but with respective home yards at Boston Naval Shipyard and Charleston, South Carolina. Incident to transfer dependents traveled from Detroit, Michigan, to East Meadow, New York. Since the home yards are different, transfer is regarded as permanent change of station for purposes of dependent transportation and dislocation allowances.

Transportation—Dependents—Military Personnel—Vessel and Yard Changes—Same Port

Navy member was transferred from one vessel to another vessel, both homeported in New York City, but with respective home yards at Boston Naval Shipyard and Charleston, South Carolina. Incident to transfer dependents traveled from Detroit, Michigan, to East Meadow, New York. While previous travel to Detroit was prior to provision allowing payment for distance to designated location, it may be regarded as designated location for purposes of Rule 5, Table 7–B–7061, 1 Joint Travel Regulations (JTR). Accordingly, payment for dependent travel is authorized for the official distance from Detroit to New York, the home port of the vessel to which the member was transferred, which is regarded as the new home port for purposes of Rule 5, Table 7–B–7061, 1 JTR.

Transportation—Dependents—Military Personnel—Dislocation Allowance—Vessel and Yard Changes—Same Port

Navy member was transferred from one vessel to another vessel, both homeported in New York City, but with respective home yards at Boston Naval Shipyard and Charleston, South Carolina. Incident to transfer dependents traveled from Detroit, Michigan, to East Meadow, New York. There is entitlement to dislocation allowance since permanent change of station, while between vessels homeported in the same city, was between vessels having different home yards not so located and since dependents performed authorized travel incident to that transfer.

In the matter of dependent travel and dislocation allowances, April 17, 1975:

This action is in response to letter, with enclosures, dated July 24, 1974, from the Disbursing Officer, U.S.S. *Power* (DD839), requesting an advance decision as to the legality of payment of dependent travel

and dislocation allowances under the provisions of Volume 1, Joint Travel Regulations (1 JTR) para. M7001 in the case of Petty Officer Romeo G. Mendoza, USN. The request received here on October 10, 1974, was assigned Control Number 74–39 by the Per Diem, Travel and Transportation Allowance Committee.

By order dated August 15, 1973, Petty Officer Mendoza was directed to proceed on permanent change of station from U.S.S. *Massey* (DD778), homeported at Brooklyn, New York, to the U.S.S. *Power* (DD839), home port Fort Schuyler, Bronx, New York. The home yards of the vessels were Boston Naval Shipyard, Massachusetts, and Charleston, South Carolina, respectively. The member was ordered to report for sea duty on the U.S.S. *Power* not later than September 17, 1973. On April 12, 1974, his wife and son left their residence in Detroit, Michigan, and traveled via privately owned vehicle and arrived the next day at East Meadow, New York, where they established a bona fide residence. Petty Officer Mendoza claims a disclocation allowance and a monetary allowance in lieu of his dependents' transportation.

Since Petty Officer Mendoza was transferred to and from the same home port (Fort Schuyler, Bronx, and Brooklyn both being located in the City of New York), the disbursing officer is doubtful regarding entitlement to the claimed allowances based on a shift of home yards. Additionally, in endorsing the request for advance decision the Commander, Navy Accounting and Finance Center, has expressed doubt as to whether Detroit may be considered as the dependents' designated location since the member previously was paid for dependent travel performed not to exceed the distance from Patuxent River, Maryland, to Brooklyn, New York, the home port of the U.S.S. *Massey*, as at the time of that travel there was no provision in 1 JTR to provide entitlement to a designated place in such circumstances.

Paragraph M1150–10 (change 246, August 1, 1973), 1 JTR, defines "permanent station" as the post of duty or official station (including the home port or home yard of a vessel or of a ship-based staff insofar as transportation of dependents and household goods is concerned) to which a member is assigned for duty other than "temporary duty" or "temporary additional duty," the limits of which will be the corporate limits of the city or town in which the member is stationed.

In accord with 37 U.S.C. § 406 (1970), 1 JTR para. M7000 provides that members of the uniformed services are entitled to transportation of dependents upon a permanent change of station, which includes a duly authorized change in home yard or home port of a vessel (1 JTR para. M3003–1a, change 245, July 1, 1973).

Rule 5, Table 7–B–7061, 1 JTR (change 242, April 1, 1973), provides that when a member is ordered on permanent change of station from sea duty to sea duty, transportation of dependents is authorized

(the limit of entitlement will be the greatest entitlement provided by this table for the case involved) including from the designated place to the new home port, or new home yard. Designated place, as used in the table is defined in para. M7001 as follows:

> In those instances in this Chapter where transportation of dependents is authorized at Government expense to a place designated by the member, entitlement to transportation of dependents will be contingent upon the certification of the member concerned that the place designated is in fact the place where his dependents will establish a bona fide residence (see par. M7000) during the interim period until further transportation is authorized.

Pursuant to 37 U.S. Code § 407 (1970), 1 JTR para. M9003–1, item 1, provides, except as provided in para. M9004, that a member with dependents is entitled to a dislocation allowance whenever his dependents relocate their household in connection with a permanent change of station. Paragraph M9004–1, item 4, indicates that a dislocation allowance will not be payable in connection with a permanent change of station between stations located within the corporate limits of the same city.

In 43 Comp. Gen. 639 (1964) it was stated that where members are transferred from sea duty to sea duty involving vessels having the same home yard and home port, there is no entitlement to transportation of dependents, as no permanent change of station is considered as having occurred, and, therefore, 1 JTR could not be revised to provide such entitlement in the circumstances. Where two vessels have the same home ports (no reference being made to home yards) it was concluded that there is no permanent change of station insofar as dependents are concerned. *See* 45 Comp. Gen. 477 (1966). However, it has long been recognized that the law fixes the home yard *or* the home port of a ship as its permanent station. 43 Comp. Gen. 639, *supra*.

In view of the foregoing, when a member is transferred between vessels which have the same home port but different home yards, it may be considered that, for the purposes of dependent travel and dislocation allowances, there has been a permanent change of station. Consequently, the member's transfer from the U.S.S. *Massey*, home yard, Boston Naval Shipyard, to the U.S.S. *Power*, home yard, Charleston, South Carolina, is regarded as a permanent change of station for the purposes indicated.

Therefore, the member is entitled to dependent travel incident to his transfer. While at the time the member's dependents traveled to Detroit, the controlling regulations did not provide for payment for mileage to such location as a designated location but allowed reimbursement based upon comparative cost of travel to the new station, since it appears that Detroit was the dependents' bona fide residence to which they moved in connection with his prior change of station, that place may be regarded as the designated location for purposes of

Rule 5, Table 7–B–7061. Accordingly, the member may be paid for dependent travel for the official distance from Detroit to Fort Schuyler, Bronx, New York, the home port of the U.S.S. *Power*, which is regarded as the new home port for the purposes of Rule 5, Table 7–B–7061. *See* 1 JTR para. M7003–3a.

The member also is entitled to a dislocation allowance incident to transfer from U.S.S. *Massey* to U.S.S. *Power*, since the permanent change of station in question, while between vessels homeported within the corporate limits of the same city, was between vessels having different home yards not so located and since his dependents did make an authorized move in connection with that transfer.

[B–182534]

Contracts—Negotiation—Requests for Proposals—Cancellation

Before canceling a request for proposals (RFP) involving lease of computer equipment, Navy had ascertained that alternative source of supply within Government might be available at lower cost. This would eliminate need for supplies being procured under RFP. Record supports reasonableness of canceling RFP, even though at time of cancellation alternative source had not yet become available to Navy.

Equipment—Automatic Data Processing Systems—Selection and Purchase—Procurement With ADP Fund—General Services Administration Control

Federal Property Management Regulations (FPMR) provide that procurement of computer equipment with Automatic Data Processing Fund under control of General Services Administration shall conform with applicable Office of Management and Budget (OMB) issuances. 1972 OMB letter indicates that contemplated 40-percent rate of return on investment is desirable prior to using fund. But, assuming that lesser rate of return is obtained in particular case, this does not mean that FPMR is violated, because OMB statement appears to be flexible guideline rather than specific minimum requirement.

Contracts—Negotiation—Requests for Proposals—Preparation Costs

For offeror recommended for award prior to cancellation of request for proposals (RFP) to recover proposal preparation costs, it must be shown that RFP was issued in bad faith. Where it appears Navy had reasonable basis to issue RFP to satisfy its needs, and record shows no bad faith, claim is denied. Allegations that RFP was improperly canceled provide no support for claim where cancellation is not found to be objectionable.

Equipment—Automatic Data Processing Systems—Leases—Evaluation—Separate Charges

Where cancellation of request for proposals (RFP) is not objectionable, protest based upon Navy's evaluation of particular offer is academic. But question raised by protest—whether RFP's for computer leasing should contain a Federal Property Management Regulations (FPMR) provision stating that "separate charges" will not be considered in evaluating offers—is of interest for future procurements. Therefore, question is referred to General Services Administration so it can consider whether FPMR provision should be revised.

In the matter of Federal Leasing, Inc.; DPF Inc., April 18, 1975:

The cancellation of request for proposals (RFP) No. N66032–75–R–0002 by the Department of the Navy's Automatic Data Processing Equipment Selection Office (ADPESO) has led to protests by two dissatisfied offerors, Federal Leasing, Inc. (FLI) and DPF Incorporated. Most of the objections to the Navy's actions have been put forward by FLI, which has vigorously alleged maladministration of almost every phase of the procurement. DPF's protest is more limited in scope and focuses on a specific question concerning the Navy's evaluation of its proposal.

The procurement arose out of a preexisting contract under which the Navy had been leasing certain computer equipment from the Univac Division of Sperry Rand Corporation for several years. The RFP, issued August 1, 1974, contemplated that the selected offeror would exercise an option under the Univac contract and purchase this equipment from Univac for $2,853,784. The offeror was to lease the equipment back to the Navy for 66 months, at which time the Navy would take title. The Navy anticipated that this third party purchase and Navy lease-to-ownership arrangement would be advantageous because it would result in a lower monthly rental cost.

However, the contemplated arrangement was never consummated because the Navy canceled the RFP in late October 1974. Instead, the Navy sought to, and eventually did, make use of the General Services Administration's (GSA) ADP Fund. The ADP Fund is defined in Federal Property Management Regulations (FPMR) 101–32.301–13 (1974 ed.) as a financing mechanism administered by GSA which, subject to GSA approval, is available without fiscal year limitation for financing the procurement of ADPE and related items by lease, purchase, transfer, or otherwise. Under this approach, money from the ADP Fund was made available by GSA to the Navy for purchase of the Univac equipment, and GSA became the lessor of the equipment to the Navy. Notwithstanding the pendency of the protests, the Navy proceeded with this arrangement in February 1975 based upon a determination under Armed Services Procurement Regulation (ASPR) § 2–407.8 (1974 ed.) that it would be in the best interests of the Government.

FLI essentially contends that the cancellation of the RFP was improper because the ADP Fund was not actually available to the Navy at that time, nor did the Navy have a sufficient indication that it was likely to become available; thus, acceptance of FLI's subsisting offer was the most advantageous course of action open to the Navy. Further, FLI contends that the use of the ADP Fund by GSA and the Navy is unlawful because it violates the FPMR and applicable Office of Man-

agement and Budget (OMB) policy issuances. These contentions and the numerous specific objections discussed *infra* require, in FLI's view, a decision compelling rescission of the exercised Univac lease option, reinstatement of the canceled RFP and an award to FLI. Also, FLI makes a claim for recovery of the expenses of preparing its proposal.

It is our conclusion that FLI has not shown that the Navy's actions in regard to the cancellation and use of the ADP Fund were unlawful. Our denial of FLI's protest in effect renders DPF's protest academic. Also, FLI's claim for proposal preparation costs is denied.

Before proceeding to a consideration of the merits, it is to be noted that both FLI and DPF requested that our Office treat certain information submitted with their protests as confidential. Essentially, this information involves the protesters' offered lease prices. We understand that FLI and DPF made similar requests to the Navy and, to our knowledge, the offered prices have not been publicly disclosed. Since this decision does not make a recommendation for reinstatement of the RFP and renewed competition, we have difficulty seeing any justification for continuing to regard this information as confidential. However, to the extent possible, our treatment of the issues is presented in a manner which safeguards the confidentiality of this nondisclosed information.

Background

A number of the facts leading up to the cancellation are in controversy. What follows is a general description of the pertinent facts and circumstances, drawn both from the Navy's report and from FLI's submissions to our Office.

The Navy's report indicates that issuance of the RFP was preceded by consideration during 1973 and 1974 of purchasing the Univac equipment either with appropriated funds or by means of the GSA ADP Fund. The using activity requested outright purchase in July 1973, but 1974 Navy appropriations had been committed to other projects. In September 1973, the Navy requested use of the ADP Fund from GSA. GSA replied in January 1974 that while the Univac purchase would be a "very worthwhile investment," the fund was unavailable at that time. GSA suggested that the request be renewed in the spring of 1974 when conditions might be more favorable. It is reported that fiscal year 1975 OP,N (Other Procurement, Navy) appropriated funds were committed to other projects of higher priority. On May 31, 1974, the Navy again requested use of the GSA ADP Fund. On or before August 1, 1974, the Navy received information from GSA that the fund was "definitely" not available, which was to be confirmed by a letter to follow. The RFP was issued August 1, 1974. By letter dated

August 12, 1974, GSA stated that it could not at that time consider the Univac purchase offer which the Navy had submitted.

Several offers were received and evaluated; subsequently, FLI and DPF submitted best and final offers. On October 17, 1974, ADPESO forwarded a recommendation that FLI's offer be acepted to the Source Selection Authority (SSA). The SSA was the incumbent Assistant Secretary of the Navy for Financial Management (ASN(FM)), who had just assumed his office on October 15, 1974. The ADPESO Director states that on October 18, 1974, the ASN(FM) was informed, during a visit to the computer site, of the presolicitation attempts to effect outright purchase, which, although impracticable for the reasons already indicated, was believed to be the most desirable alternative. It is stated that the ASN(FM) then reviewed the economics of the alternatives. Although the comparative costs were not discounted for the time value of money (see the discussion of "present value cost," *infra*), the ASN(FM) surmised that direct Government purchase would continue to be the most desirable alternative. The ASN(FM) therefore initiated a review of the various ways in which funds might be obtained for a direct purchase. FLI states that on this same date, it was informed by an ADPESO official to be prepared to execute contract award documents that afternoon, but that nothing further was heard from ADPESO for several days.

The ADPESO Director states that on October 22 or 23, 1974, a GSA official notified ADPESO that OMB had apportioned $4.3 million to the ADP Fund as of September 30, 1974, though the GSA official himself had no knowledge of this fact until about October 21, 1974. On October 23, 1974, the ADPESO contracting officer, who reportedly did not yet know of the new monies in the ADP Fund, met with FLI officials to request an extension of its offer, which was to expire at the close of business on that date. According to the Navy, the FLI officials were informed that all alternatives had to be explored before proceeding with an award. Reportedly, the FLI officials stated that if this meant that Government funds might be used to make a direct purchase, this alternative should have been explored before issuing the RFP. The contracting officer indicated that direct purchase with Government funds had been explored prior to issuance of the REP. FLI states that it was not informed at this time of the additional monies in the ADP Fund. FLI further indicates that subsequent to this meeting, it telephoned the contracting officer and orally extended its offer, and that it prepared and mailed a written extension of the offer the same day.

On October 24, 1974, Navy officials concluded that use of the ADP Fund offered "the most promising alternative" to FLI's offer. The ADPESO Director states that on October 25, 1974, he was informed

by a GSA official that the Univac option was "the top candidate" for purchase by the ADP Fund at that time in terms of rate of return on investment. The ADPESO Director informed the contracting officer of this development and attempted, but failed, to retrieve a letter to FLI requesting extension of its offer, which had already been mailed. The ADPESO Director states that he determined it would be improper and unfair to offerors to continue the procurement, and that he therefore directed the contracting officer to notify offerors that the RFP was canceled. It is stated that the contracting officer telephoned FLI and notified it of the cancellation on October 25, 1974, at approximately 5:30 p.m. In this regard, FLI states that in this conversation the contracting officer merely indicated that a cancellation was being contemplated.

The Navy states that on October 30, 1974, it received a letter from FLI dated October 23, 1974, and postmarked October 26, 1974, extending the FLI offer. The Navy believes that this extension was made after the FLI offer had expired and the solicitation had been canceled. FLI believes its offer was effectively extended as of October 23, 1974. FLI has also raised a question as to when the cancellation was actually made. FLI did receive on October 29, 1974, a Navy letter dated October 25, 1974, which stated that the solicitation was canceled; however, FLI has pointed to a Navy memorandum dated October 29, 1974, which states that the Navy decided on October 25, 1974, to notify FLI that ADPESO "intended" to cancel the solicitation.

In addition, FLI contends that on October 28, 1974, the contracting officer advised it that no cost or economic analysis had been performed prior to the cancellation. The Navy, on the other hand, has provided a copy of handwritten cost calculations which reportedly were prepared by the ADPESO Director at the time it was decided to cancel the RFP. This data covered consideration of three alternatives—direct Navy purchase from Univac; acceptance of the FLI offer; and use of the ADP Fund. For each alternative, the calculations show the "present value cost." This involves the adjustment of payments made over a period of time to reflect the present value of those payments as of the date of contract award, by means of applying specified discount factors. The calculations also show the "full cost" (cost in constant dollars) and the rates of return on investment for each alternative. Of the three alternatives, direct Navy purchase was lowest both in present value cost and full cost. It was followed in ascending order of costs by the ADP Fund and the FLI offer.

The Navy report further states that on November 6, 1974, ADPESO was informed that the contracting officer had taken his own life. Subsequently, the Navy furnished to our Office an undated, handwritten note apparently written by the contracting officer some time between

October 29, 1974, and November 6, 1974. This note discusses circumstances surrounding the cancellation. Also, it is reported that because of the very high security clearance held by the contracting officer, an investigation of the circumstances involved in his death was required to be conducted. ADPESO states it was informed by the Naval Investigative Service that there was no indication that the contracting officer had been a party to any improprieties whatsoever.

By letter dated January 31, 1975, GSA delegated to the Navy authority to use the ADP Fund for the Univac purchase, subject to a final review. By letter dated February 14, 1975, GSA informed the Navy that, after final review of the Navy documents submitted, it had no objection to the Navy's exercise of the purchase option. The Navy then proceeded to exercise the purchase option.

Cancellation of the RFP

FLI objects to the cancellation because at the time it took place the ADP Fund had not actually been made available to the Navy, nor was there any sufficient indication that the fund would become available. FLI contends that its offer had been extended and represented the most advantageous method of satisfying the requirements, but that the Navy—by failing to perform a cost analysis of the various alternatives as required by ASPR § 3-801.2(d) (1974 ed.)—arbitrarily and capriciously canceled the RFP.

