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[B-133972]

Leaves of Absence—Civilians on Military Duty—Entitlement—Part Time, Intermittent and Temporary Employees

Temporary limited employees of the Federal Government are not eligible for military leave as authorized by 5 U.S.C. 6323.

In the matter of a request by temporary employee for military leave, June 2, 1975:

This decision is in response to a grievance by Mr. Charles E. Lane, 1018 Essex Street, Lawrence, Massachusetts. Mr. Lane states that he was denied military leave by his employer, the Portsmouth Naval Shipyard, Portsmouth, New Hampshire.

Mr. Lane was employed by the Boston Naval Shipyard, Boston, Massachusetts, until June 28, 1974, at which time his employment ceased due to a reduction in force caused by closure of the base. Effective July 1, 1974, Mr. Lane received a temporary appointment with the Portsmouth Naval Shipyard which had a termination date of September 30, 1974.

Mr. Lane is a Staff Sergeant in the United States Army Reserves. He received orders sending him to annual training for the period of August 18 through 31, 1974. Although we do not have before us a certificate indicating Mr. Lane's completion of service for that period, such a certificate is not necessary for the purposes of this decision. Mr. Lane requested and was denied military leave for the period of his annual training. As a consequence he used 11 days of annual leave which he claims should have been military leave and not charged against his leave record.

Our Office has previously held that the Congress, in restricting eligibility for military leave to "permanent and temporary indefinite" employees (5 U.S. Code § 6323 (1970)), excluded from eligibility employees having part-time, intermittent, and temporary appointments for periods of less than 1 year. 46 Comp. Gen. 72, 73 (1966). Although Mr. Lane had previously been eligible for military leave, as a result of his removal during a reduction in force, he lost that eligibility. His subsequent temporary appointment for less than 1 year does not carry with it eligibility for military leave.

In view of the above, Mr. Lane's request for military leave with pay and restoration of his annual leave is denied.

[B-183438]

Bids—Late—Telegraphic—Delay Due to Government Telex Machine Malfunction

Telegraphic bid transmitted to procuring agency before bid opening but not transcribed due to Government Telex machine malfunction cannot properly be

classified as lost bid as protester can establish, without use of self-serving statements, time of bid transmission and receipt as well as contents of bid.

Bids—Late—Telegraphic—Untranscribed—Due to Government Telex Machine Malfunction

Untranscribed telegraphic bid (due to Government Telex machine malfunction) should not be rejected as late bid, even though Armed Services Procurement Regulation (ASPR) 7-2002.2 appears to indicate opposite result in determining possible mishandling by Government due to lack of requisite acceptable evidence of time of receipt and question concerning whether "receipt" occurred, since to do so would contravene intent and spirit of late bid regulation. Conclusion is reached in view of fact that mishandling in transcription of telegraphic bid and resultant failure of Government installation to have actual control over bid or evidence of time of receipt does not appear to have been contemplated by ASPR 7-2002.2.

In the matter of the Hydro Fitting Manufacturing Corporation, June 2, 1975:

On February 3, 1975, the Defense Supply Agency (DSA), Defense Construction Supply Center (DCSC), Columbus, Ohio, issued invitation for bids (IFB) No. DSA700-75-B-1579 as a 100-percent small business set-aside for bids on 19 contract line items (CLINs 0001 through 0019) of Federal Supply Class Code 4730. CLINs 0020, 0021, and 0022 were added by amendment No. 0001, issued on February 5, 1975. Section "C," paragraph C01 of the IFB authorized telegraphic bids.

Hydro Fitting Mfg. Corp. (Hydro), at 4:45 p.m. on February 28, 1975, transmitted a telegraphic bid to DSA. The telegram was acknowledged by the automatic "reply back" system of the DSA Telex receiver, the DCSC automatic acknowledgement appearing at the beginning (acknowledging a proper hook-up) and end (acknowledging receipt) of Hydro's copy of its telegram.

Bid opening took place at 10:30 a.m. on March 5, 1975. The abstract reveals that seven bids were received and opened, but Hydro's name does not appear among the seven bidders listed. On March 10, 1975, an envelope postmarked in El Monte, California, on March 6, 1975, the day after bid opening, was received at DSA. The envelope was identified as a confirming bid on the IFB in question but, according to DSA, did not identify the bidder. Since the bidder was not identified and DSA had no record of any telegraphic bids having been received under the IFB, the envelope was opened for the purpose of identifying the bidder. Inside the envelope was a copy of what purported to be a telegraphic bid submitted by Hydro at 4:45 p.m. on February 28, 1975, together with a properly signed bid. Hydro has stated that it sent the confirming letter as a matter of course, before learning that its telegraphic bid had not been received.

Hydro, upon learning that its telegraphic bid had not been recorded on the abstract, questioned DSA as to the reason therefor. DSA's

investigation of this matter revealed that the Digital Branch at DSA had no record of the telegraphic bid but that the Telex machine was out of order from sometime after 3:30 p.m. until about midnight on February 28, 1975. DSA states that:.

> * * * There is no record of incoming messages during this period because the Telex machine ran out of paper and the tape was jammed but it continued to acknowledge incoming messages * * *.

Hydro was then informed that its telegraphic bid was not received and could not be considered for award purposes because of the difficulties with the Telex machine. Hydro, having submitted what would have been the lowest bid on CLINs 0009 through 0012, 0013 through 0017, 0020, 0021, and 0022, protested to our Office DSA's rejection of its bid.

The facts of this matter are not in dispute. DSA states that "There can be little doubt that the telegram was received and acknowledged by the Digital Branch * * * on February 28, 1975 but was not recorded because the Telex machine ran out of paper and the tape jammed." DSA, however, has taken the position that Hydro's telegram should be regarded in the same manner as a lost bid and not considered for award. DSA argues further that, even if the telegram is not considered as a lost bid, it could only be considered for award as a late bid under clause C39 of the IFB, entitled "LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS," since it clearly was not received in the bid opening room by 10:30 a.m. on March 5, 1975.

As a result of Hydro's protest, DSA is withholding the making of any awards under the IFB until our Office has decided this matter. For our Office, this appears to be a case of first impression.

DSA first seeks to reject Hydro's bid as a lost bid, relying on the following previous decisions of our Office—B–170437, August 10, 1970; B–167369, September 18, 1969, and B–166973, June 26, 1969. In each of these cases, the ostensible bidder had complied with all of the requirements of the particular invitations dealing with the timely submission of bids, but the bid had been lost after being received at the procuring activity prior to bid opening. In each case, notwithstanding the fact that the ostensible bidder produced a receipt for certified mail evidencing that an envelope had been mailed to and received by the procurement agency, the receipt did not show the contents of the envelope or the mailing time. In those circumstances, we concluded that it would not be reasonable or permissible to allow the ostensible bidder to resubmit the bid for award purposes. We felt that award on the basis of self-serving statements as to the contents of the bid would not be consistent with the maintenance of the competitive bidding system. *See, also*, B–149981, October 25, 1962.

In our opinion, however, the case at hand can be distinguished from the lost bid cases and should not be governed by the results there. The facts here eliminate the situation extant in the lost bid cases—the attempted resubmission of a bid through self-serving statements as to what exactly a lost bid contained. Here, Hydro has produced a copy of the acknowledged telegraphic bid which was sent to DSA. The copy of the telegram contains the contents of the bid, the time of the hook-up with the DSA Telex, the time of transmission, and DSA's acknowledgment of receipt symbol. In our opinion, this evidence clearly establishes the time of bid transmission and receipt, as well as the contents of the bid. In support of this, we observe that Hydro was unaware of the time frame within which the DSA Telex was inoperative when it sent the confirming copy of its bid to DSA. In our opinion, this fact precludes any doubt that the copy of the telegram purporting to be Hydro's bid is authentic and represents the bid transmitted to DSA prior to bid opening.

Moreover, we disagree with DSA's position that since Hydro's bid was not received in the bid opening room by 10:30 a.m. on March 5, 1975, it must necessarily be treated as a late bid. Armed Services Procurement Regulation (ASPR) § 2–303.1 (1974 ed.) states:

> Bids received in the office designated in the Invitation for Bids after the exact time set for opening are "late bids." A late bid * * * shall be considered only if the circumstances outlined in the provision in 7–2002.2 are applicable.

ASPR § 7–2002.2 (1974 ed.) prescribes the use of the following clause, which was utilized in the IFB as clause C39, mentioned above, which states in pertinent part:

> (a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:
>
> * * * * * * *
>
> (ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.
>
> (c) The only acceptable evidence to establish:
>
> * * * * * * *
>
> (ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

DSA, relying on the above-cited provisions, has stated that:

> Since receipt of the telegraphic bid in question cannot be established by the time/date stamp or other documentary evidence maintained at this Center, the telegraphic bid does not qualify for consideration under Clause C39 * * * .

In the past, our Office has construed ASPR § 7–2002.2 (formerly ASPR § 2–303.2) as authorizing the consideration of a late bid which arrived at a Government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the invitation. However, in the cases considered, bids did not reach the

designated bid opening office until after bid opening due to mishandling on the part of the installation. *See* 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B–165474, January 8, 1969; B–163760, May 16, 1968; and B–148264, April 10, 1962. In these cases, the time/date stamp on each bid wrapper was used to establish timely receipt at the Government installation. In the instant situation, there is neither the bid nor a time/date stamp or other documentary evidence of receipt maintained at the installation to establish receipt. Therefore, argues DSA, the test of ASPR § 7–2002.2(c)(ii) has not been met and Hydro's "late" bid cannot be considered.

We agree with DSA in that a reading of the regulation as implemented in the invitation would correctly appear to authorize not considering the confirming telegraphic bid of Hydro submitted after bid opening. Not only is the requisite acceptable evidence of time of receipt nonexistent but, despite DSA's statement that the original telegraphic bid was received and acknowledged, we believe that whether there was "receipt" in the context of the regulation is questionable. In this regard, consideration of a late telegraphic bid is permitted only if late receipt was due to mishandling by the Government after receipt at the Government installation. That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have involved, instances where a tangible bid was mishandled after physical receipt.

While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulation. The regulation insures that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In addition, "* * * The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules." 42 Comp. Gen. 508, 514 (1963); and B–157176, August 30, 1965. This belief is particularly proper here because, in our view, the current regulation did not contemplate the instant circumstances, i.e., mishandling in the transcription of a telegraphic bid and the resultant failure of a Government installation to have actual control over the bid or evidence of time of receipt.

Hydro has produced an acknowledged copy of its transmission to DSA with the time of transmission at the bottom of the message. This copy represents the best evidence available and establishes both the receipt and time/date of Hydro's bid. Moreover, the authenticity of the telegraphic copy of Hydro's bid seems to be buttressed by the

mailing of the confirming copy prior to the time Hydro could have known of the DSA Telex malfunction. Based upon this evidence, we conclude that Hydro's telegraphic bid was not timely considered for award purposes due solely to Government mishandling within the intent and the spirit of the late bid regulation. Accordingly, Hydro's telegraphic bid should be considered for award. We reach no conclusion as to the possibility of mistake in Hydro's bid on CLINs 0020, 0021, and 0022.

[B-166159]

Contracts—Discounts—Erroneous Rate—Clerical Error

Where contractor submitted invoices which stated discount terms of ⅛ of 1 percent for payment within 20 days, although contract provided for discount of 1/10 of 1 percent for 20 days, and Government paid within 20 days and took discount offered on invoices, contractor may be refunded difference between discount rates in amount of $7,908.87, as record indicates discount rate on invoices resulted from clerical error and not from voluntary increase in rate and contractor did not acquiesce in deduction of higher rate.

In the matter of the Consolidated Diesel Electric Company, June 3, 1975:

Consolidated Diesel Electric Company has claimed a refund of $7,908.87, representing alleged excess discounts taken under contract No. DAAE07-68-C-2606 (MYP). The contract provided for a prompt payment discount of 1/10 of 1 percent for payment within 20 days. However, the invoices stated the terms as ⅛ of 1 percent for payment within 20 days. This rate was specially typed on the invoice. There is no dispute between the parties as to the facts. The Government made all payments in question within the 20-day period, thereby earning a discount for prompt payment. The only issue presented is which discount rate was the Government entitled to.

The Defense Supply Agency (DSA) contends that the disputed discount rate (⅛ of 1 percent) was correctly taken pursuant to Defense Supply Agency Manual (DSAM) 7000.1, paragraphs 100602(e), (f). The cited sections read in pertinent part as follows:

e. If the discount terms of the contract are not in agreement with discount terms offered on the invoice, the discount most advantageous to the Government will be taken.

f. When a discount is taken on the basis of preprinted discount terms on the contractor's commercial invoice which differs from the terms in the contract and the contractor requests a refund, refund will be made in the appropriate amount.

However, since DSAM 7000.1 is not published in the Federal Register, it does not have the force and effect of law. The regulation in question is merely an internal instruction and not binding on the claimant.

DSA also relies upon 25 Comp. Gen. 890 (1946), which held that a

discount provision on invoices may be properly taken by the Government if otherwise earned even where the contract had no provision for a prompt payment discount. The case distinguished 5 Comp. Gen. 739 (1926) on the basis that the discounts were taken on numerous occasions over a 3-year period without objection by the contractor, thereby amounting to acquiescence on his part, whereas the claimant in the earlier case brought the error to the attention of the Government within a short period of time.

The general rule is that a printed offer on a contractor's regular billhead does not constitute an express offer of discount amending the contract. 2 Comp. Gen. 83 (1922). The rule was extended to discounts specially typed on the invoice where it was shown to have been in error and no express offer or discount was intended. 5 Comp. Gen. 739, *supra.* On the other hand, if the erroneous discount is specially typed and the contractor accepts the reduced payments over a long period of time without complaint, and there has been some conduct on the part of the contractor tantamount to abandonment, waiver or estoppel, he is said to have acquiesced in such discounts. 25 Comp. Gen. 890, *supra.*

Although the higher discount rate was taken over a time span of approximately 1 year and 9 months before the contractor caught the error, something more than acceptance of a smaller amount due without protest must be shown to constitute acquiescence. *St. Louis, Brownsville & Mexico Railroad Company* v. *United States*, 268 U.S. 169 (1925). The rule of acquiescence was developed in cases where no discount was provided in the contract and the Government by making payment within the stated discount period performed in a manner which benefited the contractor and which was not required by the contract. This, coupled with the contractor accepting the reduced payments over an extended period of time, was determined to estop the contractor from claiming error. 25 Comp. Gen. 890, *supra.* Here, while the Government was not under a duty to make payment within the discount period, the contract provided for a prompt payment discount if payment was made within such period. The discount period of 20 days was the same under the contract or invoice terms, only the discount rate varied. Therefore, we do not believe that the Government was encouraged to make payment within the discount period merely because of the higher rate. The rule of acquiescence, then, is not applicable to this case, and the Government should not reap the benefits of the contractor's error by retaining the money deducted on the basis of the higher erroneous rate.

In view of the foregoing, refund in the amount of $7,908.87 should be made, if otherwise correct.

[B-182999]

Officers and Employees—Transfers—Relocation Expenses—Duty Stations Within United States Requirement

Employee who was separated due to reduction in force while stationed in Okinawa, and was reemployed within 1 year in Washington, D.C., claims reimbursement of real estate expenses and additional temporary quarters allowance. Statute and regulations require that both old and new duty stations be in United States, its territories or possessions, Canal Zone or Puerto Rico in order to receive this reimbursement. Okinawa was not territory or possession of United States before its reversion to Japan because Japan had retained residual or de jure sovereignty under Peace Treaty. Therefore, disallowance of claim is sustained.

In the matter of real estate expenses and temporary quarters allowance—status of Okinawa, June 3, 1975:

This matter concerns a request for reconsideration of Settlement Certificate No. Z-2559247, issued by our Transportation and Claims Division on August 27, 1974, disallowing Mr. William T. Burke's claim for reimbursement of real estate expenses and additional Temporary Quarters Allowance (TQA) incident to reemployment after a reduction in force (RIF) and a transfer.

According to the record before us, prior to March 1972 Mr. Burke was employed with the Joint United States/Japan Preparatory Commission that negotiated the terms for the reversion of the Ryukyu Islands, including Okinawa, to Japan. Apparently at the conclusion of these negotiations, Mr. Burke was separated due to a RIF. Within a year of his separation, he was able to obtain employment with the Department of the Army, in the Washington, D.C. area, and was entitled to be reimbursed for certain relocation expenses, in accordance with 5 U.S. Code § 5724a(c) (1970). All points at issue between Mr. Burke and the Army, regarding the benefits to which he was entitled, have been settled except for Mr. Burke's contention that he is entitled to be reimbursed for real estate expenses and for an additional 30 day period of TQA.

Reimbursement of real estate expenses and payment of TQA are authorized by 5 U.S.C. § 5724a(a) (1970) which provides, in pertinent part, that:

(3) Subsistence expenses of the employee and his immediate family for a period of 30 days while occupying temporary quarters when the new official station is located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. The period of residence in temporary quarters may be extended for an additional 30 days when the employee moves to or from Hawaii, Alaska, the territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. * * *

(4) Expenses of the sale of the residence (or the settlement of an unexpired lease) of the employee at the old station and purchase of a home at the new official station required to be paid by him when the old and new official stations are located within the United States, its territories or possessions, the Commonwealth of Puerto Rico, or the Canal Zone. * * *

At the time of Mr. Burke's transfer, this authority was implemented by the statutory regulations, Office of Management and Budget Circular No. A–56, Revised August 17, 1971, specifically sections 4.1a and 8.2b, and the departmental regulations, 2 Joint Travel Regulations paras. C8251–2 (change 75, December 1, 1971) and C8350 (change 77, March 1, 1972). We have held, with respect to real estate expenses, that the language in the statute requires that *both* the old and new duty stations be located in the places enumerated. 47 Comp. Gen. 93 (1967). For purposes of eligibility for the additional 30 days of TQA, the employee must have moved to or from the enumerated places which, in this subsection, do not include continental United States. Therefore, the narrow issue presented here is whether or not Okinawa is a "territory or possession" of the United States within the meaning of this particular statute.

The United States' control over Okinawa and the rest of the Ryukyu Islands was recognized by the Treaty of Peace with Japan, 3 U.S.T. 3169, TIAS 2490, which was signed on September 8, 1951, ratified by the United States Senate on March 20, 1952, and proclaimed by the President on April 28, 1952. Article III of the Treaty provides that:

> Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Under Article II of the Treaty, Japan renounced "all right, title and claim" to specified areas, but Okinawa was not one of those areas. Therefore, under the Treaty, the actual remaining relationship between Japan and Okinawa was not completely clear. In *United States* v. *Ushi Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954), the court held that:

> Under Article 3 of the Treaty of Peace, Japan which previously had full sovereignty over Okinawa transferred a part of that sovereignty, while retaining the residue. That portion of the sovereignty which gives the United States "the right to exercise all and any powers of administration, legislation and jurisdiction" under Article 3 may be labeled "de facto sovereignty." The residue or "residual sovereignty" retained by Japan is the traditional "de jure sovereignty." What the situation will be when the United States, under Article 3, makes a proposal to the United Nations to place Okinawa under its trusteeship system and affirmative action is taken thereon is not presently material. 123 F. Supp. at 149.

It is our understanding that Okinawa was never placed within the United Nations Trusteeship system, so Japan retained "residual sovereignty" over Okinawa until it regained full sovereignty following reversion.

Okinawa's status was considered in the context of the Federal Tort Claims Act in *Burna* v. *United States*, 142 F. Supp. 623 (E.D. Va. 1956) aff'd. 240 F. 2d 720 (4 Cir. 1957). In that case the issue was whether or not Okinawa was a "foreign country," within the meaning of the Federal Tort Claims Act exclusion found in 28 U.S.C. § 2680(k) (1952), which excluded from coverage under the act, "[A]ny claim arising in a foreign country." After considering the import of the Peace Treaty, the court held that Okinawa was a foreign country within the meaning of the act.

Title 48 of the U.S. Code is entitled "Territories and Insular Possessions." Included in that title are the basic statutory authorities for the governments of territories and possessions of the United States, including, among others, the Virgin Islands, Guam, Eastern Samoa, and the Trust Territory of the Pacific Islands, but not Okinawa or the Ryukyu Islands. The government of Okinawa, while it was under the control of the United States, was established not by statute, but by Executive order, beginning with Executive Order 10713, 22 F.R. 4007, June 7, 1957, which was amended several times prior to the reversion of Okinawa to Japan. While not legally dispositive of the issue, this distinction is another indication that Okinawa held a status other than that of a "territory or possession of the United States." Our Office considered the status of Okinawa in B–159559, February 12, 1968, where we held that Okinawa was not a territory or possession of the United States. That case considered the issue in relation to the efforts of the Department of the Army to procure increased electric power generation capability for the Ryukyu Electric Power Corporation.

All of Mr. Burke's contentions in support of his position that Okinawa was a possession of the United States essentially can be reduced to the argument that since the United States had full judicial, legislative and administrative control under the Peace Treaty, and since the United States relinquished all rights under the reversion treaty, there is nothing that Okinawa could have been other than a de jure and de facto possession acquired by right of conquest. That argument is answered by the court in *United States* v. *Ushi Shiroma*, *supra*, when it held that Japan retained residual or de jure sovereignty over Okinawa. The fact that the United States retained full control over an area is not sufficient to make that area a territory or possession of the United States. The fact that the United States occupies Guantanamo Bay, Cuba, under an indefinite lease, and exercises complete control over the leasehold, does not make Guantanamo Bay a territory or possession of the United States. B–178396, June 18, 1973. Mere control is not sufficient to make an area a territory or possession of the

United States within the meaning of the statute under consideration here.

Accordingly, the disallowance of Mr. Burke's claim by our Transportation and Claims Division is sustained.

[B–181738]

Contracts—Protests—Court Solicited Aid

Objection to request for proposals evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving General Accounting Office decision, untimely issue is addressed on merits along with other issues raised by request.

Contracts—Negotiation—Evaluation Factors—All Offerors Informed Requirement

Where reading of evaluation factors statement in National Aeronautics and Space Administration request for proposals gives reasonably clear indication of relative importance of various factors, requirement that offerors be informed of importance of cost in relation to technical and other factors is satisfied. Description of statement of work as "level of effort" did not establish cost as overriding evaluation factor, because offerors were asked to exercise flexibility and discretion in proposing support services of greater scope and complexity than those performed under predecessor contract.

Contracts — Negotiation — Competition — Discussion With All Offerors Requirement—Actions Not Requiring

Upon further consideration, decision is affirmed that insufficient basis exists to conclude National Aeronautics and Space Administration failed to conduct written or oral discussions required by 10 U.S.C. 2304(g). Controverted areas of protester's proposals—low level of effort; planned demotions of technicians; and salary reductions of key personnel—were deficiencies, not strengths, ambiguities, or uncertainties, and agency could reasonably judge that deficiencies were not required to be discussed under circumstances present.

General Accounting Office—Contracts—Recommendation for Corrective Action—Satisfied

Where General Accounting Office previously judged probable cost evaluation to be doubtful in certain respects, actions taken by National Aeronautics and Space Administration source selection official—in considering certain cost data and reaching determination that neither cost reevaluation nor reconsideration of selection decision is warranted—are responsive to intent of GAO recommendation. Under circumstances, additional analysis in area of application of G&A cost rates does not appear to be required.

Contracts—Protests—Procedures—Information Disclosure

Withholding from protester of certain procurement information furnished by agency in connection with protest does not establish that protest procedure is unfair. Where protester does not avail itself of disclosure remedy under Freedom of Information Act, but relies instead on information made available through agency's protest reports, and agency indicates withholding of procurement sensitive information is appropriate, withholding by GAO of such information is proper under bid protest procedures.

In the matter of Dynalectron Corporation; Lockheed Electronics Company, Inc., June 5, 1975:

Dynalectron Corporation, in a letter to our Office dated January 24, 1975, requested reconsideration of our decision in regard to its protest against the selection by the National Aeronautics and Space Administration (NASA) of Lockheed Electronics Company, Inc. (LEC), for final negotiations leading to the proposed award of a contract for site support services under request for proposals (RFP) No. 9-WSRE-3-3-1P (*Dynalectron Corporation et al.*, 54 Comp. Gen. 562 (1975)).

The principal contentions presented by Dynalectron in its request are that the RFP should be canceled because it failed to list the relative importance of price vis-a-vis other evaluation factors; that a statement in our decision that Mission Suitability was the most important of the evaluation criteria is erroneous; and that NASA in several respects violated the requirement of 10 U.S. Code § 2304(g) (1970) regarding the conduct of "written or oral discussions."

By letter dated February 11, 1975, to our Office NASA responded to the recommendation which was contained in our decision. The NASA Administrator stated essentially that after full consideration of our decision, the Source Selection Official (SSO) had concluded that neither a reevaluation by the Source Evaluation Board (SEB) nor a reconsideration of the selection was warranted under the circumstances, and that NASA intended to proceed with the contract award to LEC.

On February 12, 1975, Dynalectron instituted Civil Action No. 75-0208 in the United States District Court for the District of Columbia (*DYNALECTRON CORPORATION* v. *THE HONORABLE JAMES C. FLETCHER et al.*). The complaint requested, *inter alia*, a declaratory judgment stating that award to LEC is contrary to law and regulations; permanent injunctive relief in furtherance of the declaratory judgment; preliminary injunctive relief enjoining defendants from making an award to LEC until our Office rendered a decision on the request for reconsideration; and that the preliminary injunctive relief be continued, in the event of an adverse decision by our Office, until the court has an opportunity to conduct a due process hearing and to render a decision on the merits of plaintiff's request for a declaratory judgment.

The complaint and supporting papers indicate that many of the issues involved in the protest, as well as the points raised in Dynalectron's request for reconsideration and NASA's response to the recommendation contained in our decision, were raised by Dynalectron before the District Court. In short, the propriety of NASA's source selection of LEC was put into issue in the litigation.

Dynalectron's motion for a temporary restraining order was denied by the District Court on February 13, 1975, and recourse by Dynalectron to the United States Court of Appeals for the District of Columbia Circuit in an attempt to overturn the District Court's denial was unsuccessful. On or about February 18, 1975, NASA awarded a contract to LEC for the first year's services. Also, our Office was advised that on or about February 26, 1975, plaintiff and defendants stipulated that all further proceedings in the case would be suspended until our Office rendered a decision on the request for reconsideration, and for a period of 5 days thereafter, to allow defendants an opportunity to file an opposition to plaintiff's motion for a preliminary injunction should it be necesary for defendants to take this action. We understand that the stipulation was signed by the parties and the presiding judge.

Ordinarily, our Office will not render a deicsion on the merits of a protest where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. See *Nartron Corp. et al.*, 53 Comp. Gen. 730 (1974). The same rule applies where the issues in a request for reconsideration before our Office become involved in litigation. See *Cincinnati Electronics Corporation et al.*, B–175633, January 25, 1974. However, this practice is subject to the exception that we will render a decision where the court expresses an interest in receiving our decision. *See*, for example, 52 Comp. Gen. 706 (1973) and *Descomp, Inc.*, 53 *id.* 522 (1974).

In the present case, we believe that the above stipulation is to be reasonably regarded as an expression of the court's interest in receiving our decision on the merits of Dynalectron's request for reconsideration. For the reasons which follow, our decision of January 15, 1975, is affirmed upon reconsideration. Also, Dynalectron's protest is now denied.

Dynalectron presents two arguments in regard to the RFP's statement of evaluation factors and criteria. This statement is quoted at pages 7–8 of our decision of January 15, 1975. Dynalectron first contends that because the RFP failed to indicate the relative importance of price vis-a-vis the other evaluation factors, it should have been canceled because the record indicates that such failure resulted in prejudice to the competing offerors, citing *Signatron, Inc.*, 54 Comp. Gen. 530 (1974). This decision has since been affirmed on reconsideration (*Signatron, Inc.*, B–181782, April 2, 1975).

In this regard, our Interim Bid Protest Procedures and Standards require that protests based upon alleged improprieties in solicitations which are apparent prior to the closing date for receipt of proposals shall be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1974). Therefore, a protest at this late stage of the procurement against the sufficiency of the RFP's statement of evaluation

factors is clearly untimely and not for consideration. See *BDM Services Company*, B-180245, May 9, 1974. However, since the court may be interested in this matter, it is appropriate under the circumstances to address the issue for the record. *See*, in this regard, 52 Comp. Gen. 161, 163 (1972).

Dynalectron next contends that statements in our decision that Mission Suitability was the most important of the RFP's evaluation criteria are erroneous, because the RFP made no specific reference to the relative importance of the various factors. That issue will also be addressed.

The protester has cited the *Signatron* decision for the following general principle which has been recognized in a number of decisions of our Office:

> * * * [I]ntelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is not served if offerors are not given any idea of the relative values of technical excellence and price. See *Matter of AEL Service Corporation et al.* * * * [53 Comp. Gen. 800 (1974)]; 52 Comp. Gen. 161 (1972).

Signatron involved a situation where the RFP specified "Approx. 75%" for "Technical Considerations" and "Approx. 25%" for "Management Capability;" it was separately stated that "price and other factors" would be considered. Thus, although the RFP mentioned price as a factor, no indication of its relative importance was given. Our decision found that this and other deficiencies in the RFP were material deviations from the statutory and regulatory negotiation requirements such as to require the reopening of negotiations. See also *TGI Construction Corporation et al.*, 54 Comp. Gen. 775 (1975), where we found the RFP to be defective because it listed five evaluation factors (four technical factors and cost) in a single sentence without giving any indication of their relative order of importance.

In contrast, we believe the RFP in the present case provided several indications of the relative importance of cost:

—The initial sentence in the RFP's evaluation statement—which states that the SEB is interested in the quality of service and the probable cost—would indicate that these were the two most important factors, with quality of service, or Mission Suitability, being the foremost consideration.

—The first sentence in the numbered paragraph 2—referring to the "major criteria" identified above (in the discussion of Mission Suitability)—is a further indication that Mission Suitability was to be considered most important.

—The subsequent statement that offerors should not minimize the importance of responding in regard to factors which were not numer-

ically weighted (Cost and Other Factors) would indicate that it was believed to be desirable to caution offerors against placing overwhelming importance on Mission Suitability considerations to the exclusion of Cost and Other Factors, which, although of lesser importance, were nevertheless to be accorded some importance in evaluating the proposals and reaching a source selection decision.

—The grammatical structure of the RFP's statement of evaluation factors and criteria as a whole, that is, a heading entitled "B. *Evaluation Criteria and Relative Importance:*," followed by numbered paragraphs "1. *Mission Suitability:*," "2. *Cost:*" and "3. *Other Factors:*" would further tend to indicate that Mission Suitability was most important, followed in descending order of importance by Cost and Other Factors.

We would also note that the RFP advised offerors that award of a cost-plus-award-fee contract was contemplated. In this regard, NASA Procurement Regulation 18–3.805–2 (41 C.F.R. § 18–3.805–2 (1974)) provides, *interalia*, that where a cost-reimbursement type contract is involved, estimated costs and proposed fees should not be considered as controlling in selecting a source, and that the primary consideration is which contractor can perform the contract in a manner most advantageous to the Government. The RFP also advised offerors that their proposed costs would be analyzed and presented to the SSO for his consideration. We believe that consideration of these facts would give offerors further insight into the relationship between proposed costs and probable costs (estimated price) and their relationship to the other evaluation factors in a procurement of this type.

In view of these considerations, we believe the RFP gave a reasonably clear indication of the relative importance of the various factors. This is not to say, of course, that the RFP statement represented an ideal exposition of the evaluation factors, but merely that, in our opinion, it met a minimum standard of legal sufficiency.

We note that Dynalectron has additionally contended that since, as recognized by our prior decision, the RFP specified a "level of effort" based upon NASA's minimum needs and contained a detailed description of the technical requirements involved in fulfilling those needs, the overriding factor for evaluation and source selection should have been cost.

It is correct that both NASA's source selection statement and our decision described the RFP as specifying a "level of effort." However, it is also clear that the level of effort was not specified in complete and exact detail. Labor categories and their estimated hours were set forth in the RFP, but labor skill mixes and the quantum of management requirements were not. Dynalectron's protest itself, of course, repeatedly emphasized these points and the fact that the RFP explicitly

accorded to offerors flexibility and discretion in preparing their proposals. Our prior decision also recognized these facts. Also to be noted is NASA's view that the work called for in the RFP was to be of greater scope and complexity than the work performed in the past. See, in this regard, the discussion of this point in our prior decision and the discussion *infra*.