FLI further contends that the cancellation must find justification, if at all, under the various criteria prescribed in ASPR § 2-404.1(b) (1974 ed.) pertaining to cancellations of invitations for bids (IFB's), because decisions of our Office have recognized that these criteria are equally applicable to cancellations of RFP's (B-178282, July 27, 1973; B-175138, January 3, 1973). In this regard, while these decisions do so recognize, we do not agree with FLI's implication that they necessarily limit the justification for canceling an RFP to the circumstances described in ASPR § 2-404.1(b) (1974 ed.). Rather, we think inquiry must be undertaken in light of the right reserved to the Government under the RFP to reject "any or all offers" under paragraph 10(b), (f) of the "Solicitation Instructions and Conditions," Standard Form 33A (March 1969 ed.), as construed by prior decisions of our Office dealing with cancellations of negotiated procurements.

In any event, we believe the cancellation can be justified under two of the ASPR criteria—i.e., where the supplies or services being procured are no longer required and where, for other reasons, cancellation is clearly in the best interests of the Government (ASPR § 2-404.1 (b) (iii) and (viii) (1974 ed.), respectively). We note that the supplies or services solicited under the present RFP essentially involved the

use of money. If, during the procurement, the use of money became available from an intra-Government source, the situation would appear to be similar to cases where cancellation of an RFP is proper because there is no longer a need for the supplies or services. *See, e.g.*, B-175138, *supra.* That decision involved circumstances where the need for the supplies being solicited no longer existed because of a decision to change the Government's requirements. Even more to the point here is the situation where the agency still has an unchanged need, but finds that it can meet that need by obtaining the necessary supplies from another Government agency. *Matter of Keco Industries, Inc.*, 54 Comp. Gen. 215 (1974).

Recognizing the validity of these principles, there must still be considered the question of what action the agency should take in regard to a cancellation or an award where information regarding the availability and cost of an alternative source of supply is not yet definite and certain. Where, as here, there are one or more subsisting offers under an outstanding RFP, and the possibility arises that the required supplies or services may become available at a lower cost from an intra-Government source—thus obviating the need to accept an offer under the RFP—the agency is faced with three alternatives. First, it could proceed with an award under the RFP notwithstanding the possible availability of a less costly alternative source within the Government; second, it could delay taking action until obtaining more certain or absolutely certain information regarding the availability and cost of the intra-Government source; or, third, it could cancel the RFP forthwith and pursue the intra-Government source.

To follow the first alternative may raise a serious question of impropriety. The contracting officer and other responsible agency officials have the duty to ensure that all applicable requirements of law have been met before entering into contracts. ASPR §§ 1-402 and 1-403 (1974 ed.). Where solicited supplies or services are no longer needed, decisions of our Office speak not only of the right, but also of the contracting officer's duty, to cancel the solicitation. See *Matter of Keco Industries, Inc., supra*, and decisions cited therein.

Whether the second or the third alternative is appropriate depends on the particular facts and circumstances at a given point in time. To hold the procurement in abeyance while exploring other alternatives, or while waiting for definite and certain information concerning the alternative source, may prejudice offerors under the RFP. To cancel too soon may deprive the Government of the most advantageous offer if the alternative source of supply fails to materialize and offerors decline to renew their offers, or increase their offered prices under a reinstated RFP or resolicitation. We believe that determinations of this

kind must be left in the first instance to the sound judgment and discretion of responsible agency officials, subject to objection upon review only if clearly shown to be without a reasonable basis.

After a review of the record in the present case, we cannot conclude the Navy lacked a reasonable basis to cancel the RFP at the time it did so. In reaching this decision, we take particular note of the indications of availability of additional monies in the ADP Fund; the conclusion that the ADP Fund offered the most promising alternative to the FLI offer; the contemporaneous handwritten cost data indicating that the ADP Fund would be more advantageous to the Navy than acceptance of the FLI offer; the ADPESO Director's statement that GSA indicated on October 25, 1974, that the Univac option was "the top candidate" for purchase by the fund; and the Navy's belief that to continue the procurement would be unfair to offerors. In regard to the cost data developed by the Navy, we cannot agree with FLI that there was a failure to comply with ASPR § 3-801.2(d) (1974 ed.), as that provision deals with the responsibility of contracting officers in connection with negotiation of prices prior to contract awards. The Navy had indicated that prior to the cancellation it conducted an appropriate analysis of comparative costs in accordance with applicable executive branch policy directives relating to ADPE selection. As indicated *infra*, to the extent that policy issues are raised by FLI regarding the scope or character of the analysis, we believe review by our Office of such questions is inappropriate.

FLI further points out that Navy documents contemporaneous in time with the cancellation indicate consideration of a number of alternatives, including use of the ADP Fund, direct Navy purchase with additional appropriated funds obtained from Congress, or a possible resolicitation. FLI contends that this vacillation among various possibilities is an indication that the Navy had no firm alternative to the FLI offer at the time of cancellation and, therefore, that the hasty cancellation was arbitrary and capricious.

While the record indicates the Navy did have several alternative sources in mind at the time of cancellation, it appears that the ADP Fund was considered the primary alternative. Assuming, *arguendo*, that FLI is correct in its assertion that the Navy made a hasty and premature cancellation, it is pertinent to ask how FLI was prejudiced by this action. If the ADP Fund did not actually become available to the Navy after the cancellation, presumably FLI could complain of delay in receiving its rightful award, or that its competitive position under a reinstated RFP or a resolicitation was compromised. However, the ADP Fund did in fact become available to the Navy. Further, we note that FLI had not, as far as the record shows, actually been

selected by the SSA for award under the canceled RFP. Also, as noted *supra*, FLI's offered lease prices were not publicly disclosed and, thus, its competitive position has not been compromised.

In addition, FLI could conceivably contend that it was prejudiced by a premature cancellation in the event that a more detailed analysis revealed that the Navy's cost calculations made at the time of cancellation were in error—i.e., if it appeared, upon closer analysis, that the ADP Fund was not more advantageous to the Government in terms of cost than acceptance of FLI's offer.

However, the Navy maintains that its cost data, as developed in greater detail subsequent to the cancellation, continues to demonstate that use of the ADP Fund is considerably more advantageous than acceptance of FLI's offer.

FLI contests, on a number of grounds, certain assumptions or factors built into the Navy's cost analysis and contends that its own analyses are more accurate. The Navy has responded to and refuted these allegations:

FLI: The Navy analysis fails to account for a 10-percent to 30-percent factor for residual value of the equipment, as provided in a GSA draft document entitled

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Navy: The Navy brought this point up with GSA, which concluded that there would be no basis for estimating a significant value of this equipment in 1980. Also, whatever residual value might exist is not affected by the source of funds utilized to make the purchase.

FLI: The Navy failed to negotiate with FLI concerning an advance payment plan, which would have further reduced costs under the FLI offer.

Navy: FLI's recent request for advance payments under a different contract was refused by the Navy Comptroller, and ADPESO's informal inquiry to the Navy Comptroller indicated that advance payments under the present offer would likewise be rejected. Therefore, FLI was notified by the contracting officer that this matter was not negotiable.

FLI: The Navy analysis fails to consider the continuing rental costs under the Univac lease between the time of the cancellation and the time of purchase; that is, in the several months after the cancellation and before the use of the ADP Fund, the Navy continued to pay monthly rental charges to Univac, and these should have been included in the cost of the ADP Fund alternative.

Navy: This factor has no place in the analysis; but for the protests, the Navy could have obtained use of the ADP Fund more expedi-

tiously, thus lessening interim lease costs; even if the difference between the FLI offer's monthly lease cost and the Univac monthly lease cost for the interim period is added to the ADP Fund cost, the ADP Fund is still less costly than the FLI offer.

FLI: FLI's own cost analyses show that its offer is less costly than direct Government purchase.

Navy: These analyses are incorrect for various reasons, including incorrect inclusion of a residual value factor; improper application of discount factors in making the present value analysis; and incorrect inclusion of a 25-percent "Routine Modification to System" factor.

We do not believe that FLI, in its comments on the Navy's report, has effectively responded to the Navy's position on these points.

In its letter to our Office dated January 16, 1975, FLI does criticize the Navy's analysis on an additional basis—namely, that in mid-October, at the time when the FLI offer was under consideration for award, the ADPESO calculations used a $128,500 figure as representing the monthly lease cost under the Univac lease, whereas, in November, after the cancellation, the monthly lease cost used in the calculations is $117,956. FLI contends, essentially, that ADPESO has juggled the figures at different points in time, depending on whether it wanted to justify an award to FLI or to justify a direct Government purchase.

However, at the conference on the protest, the ADPESO Director explained that the checkpoint monthly lease cost figure is adjusted periodically to reflect changes in the status of individual items of equipment under the Univac lease. In any event, we think that the decisive fact is that using either figure, the FLI offer is still more costly than use of the ADP Fund for direct purchase.

From the foregoing considerations, there appears to be no basis to conclude that FLI suffered prejudice to its position even if it is assumed that the Navy acted prematurely in canceling the RFP.

Accordingly, since review of the record provides a sufficient showing of the availability of an alternative source at a lower cost, thus obviating the need to accept an offer under the RFP and indicating that cancellation would be in the best interests of the Government, we cannot conclude that the cancellation of the RFP has been shown to be without a reasonable basis.

Use of the ADP Fund

FLI's contention that the use of the ADP Fund was improper rests on FPMR § 101-32.408(c), which states that the procurement of ADPE shall be accomplished in conformance with the policies and guidance stated in applicable OMB issuances. FLI has cited an OMB

letter to GSA dated March 7, 1972, and paragraph 6b of OMB Circular No. A–54, as amended, as demonstrating three requirements for use of the ADP Fund which were not met here:

1. the existence of a "special opportunity" to purchase ADPE;
2. the exhaustion of internal sources of agency funding, including efforts to reprogram funds (*see also* FPMR § 101–32.403–4(a) (1974 ed.)); and
3. the offering of a significant rate of return on investment, on the order of 40 percent or more.

FLI argues that the Univac purchase is not a special opportunity, since the option to purchase has been available for the past 16 months; that the Navy did not exhaust its internal funding possibilities; and that the rate of return on investment is only 21 percent when compared to the rate of return available on FLI's offer.

As for the first two contentions, we note that in the postcancellation situation facing the Navy, it appears that the possibility of obtaining additional OP,N appropriations was given consideration before the ADP Fund was utilized. In this regard, Federal Management Circular 74–5, July 30, 1974, which supersedes OMB Circular No. A–54, speaks in paragraph f(2) merely of efforts to reprogram current agency funds "if possible." In similar permissive terms, FPMR § 101–32.403–4(a) (1974 ed.) refers to pursuit of the ADP Fund alternative where funds are "not readily available" within the agency. Also, we believe that whether the Univac option was a "special opportunity" must be judged as of the time the Navy and GSA were in a position to make such a determination, not in light of a prior time when funds were unavailable. Under the circumstances, we believe that GSA—the agency charged with the primary authority and responsibility to procure ADPE for the Government—was in the best position to determine if the Univac option as of February 14, 1975 (the expiration date of the Univac lease purchase option offer), was an appropriate "special opportunity." GSA considered the Navy's request for delegation of authority to use the ADP Fund and granted the authority.

In regard to the rate of return on investment, the record indicates that this concept is defined as the compound interest rate that the capital investment (purchase price) would have to earn in order that the investment plus the interest earned thereon would equal the monthly payments (rental) as they become due over the expected life of the system. FLI argues, first, that the 1972 OMB letter, *supra*, establishes a requirement that use of the ADP Fund in a particular situation must yield a 40-percent rate of return. Furthermore, as FLI points out, several Navy documents in the record, including the contracting officer's undated, handwritten note, referred to *supra*, indicate that availability of the ADP Fund was believed to be contin-

gent upon the Navy having no valid offer under the RFP which would reduce the fund's rate of return on investment below the 40-percent threshold. FLI points out that under the Navy's precancellation cost analysis, use of the ADP Fund as compared to the preexisting Univac lease would yield a 44-percent rate of return on investment. However, the figures show that use of the fund as compared to FLI's offer would yield only a 21-percent rate of return.

In addition, FLI alleges that a GSA official informed it in February 1975 that the Navy advised GSA that there was no valid and outstanding FLI offer because the offer had expired prior to the cancellation and, therefore, that GSA was free to ignore the offer in reviewing the Navy's request for use of the ADP Fund. Further, the official allegedly stated to FLI that GSA in its deliberations proceeded on this basis. In this regard, GSA was informed—prior to the time that a final delegation of authority to use the fund was made—that the question of whether FLI's offer had expired, or was still valid and subsisting, was an issue involved in the protest before our Office.

We find it unnecessary to decide whether or when FLI's offer expired. We think it sufficient to note that by filing its protest—requesting reinstatement of the RFP and acceptance of its offer—FLI indicated its intent to extend its offer. In this light, the fact that the solicitation had been canceled is irrelevant as to the problem of making any necessary comparisons of the desirability of other alternatives vis-a-vis the FLI offer. The simple fact is that if such comparisons had led to a decision that pursuit of other alternatives was inappropriate, the RFP could have been reinstated; the SSA could have selected the FLI offer for award; and FLI would have been in a position to accept the award. *See*, in this regard, 46 Comp. Gen. 371 (1966), where we held that a bid which had expired could be extended and accepted; and 34 *id.* 535 (1955), where it was found proper to reinstate a canceled solicitation and accept the low bid. See, also, *Matter of Spickard Enterprises, Inc., et al.*, 54 Comp. Gen. 145 (1974).

However, given these circumstances, and assuming that, as FLI contends, the proper basis of comparison for determining rate of return would be the FLI offer versus the ADP Fund, we nevertheless cannot find that GSA's delegation of the fund under these circumstances was unlawful. In this regard, the portion of the March 7, 1972, OMB letter dealing with rates of return states:

> In general, in view of the limited funds available to the Fund, we believe that with respect to the purchase of equipment, you should continue to concentrate on those opportunities which offer prospects of significant rates of return, say on the order of 40 percent or more, and that each opportunity should be evaluated in light of whether other opportunities with greater rates of return exist so that maximum advantage is taken of the funds available.

We believe first of all that to view this 1972 letter as a definitive and conclusive policy statement, intended to be uniformly applicable to all future purchase opportunities, regardless of changed circumstances over the course of time, is somewhat tenuous. Further, even assuming that the statement is of this character, we note that it appears to speak in general terms of the desirability of obtaining a 40-percent rate of return; this appears to be in the nature of a flexible guideline, rather than a clear and specific minimum requirement. Under the circumstances, we do not see a sufficient basis to conclude that there was in this case a marked departure from applicable policies such as would raise a serious question that FPMR § 101–32.408(c) was violated. In this regard, FLI has not called our attention to any statute or regulation which establishes the 40-percent rate of return as a clear and specific minimum requirement which must be met before the ADP Fund can legally be utilized. As we do not find a violation of applicable law or regulations, the question of to what extent, if any, the Navy or GSA failed to properly implement applicable ADPE policies *per se* is a matter for resolution within the executive branch of the Government. *Cf.* 53 Comp. Gen. 86 (1973); B–161862, September 14, 1967.

FLI Claim for Proposal Preparation Costs

FLI contends that where, as here, a solicitation is issued without the good faith intent to make an award under it, offerors are entitled to the costs of proposal preparation, citing a number of authorities beginning with *Heyer Products Company* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956), and concluding with *McCarty Corporation* v. *United States*, 499 F. 2d 633, 204 Ct. Cl. 768 (1974). FLI argues that the course of events in the present case—initial Navy attempts to purchase directly with appropriated or ADP Funds, subsequent issuance of the RFP, and later abandonment of the RFP to pursue use of the ADP Fund—demonstrate that the RFP was issued without the bona fide intent to make an award to the successful offeror. The real purpose of the RFP, in FLI's view, was informational in nature—i.e., to demonstrate that proposed offers for third party purchase and leaseback would be more costly than Government-funded purchase. FLI contends that, having accomplished this, the Navy could then use the procurement results to "pressure" the release of Government funds for a direct purchase.

The allegation that improper issuance of the RFP provides a basis for recovery of proposal preparation costs is to be considered in light of the principles established in the *Heyer* case. See, in this regard, *Matter of Keco Industries, Inc.*, *supra*. The *Heyer* standard calls for clear and convincing proof of a fraudulent inducement of offers, that

is, that offers were not solicited in good faith, but as a pretense to conceal the purpose to award the contract to some favored offeror or offerors, and with the intent to willfully, capriciously and arbitrarily disregard the obligation to let the contract to the offeror whose offer was most advantageous to the Government.

On the record before us, FLI has not met this high standard of proof. Initially, we note that evidence of the Navy's intent to award a contract under the RFP to a preselected offeror other than FLI is lacking. Also, as noted previously, the record indicates that in the time prior to the issuance of the RFP, the Navy made two attempts to obtain use of the ADP Fund and also gave consideration to the possibility of using appropriated funds for a direct purchase. These alternatives proving unavailing, and faced with a perceived need to reduce monthly lease costs, the issuance of an RFP to solicit offers for a third party purchase and leaseback does not appear to be an unreasonable exercise of procurement judgment. In short, we think that in light of the circumstances reflected in the record, FLI's allegation that the solicitation was issued in bad faith is mere speculation. Also, in light of our conclusion, *supra*, that the cancellation of the RFP and use of the ADP Fund have not been shown to be legally objectionable, the course of events viewed as a whole does not provide clear evidence of bad faith issuance of the RFP.

DPF Protest

DPF objects to the rejection of its offer by the Navy. The DPF offer was rejected because it contained certain separate charges which would be incurred in the event the Navy did not renew the options throughout the 66 months' period. DPF states that the separate charges were constructed so as to put it in the same position upon failure to renew the options as it would have been if the options were renewed. DPF believes that without such separate charges, a contractor would stand a high probability of losing money if the options are not renewed, and that to reject an offer containing such separate charges damages the integrity of the procurement process, because responsible offerors will be discouraged from submitting offers to meet the Government's needs.

Also, DPF cites FPMR § 101-32.408-5 (1974 ed.), which provides a clause for insertion in ADPE solicitations providing, *inter alia*, that "Separate charges, if any, which will incur to the Government should the latter fail to exercise the options, will not be considered in the evaluation * * *." The Navy omitted this portion of the clause from the RFP terms and advised offerors that any pricing factor included to cover the possibility that any or all options for renewal might not

be exercised was to be included in the basic monthly charge. DPF believes that by considering its separate charges in the evaluation, the Navy has departed from the requirements of FPMR § 101–32.408–5 (1974 ed.).

The Navy's report has responded to DPF as follows:

> * * * DPF's offer was so structured as to either (i) force the Navy into a five year contract, or (ii) enter into an installment purchase in the nature of a multi-year contract. DPF did this through the mechanism of requiring the Navy to pay them a balloon payment if the Navy should elect not to exercise any one of the renewal options. Upon receipt of such payment, clear title would have vested in the Navy, and the contract would be at an end. This offer was considered to require at best a multi-year contract, an illegal use for ADPE procurement of the annual Appropriation O&M,N, and its acceptance was considered imprudent for policy reasons as well. Accordingly, DPF was advised that its offer would not be accepted as structured at that time. DPF's best and final offer contained the same unacceptable conditions, and was to be rejected had the solicitation not been canceled. This is, of course, the basis of DPF's protest.