In this light, we cannot agree that the work called for in the RFP had the effect of establishing cost as the most important evaluation factor. In addition, since the SSO, based upon the results of the evaluation, found "significant" Mission Suitability differentials among the competing offerors, it is not apparent why he should have turned to the cost factor as the overriding basis for a selection decision.

In the request for reconsideration, Dynalectron next contends that NASA failed to meet the requirement for conducting "written or oral discussions" (10 U.S.C. § 2304(g) (1970)). The protester's position can be summarized as follows: Dynalectron contends that it reasonably interpreted the RFP as being directed more towards the cost of continuing the level of past performance than to what it terms "increased and unnecessary technical excellence." Thus, in Dynalectron's view, the technical deficiencies found by NASA were not actually deficiencies, but strengths, since Dynalectron's proposed low level of effort was what the RFP called for. At the very least, viewing the issue most favorably to NASA, the alleged "deficiencies" should have been regarded as ambiguities or uncertainties which NASA should have clarified in the discussions. In this regard, Dynalectron contends that our decision erroneously stated that the protester admitted that certain controverted aspects of its technical proposals were "weaknesses," which should have been discussed so that the proposals could have been revised to accommodate NASA's desires.

Dynalectron further points out that it had no knowledge of the guidelines used by the SEB in the technical evaluation. Dynalectron believes that the application of these guidelines created certain ambiguities in the evaluation process, because the SEB erroneously determined that Dynalectron technicians would be demoted. The protester contends that NASA had a full opportunity to correct these mistakes through discussions with it. However, NASA did not discuss these matters, but mistakenly concluded (1) that the skills mix and management effort proposed by Dynalectron were *per se* too low; and (2) that there was doubt that Dynalectron could furnish even the low level of effort proposed, because of demotions of technicians and salary reductions of key personnel.

Dynalectron implies that, if NASA had discussed these matters, the agency first of all would have realized that Dynalectron's interpreta-

tion of the RFP was correct and, therefore, that the low level of effort proposed was actually an appropriate and desirable response to the RFP. In any event, NASA would, at a minimum, have understood that there was no deficiency in Dynalectron's low level of effort *per se*, because there were in fact no planned demotions or salary reductions.

Before addressing the question of discussions, we must first note that the above contentions were advanced by Dynalectron in its protest, were considered, and were rejected. Our earlier decision found, for instance, that the protester had not shown that NASA's interpretation of the RFP as calling for a work effort of increased scope and complexity was incorrect. Likewise, we rejected the protester's arguments concerning the unreasonableness of the SEB's evaluation of the proposed demotions and salary reductions in the Dynalectron offers. Our earlier decision also noted that while all of the contentions presented had been considered, the decision nevertheless focused upon those central issues which were believed to be dispositive of the protest. In this light, we see no difficulty with Dynalectron's contention that our decision incorrectly stated that the protester had admitted weaknesses in its proposals which could have been corrected as a result of discussions so as to accommodate NASA's desires. In reaching our prior decision, we considered the protester's arguments that its low level of effort was a "strength" or an "ambiguity." Our conclusion then, as now, was that we could not object to NASA's determination that the controverted aspects of the proposals were actually weaknesses or deficiencies. See the discussion *infra*. We would also note that Dynalectron's submissions to our Office at several points indicated its willingness to revise its proposals to accommodate NASA's desires if given the opportunity to do so (for example, pages 25 and 36 of Dynalectron's September 30, 1974, letter to our Office).

Moving to the question of discussions, our earlier decision found an insufficient basis to conclude that where there was any departure by NASA from the statutory requirement for written or oral discussions.

In regard to Dynalectron's argument that its proposed low level of effort was actually a "strength," and that NASA should have conducted discussions so as to correct its own misunderstandings, we would again note that Dynalectron has not shown that NASA's view of the RFP as calling for a work effort of increased scope and complexity is incorrect. In this light, we see no basis to conclude that NASA should have regarded Dynalectron's proposed low level of effort as a strength.

In addition, we see no reason why a proposed low level of effort *per se* should have been regarded as ambiguous or uncertain. It is true that, in certain circumstances, discussions would be required where the proposals indicate that one or more offerors have reasonably placed

emphasis on some aspect of the procurement different from that intended by the solicitation—because, unless this difference in meaning was removed, the offerors would not be competing on the same basis. *See* 51 Comp. Gen. 621, 622–623 (1970) and NASA Procurement Regulation Directive (PRD) No. 70–15 (revised), September 15, 1972, section III.e(2)(ii). In the present case, we note that Dynalectron was the incumbent contractor. As such, we believe it could reasonably be regarded as having some understanding of the peculiarities and nuances involved in the performance of site support services at White Sands Test Facility. In fact, it may be that, of all the offerors, Dynalectron was in the best position to understand what the RFP called for. In these circumstances, we cannot say that NASA erred in failing to regard Dynalectron's reading of the RFP, as evidenced by its proposals, as being a reasonable misunderstanding of what the solicitation requested. Likewise, we cannot say the agency should have regarded the proposed low level of effort submitted by an experienced contractor as being ambiguous or uncertain. We believe that under these circumstances the proposed low level of effort could reasonably be regarded as a weakness resulting from the offeror's lack of diligence, competence, or inventiveness in preparing its proposal. *See* 51 Comp. Gen., *supra*, at 622; NASA PRD No. 70–15, September 15, 1972, section III.e(2). Under these circumstances, we cannot say that NASA failed to conduct required discussions.

In regard to the technician demotions, Dynalectron's request states:

> * * * NASA made no effort to inquire of Dynalectron as to how it intended to provide its technician work force. Thus, Dynalectron was not afforded an opportunity to explain that it did not intend to demote any technicians on the job and that the new skills mix configuration would be obtained through (1) normal attrition, (2) transfers of people between the WSTF work force and other Dynalectron work forces in the same area, and (3) upgrading skills of lower level technicians. Dynalectron could not have anticipated in its original proposal that it would have had to give such explanations, since it could not be aware of NASA's concern about the skills mixes as reflected in its "Nominal guidelines." * * *

Initially, this does not appear to be a situation where discussions might be required because a proposal was deemed weak for failing to include substantiation for a proposed approach. 51 Comp. Gen., *supra*, at page 623. Dynalectron's proposals contained information concerning its technician manning and staffing and, based upon the information, the NASA evaluation judged Dynalectron's proposals to be deficient in this respect. Our earlier decision found that both the application of the technical guidelines and the resulting evaluation had not been shown to be objectionable. An additional consideration is that to discuss such a deficiency raises the possibility of unfairness to other offerors resulting from discussions—because Dynalectron would have been given the opportunity to improve its proposals in this area. Thus,

discussions might have promoted a leveling effect among Dynalectron and other offerors whose proposals were stronger in this area. This justification for foregoing discussions would be more persuasive if there were a risk of transfusion of novel approaches between proposals, which does not appear to be involved here. In sum, while we do not necessarily believe that discussions of this point would have been undesirable or unwise from a standpoint of sound negotiation practices, at the same time we do not believe a sufficient basis exists to conclude that NASA's declining to hold discussions was legally objectionable.

Concerning the proposed salary reductions, Dynalectron's request states:

> The error that NASA made and the error that has been adopted by the GAO is in looking only to the Best and Final Cost Proposal to determine Dynalectron's intention. The salaries were also stated for Key Personnel in the Technical Proposal and those did not change at all in the "Best and Final Offer." A review of the two proposals must at least result in an inconsistency which would have to be resolved by a request for clarification. * * *

In this regard, we note the following facts with reference to Dynalectron's Alternate Proposal No. 2 (the same observations apply with reference to Dynalectron's basic and Alternate No. 1 proposals). The initial technical proposal, dated March 1974, included Key Personnel Résumés containing descriptions of the individuals' education, experience, etc. These résumés also contained blanks for "Proposed Annual Salary," which were filled in with lump-sum dollar amounts. Also, the initial cost proposal, dated March 1974, contained cost information on Key Personnel consisting, *inter alia*, of the total number of work hours per person; salary rates per hour; and total base labor costs per person.

The best and final technical proposal, dated May 20, 1974, included material on Key Personnel, described as an "addendum," which contained information concerning the identity and background of various personnel. The best and final technical proposal, as Dynalectron observes, does not contain information regarding proposed salaries. The best and final cost proposal, dated May 20, 1974, indicated the total work hours per person, which were unchanged from those indicated in the initial cost proposal. Also, as found by NASA, there were certain reductions in salary rates. In addition, the "INTRODUCTION" to the best and final cost proposal contains the following statement: "The cost proposal portion of this volume is complete and cross-reference to our Alternate proposal No. 2 dated March 1974 is not necessary."

In view of the foregoing, we believe the SEB could reasonably look to the salary information in the best and final cost proposal

as superseding the initial proposal's salary information and as being the final indication of the protester's intent in regard to proposed salaries. Therefore, we cannot conclude that there was an inconsistency between the technical and best and final cost proposals which should properly have been viewed as requiring clarification through discussions.

Dynalectron has further contended that the question of whether its proposed G&A costs are absolute dollar amounts or ceiling rates could have been resolved by a simple inquiry in the discussions. In this regard, our decision treated the issue of the nature of the G&A ceiling and concluded that the ceiling as requested and proposed is a percentage rate and not an absolute dollar amount. Dynalectron had not contested this conclusion. Therefore, we see no basis to consider further the nature of the G&A ceiling as it relates to the requirement to conduct discussions.

Dynalectron further contends that the application of the G&A percentage rates to probable costs in the SEB's cost evaluation should have been discussed with the offerors. Dynalectron contents that when an offeror's direct costs are adjusted upwards in the probable cost evaluation, the G&A percentage rate applied to such costs should decrease, citing *Lockheed Propulsion Company et al.*, 53 Comp. Gen. 977 (1974). Dynalectron points out that in the *Lockheed Propulsion Company* case, both offerors' costs had been increased in the probable cost evaluation, and our Office found that the procedure employed by the SEB in applying G&A rates thus was consistently applied to all offerors. The protestor points out that the present case, NASA's application of the ceiling percentage rates to probable costs operated solely to its detriment, since its probable costs had been increased in the evaluation, while LEC's had been decreased. Dynalectron contends that the G&A rates applied to its probable costs should have been lower, and that the rates applied to LEC's probable costs should have been higher.

Further, the protester contends that once the SEB had determined to adjust the offerors' probable costs, it was then obligated to inquire of the offerors whether the adjustments had any impact on the G&A "amounts or rates" proposed, so that the matter could have been clarified at that time and resolved in a fair and equitable manner.

We do not believe this issue involves the requirement to conduct discussions. As to the nature of the G&A ceiling requested and proposed, see the discussion of this point in our prior decision, and *supra*. Rather, the issue raised relates to the propriety of the probable cost evaluation itself as regards this aspect of the proposals.

In this connection, we would note that our earlier decision made the following recommendation to NASA:

* * * The only question for consideration is what recommendation, if any, is mandated by our doubts concerning certain aspects of the probable cost evaluation. (See pp. 19–21.) In this regard, we note that although a cost reevaluation might reveal an increase in the probable cost differential between Dynalectron and LEC, this development would not necessarily have a decisive effect on the selection decision, since a wider differential might not exceed the range of uncertainty which exists in estimating for cost-type contracts over a period of years.

Accordingly, we recommend that the SSO determine, in light of the views expressed in this decision, whether a reevaluation of costs is called for under the circumstances, or whether our doubts relating to the evaluation of the criterion which was second in importance are not, in the SSO's judgment, of sufficiently serious impact to affect the validity of his selection decision. In the event the SSO determines that a cost reevaluation is called for, we recommend that he then determine whether the results of the reevaluation mandate a reconsideration of his selection decision.

An addendum to the Source Selection Statement, dated February 11, 1975, describes the actions taken in response to our recommendation:

We decided to explore whether the probable magnitude of additional cost differences between proposals based on nonnormalized staffing plans could be assessed on the basis of data previously developed by the SEB in its evaluation. Such data were available, and calculations based thereon were submitted to us by the Chairman of the SEB. In the light of these data we found it unnecessary for present purposes to consider further whether or not the methodology employed by the SEB in evaluating the probable cost to the Government of direct labor was doubtful in this procurement.

The calculations presented to us did not use a normalized probable cost for direct labor. Instead, individualized direct labor probable costs were estimated based upon adjusted individual direct labor staffing proposals. The latter probable costs were substituted for the previously SEB normalized costs for direct labor, and the remainder of the costs were calculated on the basis of the same rationale as the SEB used in its original evaluation.

In arriving at the individualized adjusted direct labor probable costs, neither the direct labor plans proposed by the firms nor the SEB direct labor guidelines were employed. Rather, the individualized staffing plans were arrived at by utilizing the original SEB approach to establishing the Mission Suitability scores. This approach set up a range of acceptability, from 20 percent below the numbers in the various labor categories in the Government's estimated staffing plan to 20 percent above. Where a proposed labor category fell within the range, no penalty in Mission Suitability score was assessed whereas a penalty was assessed for proposing staffing outside of the range.

Following this rationale, it was feasible to construct individualized direct labor staffing plans for both Lockheed and Dynalectron by accepting the staffing where the actual numbers of people proposed in a skilled category fell within the range, but adjusting the staffing for skill numbers outside the range up or down to the outer perimeter of the range. This adjustment process resulted in an upgrading of the Dynalectron work force, although not as much as would be the case if adjusted to the Government guideline. The Lockheed adjustments under this approach were not as sizable, since the Lockheed staffing either fell within the range or was closer to the outer perimeter of the range than was Dynalectron.

We recognized that the staffing calculated through this approach would not necessarily represent a work force for any of the firms which the SEB would find totally acceptable. Nevertheless, we agreed that this calculation of individualized direct labor staffing for the firms formed an acceptable basis upon which to calculate individualized probable direct labor costs for analysis purposes. It would represent the most favorable costing of direct labor for Dynalectron. Adjustment to a labor force acceptable to the SEB would be less favorable to Dynalectron.

When the appropriate cost factors were applied to the calculated staffing, a total probable proposal cost was derived which could be compared with the

previous SEB total probable costs which had been premised upon a normalized probable cost for direct labor. The comparison indicated that the spread between Lockheed and Dynalectron total probable costs would be increased less one percent over the first two years, and thus the total difference between the two, considering the total dollar value of the procurement, was not materially increased. Furthermore, we noted that the increased difference between the total probable costs would be less if the direct labor staffing were to be adjusted closer to a totally acceptable staffing plan instead of to the outer perimeter of the range of acceptability for the competitive range evaluation under Mission Suitability. In light of the foregoing analysis, it did not appear reasonable to reconvene the SEB to determine totally acceptable direct labor staffing plans, because the adjustments to the outer perimeter of acceptability did not materially alter the total probable cost differences.

We concluded from the foregoing examination, analysis and calculations that the doubts expressed by the Comptroller General regarding the methodology used by the Source Evaluation Board do not, under the circumstances, have a sufficiently serious impact to affect the validity of the source selection decision. Taking into account the high level of the technical and managerial services required and the range of uncertainty which exists in estimating for multiyear cost reimbursement type contracts, it was our judgment that the significant technical advantage of Lockheed still outweighed the slight possible cost advantage of Dynalectron. In view of this judgment, we determined that neither a cost reevaluation by the SEB nor a reconsideration of the selection decision was required under the circumstances.

We view the actions taken as being responsive to the intent of our recommendation. As regards Dynalectron's argument concerning G&A adjustments, the basic concept cited is, as noted in the *Lockheed Propulsion Company* decision, supported by accounting principles. However, in view of the relatively small portion of overall costs comprised by G&A, and after review of the data submitted by NASA, we cannot say that further analysis or adjustment in this area must be regarded as requisite to a minimally adequate evaluation. Therefore, on the present record we do not have any further recommendations to make in regard to the probable cost evaluation or the source selection decision.

Several additional points presented by the protester must be considered.

Concerning the manning and staffing areas, Dynalectron has again contended that the DCAA auditor who analyzed Dynalectron's basic best and final cost proposal correctly understood the proposal and clearly recognized that no reductions in salaries were proposed. Dynalectron suggests that the auditor be contacted so as to ascertain his understanding of this matter.

This contention was considered and rejected in our decision, and Dynalectron has presented no evidence indicating why our disposition of this question was incorrect. Accordingly, we see no basis to reconsider our initial decision on this issue.