As FLI's protest and its requested remedy of reinstatement of the RFP have been denied, we think the issue raised by DPF's protest has been rendered academic. The "separate charges" provision prescribed in the FPMR clause raises a question of the proper drafting of the RFP, which may be of interest in connection with future procurements of this kind. In this regard, counsel for the Navy has stated that since only GSA has the authority to enter into multiyear leases, and since the FPMR provision, if applied, could have the effect of forcing other agencies to enter into multiyear leases, the FPMR clause as presently constituted represents an oversight in draftmanship by GSA. In this regard, by letter of today we are furnishing a copy of this decision to GSA and calling its attention to this point for consideration whether revision of FPMR § 101–32.408–5 (1974 ed.) is warranted.

Conclusion

In addition to the above points, FLI has also made reference to a number of incidents which it believes indicate an overall pattern of maladministration by the Navy which is so pervasive as to give rise to an appearance that Navy officials have acted in bad faith. For instance, FLI complains of alleged improper and/or inaccurate Navy transcription of several Navy–FLI meetings which were held to discuss the protest. Also, FLI complains of the Navy's actions in regard to Navy–FLI negotiations during the pendency of the protest regarding the possible award of an interim contract to FLI covering 1 or 2 months. No such award was made, and the utilization of the ADP Fund alternative in February 1975 eliminated any possibility of an interim contract award. FLI states that it is compelled to express its belief that the Navy, acting ostensibly in bad faith, used these negotiations as a bargaining lever to extract price reductions in contemporaneous

Navy-Univac negotiations on the subject of the price of the Univac lease option. The exercise of the Univac lease option in February 1975 was at a lower purchase price than Univac had previously offered. It should be noted that, owing to the circumstances of the development of this case, the Navy did not have an opportunity to respond to this last allegation.

We believe these allegations are basically irrelevant to the issues involved in the protest except for the light, if any, which they shed on the course of events in the procurement. In any event, in our review of the entire record, we have taken these allegations into consideration. Also, we have given full consideration to the contents of the contracting officer's undated handwritten note, referred to previously.

We do not believe that FLI's allegations of bias and bad faith on the Navy's part can be substantiated on the record. It is our conclusion that the cancellation and use of the ADP Fund have not been shown to be legally objectionable. This is not to say, however, that all of the Navy's actions are above criticism from a standpoint of sound procurement policy. In particular, we take note of the 3-week delay between the availability of new monies in the ADP Fund (September 30, 1974) and ADPESO's awareness of this fact (October 22 or 23, 1974). During this time, FLI and DPF were preparing and submitting revised proposals. We further note that the ADPESO Director has made reference to the "very close contact" between ADPESO and GSA ADPE officials since ADPESO's establishment in 1968. We think it is fair to say that ADPESO officials should have been more sensitively attuned to the possibility that a change in intra-Government funding might obviate the need for accepting an offer under the RFP. Prompter awareness by ADPESO of the change in the ADP Fund circumstances—by closer contact with GSA and/or OMB—might at least have spared the offerors some measure of proposal preparation expenses.

In addition, we believe some comment is called for concerning the degree of communication between the Navy and the offerors during the period from about October 18, 1974, to October 29, 1974—the time during which the Navy was considering the alternatives and deciding to cancel the RFP. We recognize the administrative difficulties involved in making a timely analysis of various alternatives and deciding upon an appropriate course of action in a situation of this kind, as well as the problems involved in explaining to offerors the Government's position. Also, the agency cannot, of course, disclose information which would violate the prohibition against auction techniques. *See* ASPR § 3–805.1(b) (1974 ed.). However, under circumstances such as those involved here, communication with the offerors regarding the intra-

Government funding alternatives being investigated and the reasons for the investigation is a desirable policy in order that offerors' confidence in the integrity of the procurement process may be furthered. While the record shows that there was some discussion between the Navy and FLI along these lines, we believe it also indicates that greater efforts by the Navy to candidly communicate to the offerors the changes in the procurement situation would have been appropriate.

In view of the foregoing, the protests of FLI and DPF are denied.

[B-182734]

Compensation—Promotions—Retroactive—Administrative Error—Collective Bargaining Agreement

Collective bargaining agreement provides that certain Internal Revenue Service career-ladder employees, duly certified as capable of higher grade duties, will be promoted effective first pay period after 1 year in grade, but employees were promoted 1 pay period late. Since provision relating to effective dates of promotions becomes nondiscretionary agency requirement if properly includable in bargaining agreement, General Accounting Office will not object to retroactive promotions based on administrative determination that employees would have been promoted as of revised effective date but for failure to timely process promotions in accordance with the agreement.

In the matter of Internal Revenue Service employees—retroactive promotion with backpay, April 18, 1975:

This matter concerns a request on behalf of a District Director of the Internal Revenue Service (IRS), Department of the Treasury, for a decision as to whether the office concerned may retroactively adjust the promotion dates of two IRS employees whose promotions were erroneously delayed for one pay period beyond the date they should have become effective pursuant to a collective bargaining agreement between IRS and the National Treasury Employees Union (NTEU).

The record, as provided by the agency, indicates that the two IRS employees, initially appointed to grade GS-5 career-ladder positions as Tax Technicians, became eligible for promotion to grade GS-7, the next grade in their career ladders, shortly before September 1, 1974. Prior to September 1 the group manager, who was responsible for certifying that the two employees were capable of performing duties at the next higher grade level, orally advised them that they would be promoted to grade GS-7, effective September 1. However, as the apparent result of administrative oversight, the requisite personnel actions were not timely processed, and as a result the promotions did not become effective until September 15.

The delayed effective dates prompted the two employees to file a grievance through their union representative, alleging a violation of

article 7, section 5, of the Multi-District Agreement between the IRS and the NTEU which states:

> All employees in career ladder positions will be promoted on the first pay period after a period of one year or whatever lesser period may be applicable provided the employer has certified that the employee is capable of satisfactorily performing at the next higher level.

The grievance has been held in abeyance pending our decision, which could conceivably resolve the matter if the retroactive adjustment is held to be proper and is administratively implemented by IRS.

Our decisions have generally held that personnel actions, including promotions, cannot be made retroactively effective unless clerical or administrative errors occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. *See* 54 Comp. Gen. 263 (1974), and decisions cited therein; 52 *id.* 920 (1973); and 50 *id.* 850 (1971). We have also recognized that the above-stated exceptions to the general rule, prohibiting retroactively effective personnel actions, may constitute "unjustified or unwarranted personnel action[s]" under 5 U.S.C. § 5596 (1970), and consequently be remediable through the payment of backpay (B–180056, May 28, 1974, and 54 Comp. Gen. 312 (1974)).

Furthermore, our recent decisions considering the legality of implementing binding arbitration awards, which relate to Federal employees covered by collectve bargaining agreements, have held that the provisions of such agreements may constitute nondiscretionary agency policies if consistent with applicable laws and regulations, including Executive Order 11491, as amended. Therefore, when an arbitrator acting within proper authority and consistent with applicable laws and Comptroller General decisions decides that an agency has violated an agreeemnt, that such violation directly results in a loss of pay, and awards backpay to remedy that loss, the agency head can lawfully implement a backpay award for the period during which the employee would have received the pay but for the violation, so long as the relevant provision is properly includable in the agreement. *See* 54 Comp. Gen. 312, *supra*, and 54 *id.* 435 (1974). Similarly, an agency head on his own initiative, without waiting for the matter to come before an arbitrator, may conclude that the agreement has been violated and institute the same remedy.

In this case, no challenge to the propriety of including article 7, section 5 of the Multi-District Agreement has been presented either to this Office or to the Federal Labor Relations Council in accordance with Executive Order 11491, as amended. Since that issue is not before us, our consideration is limited to the question of whether

compliance with the provision in question would constitute a violation of existing statutes, regulations, or Executive orders. It does not appear that compliance would be such a violation in the instant case.

The provision is a lawful exercise of the agency's discretion to effect promotions in a timely manner.

In view of the foregoing, we would have no objection to prearbitration administrative action changing the effective dates of promotion for the two employees to September 1, 1974, if the agency determines that they would have been promoted to grade GS-7 positions effective September 1, 1974, but for the administrative failure to timely process such promotions. Changes in the promotion dates would also require adjustment of waiting periods for within-grade step increases.

[B-178084]

Compensation—Wage Board Employees—Night Differential—Majority of Hours

Our decision 53 Comp. Gen. 814 (1974) interpreted the phrase "majority of hours," as contained in 5 U.S.C. 5343(f), regarding entitlement of prevailing rate employees to night differential, to mean a number of whole hours hours greater than one-half. Prior interpretation was made by the Civil Service Commission to include any time period over 4 hours in an 8-hour shift. Since our decision 53 Comp. Gen. 814 was tantamount to a changed construction of law, it need not be given retroactive application.

In the matter of prospective application of 53 Comp. Gen. 814, April 21, 1975:

This action is taken at the request of the Chairman, United States Civil Service Commission, who requests that prospective-only effect be given to our decision of May 1, 1974, 53 Comp. Gen. 814. In that decision we pointed out that the provisions of 5 U.S. Code § 5343(f), as enacted by Public Law 92-392, approved August 19, 1972, 86 Stat. 568, provide that a prevailing rate employee is entitled to pay at his scheduled rate plus a night differential:

(1) amounting to 7½ percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and
(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

We concluded that under the aforestated language, a prevailing rate employee may be paid night differential only when 5 or more hours of his regularly scheduled 8-hour shift occur during the specified hours since the term "majority of hours" must be given its obvious meaning—a number of whole hours greater than one-half.

After reviewing the legislative history of section 5343(f), *supra*, we were unable to find authority that would permit splitting the amount of night differential. We further stated that:

> * * * Under CFWS (Coordinated Federal Wage System) night differential was payable for work performed during the hours of 6 p.m. to 6 a.m. Under 5 U.S.C. 5343(f) night differential is payable for work performed during a longer period of time—3 p.m. to 8 a.m.—and there is an overlap of the 7½ percent period of 3 p.m. to midnight and the 10 percent period of 11 p.m. to 8 a.m. This results in a substantially different night differential system from that established under the instructions applicable to CFWS. In view of the substantial liberalization of night shift differential in Public Law 92-392, we see no persuasive basis for giving a meaning to the phrase "majority of the hours" other than its obvious meaning in order to preserve one feature of CFWS which would have, if continued, afforded even greater benefits. Therefore, we conclude that a prevailing rate employee must work 5 hours of a scheduled 8-hour shift during the period covered by night differential in order to qualify for payment. [Parenthesis added for clarity.]

The Chairman states that his agency had interpreted the term "majority of hours" literally, i.e., as any time period over 4 hours in an 8-hour shift. For example, if an employee worked 4½ hours of his regularly scheduled 8-hour shift during a time period for which night differential is authorized, such employee would be entitled to night differential for the entire 8-hour shift. He further points out that under the CFWS, a night differential was paid to an employee when "half or more of the regularly scheduled hours" fell between 6 p.m. and 6 a.m. He states that when Congress enacted Public Law 92-392, commonly referred to as the "Federal Wage System," it authorized a nightshift differential for an employee's entire shift if a majority of the employee's regularly scheduled work fell within the time periods designated in 5 U.S.C. § 5343(f). The Chairman concludes that:

> Since it was the intent of Congress to continue the long-established pay practices of the Coordinated Federal Wage System when it enacted P.L. 92-392, we believed that our interpretation was a reasonable one in light of pay practices under the CFWS. We also pointed out to you that since overtime pay is paid for fractional hours in excess of eight hours in a day or 40 hours in a regularly scheduled workweek, we felt that night-shift differential should also be paid when an employee has worked more than four hours in an eight-hour shift. * * *

In view of the fact that thousands of employees have been paid a night differential between November 17, 1972, the effective date of the nightshift differential provisions of Public Law 92-392, and May 1, 1974, the date of our decision 53 Comp. Gen. 814, and the fact that agencies would be required to waive overpayments of pay themselves, or seek waiver by the Comptroller General when the amounts exceed $500, or in the alternative, seek refunds from employees who have been erroneously paid the night differential, the Chairman requests, as was our conclusion in B-170589, August 8, 1974, that a prospective-only effect rule be given to our May 1, 1974 decision.

Ordinarily an original construction of a statute, or of a regulation

having the force and effect of law, is effective from the date of the statute or regulation. In our decision B–170589, *supra*, we stated that:

* * * Where, as here, a decision of this Office has the effect of clarifying the purpose of a statute in a manner that is inconsistent with a not unreasonable interpretation given that statute by the agency responsible for its implementation, that decision is tantamount to a change in construction of the law and need not be given retroactive effect. * * *

We view section 5343(f) as being susceptible of the interpretation given it by the Commission and such interpretation was reasonable, particularly in light of the prior pay practices which existed under the CFWS as enumerated by the Chairman. Since our decision 53 Comp. Gen. 814 (1974) was tantamount to a changed construction of law, it need not be given retroactive application. Accordingly, and since it would appear to be in the best interests of the Government not to apply the decision of May 1, 1974, retroactively so as to require collection of erroneous overpayments to the numerous affected employees, such decision may be treated as effective from the date it was issued.

[B–181994]

Husband and Wife—Dual Rights Where Both in Military or Federal Service—Traveling Expenses

Since agency's apparent reason for declining to issue female GS–11 employee travel orders for permanent change of station (PCS) was based on its erroneous belief that she could have no PCS entitlements in her own right solely because her U.S.A.F. Lieutenant Colonel husband was transfered at approximately same time to same place, employee's PCS entitlements may be paid if agency determines transfer was in Government's interest; that transfer also serves employee's personal needs does not preclude such determination.

Mileage—Travel by Privately Owned Automobile—Incident to Transfer—Spouse in Armed Services

Female civilian employee transferred at approximately same time as military member spouse is entitled to mileage plus per diem for permanent change of station (PCS) travel of herself and her children if her transfer is found to have been in Government's interest, but mileage allowance paid to member for travel of his dependents would consequently be for recovery, since duplicate payments of PCS entitlements may not be made for same purpose.

Officers and Employees—Transfers—Relocation Expenses—Miscellaneous Expenses—Spouse in Armed Services

Although payment of miscellaneous expense allowance to civilian employee may be considered duplicate payment of permanent change of station (PCS) allowances where employee's military member spouse, who transferred at same time to same place, received dislocation allowance and employee and member reside in same household, such payment would not be duplicate payment if member and employee maintain separate households; however, dislocation allowance would be at a "member without dependents" rate where employee has own PCS entitlements.

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Spouse Entitled to Military Allowances

Employee's entitlement to 30 days temporary quarters subsistence expenses for permanent change of station (PCS) transfer does not constitute duplicate payment of PCS allowances where employee's military member spouse received basic allowance for quarters for same 30 day period since these allowances are for different purposes; however, employee would not be entitled to be reimbursed for member's temporary quarters subsistence expenses where employee and spouse maintain separate households, since under such circumstances he is not considerd to be employee's "dependent" for PCS entitlement purposes.

In the matter of travel, transportation and relocation expenses incident to a change of station, April 23, 1975:

An Accounting and Finance Officer has requested an advance decision regarding the entitlement of Mrs. Carolyn J. McDowell, an employee of the Defense Contract Administrative Services Region (DCASR), Defense Supply Agency, Atlanta, Georgia, to permanent change of station (PCS) orders incident to her transfer from Kirtland Air Force Base, Albuquerque, New Mexico, to DCASR, Atlanta, Georgia. This PCS move was occasioned by the acceptance of Mrs. McDowell, a GS-9 operating accountant at Kirtland, AFB, of the position of Chief, Accounts and Reports, Supervisory Operating Accountant, GS-510-11, at DCASR effective July 22, 1973.

Mrs. McDowell transferred her permanent duty station at approximately the same time as her husband, Lt. Colonel Dwight C. McDowell, who received orders dated June 20, 1973, transferring him from Kirtland AFB to Robins AFB, Warner Robins, Georgia. Mrs. McDowell was not issued travel orders for her transfer based on the assumption that she was moving in conjunction with her husband's transfer and as such she did not have any PCS entitlements in her own right. Mrs. McDowell has claimed that this was not the case and her transfer was unrelated to her husband's transfer. Mrs. McDowell performed her PCS travel from July 25 to 27, 1973.

Mrs. McDowell's claim is for miscellaneous moving expenses, temporary quarters subsistence allowance, and per diem for the PCS travel of herself and her children and the real estate expenses incurred in selling her residence in Albuquerque, New Mexico, and buying a residence in Atlanta, Georgia. Her household goods were moved pursuant to Lt. Colonel McDowell's orders, since she was not issued orders despite her protests and she had no time to oppose the decision not to issue her orders. Also, Lt. Colonel McDowell was paid a dislocation allowance and mileage for the PCS travel of his dependents, i.e., his wife and children.

It is clear that an employee's PCS travel expenses may only be paid if the employee's transfer was in the interest of the Government. 5 U.S. Code § 5724(a)(1) (1970); Volume 2, Joint Travel Regulations

(JTR), para. C4100 (change 75, December 1, 1971). However, if a transfer is primarily for the convenience or benefit of the employee or at his or her request then the PCS travel expenses may not be paid. *See* 5 U.S.C. § 5724(h) (1970); B–163345, October 22, 1969.

DCASR's apparent belief that she could have no PCS entitlements in her own right solely because her military member husband was transferred at approximately the same time to the same place, was clearly erroneous. There is *no* basis in law for precluding the payment of PCS allowances to a civilian employee, who happens to be married to a military member also being transferred, if the civilian employee's transfer was found to have been in the Government's interest. Consequently, a male/female employee is entitled to have his or her PCS transfer expenses paid, whenever the transfer is found to be in the Government's interest, even if his or her military member spouse was also being transferred at the same time to the same place, provided, however, that the married couple do not receive duplicate payments of PCS entitlements for the same purpose.

Since DCASR's apparent reason for declining to issue Mrs. McDowell travel orders was clearly erroneous and since there is no indication on the record before us that any determination was made as to whether or not her transfer was in the interest of the Government or was primarily for her own benefit or at her request, we believe that PCS travel orders may be issued for her transfer to DCASR, provided that DCASR determines that her transfer was in the Government's interest. In this regard, we note that Mrs. McDowell is a career professional employee who competed successfully for a relatively high level position and was permitted temporary duty travel for a job interview at DCASR, prior to her acceptance of the supervisory accountant position. This appears to indicate that her subsequent PCS transfer to DCASR was regarded as being in the Government's interest. The fact that her transfer also served her personal needs in view of her husband's transfer (which could well have been the reason she chose to apply for the job at DCASR) would not preclude a determination that the transfer was in the Government's interest. This determination, however, must be made by the agency concerned. Should it be determined that Mrs. McDowell's transfer was in the Government's interest, then she can have her PCS entitlements paid, if they are verified and otherwise correct.