Dynalectron also contends that the withholding from it by NASA of a "substantial amount of the procurement information" (see page 564, our decision of January 15, 1975) raises a substantial question of due process in the protest procedure, in that a protester is charged with a heavy burden of proof but is not afforded any means by which to obtain information necessary to carry that burden.

We do not agree that Dynalectron was without the means to obtain information which it believed to be necessary to present its case. The fact that information was withheld by NASA does not mean it was necessarily unobtainable by the protester. Dynalectron could have attempted to obtain NASA procurement documents by pursuing a disclosure request under the Freedom of Information Act, 5 U.S.C. § 552 (1970). To our knowledge, the protester did not avail itself of this alternative, but instead relied on the information which became available in NASA's reports on the protest furnished to our Office. Where a protester has not sought disclosure of records from the agency, and the contracting agency has indicated to our Office its belief that withholding of certain information is appropriate, withholding of that information by our Office under our Interim Bid Protest Procedures and Standards is proper. See *Unicare Health Services, Inc.*, B–180262, B–180305, April 5, 1974.

Lastly, the correction of a typographical mistake in our decision of January 15, 1975 (54 Comp. Gen. 562), should also be noted for the record. The second sentence in the second paragraph on page 565 should have read as follows: "Offerors were requested to provide complete and detailed information on all evaluation factors for the first two contract years. For the third, fourth and fifth years, offerors were requested to submit detailed staffing and manning information and summary cost information."

[B–181261]

Contracts—Specifications—Restrictive—Particular Make—"Or Equal" Product Rejected—Determination Arbitrary and Capricious

In brand name or equal solicitation where agency had no reasonable basis to determine that offered item was not "equal," determination to reject bid must be found to be arbitrary and capricious. Accordingly, bidder is entitled to bid preparation costs.

Contracts—Protests—Preparation—Costs—Noncompensable

Expenses incurred by bidder–claimant subsequent to bid opening to enlighten contracting officer of true facts and/or to pursue protest are not expenses incurred in undertaking bidding process but are noncompensable protest costs.

Bids—Preparation—Costs—Recovery

Expenses incurred by bidder–claimant in researching specifications, reviewing bid forms, examining cost factor and preparing draft and actual bid are compensable bid preparation expenses.

In the matter of the T&H Company, June 9, 1975:

This decision involves the claim of T&H Company for bid preparation costs in the amount of $507.50. For the reasons set forth below, we find that the claimant is entitled to recover an amount not in excess of

$260 as compensable bid preparation expenses. Our conclusion as to T&H's entitlement to bid preparation costs is the first GAO decision allowing recovery and it is important to observe that it is based on the particular facts of T&H's claim. The decision also reflects our recognition of evolving judicial standards in this area from the sole standard of subjective bad faith stated in *Heyer Products Company, Inc.* v. *United States*, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956), to the standards of arbitrary and capricious action set out in *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974) (hereinafter *Keco II*).

It should be noted at the outset that the actions of the Army under the solicitation in question (invitation for bids (IFB) DAFA03-74-B-0069) were the subject of our decision in *T&H Company*, B-181261, September 5, 1974.

Item 1 of the IFB called for the furnishing of 53 unit heaters with a "VERTICAL THROW [OF] 200,000 BTU/HR (MIN) 250,000 BTU/HR (MAX) * * * YOUNG MOD. V-260L, OR EQUAL." Bid opening occurred on March 5, 1974. T&H, the low bidder, offered to supply a Modine model V-870L at $232 per unit. After bid opening the contracting officer requested the facilities engineer to determine if the unit bid by T&H met the specification.

On March 19, the facilities engineer stated in a memorandum to the contracting officer that: "The modine unit heater does not meet our requirements. It is undersized compared to what was specified."

As a result of this statement, on April 4, 1974, a contract was awarded to the second low bidder, Amfac Supply, which had bid on the basis of the brand name item. By letter of April 10, 1974, to the procuring activity, T&H protested the award. The contracting officer thereafter sought more definitive comments from the facilities engineer as to why the Modine unit, which had a throw of 210,000 BTU/hour, was technically unacceptable.

The engineers responded that contrary to the interpretation given the specification by the protester, they had interpreted the specification to mean that the heater must be capable of providing a range from 200,000 to 250,000 BTU/hour. Therefore, since the Modine unit provided only a fixed rate of 210,000 BTU/hour, the engineers at the time the question of size arose felt that the unit was undersized.

After reviewing this conflict in interpretation, the Staff Judge Advocate (SJA) stated that the specification was obviously ambiguous. In response the facilities engineer stated on April 26, 1974, that:

> This is not an "ambiguous specification"; it is the normal classical wording for specifying heat output of unit heaters.

and that:

> The minimum acceptable heat output is 200,000 BTU/hour * * *. There is no requirement that the unit heaters provide a range of output (i.e., vary heat output).

Thereafter, the SJA, after a review of the above-noted memorandum, determined that termination for the convenience of the Government was in order and that award should be made to T&H.

On April 30, 1974, steps were taken with the contractor to attempt to terminate the contract for the convenience of the Government on a no-cost settlement agreement basis.

However, after discussing the status of performance and estimated termination costs with the supply officer and the contractor, the contracting officer determined, with SJA concurrence, that although T&H's heater did, in fact, meet the specifications and that a misunderstanding of the specification had occurred, it was in the best interests of the Government "to let the award stand." T&H was so notified on May 6, 1974.

In our decision of September 5, 1974, we noted that:

> * * * From our review, *the contract was not substantially performed on April 30, 1974.* The using agency had not received any of the heaters at that time, and although the manufacturer may have sent the heaters to the contractor on April 29, 1974, the first shipment of 10 heaters was not received by the Government until June 12, 1974. Another 10 were delivered in July and, according to informal advice, the balance was to be shipped August 26. Based on these facts, *it may have been in the Government's interests to have terminated the contract for the convenience of the Government* * * *. [Italic supplied.]

Our decision did not, however, recommend termination of the Amfac contract for the convenience of the Government and award to T&H since we did not feel that, as of September 5, 1974, this action would have been in the best interest of the Government. The basis for this belief was that T&H would not have had sufficient time to provide the items when needed.

The Court of Claims stated in *The McCarty Corporation* v. *United States*, 499 F.2d 633, 637 (1974):

> * * * it is an implied condition of every invitation for bids issued by the Government that each bid submitted pursuant to the invitation will be fairly and honestly considered (Heyer Products Co. v. United States, 140 F. Supp. 409, 412, 135 Ct. Cl. 63, 69 (1956)), and if an unsuccessful bidder is able to prove that such obligation was breached and he was put to needless expense in preparing his bid, he is entitled to his bid preparation costs * * *. *Keco Industries, Inc.* v. *United States*, 428 F.2d 1233, 1240; 192 Ct. Cl. 733 (1970) (hereinafter *Keco I*).

However, at the outset, we also note that:

> * * * if one thing is plain [in the area of bid preparation cost claims] it is that not every irregularity, no matter how small or immaterial, gives rise to the right to be compensated for the expense of undertaking the bidding process. *Keco II*, at 1203.

In *Keco II*, the Court of Claims outlines the standards for recovery. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious toward the bidder-claimant. *The McCarty Corporation* v. *United States*, *supra*; *Keco I* v. *United States*, *supra*. See *Excavation Construction, Inc.* v. *United States*, 494 F.2d

1289, 1290 (1974); *Continental Business Enterprises, Inc.* v. *United States*, 452 F.2d 1016, 1021; 196 Ct. Cl. 627 (1971).

However, as set out in *Keco II*, there are four subsidiary criteria; namely:

1. Subjective bad faith on the part of the contracting officials—depriving the bidder of fair and honest consideration of his proposal. *Heyer Products Company, Inc.* v. *United States*, *supra.* The court did note that wholly unreasonable action is often equated with subjective bad faith. *Keco II*, *supra*, at 1204; *Cf. Rudolph F. Matzer & Associates, Inc.* v. *Warner*, 348 F. Supp. 991, 995 (M.D. Fla. 1972);

2. That there was no reasonable basis for the agency's decision. *Excavation Construction, Inc.* v. *United States*, *supra; Continental Business Enterprises, Inc.* v. *United States*, *supra;*

3. That the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable regulations. *Continental Business Enterprises, Inc.* v. *United States*, *supra; Keco I*, *supra;* and

4. Violation of statute can, but need not, be a ground for recovery. *Cf. Keco I*, *supra.*

Application of these criteria depends on the type of error or dereliction committed by the procurement officials and whether that action was directed toward the claimant's own bid or that of a competitor.

As the court notes in *Keco II*, *supra*, with regard to situations involving errors or dereliction with respect to the claimant's bid, the principle espoused in *M. Steinthal & Co., Inc.* v. *Seamans*, 455 F. 2d 1289 (D.C. Cir. 1971); *Continental Business Enterprises, Inc.*, *supra*—(also *Excavation Construction, Inc.*, *supra*, i.e., the no-reasonable-basis test—is not far removed from the bad faith test outlined in *Heyer Products Company, Inc.*, *supra.* Thus, it appears that a no-reasonable-basis test should be applied at least to situations, such as here, involving the erroneous consideration of the claimant's own bid. In doing so, our Office will, and does, take due note and consideration of the Court of Claims' designated criteria 3 and 4, *supra.*

The Army argues that the case at hand is analogous to *Keco II*, *supra*, and thus the result reached by our Office should be the same as the *Keco II court*—i.e., we should deny the claim.

Keco I and *Keco II* involved the same two-step advertised procurement. There, two companies were found technically acceptable (Keco Industries and Acme Industries). However, Acme's proposal requested two departures from the specifications. In response to the Acme request, the Government amended the final specification to permit the Acme departures as authorized alternatives. Acme received the award.

When, during the course of contract performance, Acme encountered

difficulties in implementing the two specification deviations which it had requested, and the Government issued formal change orders which increased the contract price, Keco first filed a protest with our Office relative to who should bear the cost of the modifications contained in the change order and later brought suit in the Court of Claims for its bid preparation expenses (and anticipated profit). Keco argued that the Government had acted arbitrarily and capriciously and had breached its implied promise to fairly and honestly consider the Keco bid. See *Heyer Products Company, Inc., supra.*

The Army here argues that:

> * * * In *Keco II* it was held that even though the decision to award was erroneous, it could not be said that there was no reasonable basis for the official action. Admittedly, the decision in T&H was erroneous, however, following *Keco II*, that does not preclude a finding that there was a reasonable basis for the action. We submit that in T&H there was a reasonable basis for the action taken, namely the contracting officer's submission of the question to the cognizant technical personnel and his being informed by them that the T&H bid was nonresponsive. * * *

The Army now also contends that there was an apparent ambiguity in the specification which was not recognized by T&H, the contracting officer or our Office in our earlier decision.

We agree with the Army on the following statement from *Keco II:*

> The mere failure to exercise due diligence in the apraisal of the advantageousness of a competitor's bid, when that omission amounts to simple negligence, is not a sufficient showing of arbitrary or capricious conduct to warrant recovery of bid preparation expenses. * * *

However, as noted by the court, an agency's duty toward the handling of the claimant's bid may be something else. Precisely:

> The Government's duty to exercise care in evaluating the "price and other factors" of a bid runs *first to the proponent of that bid* and to the public and its representatives, and only then to another bidder. *Keco II* at 1207. [Italic supplied.]

While the Army concedes that the decision to award to Amfac was erroneous, we believe that the April 26, 1974, statement of the facilities engineer, quoted above, clearly shows that the agency's determination that the heater bid by T&H was not "equal" to the brand name was not merely erroneous but was in fact without a reasonable basis. Since it is admitted that (1) the specifications were not ambiguous, and (2) that the phraseology used in the IFB was the normal way to specify heat output and since it is agreed that the T&H heater exceeded the minimum BTU output required, the determination to reject T&H's bid must be found to have been arbitrary and capricious.

We believe that this view is entirely consistent with the two court cases which have allowed bid preparation costs. *Armstrong & Armstrong, Inc.* v. *United States*, 356 F. Supp. 514 (E.D. Wash. 1973), affirmed United States Court of Appeals for the Ninth Circuit, No.

73–1983, April 10, 1975; *The McCarty Corporation* v. *United States*, *supra*. In each of these cases, it was concluded that the Government's actions in correcting the bidder's total price to equal the arithmetic sum of component bid prices was arbitrary and capricious and in violation of procurement regulations. The regulations there in question require that, as a prerequisite to allowing any correction which would displace another bidder, the intended bid must be clearly and convincingly evident on the face of the bid itself. As set out by the Ninth Circuit in *Armstrong*: "The Government could not know from the face of the bid whether the error lay in one of the component items or in the summation." Therefore, the court concluded that correction of the bid to the sum of the component bid items was a violation of the regulations.

With regard to the instant claim, we note that Armed Services Procurement Regulation (ASPR) § 2–407.1 (1973 ed.) provides that:

> Unless all bids are rejected, award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. * * *

This regulation is a direct implementation of 10 U.S. Code § 2305(c) (1970).

Consistent with the statute and the regulation, our Office has held that a contracting officer has no authority to award a contract to other than the lowest responsive, responsible bidder and that an award to another party is illegal, although not necessarily palpably illegal. *Matter of Fink Sanitary Service*, 53 Comp. Gen. 502, 507 (1974), 74–1 CPD ¶ 36, see 38 Comp. Gen. 368 (1958); B–162535, October 13, 1967; B–149466, July 27, 1962. Cf. *Schoenbrod* v. *United States*, 410 F. 2d 400, 404; 187 Ct. Cl. 627 (1969).

In the instant claim, since the rejection of the lowest bid was arbitrary and capricious we must conclude that the award made to Amfac was clearly in violation of the above-noted statute and regulation. Moreover, we believe that the agency erred in permitting this award to stand when corrective action could have been taken.

The agency now argues that, in retrospect, the specifications were obviously ambiguous, although it notes that the ambiguity was not recognized by the contracting officer, our Office or T&H. However, on the basis of our review of the record we do not agree with this argument.

Compensation

Counsel for T&H states that as a result of the Army's actions T&H "* * * has suffered a direct loss in bid preparation costs and necessary

follow-up action in the sum of $507.50." The claim, supported by affidavit, has three separate elements:

I. the expenses ($260) allegedly incurred by T&H in:

a. researching the specifications

b. reviewing and analyzing the bid forms

c. searching catalogs and other sources of material for cost factors

d. preparing bid form in draft, review and preparing actual bid form

e. mailing costs

II. the expenses ($97.50 allegedly incurred subsequent to May 6, 1974, relative to a comparative search, furnished to contracting officer, regarding a comparison of the product proposed in the T&H bid and the requirements of the IFB; and

III. the expenses ($150), including additional time and attorneys' fees, allegedly incurred "* * * as a result of the refusal of the contracting officer to acknowledge his errors and mistake * * *."

The Court of Claims in *Keco I* stated that if the claimant's bid was not fairly and honestly considered, then the claimant should be allowed to recover only those costs incurred in *preparing* its bid. *Keco I*, *supra*, at 1245; *The McCarty Corporation* v. *United States*, *supra*, at 637. More succinctly, if the obligation to fairly and honestly consider is breached and the claimant "* * * is put to needless expense in preparing its bid, it is entitled to recover such expenses." *Heyer Products Company, Inc.* v. *United States*, *supra*, at 413, 414.

While *Keco II* does speak at 1203 of "* * * the right to be compensated for the expense of undertaking the bidding process," we do not believe that the second and third portions of T&H's claim are compensable as bid preparation expenses, since they were incurred long after the preparation of the bid, the bid opening and the initial erroneous actions of the agency. Expenses incurred subsequent to bid opening to enlighten the agency of the true facts or a more proper interpretation of an IFB and/or to pursue a protest are not expenses incurred in undertaking the bidding process, but are essentially protest costs. See *Descomp, Inc.* v. *Sampson*, 377 F. Supp. 254 (D. Del. 1974); *Matter of Frequency Electronics, Inc.*, B–178164, July 5, 1974. In *Descomp*, *supra*, at 367, the court, well aware of *Keco II*, held that since the claimant "* * * has pointed to no statute or court-made exception authorizing the award of the protest costs and attorney fees, they will not be allowed."

However, we do feel that the expenses incurred by T&H in the activities listed in part I of its claim (i.e., researching specifications' reviewing bid forms; examining cost factors; and preparing draft

and actual bid) are compensable as bid preparation expenses. T&H states that the time spent in preparing the bid (8 hours), to which the total costs per hour (including overhead—$32.50) are applied, totals to an expense of $260.

The dollar amounts claimed by T&H have not been challenged by the agency. Therefore, in these circumstances, since we find the above amount to be reasonable, we have directed our Transportation and Claims Division to issue a certificate of settlement in favor to T&H in the amount of $260.

[B-182877]

Appointments—Retroactive—Correction—Back Pay Statute

Retroactive correction of an appointment date may be accomplished under provisions of Back Pay Statute, 5 U.S.C. 5596 and implementing regulations where agency committed a procedural error by failing to follow provisions of administrative regulations requiring that retirement and reappointment be included in same action to preclude a break in service which was not intended, and where the break in service was only 1 nonworkday.

In the matter of retroactive correction of appointment action, June 9, 1975:

This matter concerns the question as to whether the Kansas Air National Guard has authority to effect a retroactive correction of an appointment action in the case of Mr. Alec H. Stratton, a retired employee of that agency.

Mr. Stratton was retired from Forbes Air National Guard Base, Kansas, on Saturday, June 30, 1973. At the time of retirement, his agency apparently planned to immediately reemploy him under a temporary appointment. However, the reemployment appointment was not made effective as of the day following retirement which was a Sunday, but rather was made effective as of the following day, Monday, July 2, 1973, which caused Mr. Stratton to have a 1-day break in service. The employee worked under his temporary appointment and extensions thereof until June 30, 1974, when he was separated. He applied for a supplemental annuity which was disapproved on the basis that his temporary appointments did not cover a full year period of continuous service as required by 5 C.F.R. 831.801(d)(3). Computation of the employee's last period of service revealed that he was 1 day short of the full year service requirement. Apparently, Mr. Stratton was not aware that he had experienced a 1-day break in service on Sunday, July 1, 1973.

The employee protested the disapproval of his supplemental annuity on the ground that the period in question did cover a full year of work days. The agency sought guidance on the matter from the St. Louis, Missouri, Regional Office of the Civil Service Commission. The Commission reviewed the case and advised that a procedural error was ap-

parently committed by the agency in having Mr. Stratton experience the 1-day break in service at the time he was reemployed. It was pointed out that his retirement and temporary appointment should have been processed as one action with an effective date of Sunday, July 1, 1973, pursuant to Federal Personnel Manual Supplement 296-31, Book V, Table 4, § 1-3 (March 31, 1969), which provides in pertinent part as follows:

1-3. GENERAL INSTRUCTIONS FOR APPOINTMENTS AND CONVERSIONS TO APPOINTMENTS

a. Nature of Action.

(1) *Mandatory use of conversion terms.*

(a) Except as provided in (2), below, the conversion terms prescribed in this table must be used on SF 50 when an employee on an agency's rolls is given a new appointment in his *same* agency without a break in service. The conversion term *must*, in such cases, be used instead of reporting a separation and a new appointment, whether the change to the new appointment is:

—Within the same agency appointing office or between appointing offices of the same agency;

—To the same or a different kind of appointment; or

—In the same or to a different position.

("Same agency" for this purpose means the entire agency such as Army; Air Force; Department of Transportation; Department of Health, Education, and Welfare; Department of Housing and Urban Development.)

(b) Mandatory use of the conversion term is prescribed in the above cases to avoid issuing two SF's 50 and to assure a more accurate *total* employment count for the agency as a whole.

(c) The employee must meet the requirements for the new appointment and the agency must have the appropriate authority to make the new appointment.

Caution: An employee's appointment must not be converted to another appointment under which *he will have less rights and benefits* until he has:

—Been informed of the conditions of employment under the new appointment; and

—Submitted a written statement to the effect that he is leaving his previous employment voluntarily to accept the conversion to the new appointment.

In addition, if the employee is leaving a nontemporary appointment in the competitive service to accept an appointment in the excepted service (see FPM Ch. 302, Subch. 2):

—He must also be informed that because the position is in the excepted service it may not be filled by competitive appointment and that his acceptance of the proposed appointment will take him out of the competitive service while he occupies the position; and

—His statement must clearly show that he is leaving the competitive service voluntarily to accept conversion to an appointment in the excepted service.

(The employee's statement is filed in his Office Personnel Folder as back-up for the conversion to the new appointment.)

(2) *Exception to mandatory use of conversion terms.* When a new appointment in the same agency follows a retirement separation without a break in service, effect both a separation and a new appointment. Both actions may be recorded on the same SF 50, using the appropriate personnel action code and term for the retirement separation and the appropriate code and term for the new appointment. For example, if the employee was separated by mandatory retirement on June 30, 1968, and was appointed the following day by temporary appointment based on reinstatement eligibility, the nature of action box would show:

"300 Retirement—Mandatory 06-30-68 115 Temp Appt NTE 6-30-69—Reempl Ann"

and 07-01-68 would be shown in the effective date box as the date of the appointment. * * *

From the above-quoted instruction, it appears that the agency erred in failing to include the separation and new appointment in the same

personnel action to preclude the break in service that occurred in this case. The agency recognizes the procedural error inasmuch as there was no intent to have a break in service in the action and seeks advice from this Office concerning what, if any, corrective action it may take to retroactively correct this error in appointment.

The general rule of law applicable to appointments is that they are effective only from the date of acceptance and entrance on duty after the appointing authority exercises his discretion. Hence an appointment may be made effective on a date subsequent, but not previous, to the date such discretion was exercised. 8 Comp. Gen. 582 (1929); 24 *id.* 150 (1944). From the material submitted, it would appear that the appointing authority had actually exercised his discretion to appoint Mr. Stratton on Monday, July 2, 1973, after he retired on Saturday, June 30, 1973. It would also appear that the agency failed to comply with applicable administrative regulations, in that the appointment was not properly included and recorded in the retirement personnel action of June 30, 1973, so as to avoid a break in service for the employee, which it did not intend.

The statutory authority for correcting unjustified and unwarranted personnel actions that result in the withdrawal or reduction of all or a part of the pay, allowances or differentials of Federal employees is contained in the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), which provides in pertinent part:

§ 5596. *Back pay due to unjustified personnel action*

* * * * * * *

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action has not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

The Civil Service Commission has promulgated regulations for the above-quoted statute in 5 C.F.R., Part 550, subpart H. Subsections 550.803(d) and (e) set forth the criteria of an unjustified or unwarranted personnel action as follows:

(d) To be unjustified or unwarranted. a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural

defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

The action in this case did not result in a loss of pay since Sunday was a nonworkday. However, it did result in the loss of service credit for 1 day and that loss prevented recomputation of Mr. Stratton's annuity which is based on such service. In view of this we are of the opinion that the agency's failure to follow proper administrative procedure that directly resulted in the employee sustaining a 1 day break in service comprising a nonworkday is a procedural defect which constitutes an unjustified or unwarranted personnel action as contemplated by the above-quoted statute and regulations. *See* B–175373, April 21, 1972. Support for this contention is found in the legislative history of the Back Pay Act of 1966, *supra*, contained in S. Report No. 1062, 89th Cong., 2d Sess. 3 (1966), that states in part:

4 H.R. 1647 does not prescribe the specific types of personnel actions covered. Separations, suspensions, and demotions constitute the great bulk of cases in which employees lose pay or allowances, *but other unwarranted or unjustified actions affecting pay or allowances could occur in the course of reassignments and change from full-time to part-time work.* If such actions are found to be unwarranted or unjustified, employees would be entitled to backpay benefits when the actions are corrected. [Italic supplied.]

This legislative history indicates that procedural errors, that result in unjustified or unwarranted personnel actions, occurring in connection with personnel status changes are covered by the Act.

Accordingly, appropriate corrective action, to include a retroactive adjustment of the employee's reappointment date, may be accomplished in accordance with Civil Service Commission regulations contained in 5 C.F.R. 550.804.

[B–182810]

Contracts—Termination—Convenience of Government—Administrative Determinations

Question of whether supplies under contract are still needed is matter for contracting agency to determine in accordance with its obligation to properly administer contract. Moreover, decision made in this regard as to whether or not any given contract should be terminated for convenience of Government rests with contracting agency.

Contracts—Escalation Clauses—Purpose

Inclusion of price escalation clause which limited price increase to 25 percent of original price was not done by mutual mistake since Government did not intend to compensate contractor for all increases in costs but rather merely intended to share the risk of possible price increase with contractor.

Contracts—Mistakes—Mutual—Price Escalation Clause Inclusion

Reformation of contract on grounds of mutual mistake is permissible only when there has been mutual mistake as to past or present material fact. Mistakes pertaining to future events, such as degree of cost escalation in fixed-price contract containing limited escalation provision, do not constitute grounds for reformation.

Contracts—Escalation Clauses—Limitation

Contention that contracting officer arbitrarily set escalation limit in fixed-price contract should have been raised prior to bid opening as required by 4 C.F.R. 20.2, and not in midst of contract performance.

Claims—Reporting to Congress—Limitation on Use of Act of April 10, 1928—Extraordinary Circumstances

Claim for relief by fixed-price Government contractor suffering inflationary pressures is not extraordinary claim for consideration under Meritorious Claims Act.

Contracts—Price Adjustment—Extraordinary Contractual Relief—Public Law 85–804

Our Office cannot review agency's findings under Pub. L. 85–804 since we are not one of Government agencies authorized by statute or implementing Executive orders to modify contracts without consideration.

In the matter of Sauk Valley Manufacturing Co., June 10, 1975:

The Sauk Valley Mfg. Co. (Sauk Valley) was awarded three contracts by the Defense Supply Agency (DSA), each calling for delivery of a specified quantity of barbed wire on a fixed-price basis. Subsequent to the award of these contracts the price of steel greatly increased and it became difficult for Sauk Valley to perform the contracts at the prices specified. Sauk Valley therefore sought relief from DSA under Public Law 85–804, 72 Stat. 972, August 28, 1958. However, on September 26, 1974, such relief was denied. Subsequently, Sauk Valley submitted a claim to our Office requesting relief under the Meritorious Claims Act of 1928, 31 U.S. Code § 236 (1970); Public Law 85–804; or any other relief permissible under our jurisdiction.

We note at the outset that contract No. DSA700–73–C–0313, which was initially included in Sauk Valley's request for relief, has since been terminated for mutual convenience at no cost to either party pursuant to Armed Services Procurement Regulation (ASPR) § 8–602.4 (1974 ed.). However, Sauk Valley still seeks relief with respect to contracts DSA700–73–C–4908 and DSA700–73–C–3156.

DSA700–73–C–4908

Contract No. –4908 was awarded to Sauk Valley on March 12, 1973. The contract provided for a 100-percent option which was exercised by the Government. To date the contract has been partially performed. However, Sauk Valley now seeks a no-cost termination for the unperformed portion of the contract on the grounds that the supplies are no longer required by the Government.

The question of whether the supplies are in fact still needed is a

matter for the agency to determine in accordance with its obligation to properly administer the contract. Moreover, a decision made in the course of contract administration as to whether or not any given contract should be terminated for the convenience of the Government rests with the contracting agency. *Veterans Administration*, B–108902, May 17, 1974. Therefore, we would not object to such a termination if indeed the supplies are no longer required. However, that determination must be made by the contracting agency.

DSA700–73–C–3156

On January 18, 1974, Sauk Valley was awarded contract No. –3156 on a fixed-price basis for a specified quantity of barbed wire. In accordance with DSA policy effective as of the contract date, the contract provided that each contract unit price would be subject to revision in order to reflect changes in the cost of steel but the total of the increases was not to exceed 25-percent of the original applicable contract unit price. Since DSA policy now provides for a 50-percent limitation on price increases in contracts for steel products, Sauk Valley seeks a contract amendment which would substitute the 50-percent limitation for the 25-percent limitation contained in its contract. Sauk Valley contends that the inclusion of the 25-percent limitation was done by mutual mistake since both parties intended that the Government compensate the contractor for any and all increases in cost due to a rise in steel prices. Sauk Valley contends that this intention is evidenced by the following factors: (1) DSA's inclusion of an escalation clause in the contract; (2) the requirement for the contractor to represent that the unit prices set forth in the contract did not include any contingency allowance to cover the possibility of increased cost of performance resulting from increases in the price of steel required during the performance of the contract; and (3) the prior course of dealings between DSA and Sauk Valley.

However, we believe that these circumstances evidence an intention to limit contract price increases to the stated 25 percent. Although an escalation clause was included in the contract, it was specifically and intentionally limited to 25 percent. Sauk Valley was required to represent that the original unit prices did not include any contingency allowance to cover possible increases in the price of steel required during the performance of the contract. The fact that DSA required Sauk Valley to make such a representation establishes DSA's intention not to assume the burden of a steel price increase in excess of 25 percent but merely to share the risk of possible price increases with the contractor. That is, all price increases in excess of 25 percent would be assumed by the contractor out of its own corporate funds and DSA would not indirectly pay for these increases through the inclusion of contingencies by the contractor in the original contract price.

Previous dealings between DSA and Sauk Valley have been based on a similar method of risk allocation. All three of the contracts between DSA and Sauk Valley which have been brought to our attention have been fixed-price contracts which would not entitle the contractor to any additional compensation if the cost of performance increased since fixed-price contractors assume the risk of subsequent price increases. *The R. H. Pines Corporation*, 54 Comp. Gen. 527 (1974); B–173925, October 12, 1971. *See* 53 Comp. Gen. 187 (1973); *Penn Bridge Co.* v. *United States*, 59 Ct. Cl. 892 (1924). Moreover, even though Sauk Valley has previously entered into fixed-price DSA contracts containing escalation clauses, the escalation of prices was always limited to a specified percentage of the original contract unit price. By using these percentage limitations, DSA has set a policy of expressly limiting its share of risk allocation.

We conclude that the course of dealing between DSA and Sauk Valley reveals that the actual intention of the parties was expressed in the written contract and there was no mutual mistake of fact. Furthermore, reformation of a contract is only permissible when there has been a mutual mistake as to a past or present material fact. 17 C.J.S. Contracts § 135 (1963). *See* B–177658, April 30, 1973; B–167951, April 21, 1970. Mistakes pertaining to future events do not constitute grounds for reformation. Indeed, one who contracts in reliance upon opinions or beliefs concerning future events assumes the risk that his conjectures will be proven unjustified. B–177658, *supra*, B–167951, *supra*.

Sauk Valley also contends that the contracting officer acted arbitrarily in setting the 25-percent escalation limitation. However, this contention should, in accordance with 4 C.F.R. § 20.1 (1974), have been raised prior to bid opening and not in the midst of contract performance.

With regard to Sauk Valley's request for relief under the Meritorious Claims Act of 1928, our Office has consistently refused to report claims to Congress under that Act unless the claim is of an unusual nature and is unlikely to constitute a recurring problem. B–175278, April 12, 1972. We have held that a claim for relief by a Government contractor who is experiencing increased costs in attempting to meet its contractual commitments to the Government is not an extraordinary claim for consideration under the Meritorious Claims Act. 53 Comp. Gen. 157 (1973); B–179309, October 2, 1973.

As to Sauk Valley's request for relief under Public Law 85–804, it must be noted that our Office is not authorized by that statute and implementing regulations to amend or modify contracts without consideration to facilitate the national defense. *Trio Chemical Works*, B–172531, August 14, 1974. Furthermore, administrative decisions

granting or denying relief under Public Law 85–804 are not subject to review by our Office and due to the absence of specific authority are binding upon us. *Trio Chemical Works, supra.* Accordingly, Sauk Valley's request under Public Law 85–804 need not be further discussed.

For the reasons stated above Sauk Valley's request for relief is denied. However, we note that legislation has been introduced in Congress which would grant relief to small businesses committed to fixed-price Government contracts which have encountered significant and unavoidable difficulties during the performance of their contracts because of rapid and unexpected cost escalation. *See* H. R. 2879, 94th Cong., 1st Sess. (1974); H. R. 3207, 94th Cong., 1st Sess. (1974); H. R. 4544, 94th Cong., 1st Sess. (1974); H. R. 3886, 94th Cong., 1st Sess. (1974); S. 1259, 94th Cong., 1st Sess. (1974).