However, as indicated above, Lt. Colonel and Mrs. McDowell may not receive duplicate payments of PCS entitlements for the same purpose. *See* B–162977, April 29, 1968. In this regard, if Mrs. McDowell's transfer is found to have been in the Government's interest, then she could be entitled to mileage plus applicable per diem for her PCS

travel with her children from Albuquerque, New Mexico, to Atlanta, Georgia, in accordance with 2 JTR paras. C10155–1b and C10157–1 (change 74, December 1, 1971). The 12 cents per mile allowance paid to Lt. Colonel McDowell for the travel of his dependents would, consequently, be for recovery. *See* 1 JTR para. M7000(10) (change 236, October 1, 1972) (now 1 JTR para. M7000(11)).

On the other hand, although the payment of the miscellaneous expense allowance to a civilian employee may be considered a duplicate payment, if the employee's military member spouse, who was transferred to the same place, received a dislocation allowance and the employee and the member reside in the same household, *see* 2 JTR para. C8303–1–4 (change 86, December 1, 1972) (clarified by change 94, August 1, 1973), we do not believe such payment would be a duplicate payment if they maintained separate households, such as is alleged by Mrs. McDowell to have been the case here. *Cf.* 54 Comp. Gen. 665 (1975). In any case, Lt. Colonel McDowell's dislocation allowance would be at the "member without dependants" rate, if it should be found that Mrs. McDowell should have been issued PCS orders. 1 JTR paras. M9001–2, M9002 (change 222, July 1, 1971).

It is clear that if Mrs. McDowell receives 30 days temporary quarters subsistence expenses, such allowance would not constitute a duplicate payment to her husband's receipt of basic allowance for quarters for the same 30-day period, since those allowances are for different purposes in that the temporary quarters subsistence expenses allowance is intended to lessen the economic hardship that employees face when transferred, whereas the permanent military basic allowance for quarters allowances are in the nature of compensation and cover the normal day-to-day expenses for food and shelter when not provided by the Government. *See* 52 Comp. Gen. 962 (1973). However, we note that the lodging receipts submitted by Mrs. McDowell in support of her claim indicate that her husband shared the temporary quarters for which she is claiming reimbursement during this period. We do not believe she would be entitled to be reimbursed for her husband's temporary quarters subsistence expenses, if it should be found that they maintained separate households, since under such circumstances he would not be considered to be her "dependent" for PCS entitlement purposes. *See* 2 JTR para. C1100 (change 93, July 1, 1973); 2 JTR para. C8250 (change 75, December 1, 1971).

If it should be found that she was entitled to PCS orders, there would be no objection to the shipment of Mrs. McDowell's household goods pursuant to her husband's orders under the circumstances of this case, provided that her 11,000 pound weight limitation was not exceeded. *See* 2 JTR para. C7050 (change 75, December 1, 1971).

Finally, her expenses incurred in connection with the sale of her residence in Albuquerque, New Mexico, and the purchase of her residence in Atlanta, Georgia, would be for reimbursement, if properly substantiated, in accordance with the Federal Travel Regulations (FPMR 101–7) chapter 2, part 6 (May 1973).

Appropriate adjustments may be made to those amounts paid to Lt. Colonel McDowell, if it is determined that Mrs. McDowell had PCS entitlements in accordance with this decision.

[B–182213]

Contracts—Research and Development—Evaluation Factors—Conflict Between Evaluators

Factually supported views of technical evaluation committee and second evaluator concerning award of cost-reimbursement contract that proposal, rated 5.6 percent higher in technical score than proposal of second-ranked offeror, was "innovative," represented "greatest chances of success" of any submitted proposal, as contrasted with evaluators' view that second-ranked proposal was "not as innovative," reasonably show that evaluators considered first-ranked proposal to be technically superior without evidence of proscribed "gold-plating." Consequently, views must be seen as conflicting with bare conclusions advanced by third evaluator, whose views prompted source selection, that proposals were "essentially equal;" that differences between proposals were not substantial; and that proposals offered "equal chance of program success."

Contracts—Negotiation—Evaluation Factors—Criteria—Record *v.* Conclusions

Because no indication has been furnished of reasoning process underlying conclusions advanced by third evaluator, whose views prompted questioned source selection and conflicted with technical evaluation committee's views, present record does not justify conclusions reached.

Contracts—Negotiation—Cost, etc., Data—Reasonableness of Proposed Cost

Because of uncertainties inherent in cost-reimbursement contracting and fact that submitted cost proposals, separated on percentage basis by amount less than difference in technical scores of same proposals, were below Government cost estimate for work, argument might be advanced, as suggested by protester, that cost proposals were essentially equal. However, cost proposals offered on cost-reimbursement basis should be subject to independent cost projection to determine realism and reasonableness of proposed costs.

General Accounting Office—Recommendations—Agency Review of Technical/Cost Justification for Contract Award

Since substantial justification for conclusions reached by third evaluator, whose views prompted source selection, may exist, recommendation is made that Secretary of Transportation ascertain reasons for conclusions. If investigation shows that conclusions reached are not rationally supported, in light of contrary views advanced by technical evaluation committee, further recommendation is made that awarded contract be terminated for convenience and awarded to protester, provided: (1) cost savings, in award to lower-ranked technical offeror, upon reflection and consideration of GAO-expressed views, are considered insubstantial; (2) protester agrees to accept award on terms and conditions finally proposed; and (3) protester agrees to meet any congressionally imposed deadlines for completion of study.

In the matter of Tracor Jitco, Inc., April 23, 1975:

This protest questions the rationale for the award of a cost-reimbursement contract. For the reasons discussed below, we recommend that the Secretary of Transportation further review the technical/cost justification given for the award.

Requests for proposals (RFP) No. NHTSA-4-B575 was issued by the Office of Contracts and Procurement, National Highway Traffic Safety Administration, Department of Transportation (DOT), on April 19, 1974, for a research study involving passenger-vehicle tire safety. A cost-reimbursement contract was contemplated for the contract which was to be completed 18 months after the date of award.

The "Evaluation of Proposals and Contract Award" provision of the RFP stated that award would be made to that offeror whose proposal was "technically acceptable;" whose technical/cost relationship was considered most advantageous to the Government; and who was considered a responsible offeror. Further, offerors were advised that cost would be a significant factor in selecting the successful offeror and that technical proposals should not be "gold-plated." In that connection, the RFP stated:

> * * * Cost will be a significant factor * * * although * * * award may not necessarily be made to that offeror submitting the lowest estimated cost. Likewise, award will not necessarily be made for capabilities that would appear to exceed those needed * * *.

Technical merit was to be determined from offerors' scores on seven evaluation factors—including factors involving offerors' qualifications and experience.

Of the four concerns submitting proposals for the study, only the proposals submitted by Tracor Jitco, Inc. (Tracor) and Southwest Research Institute (Southwest) were determined acceptable.

Both the Chairman of the Evaluation Committee (Evaluator 1) and the Associate Administrator for Research and Development (Evaluator 2) concluded that Tracor's proposal (which was about 5.6 percent higher in technical score (826 vs. 782) and 5.1 percent higher in estimated cost ($253,800 vs. $241,440) than Southwest's proposal) represented the "greatest chances of success of any of the proposals submitted." By contrast, the Southwest proposal, although judged acceptable, was considered "not as innovative" as the Tracor proposal.

We quote at length from the memo evidencing this analysis:

> The Tracor-Jitco proposal was totally responsive and complete. Substantial innovation was presented by their proposal in both the mechanical and electrical areas of the RFP requirements such as the tire locating and instrument centering mechanism. Cost saving features such as a lower cost vibrator were also explored in the technical discussion. The proposal is also fully responsive to the tread depth and inflation pressure measurement requirements. In summary, the proposal is totally responsive to the RFP required task and displays a good understanding of the problems involved. I judge this proposal as possessing the greatest

chances of success of any of the proposals submitted in response to the subject RFP.

The second acceptable proposal was submitted by Southwest Research. The proposal shows a complete understanding of resonance tire testing and the problems involved. The proposal is responsive with respect to tire tread depth and inflation pressure. The personnel assigned to the project have past experience in resonance tire test methodology. Hower, the proposal is not as innovative as the Tracor-Jitco proposal in solving the mechanical and electrical problems of resonance tire inspection relative to a PMVI situation.

We note that the analysis does not expressly or implicitly consider the innovative aspects of Tracor's proposal to be "unneeded" capabilities or evidence of "gold-plating."

The above conclusions were then forwarded to the Administration's Associate Administrator for Administration (Evaluator 3) who decided that the proposals were essentially equal in technical merit and recommended that Southwest receive award "as their proposal represents the best dollar value procurement." The Associate Administrator's recommendation was forwarded by memo dated June 28, 1974, through the Assistant Secretary for Administration to the Secretary. Since we have been advised that there are no other written materials (other than the personal worksheets of the Evaluation Committee—chaired by Evaluator 1) which evidence the selection process, it is clear that the conclusions of the Associate Administrator for Administration prompted the ultimate award to Southwest in December 1974. The award was made, we assume, at the cost ($253,800) finally proposed by Southwest. The cost compares to a Government estimated cost for the work of $271,676.

Tracor asserts that it should have received award because its higher-rated technical proposal represented greater value than Southwest's offer. Similar complaints, questioning agency decisions in weighing cost/technical "trade-offs," have been considered by our Office in recent years. *See*, for example, *Matter of ILC Dover*, B-182104, November 29, 1974; 52 Comp. Gen. 686 (1973); 51 *id.* 678 (1972); B-170181, February 22, 1971; 50 Comp. Gen. 246 (1970). Uniformly, we have agreed with the exercise of the administrative discretion involved—in the absence of a clear showing that the exercised discretion was not rationally founded—as to whether a given technical point spread between competitive-range offerors showed that the higher-scored proposal was technically superior. On a finding that technical superiority was shown by the point spread and accompanying technical narrative, we have upheld awards to concerns submitting superior proposals, although the awards were made at costs higher than those proposed in technically inferior proposals. 52 Comp. Gen. 358 (1972); B-171696, July 20, 1971; B-170633, May 3, 1971. Similarly, on a finding that the point score and technical narrative did not indicate superiority in the higher-ranked proposal, we have upheld awards to offerors

submitting less costly, albeit lower-scored technical proposals. *See* 52 Comp. Gen. 686 (1973); 50 *id.*, *supra*. This reflects our view that the procuring agency's evaluation of proposed costs and technical approaches are entitled to great weight since the agencies are in the best position to determine realism of costs and corresponding technical approaches. *Matter of Raytheon Company*, 54 Comp. Gen. 169 (1974); 50 *id.* 390 (1970). Our practice of deferring to the agency involved in cost/technical trade-off judgments has been followed even when the agency official ultimately responsible for selecting the successful contractor disagreed with an assessment of technical superiority made by a working-level evaluation committee. *See* B–173137(1), October 8, 1971. Our review of the subject award, therefore, is limted to deciding whether the record reasonably supports a conclusion that the award was rationally founded. See *Matter of Vinnell Corporation*, B–180557, October 8, 1974.

Prior to making this decision, it is necessary to determine whether the views of Evaluators 1 and 2 may reasonably be interpreted as a determination that the point spread disparity involved indicated that Tracor's proposal was technically superior. The repeated descriptive references to the "innovative" aspects of Tracor's proposal, coupled with the statements that the proposal possessed the "greatest chances of success" of any submitted proposals—in contrast with the expression that Southwest's proposal was "not as innovative" as Tracor's proposal—reasonably shows that Evaluators 1 and 2 considered Tracor's proposal to be technically superior without evidence of "gold-plating." It is, therefore, clear that the finding of Evaluator 3 (to wit: the subject proposals were "essentially equal") was in conflict with the views of Evaluators 1 and 2.

Since we are advised that no other documentation exists which evidences the rationale of source selection, we are confronted with a record which contains factual development reasonably showing the superiority of Tracor's proposal as contrasted with bare conclusions reached by Evaluator 3 that the proposals were technically equal; that the "differences (between the concerned proposals) were not substantial;" and that the two offers assured "equal chance of program success." (The last two statements were presented to our Office in a transmittal letter signed by Evaluator 3. The transmittal letter enclosed the referenced memos.)

Because we do not have any indication of the reasoning process underlying the conclusions reached by Evaluator 3, we are unable, on the basis of the present record, to conclude that the conclusions are rationally justified. On the other hand, there may be substantial justification for the conclusions reached.

This case is, therefore, factually distinguishable from the circumstances in B–173137(1), *supra*, where the evaluation record contained a detailed analysis reasonably supporting the source selection official's technical/cost trade-off decision in the face of a conflicting trade-off analysis made by a working-level evaluation committee.

If the conclusions advanced by Evaluator 3 may be rationally supported (we do not decide this), the award to Southwest can be justified within the framework of 52 Comp. Gen. 686 (1973). If the conclusions advanced by Evaluator 3 cannot be so supported, Tracor's proposal would possess an uncontroverted superior rating. Given that situation, the only other basis for justifying the award would be offsetting cost savings involved in the Southwest proposal.

The cost savings contemplated here represent the difference between Tracor's cost proposal ($253,800) and Southwest's proposal ($241,440) of $12,360. The percentage difference between the cost proposals is less than the percentage difference between the technical scores.

Assuming, for the sake of discussion, that the conclusion of technical equality made by Evaluator 3 was primarily based on the relatively small percentage difference between the technical scores, notwithstanding the narrative prepared by Evaluator 1 (and concurred in by Evaluator 2) which reasonably demonstrated Tracor's considered technical superiority, we think an argument might be similarly advanced, that the cost proposals of Tracor and Southwest were essentially equal, given the uncertainties inherent in cost-reimbursement contracting. Indeed, Tracor makes this precise argument in its protest.

This argument is strengthened by noting that the Government's cost estimate ($271,676) for the work exceeds the costs proposed by Tracor and Southwest by about $20,000, and $30,000, respectively. If Southwest fully incurs the costs ($271,676) estimated by the Government for the work, there will be no monetary savings in comparison to a cost-reimbursement award to Tracor at $253,800.

Moreover, we have no way of knowing, based on our review of the record, whether an independent cost projection was made of the offerors' proposed costs as contemplated by Federal Procurement Regulation § 1–3.807–2. In the *Matter of Signatron, Inc.*, 54 Comp. Gen. 430 (1974), we made the following observations:

> There is no indication that the Government performed an independent cost projection of the offerors' proposed costs. We believe such an examination of offerors' proposed costs should be made prior to determining the most advantageous proposal. In 50 Comp. Gen. 390, 410 (1970), we stated:
>
> "Our Office has noted that the ward of cost-reimbursement contracts requires procurement personnel to exercise informed judgments as to whether submitted proposals are realistic concerning the proposed costs and technical approach involved. B–152039, January 20, 1964. We believe that such judgment must properly be left to the administrative discretion of the contracting agencies involved, since they are in the best position to assess 'realism' of costs and technical ap-

proaches, and must bear the major criticism for any difficulties or expenses experienced by reason of a defective cost analysis."

Since the RFP contemplated a cost-type reimbursement contract, evaluated costs rather than proposed costs provide a sounder basis for determining the most advantageous proposal, especially when contending offerors are essentially equal as to technical abilities.

In the event no such cost projection was made, we suggest, in connection with our recommendation below, that cost factors inherent in each offer be evaluated to determine the reasonableness and realism of cost under the technical approaches proposed by each offeror.

Consequently, we are bringing this case to the attention of the Secretary of Transportation. We are requesting him by letter of today to ascertain the reasons Evaluator 3 had for reaching the bare conclusions involved, with specific reference to the conclusion that the proposals were technically equal, notwithstanding the implicit findings of Evaluators 1 and 2 that Tracor's proposal was technically superior. If the Secretary's investigation shows that the bare conclusions reached are not rationally supported, we are further recommending that action be taken to terminate for convenience Southwest's contract and to award the study to Tracor, provided: (1) the cost savings involved with an award to Southwest are, upon further reflection and consideration of our above-expressed analysis, considered insubstantial; (2) Tracor agrees to accept award on the terms and conditions it finally proposed; and (3) Tracor agrees to meet any congressionally imposed deadlines for completion of the study.

[B-182384]

Bids—Evaluation—Erroneous—Contrary to Terms of Solicitation

Agency's evaluation of transportation costs based on other than most economical method of shipment was contrary to terms of solicitation. General Accounting Office recommends that agency consider feasibility of partial termination for convenience of award made on basis of erroneous evaluation and of awarding any remaining quantities to protester.

In the matter of the Ellinor Corporation, April 23, 1975:

The Ellinor Corporation (Ellinor) has filed a protest against the action of the Department of the Air Force in awarding a contract to the Panel Corporation of America (PANCOA) for aerial tow targets. It is Ellinor's position that the Government's evaluation of transportation costs is inconsistent with the solicitation and that it should have received the award as low bidder under the terms of the solicitation. For the reasons stated below, the protest is sustained.

Invitation for bids (IFB) No. F42600-74-B-9044 was issued on June 14, 1974, by the Department of the Air Force, Hill Air Force Base, Utah, for 4,558 targets. Pursuant to the IFB, delivery terms

were f.o.b. origin. Bidders were advised that each bid would be evaluated by adding to the f.o.b. origin price all transportation costs to the tentative destination. As the Air Force was not certain of the final destination or destinations of the targets (but would furnish them later), for purposes of evaluation the destination for all targets was stated to be Hill Air Force Base.

On bid opening date, July 16, 1974, four bids were received, with the bids of both Ellinor and PANCOA tied at the low unit bid price of $285. Both bidders offered identical prompt payment discounts. Ellinor proposed to ship targets from its Stockton, California, plant while PANCOA proposed to ship from its Denver, Colorado, facility. Ellinor's previous contract work was performed at its Dallas, Texas, plant and the Air Force therefore requested a preaward survey on Ellinor's Stockton facility. The preaward survey results verified that Ellinor could manufacture targets at its Stockton plant.

Immediately after bid opening, the Air Force requested an evaluation of transportation cost factors under both bids so as to determine the low bidder. Since first article testing would be waived for both bidders, they bid on the basis of delivering 500 units 180 days after receipt of written notice of award and 500 units every 30 days thereafter for the remaining quantity.

Initially, the Air Force evaluated the bids using the most economical rates on the basis of shipments of 500 targets a month at one time to Hill Air Force Base. On this basis, the lowest transportation rates from Stockton to Hill would be by full rail carload shipments to the extent possible at a total cost of $22,564 (37 shipments of 120 targets for $21,979.85 plus one shipment of 118 targets for $584.15). The lowest rates from Denver to Hill are obtained by full truckload shipments at a total cost of $25,920.18 (56 shipments of 80 targets with a 6 percent differential for $25,465.44 plus one shipment of 78 targets with a 6 percent differential for $454.74). On this basis Ellinor is the low bidder.

The contracting officer, however, was advised by the item manager that targets actually would be shipped to several different locations and that quantities to be shipped at any one time to a particular place would be less than 80, that is, less than a full truckload or carload. The contracting officer reviewed the history of shipments to various locations on recent contracts for tow targets and on the basis of this review projected that 80 percent of all shipments would contain less than carload or less than truckload quantities. When transportation costs are evaluated on the basis of shipments to Hill Air Force Base in less than full truckload or carload quantities 80 percent of the time, PANCOA is the low bidder. Award was made to PANCOA on the basis of such an evaluation.

Armed Services Procurement Regulation (ASPR) § 2-201(a)(D)(i) (1974 ed.) requires that the exact basis upon which bids will be evaluated and award made be stated in the solicitation. Generally, solicitations for supplies which will or may be purchased f.o.b. origin are required to provide for delivery in carload or truckload lots. ASPR 19-208.2(a) (1974 ed.). If the purchasing office and requesting activity however, have determined that it is impracticable to estimate any tentative or general delivery points for the purpose of evaluating transportation costs, ASPR 19-208.4(b) (1974 ed.) requires that bids be solicited f.o.b. origin only and that bidders be advised that bid evaluation will be made without regard for transportation costs. If the exact destination for the purchase is not known but the general location of the expected users can be reasonably established, ASPR 19-208.4(a) (1974 ed.) requires that the purchase request designate a place or places as the tentative point(s) to which transportation costs will be computed, stating estimated quantities for each tentative destination. That regulation also requires that the following clauses be included in the solicitation:

7-2003.24 Evaluation Factors for Award.

(a) Destination Unknown. In accordance with 2-201(a) Sec. D(vii), insert the following provision.

DESTINATION UNKNOWN (1968 JUN)

For the purpose of evaluating bids (or proposals), and for no other purpose, the final destination(s) for the supplies will be considered to be as follows:

(End of provision)

(b) F.O.B. Origin—Carload and Truckload Shipments. In accordance with 2-201(a) Sec. D(viii), insert the following provision.

F.O.B. ORIGIN—CARLOAD AND TRUCKLOAD SHIPMENTS (1968 JUN)

The Contractor agrees that shipment shall be made in carload or truckload lots when the quantity to be delivered to any one destination in any delivery period pursuant to the contract schedule of deliveries is sufficient to constitute a carload or truckload shipment, except as may otherwise be permitted or directed, in writing, by the Contracting Officer. For bid (or proposal) evaluation purposes, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) on file or published in common carrier tariffs or tenders as of the date of bid opening (or the closing date) specified for receipt of proposals. For purposes of actual delivery, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) on file or published as of date of shipment. If the total weight of any scheduled quantity to a destination is less than the highest carload/truckload minimum weight used for bid (or proposal) evaluation, the Contractor agrees to ship such scheduled quantity in one shipment. The Contractor shall be liable to the Government for any increased costs to the Government resulting from failure to comply with the above requirements.

The above clauses were contained in the subject solicitation and as stated, Hill Air Force Base was inserted as the only tentative destination for purposes of evaluating transportation for all quantities to be delivered. With reference to the above quoted clause, ASPR 19-209 (1974 ed.) states that it "will provide agreement as to the appropriate freight costs for evaluation of bids and assure that contractors produce

economical shipments of agreed size." Furthermore, as to the evaluation of transportation costs, ASPR 19–301.1(a) (1974 ed.) states, in part, that the best available transportation rates and related costs in effect or to become effective prior to the expected date of initial shipment and on file or published at the date of bid opening shall be used in the evaluation.

In defense of its evaluation, Air Force argues that bidders knew that Hill Air Force Base was only a tentative destination and that it was implicit that less than full load transportation costs could be employed for bid evaluation purposes since less than full load quantity shipments were not expressly prohibited by the solicitation.

In our opinion Air Force's evaluation of transportation costs was contrary to the terms of the solicitation. The solicitation called for the delivery of 500 items per month, and Hill Air Force Base was specified as the final destination point for purpose of evaluating bids. The solicitation clause, quoted above, stated that "For bid * * * evaluation purposes, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) * * * as of the date of bid opening * * *." We think the only reasonable interpretation of these terms is that the cost of carload or truckload shipments to Hill Air Force Base would be computed based on the highest applicable minimum weight which will result in the lowest freight rate, namely, full load quantities for both Ellinor and PANCOA.

We are mindful of the contracting officers' argument that freight evaluation based on monthly shipments of 500 targets at one time to one location is not realistic. Historical experience with these items reportedly indicates that the monthly shipments will be made to several different locations mostly in less than full truckload or carload quantities. Since the purpose of the freight evaluation is to determine as accurately as possible the transportation costs which the Government will pay, the contracting officer believes that freight evaluation properly was based on less than carload and truckload shipments to Hill Air Force Base.

We agree with the contracting officer that the purpose of a freight evaluation is to determine transportation costs as accurately as possible. We believe, however, that the proper way to accomplish this objective consistent with the rules of competitive bidding is to set forth realistically estimated delivery point(s) in the solicitation. ASPR 19–208.4(b). If the ultimate destination points are too indefinite to be realistically estimated, ASPR 19–208.4(b) provides that transportation costs should not be evaluated. B–177763, July 9, 1973. Here it appears that at the time the solicitation was issued the agency was in a position to determine that the items would be shipped to several differ-

ent locations, although the *exact* quantities and locations of each shipment were not known. Apparently the contracting officer did not consider whether quantities and ultimate destination points realistically could have been estimated for inclusion in the solicitation, since in past procurements of the item transportation costs had not been a significant evaluation factor in determining the low bidder. As a result the solicitation unrealistically provided only one tentative destination point and did not provide that less than full load quantities would be utilized in the evaluation.

It is a fundamental rule of advertised procurement that bids must be evaluated in accordance with the terms specified in the solicitation. 50 Comp. Gen. 447, 454 (1970). As it is our view that the only reasonable interpretation of the solicitation was to the effect that transportation costs were to be evaluated based on the lowest per car or truck charge to Hill Air Force Base, we must conclude that Ellinor was the low bidder and that the award to PANCOA was improper.

Accordingly, we recommend that a partial termination for convenience be considered at this time consistent with the urgent needs of the Air Force and the overall best interests of the Government, and that award be made to Ellinor for any terminated quantities. We request that the Air Force take immediate action to determine the feasibility of a partial termination and that it report to us its findings and any actions taken pursuant to this decision as soon as possible.

As this decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U.S. Code § 1172 (1970).

[B-181289]

National Guard—Civilian Employees—Technicians—Severance Pay—Annuity Entitlement Effect

National Guard technician, who at time of involuntary separation due to loss of military membership was immediately eligible for retirement annuity from State retirement system in which he had elected to participate in lieu of Federal Civil Service Retirement System pursuant to section 6 of the National Guard Technicians Act of 1968, is precluded by 5 U.S.C. 5595(a)(2)(iv) (1970) from receiving Federal severance pay since phrase "any other retirement statute or retirement system applicable to an employee as defined by section 2105" of Title 5, in 5 U.S.C. 5595(a)(2)(iv) (1970) does not limit retirement system to Federal or federally administered retirement system.

Officers and Employees—Severance Pay—Eligibility—National Guard Technicians—Annuity Entitlement Effect

Entitlement to severance pay for National Guard technicians, who had elected to participate in State retirement systems and who are entitled to an immediate annuity thereunder at time of involuntary separation, does not rest on whether

employee contributions to State system were withheld by Federal Government or whether Federal Government, as employer, contributed to State retirement system, since there is an absence of statutory differentiation among technicians on these bases and absence of supportive legislative history, and each of these factors is largely beyond control of individual technicians while employee monetary contributions remain unchanged.

In the matter of National Guard technician—severance pay, April 25, 1975:

This decision is in response to requests by (1) the National Guard Bureau, Departments of the Army and the Air Force (letter of July 26, 1974, file NGB–TNC–C) and (2) the Delaware National Guard (file TAGD–B), concerning entitlement to Federal severance pay of a National Guard technician who at the time of involuntary separation was eligible for an immediate annuity under the Delaware State retirement system, although not under any federally administered retirement system.

The record shows that Mr. Raymond S. Holland, SSN 221–10–3295, had a total of 27 years of creditable service with the Delaware Army National Guard and had attained the rank of lieutenant colonel by August 4, 1973, when he was involuntarily separated from his National Guard civilian technician position, Grade 13, step 4, due to his loss of military membership in the Army National Guard. Under 32 U.S. Code § 709(e)(1) (1970) such military membership is a prerequisite to retention of the civilian position. Mr. Holland had lost his federally recognized military status as a result of 32 C.F.R. § 564.5 (f)(5)(ii) (July 1, 1973), which permits officers employed as technicians only to be retained until the earliest of either the end of the month in which the officer reaches age 60 or the attainment of eligibility for an immediate annuity at age 55 under the Civil Service Retirement System, or State retirement system for those technicians who had elected to continue membership therein. Although Mr. Holland had become a Federal employee, effective January 1, 1969, by virtue of subsection 3(b) of the National Guard Technicians Act of 1968, Act of August 13, 1968, Public Law 90–486, 82 Stat. 757, 32 U.S.C. § 709 note (1970), pursuant to subsection 6(a) of said Act, 82 Stat. 758, 32 U.S.C. § 709 note (1970), he had elected on December 28, 1968, with the consent of the State of Delaware, to remain a participant in the State Employees' Pension Plan of the State of Delaware, in lieu of being covered by the provisions of the Federal Civil Service Retirement Act, 5 U.S.C. § 8331 (1970) *et seq.* After Mr. Holland reached the age of 55 on July 18, 1973, he became eligible, effective August 1, 1973, for an immediate State retirement annuity under 29 Delaware Code § 5522 (1970 Supplementary Pamphlet) triggering the applicability of 32 C.F.R. § 564.5(f)(5)(ii) (July 1, 1973). The legal issue presented is whether he, and other National Guard technicians similarly situ-

ated, who fulfill the requirements for an immediate State retirement annuity at the time of involuntary separation are precluded from receipt of severance pay from the Federal Government.

The Federal severance pay provision was enacted as section 9 of the Federal Employees Salary Act of 1965, Act of October 29, 1965, Public Law 89-301, 79 Stat. 1118, now codified as 5 U.S.C. § 5595 (1970), which provides in pertinent part as follows:

> (b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who—
>
> (1) has been employed currently for a continuous period of at least 12 months; and
>
> (2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
>
> is entitled to be paid severance pay in regular pay periods by the agency from which separated.

There is no doubt that Mr. Holland satisfies conditions (1) and (2). However, for purposes of severance pay 5 U.S.C. § 5595(a)(2)(iv) (1970) provides that the term "employee" does not include:

> an employee who is subject to * * * [the Federal Civil Service Retirement Act] or any other retirement statute or retirement system applicable to an employee as defined by section 2105 of * * * title [5] or a member of a uniformed service and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system;

Technicians appointed in the civil service by the adjutants general designated by the Secretary of the Army or Secretary of the Air Force under 32 U.S.C. § 709(c) (1970) are explicitly included as employees under 5 U.S.C. § 2105(a)(1)(F) (1970).

Mr. Holland contends that he is entitled to Federal severanee pay because:

1. He is a State employee for retirement purposes by election pursuant to section 6 of the National Guard Technicians Act of 1968, *supra*, 32 U.S.C. § 709 note (1970), and does not, therefore, come within the exclusion of 5 U.S.C. § 5595(a)(2)(iv) (1970).

2. For all purposes other than retirement he remains a Federal employee entitled to benefits applicable to other Federal employees.

3. The Federal Government does not withhold from his salary his employee contribution to the Delaware State retirement system.

4. The Federal Government makes no contribution to the Delaware State retirement system as his employer.

As a matter of administration the claimant must be considered a State employee for retirement purposes in order to enable him to continue to participate in the State retirement system. Such a status was acknowledged in National Guard Regulation No. 51/Air National Guard Regulation No. 40-01, § 8-12a (March 1, 1970) (NGR 51 renumbered NGR 690-2, effective January 1, 1971), referred to by Mr. Holland. This position has been continued in Technician Personnel

Manual (TPM) 831.1, § 1–1 (December 11, 1972), and TPM 831.2, § 2–1 (December 11, 1972), which have superseded the comparable provisions of NGR 690–2/ANGR 40–01 and which are filed as inserts in the appropriate places to the Federal Personnel Manual (FPM) ch. 831.

However, classification as a State employee for one particular purpose, even if that purpose is retirement, does not affect a technician's overall status as an employee under 5 U.S.C. § 2105, nor necessarily make the exclusion of 5 U.S.C. § 5595(a) (2) (iv) inapplicable to him. In fact, Mr. Holland wants to be considered a Federal employee for all other purposes. Rather that factor, as well as any absence of an agreement to withhold employee contributions pursuant to 5 U.S.C. § 5518 (1970) or to pay the employer's contribution to the State retirement system as authorized by subsection 6(c) of the National Guard Technicians Act of 1968, *supra*, 32 U.S.C. § 709 note (1970), is not independently significant, but each is relevant only to the extent it may impact upon the central issue of whether it was the legislative intent that the phrase "any other retirement statute or retirement system applicable to an employee as defined by section 2105" of Title 5 be limited to Federal or federally administered retirement statutes or systems.

Although the literal language of the phrase does not require the conclusion that it be confined to Federal or federally administered retirement statutes or systems, there is language in the legislative history to support that position. Sen. Report No. 910, 89th Cong., 1st Sess. 8, 9 (1965) states in part:

> Section 9 establishes the new fringe benefit policy of severance pay for most Federal employees who are separated from the service for reasons other than misconduct, delinquency, or inefficiency.
>
> * * * * * * *
>
> Section 9(b) excludes certain employees:
>
> * * * * * * *
>
> (4) Any employee who at the time of separation is receiving or eligible to receive retirement benefits under *any Federal civilian or military retirement program.* [Italic supplied.]

On the other hand, the Civil Service Commission, which was delegated the responsibility to prescribe rules and regulations governing severance pay (Executive Order 11257, 30 Fed. Reg. 14353 (November 17, 1965)), states in FPM ch. 550, § 7–3b(2) (Inst. 187, February 28, 1973), in part:

> This subchapter [Severance Pay] does not apply to—
>
> * * * * * * *
>
> (iv) an employee who is subject to *any retirement law or retirement system applicable to Federal employees*, and who, at the time of separation from the service, is entitled to an immediate annuity; [Italic supplied.]

However, FPM Supplement 990–2, Book 550, § S7–3b(c)(v), provides, in part:

> The law excludes from entitlement to severance pay an employee who, at the time of separation, has fulfilled the requirements for an immediate annuity. The statutory exclusion is applicable to any employee who at the time of separation is receiving or is eligible to receive (he need not actually apply) retirement benefits under any *Federal* military (including a Reserve component) or civilian retirement program. * * * [Italic supplied.]

Moreover, subparagraph 5–29d of NGR 690–2/ANGR 40–01 (March 1, 1970) had provided in part:

> A technician is entitled to severance pay provided that he—
>
> * * * * * * *
>
> (3) Is not entitled to an immediate annuity under any retirement law or retirement system applicable to Federal employees or members of the uniformed services, or *any other technician retirement system to which the Federal Government had made contributions.* In this connection—
>
> (a) Social Security benefits do not preclude the payment of severance pay.
>
> (b) Entitlement to immediate retired pay precludes payment of severance pay. [Italic supplied.]

However, chapter 5 of NGR 690–2/ANGR 40–01 (March 1, 1970) was superseded by TPM 500, effective November 30, 1972, which contains no such provision nor any comparable provision.

We recognize that part of the confusion may stem from the unique position of National Guard technicians. At the time of the enactment of the severance pay provision (October 29, 1965), National Guard technicians had no uniform status as Federal employees and did not participate in the Federal Civil Service Retirement System. Only with the passage of the National Guard Technicians Act of 1968, *supra*, on August 13, 1968, did the technicians become uniformly Federal employees; however, to protect vested rights that some of their number had earned under State retirement systems as State employees, the Congress authorized them, as Federal employees, to elect to continue to participate in the non-Federal retirement systems in lieu of the Federal Civil Service Retirement System if they chose, without losing their status as Federal employees. Participation by Federal employees in non-Federal retirement systems in lieu of the Federal Civil Service Retirement System was a privilege not enjoyed by other Federal employees and a situation not contemplated at the time of the passage of the severance pay provisions. Consequently, the reference to "any Federal civilian or military retirement program" in Sen. Report No. 910, 89th Cong., 1st Sess. 9 (1965), *supra*, might have been merely a reflection of the actual state of affairs (i.e., that all Federal employees at that time participated in a Federal or federally administered retirement program) rather than a conscious attempt to restrict those excluded from Federal severance pay benefits to those employees who at the time of separation were eligible for immediate annuities under

a Federal retirement program instead of any retirement program applicable to a Federal employee. Since the specific congressional intent with respect to severance pay entitlements of National Guard technicians who elected to participate in non-Federal retirement systems was not stated in the National Guard Technicians Act of 1968, *supra*, the purposes of the severance pay provisions should be examined in light of the information disclosed in the legislative history of the National Guard Technicians Act of 1968.

The purpose of Federal severance pay is "to compensate the worker for disruption inevitably associated with loss of employment and loss of senority-related benefits earned through years of loyal service." 111 Cong. Rec. 25673 (1965). *See also* H.R. Report No. 792, 89th Cong., 1st Sess. 31 (1965). However, rather than being applicable to all involuntarily separated personnel, it was "intended to bridge the gap between employment and reemployment." 111 Cong. Rec. 12489 (1965). *See also*, 111 Cong. Rec. 25677, 25681 (1965); Federal Employees Salary Act of 1965, Hearings on H.R. 8207 and Similar Bills Before the Subcommittee on Compensation of the House Post Office and Civil Service Committee, 89th Cong., 1st Sess. 40 and 199 (1965); Federal Pay Legislation, Hearings Before the Senate Post Office and Civil Service Committee, 89th Cong., 1st Sess. 167 (1965). Consequently, "those eligible for immediate annuities under the Civil Service Retirement Act or other conflicting benefits would not be eligible for the severance pay proposed; * * *." H.R. Report No. 792, 89th Cong., 1st Sess. 29 (1965). See also, *id.* 32.

The unique status of the National Guard Technican was explored in depth by the Congress prior to the passage of the National Guard Technicans Act of 1968, *supra*, and was summarized as follows by Senator McIntyre during the course of the debate:

> As of June 30, 1968, there were 41,320 technicans authorized for employment by the National Guard—24,520 in the Army National Guard and 16,800 in the Air Guard. Their precise legal status is quite unclear. Although, on the surface, it might appear that they are employed by the States with salaries paid by the Federal Government, courts have ruled otherwise, and, in several cases, have refused to consider them as either State or Federal employees.
>
> During peace time, the National Guard is under the aegis of the Governor of each State; and the National Guard technicians are employed by the State adjutants general. In that capacity, however, the adjutants general are acting only as designees of the Secretary of the Army and the Secretary of the Air Force. Technicians are hired under regulations promulgated by the two service secretaries, who fix their numbers and compensation. The technicians receive a Federal check from a Federal finance officer. Their cost-of-living pay adjustments are determined by a Federal wage board. Employer contributions of up to 6½ percent of individual compensation are authorized by Federal statute and paid from federally appropriated funds for social security and/or State retirement coverage, where such coverage is authorized by individual States. For workmen's compensation and unemployment compensation purposes, and for Government service awards, the technician is a Federal employee.
>
> Yet he is not recognized by either State or Federal courts and has left in a legal "no man's land." Technicians are denied State civil service status, in all but

19 States, on grounds that the States do not fix their number, their compensation, their conditions of employment, or appropriate the funds to pay them. The States do not even participate in the salary payment process since disbursement is made directly to the technicians by the Federal Government.