[B–183190]

Contracts—Protests—Persons, etc., Qualified to Protest—Persons, etc., with Financial Interest—Day Care Parents' Association

Department of Labor Day Care Parents' Association is an "interested party" under 5 C.F.R. 20.1 for purpose of protesting Department of Labor's award of contract for operation of day care center where fees paid by its members account for approximately 15 percent of total operating cost of center and nearly one-third of contract price.

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Technical Evaluation Panel

Since appointment of panel members on the technical evaluation panel is matter within administrative discretion of agency, lack of parents' representation does not provide basis for objection to award of contract.

Contracts—Negotiation—Evaluation Factors—Point Rating—Evaluation Guidelines

Contention that award to offeror who received greatest number of points upon technical evaluation was improper because scores of only one of five panel members clearly favored that offeror's proposal is without merit since function of technical evaluation panel is to score proposals in terms of evaluation factors set forth in solicitation and not to arrive at consensus as to which offeror should receive award. Since source selection authority had information regarding individual as well as total scores, determination to award on basis of highest total point score and lowest price was not improper.

Contracts—Negotiation—Technical Evaluation Panel—Members—Absence

Regarding contention that importance of attending final evaluation was not stressed to one of five panel members who chose not to attend, and that incumbent contractor would have received higher technical score if that member had been present, nothing in record indicates that nature of notification given that member was different from that given other panel members. In view thereof, and since there is no regulation precluding panel's functioning with less than all five members, no impropriety in conduct of technical evaluation is shown.

Contracts—Negotiation—Cost, etc., Data—Availability to Technical Evaluation Panel

Since there is no requirement that offeror's cost proposals be made available to technical evaluation panel, whose function is to evaluate technical merit of proposals against evaluation criteria set forth in solicitation, the failure to do so provides no basis for disturbing award.

In the matter of the Department of Labor Day Care Parents' Association, June 10, 1975:

On February 10, 1975, the Department of Labor Day Care Parents' Association (Parents' Association) filed its protest against the Department of Labor's award of contract No. J–9–E–5–0046 to Educational Systems Corporation (ESC) for implementation and operation of a working model child day care center at the Department of Labor.

As indicated in the request for proposals issued October 17, 1974, the day care center was opened October 15, 1968, for the dual purpose of serving as a demonstration model in employer-sponsored day care service and promoting employee stability and productivity. At the date of issuance of request for proposals (RFP) No. L/A–75–5, the center enrolled some 60 children from the ages of 1½ to 5 years and was operated under contract with the National Child Day Care Association (NCDCA). The cost of the program is borne largely by appropriated funds, and is supplemented with fee payments by participating parents who are Labor Department employees. The fees paid by participating employees are determined on the basis of family income. The Parents' Association has indicated that fee assessments account for approximately 15 percent of the overall cost of operating the day care center and approximately one-third of the cost of the contract awarded to ESC.

A total of seven proposals were received in response to the solicitation. Two of the proposals were not considered for award due to their late submission, three were found to be technically unacceptable, and it was determined to conduct negotiations only with the incumbent, NCDCA, and with ESC. After negotiations and receipt of revised proposals, a determination was made to award the contract to ESC based on the higher score given its technical proposal and the fact that its estimated total cost for performance (including a fixed fee) of $170,130, which was determined by the Department of Labor to represent a realistic projection of the costs to be incurred, was more than $6,000 lower than NCDCA's cost proposal.

The Parents' Association has raised several questions relating to the propriety of the selection process which resulted in award of the contract to ESC. Together with its substantive response to those questions, the Department of Labor has raised the preliminary issue of the Parents' Association's standing to protest the award, urging that it is the

function of our bid protest procedures to provide a forum for bidders and offerors. In this regard the Department states:

> * * * To permit this forum to be used by citizens whose children participate in a Government demonstration project would not, in our opinion, be proper. The objective of this project is to implement and operate a working model of an employer sponsored Day Care Center which will provide information so other employers in the public and private sector may duplicate this Department's model. The cost of space, equipment and utilities for the Center are borne totally by the Government. The Government bears the majority of the actual operating costs of the Center. The payments made by parents for enrollment of their children in this project should not, we believe, give them standing before the Comptroller General. * * *

Our Interim Bid Protest Procedures and Standards, contained at Part 20 of title 4 of the Code of Federal Regulations, provide for consideration of bid protests filed by interested parties as follows:

> § 20.1 Filing of protest.
>
> (a) An interested party wishing to protest the proposed award of a contract, or the award of a contract, by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office may do so by a telegram or letter to the General Accounting Office, Washington, D.C. 20548.

The term "interested party" as used in the above regulation is not limited to bidders or offerors participating in a procurement. Where a sufficient interest in the particular procurement has been demonstrated, we have considered protests initiated by various civic and trade associations. B–177042, January 23, 1973; *District 2, Marine Engineers Beneficial Association—Associated Marine Officers— AFL CIO*, B–181265, November 27, 1974; *Arlington Ridge Civic Association*, B–181015, December 23, 1974; *Poquito Longwood Area Civic Association, Inc.*, B–183210, March 12, 1975. In view of the clear showing of financial interest by the Parents' Association in award of the contract for operation of the day care center, we find it to be a proper "interested party" for the purpose of this protest.

The several issues raised by the Parents' Association relate primarily to evaluation of proposals by the technical evaluation panel (panel). The first issue presented concerns the Department of Labor's failure to provide for representation of the parents' interests on the panel. Specifically, the protester points out that no representative of the Parents' Association was included on the panel although parents' fees account for approximately 15 percent of the total operating costs and nearly one-third of the cost of the operations contract for the day care center.

The Department of Labor explains that program authority and responsibility for the day care center, as well as responsibility for selection of members for the technical evaluation panel, lies with the Director of the Women's Bureau. Selection of the panel in fact was made from among the members of the Department of Labor Day

Care Advisory Board. We are advised that the President of the Parents' Association is a member of that board but that she made no expression of interest in participating on the panel at the time of its formation.

We believe that composition of the panel is a matter within the discretion of the contracting agency. While appointment of a representative of the Parents' Association to the panel might have been appropriate in view of the parents' direct financial responsibility for nearly one-third of the contract cost, there is no basis for our Office to conclude that the appointment of one of its members was required.

The second issue raised relates to the point scoring technique used by the panel. In this connection, it is argued that the results of the evaluation failed to reflect the panel's consensus as to which proposal was favored and its position is further explained by the Parents' Association as follows:

> The panel members were not given the opportunity to discuss individual scores and reach a final consensus as to who should be the selected contractor. In fact, the chairperson acting independently chose to sign the [Technical Evaluation Panel] report without the joint approval or signature of the remaining members of the panel.

Suggesting that a consensus of the panel would have favored the incumbent contractor, the protester states that 4 of the 5 panel members rated NCDCA as a "favored contractor."

Upon initial technical evaluation, ESC received a total of 427 points as opposed to NCDCA's lower point score of 351 points. Initially, ESC's proposal was rated higher than NCDCA's by four of the five panel members. The fifth panel member had ranked the two proposals as equal. After negotiations and upon final technical evaluation the difference between their technical scores was reduced with ESC and NCDCA receiving 342 and 333 points, respectively. The panel member who had previously ranked both proposals equal did not participate in the final evaluation and hence the final scores reflect the votes of four panel members only. Two of those panel members gave higher point scores to NCDCA's proposal, one scored ESC's proposal higher than NCDCA's, and the remaining individual scored the two proposals as equal. The specific scores for individual evaluation factors given by each panel member, and each member's total as well as group totals were then provided to the Procurement Office, which recommended award of the contract to ESC based on its technical ranking and the fact that its cost proposal was more than $6,000 lower than NCDCA's.

On January 29, 1975, the Chairman of the technical evaluation panel sent a memorandum to the Director of the Women's Bureau together with evaluation worksheets. On February 10, 1975, a week after the contract was awarded to ESC, four members of the panel, including

the member who had not been present at the final evaluation, submitted a "Minority Report" to the Director of the Women's Bureau listing "technical irregularities" in the conduct of the evaluation and objecting to the award to ESC on the basis that it did not comport with the consensus of the panel members. The five technical objections raised in the "Minority Report" are incorporated as separate issues pertinent to the protest and are dealt with below.

The Department of Labor takes the position that the Parents' Association and the four dissenting members of the panel misconceive the panel's function, and explains that the evaluation process does not call for a selection of the winning contractor by majority vote but rather contemplates a detailed evaluation of the proposals and their scoring against the evaluation criteria set forth in the RFP. The function of the panel as set forth in the memorandum of December 4, 1974, addressed to its Chairman, is to conduct an evaluation of the technical proposals based on the evaluation criteria set forth in the RFP and using a numerical scoring technique.

The scores given by individual panel members apparently were not made the subject of discussion during the evaluation process and there is no indication that the three panel members present at the final evaluation who signed the Minority Report requested that such procedures be used. In fact, the record reflects only that after final selection was made did four members of the panel indicate that in retrospect they would have preferred to have had discussion and reconciliation of individual scores.

Moreover, the worksheet submitted by the panel Chairman to the source selection authority not only indicated total scores but gave a breakdown of the scores given by each panel member for each evaluation factor. On the same worksheet a tally of the relative rankings of the proposals by each member of the panel was provided. Thus, the source selection authority was provided not only with total scores but with information indicating that only one panel member had ranked ESC's proposal higher than NCDCA's, and that the remaining three members present at the final technical evaluation had either ranked the two proposals equal or had ranked NCDCA's superior. We understand that after submission of the "Minority Report," the members of the TEP who had participated in the final evaluation were called before the source selection authority and were asked whether their scores as indicated in the evaluation worksheets represented their true and accurate assessments of the technical merits of the two proposals. We are told that all members verified the accuracy of their scores. Under the circumstances, it appears that when the source selection authority undertook to make its award determination it had before it all information pertinent to the technical evaluation, including that with which

the four dissenting members of the panel are concerned—namely, that despite the aggregate technical scores only one panel member had actually ranked ESC's proposal as superior to NCDCA's. Nevertheless, the source selection authority chose to make award to ESC based on its higher technical score and its proposed lower cost. Under the circumstances, we believe that it was the prerogative of the source selection authority to rely on the total technical scores rather than on some other bases perhaps reflective of a consensus of the panel, even though the closeness of the scores (342 to 333) does not indicate that ESC's proposal was significantly superior. In this regard, we have recognized a very broad degree of discretion on the part of source selection officers in determining the manner and extent to which it will make use of technical evaluation results. 51 Comp. Gen. 272 (1971). For the foregoing reasons, we find no prejudice to any offeror's interest by reason of the fact that all panel members did not sign the report filed with the Director of the Women's Bureau.

The Parents' Association suggests that the presence of the fifth panel member, who was absent from the final evaluation, might have elevated NCDCA's technical score over that received by ESC. The protester complains of the fact that the "invitation to one member of the panel did not stress the importance of the meeting and therefore he did not attend," and that if this member had attended, his score could have changed the outcome of the evaluation. In response to this claim, the Department of Labor states that it does not regard it to be a function of the contracting officer to explore the reasons for an individual panel member's decision not to attend an evaluation meeting. The protester has not furnished any information as to the precise nature of the notification given this panel member and the record provides no basis for the belief that the panel member was discouraged from attending the evaluation or that the nature of the notification was different in content from that given the other members. Since we are aware of no departmental regulation or policy which precludes the panel's functioning with less than its full membership, we find no impropriety in this regard.

In the "Minority Report" the four panel members cite as "technical irregularities" the facts that the entire panel did not meet with both offerors to discuss areas in each proposal requiring clarification or modification and that information from experience checks was not made available to the panel during evaluation. The Parents' Association cites these two facts in support of its protest, together with the fact that financial information was withheld from the technical evaluation panel.

Concerning the suggestion that it was imporper for less than the entire panel to participate in negotiations with ESC and NCDCA,

the Department of Labor states that as a general rule only the contract negotiator and Chairman of the evaluation team participate in negotiations and that there is no requirement that all panel members be included in those discussions. This is consistent with the long-standing view of this Office that the content and extent of discussions required is not susceptible of precise definition. Rather, we have held that the question of whether the statutory requirement for written or oral discussions has been met is a matter of judgment for determination based on the particular facts of each case. B–179126, February 12, 1974; B–180734, May 31, 1974; 52 Comp. Gen. 466 (1973); 54 *id.* 60 (1974). Thus, it is axiomatic that there is no requirement that all or any particular member of the technical evaluation panel participate in negotiations.

With respect to the Parents' Association's concern that financial information was withheld from the panel, we note that the directions given the panel explicitly provided for the withholding of such information during the course of the technical evaluation. Such information was withheld in order to avoid the possibility that cost considerations might have improperly influenced the technical scoring. As the instructions to the panel expressly provided for the withholding of cost data from the panel, and as such procedure is reasonable, we fail to see that the withholding of such information was improper or prejudicial to any offeror.

Concerning the contention that information from "experience checks" was withheld from the panel, we are unable to identify with any certainty the information to which the protester refers. However, the RFP did provide that the offerors "experience and qualifications as related to this project" are to be a factor for evaluation, and the solicitation further required offerors to demonstrate their experience and qualifications by submitting an "outline of previous projects and specific work previously performed or being performed." Thus, information necessary to evaluate proposals in terms of the offeror's experience was before the panel during the technical evaluation.

As an additional irregularity in the evaluation process the Parents' Association suggests that ESC and NCDCA were treated differently during the course of negotiations. The protester's contention in this regard is as follows:

> Another irregularity was reported regarding the closing of the day care center during its scheduled move from the Auditor's Building to the space in the new Department of Labor Building. ESC initially reported that they would close the center for one week during this time. The panel objected to that approach. NCDCA did not address the item. After two panel members met with the contractors, ESC withdrew this item, and NCDCA changed their proposal to close the center for two days. However, NCDCA was not advised of this mistake and was not given an opportunity to revise their proposal. This resulted in a lowered score by another member of the panel who was not present at the meeting with the contractors. Consequently, this item was not evaluated on the same basis for each of the competing contractors.

In response, the Department explains that it discussed the matter with ESC and not with NCDCA during negotiations since only ESC's initial proposal had been deficient in this regard. Initially, ESC had proposed to close down operation of the day care center to accommodate the move to new facilities. Since closing of the operation was unacceptable to the Department of Labor and was regarded as a deficiency in its proposal the matter was discussed with ESC. On the other hand, NCDCA's proposal as initially submitted provided for uninterrupted operation of the center during the transitional period and hence the matter was not discussed during negotiations with it. We do not know the reasons for NCDCA's revision of its proposal to provide for a 2-day closing of the operation but it appears to be one made of its own volition.

In addition to the above allegations, the Parents' Association claims that due consideration was not given to the emotional impact that a change in contractors would have on the children enrolled at the day care center or to the cost of rewiring to accommodate ovens necessary to provide warm lunches.

In response to this contention, the Department of Labor reports that no advantage was or could be given the incumbent contractor to offset emotional impact, if any, on the children affected because it was determined that the emotional impact of a change of contractors on the children concerned was not something that could be quantified as an evaluation factor and thus the solicitation did not provide for its consideration. With regard to the contention that the cost of rewiring was not considered in evaluating ESC's proposal, we note that the solicitation specifically provides that the Government will furnish kitchen equipment and utilities. None of the costs to be borne by the Government was added to either proposal.

The Parents' Association has offered two additional bases for its protest, including its allegation that the Chairman of the panel was biased and that NCDCA was misled by one member of the panel to increase the amount of its proposal by $5,000. Inasmuch as the protester has offered no specific information as to the manner in which NCDCA was misled to increase the costs proposed and has offered nothing to substantiate its allegation of bias on the part of the Chairperson, those contentions will not be considered.

For the foregoing reasons, the protest is denied.

[B-180352]

Travel Expenses—Military Personnel—Retirement—To Selected Home—Reimbursement Entitlement—Joint Travel Regulations Amended

Volume 1, Joint Travel Regulations, may be amended to reflect that members of the uniformed services who qualify for travel and transportation allowances

to home of selection under 37 U.S.C. 404(c) and 406(g) retain the right to travel and transportation allowances based on home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a). 42 Comp. Gen. 370 and B–163248, March 19, 1968, overruled.

Military Personnel—Retirement—Travel and Transportation Entitlement—Joint Travel Regulations Amended

In connection with retirement of military members, Volume 1, Joint Travel Regulations, may be amended to permit shipment of household goods within the specified time limit to one or more places provided the total cost does not exceed the cost of shipment in one lot to the home of selection, home of record, or place of entry on active duty, whichever provides the greatest benefit.