Lacking any employer identity—State or Federal—the National Guard technician has no uniform retirement system, no employer-sponsored life or health insurance program, no merit promotion system, and no career plan. 114 Cong. Rec. 23254 (1968).

It was a result of these facts that Congress authorized the unique retirement provision whereby National Guard technicians who had been covered by a State retirement system could elect to continue to participate in such system, even though they were Federal employees, in order to protect the equity of technicians with long periods of covered State service. S. Report No. 1446, 90th Cong., 2d Sess. 24 (1968); H.R. Report No. 1823, 90th Cong., 2d Sess. 20 (1968).

Although the evident purpose of the National Guard Technicians Act of 1968, *supra*, was to alleviate the plight and regularize the status of National Guard technicians, the legislative history reveals a substantial concern that in so doing the National Guard technicians not be given "windfalls." See Hearings on H.R. 2 Before the Senate Committee on Armed Services, 90th Cong., 1st Sess. 190–198, 201–204, 207, 211–214, 222, 223, 229–232 (1967). In addition to the novelty of the retirement election provision, apparently in only one other instance had a group newly designated as Federal employees been given credit retroactively for prior non-Federal employment for purposes of determining Federal fringe benefits. *Id.* 204, 207. In an attempt to preclude "windfalls," Congress did include in sections 3 and 5 of the National Guard Technicians Act of 1968, *supra*, 82 Stat. 757, specific, and in some instances limiting, provisions relating to creditability of past technician service for purposes of both eligibility and computation of various Federal fringe benefits. *See also* S. Report No. 1446, *supra*, at 3–11, 23–25, H.R. Report No. 1823, *supra*, at 3–11, 19.

Congress did give specific consideration to the retirement consequences of involuntary separation due to the operation of the military personnel laws, with particular concern for lieutenant colonels and colonels. Sen. Report No. 1446, *supra*, at 11–13. It was expected that those so separated due to age and longevity restrictions who would participate in the Federal Civil Service Retirement System would be eligible for immediate civil service retirement annuities. However, no apparent specific consideration was given to the entitlements of a technician so separated who had elected to participate in a State retirement system.

Despite this lack of specific congressional consideration, we note that under the National Guard Technicians Act of 1968 all technicians are treated alike without regard to whether they had participated in a State

retirement system, whether employee contributions to the State system were withheld by the Federal Government or whether the Federal Government, as employer, contributed to the State retirement system. Each of these factors is largely beyond the control of the individual technician. Participation of the technician in a State retirement system is contingent upon coverage provisions of individual State statutes. Federal withholding of the employee contribution to a State retirement system is dependent upon a request from the State and the consummation of an agreement with the Secretary of Defense to withhold the funds. 5 U.S.C. § 5518 (1970); TPM 831.2, § 2–2(b) (December 11, 1972). Contribution by the Federal Government to a State retirement system is similarly contingent upon the consummation of an agreement. TPM 831.2, § 2–2 (December 11, 1972); Air Force Manual 177–104, § 80602d (Change 28, November 28, 1969). Yet, if the technician does participate in a State retirement system, his monetary contribution thereto remains the same, regardless of the presence or absence of Federal withholding or contribution. Accordingly, particularly in the absence of statutory differentiation among technicians on these bases and the absence of any supportive legislative history, we will not rest entitlement to severance pay on them. Rather, the more pertinent question, in light of the legislative history, is whether the confining of the critical statutory language of 5 U.S.C. § 5595(a)(2)(iv) to Federal or federally administered retirement systems would result in certain technicians receiving severance pay as well as "conflicting benefits," which would constitute a "windfall."

We note that had Mr. Holland chosen to participate in the Federal Civil Service Retirement System, he would have been entitled to an immediate annuity (5 U.S.C. §§ 8332(b)(6), 8336(d) and 8339(g) and (*l*) (1970)), which would have precluded his receiving severance pay. 5 U.S.C. § 5595(a)(2)(iv)(1970). Participation in a State retirement system was in lieu of participation in the Federal Civil Service Retirement System. Section 6 of the National Guard Technicians Act of 1968, *supra*, 32 U.S.C. 709 note (1970). Therefore, if Mr. Holland were to receive both a State retirement annuity and Federal severance pay, he would be in a more favorable position than his counterparts who had participated in the Federal Civil Service Retirement System. Not only would such a result create inequities among National Guard technicians, but payment of severance pay in this situation would not be compatible with the legislative expression that severance pay was "intended to bridge the gap between employment and reemployment." Therfore, eligibility for an immediate State retirement annuity by Mr. Holland and other National Guard technicians similarly situated constitutes a "conflicting benefit," precluding payment of Federal

severance pay. To hold otherwise would entitle them to "windfalls."

As a corollary we find that the phrase "any other retirement statute or retirement system applicable to an employee as defined by section 2105" of Title 5 appearing in 5 U.S.C. § 5595(a)(2)(iv) (1970) is not limited to Federal or federally administered retirement statutes or systems. Rather, it at least encompasses those non-Federal retirement systems in which a Federal employee is authorized to participate *in lieu* of participation in the Federal Civil Service Retirement System.

Accordingly, Mr. Holland is not entitled to severance pay and his claim is denied.

[B-181221]

Small Business Administration—Contracts—Sufficiency of Evaluation—Procuring Activity

Protest against award of contract to Small Business Administration (SBA) under section 8(a) of Small Business Act on basis that procuring activity did not properly evaluate SBA request for 8(a) award is without merit since record indicates that required evaluation essentially was made and award was not contrary to any law or regulation.

Small Business Administration—Contracts—Subcontracting—Administration of Program

Protest against award of section 8(a) subcontract in which it is alleged that Small Business Administration's (SBA) subcontract award was contrary to its policies regarding both the continuation of subcontractor in 8(a) program and the amount of business development expense to be paid is denied since these are policy matters which are for determination by SBA and which are not subject to legal review by General Accounting Office (GAO). However, since the matters raised in the protest concern SBA's administration of section 8(a) program, they will be considerd by GAO in its continuing audit review of SBA activities.

Contracts—Protests—Timeliness

Allegation that section 8(a) award of 50 percent of solicitation quantity of cargo nets violates SBA's policy of restricting section 8(a) awards to no more than 20 percent of Government's total purchases of an item is untimely raised under 4 CFR 20.2(a) since solicitation provided that such an award may be made and protester did not file its protest until after bid opening and award. Moreover, the 20 percent limitation is a matter of SBA policy which it may waive or revoke if it chooses to do so.

In the matter of Kings Point Manufacturing Company, Inc., April 29, 1975:

Kings Point Manufacturing Company, Inc. (Kings Point) has protested against the award of a contract by the Air Force to the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S. Code 637(a)(1) (1970), and the award of a subcontract by SBA to the Watts Manufacturing Company (Watts). It is Kings Point's contention that the Air Force did not comply with the provisions of the Armed Services Procurement Regulations (ASPR) and that SBA did not adhere to its internal procedures and policies.

The protest arises out of a procurement for top and side cargo tiedown nets. The solicitation (IFB No. F09603–74–B–0888 issued February 26, 1974, by Robins Air Force Base, Georgia) called for alternate bids, with Alternate I for 6,000 top nets and 8,500 side nets and Alternate II for 12,000 top nets and 17,000 side nets. The solicitation stated that the Air Force would procure either Alternate I or Alternate II "dependent upon receipt by the Air Force of a firm commitment from the Small Business Administration (SBA) of a Section 8(a) definitive contract for an identical quantity of items set forth under Alternate Bid I. * * * If no SBA commitment is received, the award * * * will be for items set forth * * * under Alternate Bid II."

After bid opening on March 26, 1974, SBA furnished the Air Force with the section 8(a) commitment. As a result, a contract for the Alternate I quantities was awarded to Kings Point (the low bidder under both alternatives) and a contract for like quantities was awarded to SBA. SBA then subcontracted the work to Watts. The Kings Point contract unit prices were $51.40 for top nets and $47.40 for side nets. The unit prices in the contracts awarded to SBA and to Watts were $72.22 for top nets and $63.52 for side nets. These higher prices resulted from SBA's allowance of a business development expense for Watts. These price differentials were assumed and funded by SBA under the section 8(a) program.

Kings Point contends that the award to Watts, through SBA, was improper because Watts should not be eligible for contracts under the section 8(a) program, because the price differential paid to Watts was unreasonably large, and because the award to Watts was contrary both to the SBA policy of restricting section 8(a) contracting to not more than 20 percent of the Government's total purchases of like or similar items and to the provisions of ASPR 1–705.5 (1974 ed.).

Section 8(a) of the Small Business Act empowers SBA to enter into contracts with any Government agency having procuring powers, and to arrange for the performance of such contracts by letting subcontracts to small business or other concerns. *See* 53 Comp. Gen. 143 (1973). SBA has implemented this authority by determining to "assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the marketplace." 13 CFR § 124.8–1(b). The legality and constitutionality of SBA's implementing program has been upheld. *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F. 2d 696 (5th Cir. 1973).

ASPR 1–705.5(b)(1) states that it is the general policy of the Department of Defense (DOD) "to enter into contracts with the SBA to foster or assist in the establishment or the growth of small business concerns as designated by SBA so that these concerns may become self-

sustaining, competitive entities within a reasonable period of time." ASPR 1–705.5(a) further provides that contracting officers are authorized, in their discretion, to award contracts to SBA when SBA certifies that it is "competent to perform a specific contract." ASPR 1–705.5(c) then sets forth, in pertinent part, the following procedures:

(1) *Supplies, Services and Research and Development.*

(A) In contracts for supplies, services and research and development, it is the stated policy of the SBA to contract with only those small firms which have submitted a written business plan specifically outlining a reasonable approach to the attainment of the policy objectives of (b). This business plan, if approved by the SBA, will be the basis for DoD's consideration of participation in a Section 8(a) program for the firm. In the execution of this policy, the SBA will furnish to the Secretary of the appropriate Department, Attention: Economic Utilization Advisor, its request for a commitment to support the approved plan, showing at least the following information:

(i) the background and ownership of the firm;

(ii) how and when the firm is expected to become a self-sustaining, competitive entity;

(iii) the extent to which procurement assistance is needed and an identification of the requirements sought from the DoD (The identification of the supplies or services which the SBA may require in connection with a small firm's business plan will be developed by the SBA representatives. This may be accomplished through liaison with appropriate procuring activities either before or after the SBA's approval of a small firms business plan as the SBA may elect. * * *); and

(iv) if the firm is currently in existence, the present production capacity and related facilities and how any additional facilities needed will be provided.

(B) The Department concerned will evaluate the SBA's request for a commitment to support the business plan approved by the SBA and determine whether or to what extent the Department can support the SBA request. * * *

(C) After the SBA requested commitments have been evaluated, the Department concerned, through the Economic Utilization Advisor, will notify the Office of Business Development, SBA, Washington, D.C., or its designee of the extent to which it appears that contracts will be placed with the SBA as requested. This notification represents a firm commitment of the DoD to negotiate with the SBA, *provided*, that there is no material change in requirements, availability of funds, and other pertinent factors. * * *

Kings Point claims that these ASPR provisions were violated by the Air Force because Watts, a previous recipient of contracts under the section 8(a) program, has failed to become a self-sufficient, competitive entity within a reasonable period of time, and because the Air Force did not evaluate the Watts business plan. It is Kings Point's belief that the contracting officer could not have properly exercised his discretion in awarding a contract to SBA for subcontracting to Watts because the Air Force did not evaluate the business plan and because, in light of Watts' prior lengthy involvement with the section 8(a) program, such an award would be inconsistent with the purpose of the program. In support of its assertions, Kings Point has submitted data showing that SBA has awarded Watts in excess of 25 contracts worth more than $18,000,000 since 1968, and that these contracts have included significant amounts for business development expense.

The record shows that preliminary discussions between SBA and the Air Force indicated the possibility that a portion of the required cargo tiedown nets could be obtained through the section 8(a) program. By letter dated February 27, 1974, SBA certified to the Air Force Small Business and Economic Utilization Advisor that it was competent to perform a contract calling for the manufacture of 6,000 top nets and 8,500 side nets. This was followed by an April 4, 1974, commitment from SBA to accept on behalf of Watts a contract for those quantities of nets, and a subsequent assumption by SBA of the business development expense portion of the contract prices agreed to by SBA and Watts. Award to SBA was made on May 2, 1974.

While we understand from SBA that it has issued operating instructions and a "Sample ASPR Letter" which provide for the transmittal to DOD of the information set forth in ASPR 1-705.5(c)(1)(A), we understand from the Air Force that this information is not normally furnished it by SBA and was not furnished in this case. According to the Air Force, administration of the section 8(a) program is decentralized and decisions to award section 8(a) contracts are made usually as a result of informal contacts between Air Force and SBA field personnel, which are then formalized by issuance of SBA's commitment. These informal contacts, according to the Air Force, include consideration and evaluation of the feasibility of an award to SBA's proposed subcontractor. The Air Force believes that these practices, which were followed here, comport with any legal requirement of ASPR 1-705.5(c) because in essence the evaluation referred to in ASPR 1-705.5(c)(1)(B) is made before any decision to make a section 8(a) award is reached.

We do not believe that the validity of section 8(a) awards made by the Air Force is affected because the procedures followed may not be precisely those set forth in ASPR 1-705.5. That section does not, for the most part, impose regulatory requirements on the Air Force. Rather, it sets forth, primarily as a matter of information and guidance, how SBA and the military departments will initiate section 8(a) contract negotiations. While it does say that "SBA will furnish * * * its request for a commitment to support the approved plan, showing at least the following information * * *," this statement does not purport to impose any requirement on the Air Force and cannot impose any requirement on SBA which, as a non-DOD activity, is not subject to provisions of ASPR. Furthermore, to the extent that ASPR 1-705.5(c)(1)(B) does impose a requirement for evaluation of SBA's request for a commitment, we agree that, even though the Air Force was not provided by SBA with the information listed in ASPR 1-705.5(c)(1)(A), it in effect complied with the intent of the evaluation re-

quirement when, "in accordance with the standards set forth in ASPR 1–705.5(c)(1)(B)," it performed a "limited review" to determine that its needs could be satisfied by means of a section 8(a) award to Watts.

We also do not believe that the contracting officer was required to consider Watts' lengthy involvement with the section 8(a) program or the amount of business development expense proposed by SBA for the Watts' contract. Although ASPR 1–705.5(b)(1) recites that the purpose of the program is to bring small business concerns to a self-sustaining, competitive level within a reasonable time, it does not vest in contracting officers any independent authority to determine if a particular section 8(a) award would be consistent with that stated purpose. On the contrary, section 1–705.5(b)(1) states that the small business firms to be assisted by means of section 8(a) contracts will be "designated by the SBA," which "is empowered to arrange for the performance of such contracts by negotiating or otherwise letting contracts * * *." Since it is clear that the selection of firms for participation and continuation in the section 8(a) program is a matter for SBA, we cannot conclude that the contracting officer was under any obligation to consider whether Watts, if otherwise capable of performing the contract, should be continued as a recipient of section 8(a) assistance. Similarly, since the amount of business development expense, if any, to be paid to a section 8(a) contractor is determined exclusively by SBA and is now funded entirely by that agency, we fail to see how the contracting officer was under any obligation to consider that matter. Accordingly, we believe that the contracting officer did not abuse his discretion in awarding a contract to SBA, and we have no basis for objecting to the protested award insofar as the actions of the Air Force are concerned.

There remains for consideration Kings Point's contentions that the award to Watts was improper because it was contrary to SBA policy and because the amount of business development expense was unreasonable. These contentions essentially involve SBA's administration of the section 8(a) program. In the *Ray Baillie* case, *supra*, it was held that firms which are not eligible for a section 8(a) contract have no standing to challenge SBA's awards of section 8(a) subcontracts to specific firms because "whatever the outcome * * * the plaintiff will not be directly affected." 477 F. 2d at 710. In accord with that decision, we have declined to consider a challenge by a noneligible firm to SBA's award of a subcontract to one company rather than another. *Matter of Kleen-Rite Janitorial Service, Inc.*, B–178752, March 21, 1974. See also *Matter of City Moving and Storage Company, Inc.*, B–181167, August 16, 1974. In this case, however, it appears from the record that a section 8(a) award may well not have been made if Watts

had not been considered eligible for the award, so that it cannot be said that Kings Point was not affected by SBA's determination to subcontract to Watts. Under these circumstances, we do not believe consideration of the matters raised by Kings Point to be inappropriate.

Kings Point contends that Watts has been a section 8(a) contractor for an unreasonably long period of time and that its continuance in the program is contrary to program objectives. SBA's regulation states that:

> A section 8(a) concern which has substantially achieved the objective of its business plan will be notified that its participation in the program is completed. The judgment as to the completion of program participation will be made in light of the purpose of the program.
>
> If the objectives and goals set forth in the business plan are not being met, the concern shall be informed what corrective measures are necessary. In cases where it is determined, in the judgment of SBA, that continued participation in the section 8(a) program will not further the program objectives, the concern will be notified that its participation in the program is terminated. 13 CFR § 124.8-2 (e).

SBA's policy document in effect when the award was made provides that "In order to continue participating in the 8(a) program, firms must show a pattern of continuing development consistent with their current business plan as accepted by SBA," and that "where it becomes apparent to SBA that continued subcontract support from the 8(a) Program will no longer further the objectives of developing a profitable competitive business * * * the 8(a) concern will be informed of the decision to withdraw 8(a) support * * *." Although neither the regulation nor the policy document provides a specific time frame for termination of section 8(a) support, Kings Point asserts that the continuation of Watts in the section 8(a) program since 1968 is unreasonable, not consistent with program objectives, and in conflict with 1970 Congressional testimony by SBA officials to the effect that section 8(a) program assistance will be provided for a maximum of 3 years to any one firm.

Notwithstanding that testimony, Congress has recognized that in practice SBA has not adhered to a 3-year maximum period in all cases. *See* H. Report No. 93-873, 93rd Congress, 2d sess. 30. We also recently noted our current understanding that "it is the SBA's policy to limit 8(a) support to a three or five year period. That policy is in accordance with the intent of the program that participating firms 'graduate' by becoming self sufficient." *Matter of Wallace and Wallace Fuel Oil Company, Inc.*, B-182625, April 1, 1975. It is clear that SBA has not adhered to that policy in the case of Watts. However, that policy is not mandated by law or regulation. What is required by regulation is that continued participation of a firm in the section 8(a) program be terminated when the firm's continued participation will not further the objectives of the program or when the firm has sub-

stantially achieved the objectives of its business plan. In both situations, the decision to terminate is a judgmental matter for SBA. See, in this regard, *Matter of Search Patrol Agency, Inc., Coastal Services, Inc.*, B–182403, April 3, 1975, in which we found no basis for questioning SBA's determination to terminate a firm from the section 8(a) program. Here SBA has determined that Watts should not be terminated as a recipient of section 8(a) assistance. We find no basis to question that determination.

Kings Point also challenges the award because of the allegedly excessive business development expense allowed by SBA in the contract award to Watts. SBA Policy No. 60–40, Revision 1, dated April 15, 1973, an internal policy document which was in effect at the time of this procurement, states that "Subcontracts will be negotiated at prices which are fair and reasonable to both the Government and the 8(a) subcontractor." It provides, however, that prices may include an amount over and above competitive market prices if such an amount is "needed to permit the 8(a) subcontractor to perform profitably," but that this amount, which is referred to as a business development expense, "may not be used to subsidize a firm solely to permit it to perform on a given subcontract." Kings Point asserts that the 40 percent differential paid to Watts as a business development expense on this contract is unreasonably high, especially when considered in light of the business development expense paid to Watts on prior section 8(a) contracts, and that this alone should render the award improper.

We cannot accept this argument. There is no legal limitation on the amount of business development expense which may be paid on a particular contract or to a particular contractor. In administering the section 8(a) program, SBA determines how much, if any, business development expense is reasonably necessary to allow a proposed subcontractor to perform at a profitable level. In many cases, no business development expense is allowed. In others, it has been allowed in amounts ranging to more than 70 percent, although the average business development expense percentage is substantially lower. See Hearings before the Subcommittee on Minority Small Business Enterprise of the House Select Committee on Small Business pursuant to H. Res. 5 and 19, 92nd Cong., 2d sess. 387, 440–442 and H. Report No. 92–1615, 92nd Cong., 2d sess. 14. Here documents furnished by SBA reveal that the proposed business development expense for Watts exceeded "normal guidelines" and therefore was referred by SBA's regional office to SBA's Government Contracts Division for approval. The documents further show that the proposed business development expense was approved as reasonable after evaluation was made of the cost of material, labor and overhead. Although Kings Point has suggested otherwise,

the file shows that a significant portion of the business development expense allowed resulted from the apparent high costs to Watts of material needed to perform the contract.

Finally, Kings Point claims that the award to Watts violates SBA's policy of restricting section 8(a) contract awards to 20 percent of the Government's total purchases of similar items. SBA's regulations stated that in selecting proposed procurements suitable for performance by section 8(a) concerns, SBA will consider "the percentage of all similar contracts awarded under the section 8(a) program over a relevant period of time." SBA Policy No. P. 60–40, Revision 1, *supra*, states that SBA will not seek or accept a section 8(a) contract where:

> (1) The amount considered for 8(a) contracting, whether individually or collectively, is excessive in relation to the total purchases of like or similar products, or services procured by the Federal Government. No quantity in excess of 20 percent may be requested without the approval of the Associate Administrator for Procurement and Management Assistance.

Kings Point claims that the Watts contract represents 50 percent of the Government's total purchases.

Our bid protest procedures require that protests concerning solicitation defects which are apparent prior to bid opening must be filed prior to bid opening. 4 CFR § 20.2(a). Here the solicitation clearly indicated that any award made to SBA would be for 50 percent of the cargo nets to be acquired in this procurement. Therefore, this issue should have been raised prior to bid opening. Kings Point, however, did not file its protest until after it received its award. Accordingly, the protest on this issue is untimely. However, we point out that SBA denies that the award to Watts represents a violation of the 20 percent limitation and claims that, in fact, the Watts contract "combined with all other subcontracts executed under the 8(a) program during the relevant time frame did not exceed 20% of the total purchases of like or similar items procured by the Federal Government." According to SBA, the phrase "like or similar products" refers not only to cargo tiedown nets, but also to other items which are similar with respect to "end point usage of the item (cargo tiedown), material used (nylon webbing or canvas duck), and the manufacturing process involved (cut and sew)." In SBA's view, items similar to cargo tiedown nets include slings, shoulder harnesses, aerial pickup and delivery equipment, parachutes, safety belts, and cargo bags. We also note that even if the 20 percent limitation was exceeded, it would not render the Watts contract illegal, since SBA was not irrevocably bound by its policy and could waive or revoke it if it chose to do so. Matter of *Kleen-Rite Janitorial Service, Inc., supra.* (SBA did, in fact, eliminate all reference to a percentage limitation in its new internal policy document which became effective November 14, 1974.)

For the above reasons, Kings Point's protest is denied. However, the record does indicate that one particular firm, Watts, has been a major beneficiary of section 8(a) contract assistance since initiation of the program. Therefore, since in essence Kings Point's various assertions regarding the impropriety of this assistance relates to proper administration of the program rather than to the legality of the protested award, the matter will be referred to our audit staff for consideration in our continuing review of SBA activities.

[B-180095]

Arbitration—Award—Union Dues Checkoff—Implementation by Agency—Contrary to Statute

Arbitration award directing overpayment of dues checkoff to union in order to technically comply with terms of agreement may not be allowed, on reconsideration, because 31 U.S.C. 628 (1970) provides that appropriations shall be applied solely to objects for which made and no others and hence no authority exists for payment of the arbitration award.

General Accounting Office—Decisions—Requests—Advance—Arbitration Award Payments

Agency heads and authorized certifying officers have statutory rights to obtain advance decisions from this Office on propriety of payments, including arbitration award payments, without exhausting other administrative appeals procedures. However, to avoid an unfair labor practice, an agency can also file an exception to an arbitration award with the Federal Labor Relations Council (FLRC) under regulations promulgated by that agency. Decisions by the Comptroller General are binding on the agency, the FLRC and the Assistant Secretary of Labor for Labor-Management Relations.

In the matter of implementation of arbitration award, April 30, 1975:

This matter concerns a reconsideration of our advance decision B-180095, dated October 1, 1974, which held that there was no authority to implement an arbitration award that ordered the United States Army Test and Evaluation Command, Aberdeen Proving Ground (APG), Maryland, to pay the sum of $80.33 to Local 2424 of the International Association of Machinists and Aerospace Workers, AFL-CIO.

Briefly stated, the facts in the case are as follows. For some time prior to October 1971, Mr. Robert L. Wright was an employee of APG and a member of Local 2424. Pursuant to a negotiated agreement providing for dues checkoff, APG was required to deduct dues of union members within the bargaining unit from their pay, and transfer the total of the amounts deducted to the union at stated intervals. Because he was a member of the bargaining unit, Mr. Wright's dues were properly deducted up to October 18, 1971, on which date he was transferred to a position outside the bargaining unit. However, APG continued to

deduct his dues erroneously and to pay them over to the union. In November 1972, the APG Civilian Pay Section recognized the error, ceased deducting dues from the employee's pay, and reimbursed him in the amount of $80.33 that had been improperly deducted since October 18, 1971. In December 1972, the APG Finance Office delivered a check to the union in an amount that was $80.33 less than the aggregate of the dues deducted from members' pay for the checkoff period, and justified such action on the basis that the Government was entitled to recoup an amount equal to the previous overpayment to the union because of the erroneous deduction from Mr. Wright's pay. The union filed a grievance alleging that the APG recoupment had violated the terms and conditions of their agreement which requires the aggregate of all dues withheld to be paid to the union and which makes no specific provision for recoupment. The grievance was submitted to arbitration and the arbitrator found that the agreement had been violated and awarded the union $80.33. APG did not file an appeal with the Federal Labor Relations Council (FLRC) pursuant to Executive Order 11491 but instead submitted a request for an advance decision to this Office on the propriety of paying the award. In our decision, we concluded that the payments authorized under the agreement had been fully satisfied, inasmuch as the union had been paid all members' dues that should have been withheld. Thus, we reasoned that there was no legal authority to support the payment of any additional amount because nothing was due.

After APG requested the aforementioned advance decision, the union filed an unfair labor practice (ULP) complaint with the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR), which alleged that APG violated sections 19(a) (1) and (6) of Executive Order 11491 as amended, 3 C.F.R. § 254 (1974) (hereinafter referred to as the Order), by neither seeking review by the FLRC nor complying with the binding arbitration award issued pursuant to the terms of the parties' negotiated agreement. In answer to the complaint, APG contended that it lacked authority to carry out the arbitrator's award and further asserted that the arbitrator in making his award went beyond interpreting or applying the terms of the parties' negotiated agreement and, also, that the ULP complaint lacked specificity.

On July 11, 1974, the Assistant Secretary issued an order on the ULP complaint in *Department of the Army Aberdeen Proving Ground, A/SLMR No. 412*, in which he determined that APG's refusal to comply with the award pending a determination of its propriety by the Comptroller General would be violative of sections 19 (a) (1) and (6) of the Order since no exception to the award was

filed with the FLRC. However, he referred the matter as a major policy issue to the FLRC. The pertinent part of the Summary of the Order of the Assistant Secretary is as follows:

> The Assistant Secretary rejected the Respondent's [APG's] contention that the complaint lacked specificity. The Assistant Secretary concluded that the Respondent's refusal to comply with an award issued by an arbitrator under conditions agreed to by the parties, in his judgment, would constitute a unilateral action with respect to negotiated terms and conditions of employment, would thwart the arbitration process, would be inconsistent with the purposes and policies of the Order, and would be violative of Section 19(a) (1) and (6) of the Order. However, he noted the Respondent's defense, i.e.—that it is unable to make payment of the amount involved because no appropriation exists for payment and a special authorization from the Comptroller General is needed in order to implement the award—raised the following major policy issues: (1) whether the Assistant Secretary has jurisdiction to enforce under Section 19 of the Order a binding arbitration award in which no exceptions were filed with the Federal Labor Relations Council; and (2) if the Assistant Secretary has jurisdiction to enforce a binding arbitration award, is a defense that a party cannot comply with an arbitrator's award until it receives authorization from the Comptroller General to make payment dispositive of the matter? Under these circumstances, the Assistant Secretary referred these issues to the Federal Labor Relations Council for decision.

The union has now requested us to review and reconsider our decision of October 1, 1974, that refused to authorize the agency to pay the union's claim for $80.33 awarded to it by the arbitration. In requesting reconsideration, the union makes the following contentions. It asserts that it was not consulted on the question addressed in our advance decision which was based upon ex parte submission by the Finance and Accounting Officer of the agency.

The union agrees with the facts set forth in our decision but points out that it was not officially notified of Mr. Wright's transfer outside the bargaining unit. It contends that the transfer action was completely within the knowledge of the agency, which continued to deduct the dues and submit them to the union. The union also maintains that Mr. Wright enjoyed all the rights and privileges of any other union member during the period in question. In addition, the union notes that section 4(c) (3) of the Order contains provisions for the resolution of issues where the agency or the union does not agree with an arbitration award which, it contends, is the sole remedy in such cases. The union states that APG did not avail itself of this procedure but instead attempted to circumvent the provisions of the Order by filing an ex parte request with our Office to obtain a ruling that would invalidate the award. Finally, the union asserts that the general law of payment which we relied on in our decision is not controlling in labor relations cases inasmuch as the parties are bound by their collective bargaining agreement as interpreted by the arbitrator.

We are not persuaded by the union contention that it was in effect entitled to the $80.33 of dues inasmuch as it had never been officially informed of the employee's transfer out of the bargaining unit and

that Mr. Wright enjoyed all the benefits of union membership during the period. We think it is questionable whether the employee could in fact have been represented by the union, for example, in a dispute over working conditions, a major benefit of union membership, since he had been promoted to a position outside the union's jurisdiction. In any event, this question of fact was completely settled by the arbitrator, who recognized that APG improperly withheld the dues from the employee and mistakenly paid them over to the union which was not entitled to such dues. In this connection the arbitrator said in his opinion:

> Reduced to its most basic elements, the question is simply whether the Employer may, in effect, use self help to rectify its own mistake.
> The Employer, under the Agreement, was required to withhold Union dues from certain employees' paychecks and to transfer at stated intervals these monies to the Union. This it did, but, *in the instant case, it improperly deducted dues from one who was not subject to the deduction program* and paid this over to the Union. Subsequently, and this is the crux of the grievance resulting in the present arbitration, it deducted from the payment transferring the sum of the deducted dues for the current pay period, an amount equal to that *which it had mistakenly paid* to the Union previously. [Italic supplied.]

Accordingly, we find no merit in the argument that the union was in any way entitled to the dues it was mistakenly paid. Section 7 of the collective bargaining agreement clearly contemplated that the dues check-off procedure would be terminated with respect to a particular employee when, among other events, the following occurred:

> (b) Transfer of the employee authorizing dues deduction outside of the unit (except for temporary promotion or detail).

With further reference to the union's contention that it is entitled to the $80.33 of dues because Mr. Wright enjoyed the benefits of union membership during the period, we point out that this amount has been refunded to the employee and any claim the union has for alleged services it may have rendered to the employee for these dues should be made directly to him.

The occurrence of the aforementioned transfer operated to suspend the requirement to transmit all dues collected to the union. Since there is no dispute as to the facts, as determined by the arbitrator, namely, that the dues for the transferred employee should not have been paid over to the union, the question is whether the agency had the right to take the action it did to recoup the funds it improperly paid over to the union.

The arbitrator seems to feel that the particular method of recoupment chosen was a setoff of an amount owed to the agency by the union against an amount owed by the agency to the union, and that this was a violation of the agreement because *all* the sums owed by the agency to the union had to be paid over on the specified date. As was previ-

ously pointed out, we do not agree that any part of the sum in question was owed to the union.

It is a well-established principle that Federal funds may only be paid out pursuant to law. 48 Comp. Gen. 773 (1969), and 49 *id.* 578 (1970). In this regard 31 U.S. Code § 628 (1970) provides:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made and for no others.

It was therefore not legally permissible for the agency to pay over to the union a sum amounting to $80.33 more than it was indebted to the union for. Accordingly, the arbitrator exceeded his authority in ordering the agency to make a payment for which it was not legally responsible.

The union refers to "various cases" which, it says, hold that "normal 'Hornbook' law does not apply to collective bargaining agreements." We assume that the "various cases" mentioned involve labor relations disputes in the private sector since we are aware of no similar decisions involving Federal employees. We would remind the union that there are fundamental differences in the objectives and in the authorities governing collective bargaining in the private and in the Federal sectors. Without discussing this subject in detail at this time, we point out that while it is true that in private sector cases governed by the Labor Management Relations Act, 1947, approved June 23, 1947, ch. 120, 61 Stat. 136, 29 U.S.C. § 141 *et seq.* (1970), arbitrators have a pretty free rein to fashion and enforce remedies at will, limited only by the provisions of the relevant collective bargaining agreement (see the *Steelworkers Trilogy* cases, 363 U.S. 564 (1960); *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145; rehearing denied 393 U.S. 1112 (1968)), all Federal service collective bargaining agreements are subject to "existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities or authorized by the terms of a controlling agreement at a higher agency level;" Executive Order 11491, as amended.

We also disagree with the union's contention that APG was required to appeal the arbitration award to the Federal Labor Relations Council instead of to this Office, when it questioned the legality of the award. We point out that heads of Executive agencies and certifying officers are entitled by statute to apply to this Office for a decision upon any question involving a payment to be made by them, whether

or not they have exhausted other avenues of appeal. In this regard 31 U.S.C. § 74 (1970), provides:

§ 74. *Certified balances of public accounts; conclusiveness; suspension of items; preservation of adjusted accounts; decision upon questions involving payments*

Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

And 31 U.S.C. § 82d provides:

§ *82d. Same; enforcement of liability*

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

Decisions of the Comptroller General on matters involving the payment of Government funds have long been recognized as final and conclusive and binding in the executive branch. The Attorney General as chief legal officer of the Federal Government in 33 Op. Atty. Gen. 268 (1922) (an opinion to the Secretary of the Navy who had questioned the finality and conclusiveness of a Comptroller General's determination), stated as follows:

Section 8 of the Dockery Act of July 31, 1894 (ch. 174, 28 Stat. 207), provided that the balances certified by the auditors of the Treasury, or upon revision by the Comptroller of the Treasury, should be final and conclusive upon the executive branch of the Government, *and that where disbursing officers, or the head of any executive department, applied to the Comptroller of the Treasury for his decision upon any question involving a payment, the decision, when rendered, should govern the case.* Construing these provisions of law, my predecessors have uniformly held that a question of pay for the determination of the Comptroller can not be submitted to the Attorney General for his opinion merely because it may incidentally involve some power or the effect of some power claimed to exist in the head of a department. (See, for example, 25 Op. 301, 28 Op. 129.) The same rule necessarily applies to the Comptroller General, in whom is vested all the power formerly conferred by law upon the Comptroller of the Treasury. (Act of June 10, 1921, ch. 18, sec. 304, 42 Stat. 20, 24.) [Italic supplied.]

Executive agency heads and certifying officers of the Executive branch have been granted this statutory right to obtain a Comptroller General decision in advance of payment to insure that public funds are expended only in accordance with law and thereby avoid their personal liability for payments made in error. Frequently these officials find that obtaining a decision from the Comptroller General on an arbitration award, particularly when the issue is not whether the collective bargaining agreement was violated but only whether the award may be legally implemented, is the most expeditious procedure to follow.

The FLRC by a decision dated March 20, 1975, *Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424*, A/SLMR No. 412, FLRC No. 74A–46, held that where a party fails to file an exception with the Council to an arbitrator's award under a negotiated grievance procedure and has refused to comply with the award, such refusal may be deemed an unfair labor practice. And it is not a defense to the unfair labor practice proceeding that the party has requested a decision of the Comptroller General as to the legality of the arbitrator's award. Further the Council's decision held that notwithstanding the Assistant Secretary of Labor finding that an agency has committed an unfair labor practice, the Assistant Secretary may not direct the agency to comply with an award which the Comptroller General has determined to be illegal. It thus seems that in circumstances such as outlined above, an agency can meet its obligation under Executive Order 11491, as amended, by filing an exception to the arbitrator's award with the Council within the prescribed time limits. But whether it does or does not file the exception with the Council the agency at any time has the right to request a decision of the Comptroller General in matters relating to the expenditure of Government funds. That right remains intact in either such case. Also, the decision by the Comptroller General is binding on the agency, the Council and the Assistant Secretary of Labor.

With regard to the union's contention that we should not have decided this case solely on the facts submitted by the agency but should have also sought the views of the union, we would normally agree that this is the appropriate procedure to follow, however in this case we point out that we were responding to a question of whether a particular arbitration award could be paid. The only question was the legality of implementing the award in the light of the arbitrator's findings and conclusions of fact set forth in his opinion which we had before us. Neither the agency nor the union had taken an exception to these findings and conclusions of fact; hence, we did not believe it necessary to solicit additional information in this case. We determined that the arbitration award was invalid on its face because it ordered the payment of Federal funds to the union in an amount which the arbitrator had found was erroneously paid to the union at an earlier time so as to technically comply with the literal terms of the agreement. We have, of course, carefully considered the additional information submitted by the union in its request for reconsideration but for the reasons stated, *supra*, find no basis to reach a different result. Accordingly, upon review and reconsideration we must affirm our decision of October 1, 1974, that the arbitration award cannot be paid.