Military Personnel—Retirement—Travel and Transportation Entitlement—Actual Travel Performance Requirement

A member upon retirement is entitled to travel at Government expense to his home of record or place of entry on active duty or to his home of selection if he qualifies. However, 37 U.S.C. 404(f) which permits travel payments upon separation or release of military members without regard to the performance of travel is not applicable to members upon retirement or placement on the temporary disability retired list. Such members may be paid only on the basis of authorized travel actually performed.

Military Personnel—Retirement—Travel and Transportation Entitlement—Joint Travel Regulations Amended—Effective Date

Claims arising before June 14, 1974, the date of 53 Comp. Gen. 963, for travel and transportation allowances to home of record or place of entry on active duty of members of uniformed services who were denied such allowances to selected homes may not be considered on basis of rule announced in that decision since it modifies or overrules prior decisions construing the same statutes. The effect of that decision is prospective except for its application to claimant in that decision. B–182904, February 4, 1975, overruled.

Mileage—Military Personnel—Retirement—To Selected Home—Effect of Amended Joint Travel Regulations

Member who claims mileage incident to his retirement, representing the distance from his place of separation to his home of record or place of entry on active duty less the distance from his place of separation to his selected home and who has already selected a home and received appropriate allowances thereto, may receive no additional mileage allowance because he has received all that the law allows.

In the matter of uniformed services members' travel and transportation entitlements on retirement, June 12, 1975:

This action is in response to letter dated July 26, 1974, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision with respect to questions which have arisen as a result of 53 Comp. Gen. 963 (1974), concerning travel and transportation entitlements of certain members of the uniformed services. That request was forwarded to this Office by endorsement dated July 30, 1974, from the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 74–29.

The submission refers to 53 Comp. Gen. 963, *supra*, as holding that members of the uniformed services who on termination of active duty otherwise qualify for travel and transportation to either their home of

record or place of entry on active duty under 37 U.S. Code §§ 404(a) and 406(a) (1970) are to be afforded such entitlements whenever their entitlement to travel and transportation to their home of selection under 37 U.S.C. §§ 404(c) and 406(g) (1970) is denied. It is stated that in attempting to implement the decision and in making appropriate changes to Volume 1, Joint Travel Regulations (1 JTR), questions have arisen, replies to which are considered necessary before these regulations may be amended.

In order to respond to the questions presented, the development of the law as it relates to travel and transportation allowances incident to a member's retirement must be discussed.

Long before there was any specific statutory authority for travel by an officer from his last place of duty to home at Government expense upon retirement, mileage for such travel was paid under the mileage laws because such travel was considered ordered travel on official business under orders issued to the officer directing him to proceed to his home. Travel to a place selected by the officer, which he reported to proper authority as being his home, was deemed sufficient compliance with orders directing him to proceed home and, therefore, he was entitled to mileage to such selected place. From this, apparently, evolved the rule concerning an officer's right to select home upon retirement, which was stated in 1 Comp. Gen. 363 (1922) (citing 13 Comp. Dec. 793 (1907) and 18 Comp. Dec. 634 (1912)), and restated in 4 Comp. Gen. 954 (1925). That rule was applicable to Regular members of the uniformed services and was predicated on circumstances peculiar to the military service—that an officer at the time of retirement usually did not have an established residence which he desired to make his home in civilian life. For that reason some latitude was allowed Regular officers in carrying out orders to travel home upon retirement.

On the other hand, a Reserve officer, both prior to and after the enactment of section 37a of the National Defense Act, June 4, 1920, 41 Stat. 776, and section 12 of the Pay Readjustment Act of 1942, June 16, 1942, Chapter 413, 56 Stat. 364, when on active duty received mileage from his home to his first duty station and from his last duty station to his home. For Reserve officers, the word "home" was accepted without question to mean the place where the reservist resided prior to entering the military service, where he presumably would have continued to reside had such residence not been interrupted by orders to active duty, and where he expected to return when released from active duty or he retired. This place was recorded in the member's personnel file according to regulations. 33 Comp. Gen. 386 (1954).

Section 303(a) of the Career Compensation Act of 1949, October 12, 1949, 63 Stat. 813 (37 U.S.C. 253(a) (1958 ed.)), provided for payment of travel allowances including the following provision:

> Under regulations prescribed by the Secretaries concerned, members of the uniformed services shall be entitled to receive travel and transportation allow-

ances for travel performed or to be performed * * * upon separation from the service, placement upon the temporary disability retired list, release from active duty, or retirement, from last duty station to home or to the place from which ordered to active duty * * * *Provided*, That the travel and transportation allowances under conditions authorized herein for such members may be paid on separation from the service, or release from active duty, regardless of whether or not such member performs the travel involved.

Subsequently, the Secretaries issued regulations which authorized Reserve members as well as Regular members to select a home upon retirement, which could be different from the one recorded in their personnel files, and be entitled to travel and transportation allowances to such selected home. In 33 Comp. Gen. 386, *supra*, it was held that there appeared to be no sufficient legal basis for such regulations for the following reason:

While the rule of the accounting officers that regulars may be paid mileage for travel to a selected home upon retirement has, through long application, become so engrafted in the law that it reasonably may be concluded that such selected place was the home contemplated by the Congress in enacting the Career Compensation Act of 1949, insofar as retired regulars are concerned, it is equally well established that a reservist by reason of the temporary nature of his active duty, though sometimes prolonged, has a home of record throughout his period of active duty which determines the maximum mileage payable for travel home upon release from active duty. * * *

Subsequently, the Department of Defense, through the Secretary of the Army, proposed an amendment to section 303 of the Career Compensation Act of 1949, H.R. 6600, the principal purpose of which was to equalize the travel and transportation entitlements of Regulars and reservists upon retirement by providing affirmative legislative authority for travel and transportation allowances to homes of selection for all members of the uniformed services upon retirement. S. Report No. 1221, 84th Cong., 1st Sess. 1–2 (1955); H.R. Report No. 967, 84th Cong., 1st Sess. 2 (1955).

Consequently, section 1 of Public Law 368 [H.R. 6600], chapter 806, act of August 11, 1955, 69 Stat. 691, amended section 303(a) of the Career Compensation Act of 1949 by inserting the following sentence immediately after the first sentence thereof:

"Under uniform regulations prescribed by the Secretaries concerned, a member of the uniformed services who—

"(1) is retired for physical disability or placed upon the temporary disability retired list; or

"(2) is retired for any other reason, or is discharged with severance pay * * *

may select his home for the purposes of the travel and transportation allowances payable under this subsection."

Section 303(a), as amended, was codified in the 1958 edition of the U.S. Code, as section 253(a), Title 37. The act of September 7, 1962, Public Law 87–649, 76 Stat. 451, revised, codified and enacted Title 37, U.S. Code. The purpose of the act was to restate in comprehensive form, without substantive change, the laws applicable to the pay and allowances of members of the uniformed services. As a result of this

act, travel and transportation allowances for members of the uniformed services are provided currently, in sections 404(a) and 404(c), in pertinent part as follows:

> (a) Under regulations prescribed by the Secretaries concerned, a member * * * is entitled to travel and transportation allowances for travel performed or to be performed * * *
>
> * * * * * * *
>
> (3) upon separation from the service, placement on the temporary disability retired list, release from active duty, or retirement, from his last duty station to his home or the place from which he was called or ordered to active duty * * *
>
> * * * * * * *
>
> (c) Under uniform regulations prescribed by the Secretaries concerned, as member who—
>
> (1) is retired, or is placed on the temporary disability retired list, under chapter 61 of title 10; or
>
> (2) is retired with pay under any other law, or, immediately following at least eight years of continuous active duty * * * is discharged with severance pay or is involuntarily released from active duty with readjustment pay;
>
> may * * * select his home for the purposes of the travel and transportation allowances authorized by subsection (a) of this section.

In 53 Comp. Gen. 963, *supra*, it was stated as follows:

> A member's right to choose a home upon being retired, after termination of active duty, is considered to be a greater benefit than is afforded to other members who are not permitted to choose their homes for entitlement purposes upon completion of active duty. Typically, a member retired after 20 years of service is entitled to this benefit, but a member who has served for only 3 years may not select his home.
>
> In such circumstances, it would appear to be anomalous to deny a member with long service allowances to which he would have been entitled after completion of a short period of service, because he has been denied a greater benefit.

The decision at 53 Comp. Gen. 963, *supra*, was not the first specific consideration by this Office of whether applicable statutes require the denial of travel and transportation entitlements to the home of record or place of entry on active duty where the member qualified for entitlements to a home of selection. In 42 Comp. Gen. 370 (1963), we considered the question of whether a Reserve officer who is entitled to select a home may, instead, elect a mileage allowance to his home of record or place of entry on active duty. We concluded that paragraph M4157–1a, 1 JTR, providing for such a mileage allowance which specifically excepts members who qualified for entitlements to a selected home under paragraph M4158–1a, 1 JTR, was in apparent conformity with legislative intent of the appropriate statutory provisions. Accordingly, we found no basis to conclude that the member in the case presented was entitled to elect allowances to his home of record in lieu of allowances to his selected home.

In a subsequent decision, B–163248, March 19, 1968, we considered a claim for travel and transportation entitlements incident to the retirement of a member who qualified for such entitlements to a selected home. While stating that the member was not entitled to such home

of selection benefits because travel to his selected home was not performed within the period prescribed by law, we further concluded as follows:

> * * * There is no collateral right to allowances for travel to home of record or place of entry into the service, either to cover travel performed prior to that to a home of selection or as an election in lieu of the allowances to the selected home on retirement. 42 Comp. Gen. 370.

In apparent conformity with these decisions regulations have continued to exclude a member qualified for travel and transportation entitlements to a selected home under paragraph M4158, from receiving home of record entitlements under paragraph M4157.

However, in 53 Comp. Gen. 963, *supra*, as indicated above, we expressed a different view. In that decision it is stated that:

> We are aware of no intention on the part of the Congress in establishing the foregoing entitlements that a member who has basic entitlement to travel and transportation at Government expense to his home of selection, but whose claim for such entitlements is denied for the reasons previously indicated, also shall be ineligible for travel and transportation allowances to his home of record or the place from which he was called or ordered to active duty.

We now believe that it is inappropriate to consider the home of record entitlement as separate and distinct from the home of selection entitlement. Section 404(c) states that a qualifying member *may* select a home for the purposes of travel and transportation allowances *authorized by subsection (a)*—which provides for travel and transportation allowances to home, or place from which called or ordered to active duty. That provision specifically affords a qualifying member the additional benefit, if he so desires, of selecting a home for the purposes of subsection (a) rather than being limited to his home as indicated by service records or to the place from which he was called or ordered to active duty.

To the extent that 42 Comp. Gen. 370, *supra*, and B–163248, *supra*, are inconsistent with 53 Comp. Gen. 963, *supra*, and this decision, the former decisions no longer will be followed.

With regard to the member's right to choose home of record or place of entry on active duty benefits it is stated in the submission as follows:

> Your decision indicates that the member's right to select a home, as authorized by the statute, is a greater benefit than is afforded other members who do not qualify for such right. It would seem to follow that a member authorized the greater benefit could opt to receive normal benefits at time of termination of active duty or at any time thereafter within the time limit he so decides. May the regulations be amended to so provide?

In accordance with the above a member has entitlement to travel and transportation benefits to his home of record or place of entry on active duty. Should he desire to select some other location upon retirement he may do so in accordance with such regulations as are applicable. Your question is answered accordingly.

It is stated by the Assistant Secretary that the entitlements under 37 U.S.C. § 404(c) and those under 37 U.S.C. § 406(g) relative to home of selection travel are independent of each other and if a member elects to receive allowances for personal travel under section 404(c) he must within the time limit actually perform travel thereto with the intention of establishing a residence in order to be so entitled. He may also request reimbursement for transportation of dependents and shipment of household goods to such selected home. It is further stated that provision is currently contained in the regulations (1 JTR para. M8260–1) based on rulings by this Office that household goods may be shipped within the time limit to one or more places including or excluding the home of selection provided the total cost does not exceed shipment in one lot to the home of selection. In view of the foregoing, the question presented is stated as follows:

> * * * Question now arises as to whether that ruling is too restrictive and that he should be permitted shipment of household goods within the time limit to one or more places provided the total costs do not exceed shipment in one lot to home of selection, home of record, or place from which ordered (or called) to active duty, whichever provides the greater entitlement. * * *

Within the limits prescribed in 1 JTR, especially paragraphs M8009, M8259 and M8260 it appears that the current regulations may be amended as indicated. This is in accord with the view that a member who is entitled to household goods transportation based on his home of selection retains the right to transportation on the basis of his home of record or place of entry on active duty.

The next question is stated as follows:

> It also appears that the member may elect to receive travel allowances for his personal travel to his home of record or place from which called (or ordered) to active duty and may still, within the time limit, select a home at a point more distant from his last duty station for the purposes of receiving other allowances for dependents and household goods if he otherwise qualifies therefor. Your opinion as to the validity of this viewpoint is requested.

We have expressed the view that a member who is entitled to travel and transportation allowances based on his home of selection may also be entitled to such allowances based on his home of record or place of entry on active duty.

Based on the foregoing the view indicated above appears valid. In regard to a member's personal travel, section 404(f), Title 37, U.S. Code (1970), provides that the travel and transportation allowances authorized under section 404 may be paid on the member's separation from the service or release from active duty, whether or not he performs the travel involved. This provision first appeared in section 303(a) of the Career Compensation Act of 1949, as quoted above. On the other hand, the basic provision for travel in these circumstances in 37 U.S.C. § 404(a)(3) refers to a member's travel entitle-

ments upon separation from the service, placement on the temporary disability retired list, release from active duty, or retirement. Since subsection 404(f) refers only to separation from the service or release from active duty it does not appear that the permissive authority of 404(f) was intended to include members who are retired or are placed on the temporary disability retired list. Consequently, for such members it would not be proper to issue regulations permitting payment for a member's travel without regard to its actual performance. To the extent that a contrary conclusion was reached in B–182904, February 4, 1975, that decision will no longer be followed.

In view of the above all travel and transportation entitlements upon a member's retirement are predicated on the actual performance of the travel or transportation in question. In the circumstances it would appear that payment of travel and transportation costs, including payment for the member's travel, should be deferred until travel or transportation actually is performed.

The Assistant Secretary of the Navy refers to 53 Comp. Gen. 963, *supra*, as indicating that a denial of ordinary entitlements for members otherwise authorized to select a home was not intended by Congress. Our views are requested with respect to the following statement:

> It is presumed that the allowances in question are properly payable to all who claim them provided the statute of limitations has not nullified their claim. * * *

The decision 53 Comp. Gen. 963, *supra*, in effect modified or overruled prior decisions of this Office. As such its effect, except in regard to the rights of the claimant in that decision, is regarded as prospective only and, therefore, without retroactive effect. Accordingly, claims which accrued on or after June 14, 1974, the date of that decision, shall be decided on the basis of the new construction as therein stated. To the extent that decision B–182904, February 4, 1975, *supra*, allowed a claim for mileage for the member's travel from his place of separation to his home of record after his claim for travel and transportation entitlements to his selected home was denied, which accrued prior to June 14, 1974, that decision no longer will be followed. The question presented is answered accordingly.

The Assistant Secretary also requests clarification in the case of a member who already has selected and moved to and has been paid personal travel allowances to a place nearer to his last duty station than his home of record or place of entry on active duty. This question is stated as follows:

> * * * While reimbursement for transportation of dependents and shipment of household goods to such a selected home is all that the law allows when dependents travel thereto and shipment of household goods is effected to that place, it would seem that the member should be permitted to claim the excess

mileage at this time to which he would have been entitled had he been aware of the option you indicate the law allows. Your decision as to whether your office would object to such claims is requested.

As stated above, claims arising prior to June 14, 1974, will be determined in accord with decisions then in effect. Regarding claims arising subsequently, consistent with our view that for members not specifically subject to 37 U.S.C. § 404(f), payment for personal travel without regard to actual performance may not be authorized. Members who travel to a home of selection may not be paid an allowance for their travel in excess of the actual distance traveled although the home of record or the place of entry on active duty is at a greater distance. As these members have received all that the law allows for personal travel, this Office would object to the payment of additional allowances in such circumstances.