[B-182744]

Courts—Court of Claims—Decisions—Acceptance—Application in Similar Cases—Not Retroactive

Settlement agreements regarding payments for value engineering may not be reformed to conform with a judicial interpretation of contract provisions in a subsequent court case not involving this contractor, the court case not indicating that it would have retroactive effect on other cases.

In the matter of Poloron Products, Inc., April 30, 1975:

This matter concerns a request for reconsideration of a settlement dated October 8, 1974, of our Transportation and Claims Division which disallowed Poloron's claims for additional payments for Value Engineering Incentive Proposals on certain Government contracts extending over the period from 1966 through 1972.

As a result of the Navy's acceptance of Poloron's value engineering changes the Navy was able to satisfy its requirements with revised and less costly items. The issue presented by Poloron's claim essentially concerns the extent of the firm's share in the savings gained by the Navy's acceptance of the value engineering changes. Consistent with the then practice of the Navy, Poloron's compensation for engineering changes did not include payment for the element of profit allocated to the contract work deleted by the change.

On July 13, 1973, the United States Court of Claims decided the the case of *Dravo Corporation* v. *The United States*, 480 F. 2d 1331, 202 Ct. Cl. 500 (1973), wherein the Court determined that the contract price should not be decreased for profit on deleted work, that is, the contractor should retain profit on the deleted work. In response to a request, dated September 26, 1973, for reconsideration and recomputation of the VECP adjustments under Poloron's contracts, the Navy advised by letter dated November 26, 1973, that it did not consider the Court of Claims decision a mandate to reconsider all previously accepted proposals. Poloron contended that the Court's decision should be retroactively applied to the contracts to reopen the accepted value engineering proposals and refund the profit which had not been paid under the original computation.

In the settlement of October 8, 1974, this claim was denied for the following reasons:

It is a rule of long standing that there is no duty on the part of accounting officers of the Government to reopen settlements and examine them on the basis of subsequent court decisions that may require different action than that on which the prior settlements were made. *Blazek* v. *United States*, 44 Ct. Cl. 188, 192 (1909). Furthermore, insofar as [Poloron] apparently acquiesced in the adjustments as computed and accepted final payment therefor, the transactions are considered closed. Claims which affect the amount due a contractor should be asserted at or before the time a settlement is made, and when appropriate, appeal made to a contract appeals board. The Government is entitled to know, when it makes what it believes to be a final payment on its contract,

what claims a contractor intends to assert against it on account of the contract. It is the Government's right to know whether the supposed final payment is in fact final and conclusive. See *Poole Engineering & Machine Company* v. *United States*, 57 Ct. Cl. 232 (1922); *Dubois Construction Corp.* v. *United States*, 98 F. Supp. 590 (1951); *McQuagge* v. *United States*, 197 F. Supp. 460 (1961).

In support of its request for reconsideration of the action taken on its claim, Poloron has referred to two decisions of the Armed Services Board of Contract Appeals (ASBCA). Poloron argues that in the appeal of *Kurz & Root Company*, ASBCA No. 17146, March 18, 1974, a contract modification which provided that "The above change results in no change in contract price" was not found to have the legal effect of accord and satisfaction with regard to matters excluded from negotiations. In addition Poloron cites the appeal of *Viewlex, Inc.*, ASBCA No. 12584, January 21 and August 4, 1971, wherein a contract modification covering the "delay" and "failure to deliver" Government-furnished property did not bar recovery for a defect in the Government-furnished property, including delay costs resulting from the defect.

It does not appear that the cited cases are applicable here. The basis given in the settlement of October 8 is that the compensation paid to Poloron for value engineering changes is a closed matter. Generally, a subsequent judicial interpretation of contract language which differs from the interpretation mutually agreed upon by parties to another contract in the course of settlement may not be given the effect of reforming the settlement previously agreed upon by such parties. *Blazek* v. *United States*, *supra*. The holding in the appeal *of Kurz & Root Company*, *supra*, that accord and satisfaction is not effective as to matters excluded from negotiation and the holding in *Viewlex, Inc.*, *supra*, that a contractor's limited release does not preclude a contractor's subsequent claim based upon other factors outside the scope of such limited release are inapposite since Poloron is attempting to reopen the same matter considered in the prior settlement.

We must point out that Poloron could have taken exception to the method of computation by the Contracting Officer under the "Disputes" clause of the contracts and at that time noted an appeal to the appropriate Board of Contract Appeals, as in the *Dravo* case. But obviously Poloron took no action whatever at the appropriate time and raised no objection until the *Dravo* decision was called to its attention, long after settlement of Poloron's contracts.

In view thereof, the claims may not be allowed. Accordingly, the settlement disallowing the claims is sustained.

[B-182819]

Contracts—Negotiation—Competition—Qualification Program for New Sources

Award under negotiated procurement was improper where opportunity to qualify items for procurement given to two firms was not extended to prior sole source supplier of item even though contracting officials were on notice that prior supplier intended to offer substitute for previously furnished component.

Contracts—Protests—Timeliness—Negotiated Contract

Allegation regarding activity's determination to set aside like quantities of line items for exclusive small business participation, having first been made after submission of proposals, will not be considered on merits.

In the matter of Avien, Inc., April 30, 1975:

Avien, Incorporated (Avien) has filed a protest under request for proposals (RFP) F41608-75-80187, a 50 percent small business set-aside, issued by the San Antonio Air Logistics Center (SAALC), Kelly Air Force Base, Texas, for the purchase of 16 line items of liquid quantity transmitters (probes) and one simulator, all of which are components of the liquid quantity fuel gauging system of the Air Force's B-52D aircraft. Essentially, Avien contends that it should have been awarded the contract for the non-set-aside quantity, which was awarded to another firm, as well as the remaining items under the set-aside portion of the procurement yet to be awarded. As explained below, the protest is sustained.

Prior to the issuance of the subject RFP, the B-52D probes were procured from Avien on a sole-source basis. However, as a result of an excessive price estimate submitted by Avien for budgetary purposes in planning for the subject procurement, the procuring activity decided to seek additional sources for the planned procurement of the probes. Gull Airborne Instruments, Inc. (GAI), and Simmonds Precision, Inc., both of whom provided similar tank units (probes) to the Air Force for other models of the B-52, were invited to fabricate and test to General Military Specification MIL-G-26988C and perform a form, fit and function test to become qualified sources for the items in question. Both firms complied with the procuring activity's request and qualified their respective products. It should be noted that Avien's previously qualified probe was constructed primarily of fiberglass, while metal was used as the base material for the probes of the two newly qualified sources. Both materials were determined by the procuring activity to be equally acceptable. The record indicates that Avien notified the contracting officer both before and after issuance of the RFP and prior to the submission of any proposals that it intended to submit an alternate proposal offering a probe constructed of metal which it contended had been qualified and manufactured in

the past for the B–52 aircraft. The contracting officer reports the he assumed that Avien would submit necessary data with any such offer to show that its metal probes would be acceptable.

The RFP was issued on September 12, 1974, pursuant to 10 U.S. Code 2304(a)(10), as implemented by paragraph 3–210.2(xv) (1974 ed.) of the Armed Services Procurement Regulation (ASPR), upon the contracting officer's determination that adequate data was not available for formal advertising and that negotiation was therefore required. The aforementioned provisions authorized the use of negotiation in lieu of formal advertising when "the contemplated procurement is for parts or components being procured as replacement parts in support of equipment specially designed by the manufacturer, where data available is not adequate to assure that the part or component will perform the same function in the equipment as the part or component it is to replace." The solicitation identified each qualified item by indicating the manufacturer and the appropriate part number and required that each prospective contractor submit an offer on one of the three part numbers for each line item set forth in the schedule.

Each of the three qualified firms submitted offers on their respective part numbers by the October 4, 1974, closing date for receipt of proposals. In addition, Avien, as previously indicated, submitted an alternate proposal offering a probe constructed of metal by using the same part number as its listed fiberglass, with the exception that the letter "M" was inserted in the part number identifying it as metal. All offers were considered within the competitive range and on October 16, 1974, the three firms were notified that the Government did not intend to conduct further negotiations or discussions concerning their proposals and best and final offers were requested to be submitted by October 21, 1974. Avien's offer of $93,749.88 on its alternate proposal for the line items of the non-set-aside portion of the procurement was low. The next low offer in the amount of $124,730.00 was submitted by GAI. However, San Antonio technical personnel reported that Avien's alternate proposal could not be accepted since the part numbers listed in the solicitation could not be identified and no data was supplied with the offer or available to evaluate the product to indicate whether it had previously been manufactured, qualified or offered for sale as a substitute for the part number specified in the solicitation and recognized as being constructed of fiberglass. In addition, it was stated there was insufficient time, due to the urgency of the procurement, for complete qualification testing in accordance with MIL–G–26988C and to perform compatability system tests on a B–52D aircraft. Based on this report, the procuring activity determined that Avien's alternate proposal offering a probe fabricated of metal would not be considered

because the unit had not been tested or qualified as a substitute for its previously qualified fiberglass product. Accordingly, on November 22, 1974, the contract for the non-set-aside quantities of the line items listed in the solicitation was awarded to GAI.

Avien protests the rejection of its alternate proposal, essentially on the ground that on numerous occasions during the course of the procurement the contracting officials informed the firm that the use of fiberglass or metal in the fabrication of the items to be procured would be equally acceptable. Moreover, the protester points out that the solicitation made no reference to a requirement for prequalification of the proposed items or the submission of data to substantiate compliance with MIL-G-26988C. In this regard, the protestor contends that MIL-G-26988C is not applicable to the instant procurement since both its fiberglass and metal units have been fully qualified to MIL-G-7818, and the existing fuel quantity gauge system on the B-52D aircraft has been procured or manufactured under MIL-G-7818. Finally, the protester alleges that the award to GAI was improper since its units were never qualified under MIL-G-7818, which the protester reasserts is the only applicable specification for replacement components of the MIL-G-7818 gauges on the B-52D aircraft.

It is the Air Force's position that SAALC did not afford Avien an equal opportunity to qualify its metallic probe for the B-52D aircraft either before issuance of the solicitation, during which time the other offerors were qualifying their probes, or during the course of negotiations. Nevertheless, the Air Force states that because the items called for under the non-set-aside portion of the contract awarded to GAI are urgently needed to fulfill production line requirements, termination of the contract would not be in the best interests of the Government because it would result in a production line stoppage at the contractor facility performing the modification on the B-52D aircraft. The Air Force proposes that Avien be given the opportunity to qualify its metal probes prior to a resolicitation of the remaining items under the set-aside portion, with the exception of 21 line items which will be added to GAI's existing contract in order to prevent further production line stoppage.

At this point it should be noted that in its response to the Air Force's report, GAI contends that Avien was given an equal opportunity to qualify a metallic probe on the basis that the applicable specification does not limit or preclude the method to be utilized by a probe manufacturer and for the past 20 years Avien chose to supply a probe constructed of fiberglass. It is GAI's view that "the lack of action on Avien's part over the last twenty years to requalify more cost effective components (e.g. by restricting the use of fiberglass) in the Govern-

ment's interest cannot be a valid cause in this instance to upset either the existing contract or the intended procurement of the set-aside portion." Furthermore, GAI argues that the issuance of amendment 0002, setting aside a like quantity of such line items for exclusive small business participation, was contrary to the original intent of the Air Force, and also questions Avien's financial responsibility and capability, to undertake and properly support the program required by the Air Force.

In the present case, Avien was not given adequate notice either prior to issuance of the solicitation or prior to the closing date for receipt of proposals of the need to qualify its metallic probe in order to make its low alternate proposal acceptable. The record clearly indicates that the contracting officer was on notice that Avien intended to submit an alternate proposal offering a probe constructed of metal, and while he assumed that the protester would submit necessary data with such offer to indicate that the proposed items would be acceptable to the Government, the RFP did not require such data and the invitation which was extended to GAI and Simmonds to fabricate and test to MIL-G-26988C to become qualified sources was not extended to Avien. The failure of the contracting officials to indicate to Avien the necessity for prequalification testing and/or submission of pertinent technical data qualifying its metal probe for use in the procurement, denied Avien the opportunity afforded the other offerors to qualify its metallic probe. Furthermore, the Air Force acknowledges in its report that its "Required Source Approval" clause recently developed for procurements of this nature, which sets forth the rights and obligations of prospective offerors, was inadvertently omitted from the solicitation. While the omission of this clause requiring offerors to submit such data as may be required for evaluation purposes did not prejudice either GAI or Simmonds, since their respective probes were qualified prior to the issuance of the solicitation, Avien was prejudiced in that it was not selected for award on the basis of its failure to submit data which was neither required by the RFP nor requested by the Air Force.

In view of the evidence submitted by the Air Force clearly indicating that a termination of GAI's contract for the non-set-aside quantities of the line items listed in the solicitation's schedule would cause a serious production line stoppage at the contractor facility performing the modification on the B-52D aircraft, we do not believe it is in the Government's best interest to disturb the award to GAI. Furthermore, we will not object to the addition to GAI's contract of 21 line items from the set-aside portion of the procurement as necessary to prevent a further production line stoppage. However, regard-

ing the remainder of the line items set aside for exclusive small business participation, in accordance with the Air Force's recommendation, we believe the requirement should be resolicited.

In this connection, regarding GAI's arguments relative to the Air Force's decision to set-aside a like quantity of the line items for exclusive small business participation, any objection to the issuance of amendment 0002 should have been raised prior to the date for receipt of proposals and is therefore untimely and will not be further considered by our Office. *See* 4 C.F.R. 20.2(a).

As to Avien's financial responsibility and capability to perform the proposed contract, we regard the matter to be moot since no award was made to Avien. Similarly, we view Avien's protest regarding the use of MIL–G–26988C in the instant procurement to be moot since we have been advised by the Air Force that Avien has agreed to qualify its alternate probe in accordance with that specification.

[B–183107]

Compensation—Missing, Interned, Captured, etc., Employees—Overtime—Computation

Department of the Navy has authority under Missing Persons Act, 5 U.S.C. 5561 *et seq.*, to pay pay and allowances, including overtime compensation, retroactively to civilian employee which he would otherwise have received but for his internment as POW in Vietnam. The proper amount of overtime compensation is determined by computing the average amount of overtime performed by other employees similarly situated during the period the employee was interned. In this case, overtime must terminate on the date when the office where the captured employee had been assigned was disestablished, unless other employees formerly assigned to such office were reassigned to other offices where they continued to perform overtime duty.

In the matter of overtime compensation while held as prisoner of war, April 30, 1975:

This matter concerns an inquiry on behalf of Lawrence J. Stark, an employee of the Department of the Navy, who has claimed overtime compensation for the period he was held as a prisoner of war in Vietnam.

The administrative record indicates that during the 4-month period prior to his capture in early February 1968, Mr. Stark performed and was paid for overtime duty averaging 62 hours per pay period. Pursuant to the Missing Persons Act, as amended and codified, 5 U.S. Code § 5561, *et seq.* (1970), Mr. Stark has received the basic compensation of his grade GS–12 position for the period of his internment. He has not, however, received any additional compensation for overtime duty that he would have performed but for his capture by hostile forces.

Administrative action denying any overtime compensation was apparently based on the informal views of an official in this Office who advised that the cited statute did not authorize overtime compensation for periods when an employee was missing. While normally we would regard an administrative settlement of an employee's entitlements under the Missing Persons Act as final, in accordance with 5 U.S.C. § 5566(c), the conclusiveness of such determinations does not extend to decisions as to whether a particular type of pay or allowance is properly includable under the act. 27 Comp. Gen. 205 (1947). In this instance, the Department of the Navy has indicated that it is quite willing to reconsider its settlement if this Office determines that its previous informal advice was erroneous. We do so determine.

The cited statute, at 5 U.S.C. § 5562(a) (1970) generally provides that employees in a "missing status," defined to include a period when "interned in a foreign country; [or] captured * * * by a hostile force;", are entitled to receive the same "pay and allowances" to which they were entitled at the time of capture, or thereafter by operation of law. The term "pay and allowances" is defined in 5 U.S.C. § 5561(6) (1970), which provides in pertinent part:

> (6) "pay and allowances" means—
> (A) basic pay;
> (B) special pay;
> (C) incentive pay * * *.

Usually the above terms occur in the context of pay categories for uniformed members of the military services. However, the statutory history of the act indicates that from original enactment in 1942 and through many amendments it has always applied to civilian employees assigned for duty outside the continental United States. Amendments in 1957 extended the coverage under certain conditions to civilian employees who become missing within the continental United States.

As originally enacted into law, the act provided that a person (civilian employee or military member) who entered a missing status was entitled during his or her absence to "the same pay and allowances to which such person was entitled at the time of the beginning of the absence or may become entitled to thereafter * * *." In construing that language we held in 22 Comp. Gen. 745 at 750 (1943) that American civilian employees of the Office of the High Commissioner to the Philippine Islands who were interned or held there during the Japanese occupation were entitled to overtime pay (under the Act of December 22, 1942, ch. 798, 56 Stat. 1068 (5 U.S.C. 29 (1946 ed.)) if the office of High Commissioner, after its reestablishment in the United States, was regularly working in excess of 40 hours per week pursuant to administrative order issued under prevailing regulations

of the President. *See also* 22 Comp. Gen. 192 (1942) and B-140639, November 13, 1959, in which retroactive computation of flying pay was authorized, and B-138025, December 10, 1958, authorizing inclusion of a territorial cost of living allowance.

Based on the foregoing, we conclude that under 5 U.S.C. § 5561, *et seq.* (1970) the Department of the Navy has statutory authority to pay Mr. Stark for overtime work he ordinarily would have performed during the period of his internment as prisoner of war, since immediately prior to the time he entered into a missing status his employing office had administratively approved and paid overtime compensation to him and other employees similarly situated.

The number of overtime hours for which overtime compensation is payable to Mr. Stark may be determined according to either of the following methods. The best and most accurate method would be to determine the amount of overtime actually performed by the employee who assumed Mr. Stark's duties after his capture. In the absence of records and adequate information to use this method, the agency may constructively determine Mr. Stark's overtime on the basis of the average number of overtime hours worked by other employees performing similar duties in the same office where Mr. Stark was employed. Payroll records submitted to us by the agency indicate that other employees in addition to Mr. Stark received overtime compensation during several pay periods prior to his capture. The overtime hours worked by these same employees during the period of Mr. Stark's internment may be used to determine an average number of overtime hours per pay period for which Mr. Stark could be paid.

The record also indicates that the office to which Mr. Stark was assigned at the time of his capture (early February 1968) was disestablished on June 30, 1970. It appears that constructive overtime should terminate as of that date, unless there is some reasonable basis for concluding that Mr. Stark would have been reassigned or transferred to another office where he would have continued to perform overtime work. Whether or not he would have been reassigned to such an office should be determined by looking at the personnel actions that were taken with respect to most of the other employees formerly assigned to the disestablished office.

Payment in accordance with the foregoing decision may be made to Mr. Stark after the necessary information is developed and computations made by the Department of the Navy.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 579-423