It must also be noted that dependent travel is apparently limited by the provisions of 1 JTR paragraph M7000, item 13, and that, therefore, travel performed by dependents in order to qualify for reimbursement must be made in conjunction with the establishment of a residence and not merely for purposes of a visit or vacation.

It is recognized that questions may arise in specific situations with respect to the travel and transportation entitlements considered. However, this decision together with such regulations as may be issued consistent with it should provide a reasonable basis for determining the entitlements of the members involved.

[B-182882]

Contracts—Specifications—Restrictive—Non-Price Listed Parts Clause

Parts procurement invitation for bids clause which provides that, under cost-reimbursement segment of contract, contractor will not be able to furnish parts to Government at price which includes markup from affiliates is unduly restrictive and unreasonably derived, since provision would reduce likelihood that contractor would buy from affiliates and Armed Services Procurement Regulation guidelines recognize affiliates entitlement to recover more than cost in comparable situations where there is price competition as clause contemplates.

In the matter of Wheeler Brothers, Inc., June 12, 1975:

The subject protest concerns invitation for bids (IFB) F65501-75-0-9030, which was issued by Elmendorf Air Force Base for a contractor-operated on-base automotive parts store (COPARS).

Award is to be made to the responsive, responsible bidder who submits the lowest total price for price listed auto parts and operation of the COPAR store during the estimated number of nonduty hours.

The contract also will require the successful bidder to supply non-price listed items "* * * at the contractor's net invoice cost after

prompt payment discount and any applicable prorated share of supplier's volume rebate, plus the service charge shown below plus transportation charges. The amount of the monthly service charge paid will be determined by the amount of the contractor's net invoice cost after prompt payment discount as follows:

Monthly dollar cost	Service charge
$100.01 to $500.00	$50.00
$500.01 to $1,000.00	100.00
$1,000.01 to $2,000.00	200.00
$2,000.01 to $3,500.00	300.00
$3,500.01 to $5,000.00	400.00
$5,000.01 to $6,500.00	500.00
$6,500.01 to $8,000.00	600.00
$8,000.01 to $10,000.00	700.00
$10,000.01 to $12,000.00	800.00
$12,000.01 to $16,000.00	1,000.00
$16,000.01 to $18,000.00	1,100.00
$18,000.01 to $20,000.00	1,200.00
$20,000.01 and over	1,300.00

Clause SP J–18b of the original IFB stated that:

b. Sales or transfer of parts between a parent company and/or subsidiaries or affiliates in which the COPARS contractor (or principals of the company) has a financial interest, which increases the price to the Government beyond the price which the COPARS contractor would normally expect to pay if the item was purchased at the best price obtainable elsewhere in the market place, is prohibited. In cases which involve the sale or transfer of parts between a parent company and/or subsidiaries or affiliates which the COPARS contractor (or principals of the company) has a financial interest, the Contractor will furnish proof that any item(s) was purchased at the best price obtainable elsewhere in the market place, when deemed necessary by the Contracting Officer.

However, per IFB amendment No. –MO1, dated November 20, 1974, clause SP J–18b was deleted in its entirety and replaced by a new clause. SP J–18 now reads in pertinent part:

SP J–18. *OBTAINING NON-PRICE LISTED (NPL) PARTS.*

a. Except as provided in SP J–15c, the COPARS contractor will procure all NPL parts from the manufacturer, or from the highest level in the manufacturer's distribution system which he has access to which will provide the lowest price that is obtainable by the COPARS contractor in the normal course of business. When determined necessary by the Contracting Officer, the contractor will be required to provide evidence that the supplier of NPL parts is in fact an authorized member of the manufacturer's distribution system. *The contractor's proposed source of supply, and estimated cost, must be approved by the Contracting Officer prior to obtaining parts when the estimated price of any one item exceeds $500 or a group of items to a single source is estimated to exceed $1,000.*

b. *In cases which involve the sale or transfer of parts between a parent company and/or subsidiaries or affiliates which the Contractor (or principals of the company) has a financial interest, the affected NPL parts will be furnished to the Government without any mark-up in the net cost of the item from the supplier to the contractor or the affiliate.* The contractor shall furnish proof that any item(s) was furnished to the Government at the net invoice cost to the Contractor or affiliate, when deemed necessary by the Contracting Officer. *It is not the intent of the contract to allow either the contractor or any affiliate involved in the performance of this contract, to realize a monetary profit from (or increase the cost of) NPL parts being furnished to the Government under this contract.* (See Part I, Section B, Para 10 concerning required affidavit. Also, see E–2, SPJ–1; and SPJ–22 concerning payment for NPL parts)

c. In order to satisfy the requirements of SP J–18a and b above, the Contracting Officer may require the Contractor to furnish a minimum of two proposed

sources of supply (before purchase) for one item estimated to exceed $500 or a group of items to a single source estimated to exceed $1,000, for approval. * * * [Italic supplied.]

Wheeler Brothers, on behalf of itself and its affiliate, Murdock Enterprises Incorporated, protests against the inclusion of clause SP J–18b, as amended, contending that the clause is unduly restrictive of competition. Indeed, it is stated that if SP J–18b, as amended, is utilized, should Wheeler Brothers be the successful bidder, it would effectively be precluded from buying NPL parts from Murdock since Murdock's profit would not be an allowable cost to the prime contract. This fact would occur even though Murdock's price (even including profit) for a given item might have been the lowest price at which Wheeler Brothers could have obtained the part.

The protester thus contends that SP J–18b, as amended, will cause the Government to pay more for NPL parts in that a prime contractor (such as Wheeler Brothers) would not necessarily be able to obtain a given part at the lowest price available if the lowest price was quoted by an affiliate. The results of SP J–18b, as amended, it is contended, are that affiliate suppliers are essentially eliminated as potential sources of supply while in return the Government may pay the same or, more likely, higher prices for NPL parts.

The Air Force states that the NPL portion of the contract is essentially a cost-reimbursement segment of what otherwise is a fixed-price contract. It states that since the NPL portion is not evaluated and there is no basis for competition in the NPL portion of the solicitation, it cannot be restrictive of competition.

We do not agree. By disallowing from the prime's cost the profit of potential subcontractor materialmen who happen to be affiliates of the COPARS operator, competition for the supply of NPL parts has been lessened since it would reduce the likelihood that a COPARS operator would buy from its affiliate under those circumstances. Similarly, it is not likely that an affiliate supplier would sell to the COPARS operator at cost if it had an established practice of charging a profit.

While it must be recognized that almost every clause placed in an IFB may in some way be restrictive of competition, the question presented here is whether clause SP J–18b, as amended, is *unduly* restrictive of competition. In that connection:

> Our Office has consistently stated that specifications should be drawn to maximize competition. B–178158, May 23, 1973; B–172006, June 30, 1972. Moreover, we will not interpose our judgment for that of the agency's even when competition is reduced "* * * unless there is clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such specifications would, by *unduly* restricting competition * * *, be a violation of law." 40 Comp. Gen. 294, 297 (1960); B–178158, *supra;* see 49 *id.* 156 (1969) and 17 *id.* 554 (1938). * * * *Winslow Associates,* 53 Comp. Gen. 478 (1974). [Italic supplied.]

Clause SP J–18b, as amended, sets out the method for determination of prices. Accordingly, we agree with the agency that the cost princi-

ples of Armed Services Procurement Regulation (ASPR) § 15–000, *et seq.*, are not directly applicable. The agency does, however, state that "such principles do provide guidelines in determining the appropriateness of allowing or disallowing affiliate profit on sales or transfers between affiliates."

ASPR § 15–205.22 (1974 ed.) states in pertinent part:

> (e) Allowance for all materials, supplies and services which are sold or transferred between any division, subsidiary or affiliate of the contractor under a common control shall be on the basis of cost incurred in accordance with this Part 2, except that when it is the established practice of the transferring organization to price interorganization transfers of materials, supplies and services at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control, allowance may be at a price when:
>
> (i) it is or is based on an "established catalog or market price of commercial items sold in substantial quantities to the general public" in accordance with 3–807.1(b)(2); or
>
> (ii) it is the result of "adequate price competition" in accordance with 3–807.1(b)(1)*a* and *b* (i) and (ii), and is the price at which an award was made to the affiliated organization after obtaining quotations on an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity;
>
> *provided* that in either case:
>
> (1) the price is not in excess of the transferor's current sales price to his most favored customer (including any division, subsidiary or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and
>
> (2) the price is not determined to be unreasonable by the contracting officer.

The agency contends that, in a circumstance such as the one here presented, the exception stated in ASPR § 15–205.22(e)(ii) is not applicable because if the affiliate's price to the contractor was the result of adequate price competition and award was made to the affiliate after obtaining quotations on an equal basis from the affiliate and one or more equivalent sources, then the item would or should have been included in a price list.

The agency also states that, in effect, SP J–18b, as amended, reflects the agency's view that there is neither an established catalog nor market price for the item nor "adequate price competition" for nonprice listed parts. We note, however, that SP J–18c recognizes that the contractor may be required to submit a minimum of two proposed sources for any item exceeding $500 or group of items exceeding $1,000. Moreover, "adequate price competition" is defined in ASPR § 3–807.1(b) (1974 ed.) as follows:

> (1) *Adequate Price Competition.*
>
> a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (*e.g.*, the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied. * * *

Accordingly, we do not share the agency's view that the cost prin-

ciples would not allow affiliate profit as an allowable cost in like circumstances where applicable.

We also note the philosophy expressed in ASPR § 3-806(b) (1974 ed.) that:

(b) Profit or fee is only one element of price and normally represents a smaller proportion of the total price than do such other estimated elements as labor and material. While the public interest requires that excessive profits be avoided, the contracting officer should not become so preoccupied with particular elements of a contractor's estimate of cost and profit that the most important consideration, the total price itself, is distorted or diminished in its significance. Government procurement is concerned primarily with the reasonableness of the price which the Government ultimately pays, and only secondarily with the eventual cost and profit to the contractor.

SP J-18b clearly has a desirable and legitimate purpose—to insure the reasonableness of prices charged for the NPL items. However, we believe that the ultimate effect of the clause is negative. It does not assure the reasonableness of the NPL price, but it tends to reduce competition by discouraging the lowest possible prices on the price listed parts from firms with supplier affiliates who would not be able to take advantage of the affiliate's competitive position with respect to NPL items. Under these circumstances, we must conclude that this provision of the IFB is unreasonably derived and unduly restrictive. Therefore, it is recommended that appropriate action be taken to amend the noted restrictive requirements of SP J-18b.

[B-166802]

Transportation—Dependents—Travel to Attend Award Ceremonies for Honor Award Recipients

There is no authority for the Civil Service Commission to issue regulations authorizing the payment of travel and transportation expenses of members of the immediate family of honor award recipients to attend award ceremonies as such expenses are not considered a "necessary expense" under 5 U.S.C. 4503.

In the matter of payment of travel expenses for family members of honor award recipients, June 13, 1975:

The Chairman of the United States Civil Service Commission requested a decision as to whether authority within the law exists for the heads of agencies to incur costs of travel and transportation expenses for family members of honor award recipients under the "necessary expense" provision of 5 U.S. Code § 4503.

Title 5, U.S.C. § 4503 (1970), provides that:

The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—

(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or

(2) performs a special act or service in the public interest in connection with or related to his official employment.

The above-cited statute authorizes the head of an agency to pay cash awards to and incur necessary expenses for the honorary recognition of civilian officers and employees of the Federal Government.

Since it is stated that the Civil Service Commission's regulations and guidance materials do not address the matter of "necessary expense for the honorary recognition of an employee," the determination as to what expenses may be authorized for this purpose has been left to the discretion of agency heads. For this reason, the Commission from time to time receives inquiries as to whether the cost of travel and transportation expenses for family members of honor award recipients can be authorized by an agency head under the "necessary expense provision of the law." The Commission has been requested to issue an appropriate regulation to specifically authorize travel expenses for family members of honor award recipients.

In 32 Comp. Gen. 134 (1952) the question arose as to whether field employees of the Department of the Interior may be reimbursed travel and miscellaneous expenses incident to the presentation to them of the Department's Distinguished Service Award at Department convocations held in Washington, D.C. The provisions of section 14 of the act of August 2, 1946, applicable in 1952, authorized awards for meritorious service and are similar to those contained in 5 U.S.C. § 4503.

In interpreting the phrase "to incur necessary expenses" with regard to travel expenses, it was stated that travel and miscellaneous expenses incurred by officers and employees for the purpose of participating in ceremonies held at a Department convocation in honorary recognition of exceptional or meritorious service under the incentive awards program authorized by section 14 of the act of August 2, 1946, as amended, may be considered a direct and essential expense of the award, and within the scope and meaning of the phrase "to incur necessary expenses" as used in the statute. However, since members of the family are not directly related to the presentation of the award, we do not consider the expense of travel of members of the family to attend the award ceremony to be a direct and essential expense of the award.

Therefore, in the absence of express statutory authority, we conclude that the Commission may not issue regulations providing for the expenditure of funds to cover the cost of travel and transportation expenses associated with family attendance at award ceremonies.

[B–183743]

Meetings—Short Term Conference Facilities—Service Contract—Federal Property Management Regulations

Federal agencies may now procure the use of short-term conferences and meeting facilities without regard to prohibition against rental contracts in District

of Columbia in 40 U.S.C. 34, inasmuch as the General Services Administration in its Federal Property Regulations, contained in 41 C.F.R. 101–17.101–4 has interpreted the procurement of use of short-term conference facilities as a service contract instead of a rental contract. Office of Technology Assessment (OTA), which has legislative authority to contract for such services, may reimburse its panel member sponsors for expenses incurred in arranging OTA panel meetings at the COSMOS Club in the District of Columbia, with appropriate reductions in each member's actual subsistence allowance for meals provided in this manner. 35 Comp. Gen. 314; 49 *id.* 305; and B–159633, May 20, 1974, insofar as they prohibited procurement of short-term conference facilities in the District of Columbia, will no longer be followed.

In the matter of reimbursement of expenses for use of short-term conference facilities in District of Columbia, June 13, 1975:

This action involves an informal request for an advance decision from the Office of Technology Assessment (OTA), an independent office within the legislative branch, and the authorized certifying officer of the General Accounting Office, as to the propriety of making certain payments for expenses that the OTA has incurred in connection with periodic meetings of Technology Assessment Panel members in Washington, D.C.

The OTA, established under provisions of 2 U.S. Code Chapter 15 (Supp. III, 1973) has the mission of providing Congress with scientific and technical information, assessments, reports, surveys, etc., it requires in order to legislate on such matters. Under authority provided in the aforementioned statute, the OTA has established several panels and committees to prepare assessments in such areas as materials, transportation, energy, etc. These panels have been staffed by distinguished scientists and recognized experts in their fields of endeavor, who are employed on a consultant basis by the OTA. Inasmuch as these panel members are very busy people with full-time employment in private industry or at higher level educational institutions, panel meetings are normally scheduled on the weekend and then usually for only 1 day. Periodic panel meetings are open to the public. Many of the panel members, as distinguished scientists, are long-standing members of the COSMOS Club at 2121 Massachusetts Avenue, Washington, D.C. and desire to stay at that facility when visiting Washington, D.C. Hence, in light of the panel members' preference for this facility, its central and convenient location, the fact that it is open and in operation on weekends, provides food and other services, is always available for panel meetings on short notice, and is properly staffed and equipped to provide all the services required for panel meetings, the OTA desires to use the COSMOS Club for panel meetings whenever possible. In addition, OTA believes that holding panel meetings at this facility will give its work visability in the scientific community and attract the interest of other distinguished scientists that it may desire to recruit for consultation.

The facilities of the COSMOS Club are available only to members and their guests. Thus, to obtain the use of these facilities for panel meetings, the OTA must reimburse a COSMOS Club member for the expenses he incurs in sponsoring the meetings. These expenses include food, telephone, parking, room charges, coffee and similar services. The OTA has submitted the COSMOS Club bills of several panel member sponsors to this Office for payment and the General Accounting Office authorized certifying officer has informally requested an advance decision on such expenditures. Specifically, the authorized certifying officer questions whether payment of these claims would be precluded by the prohibition in 40 U.S.C. § 34 (1970), against the execution of a contract by a Government agency for rental of any building in the District of Columbia for governmental purposes unless there is a specific appropriation therefor. In this connection, 40 U.S.C. § 34 (1970) provides as follows:

> No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or part of any building.

Our Office has long held that the prohibition expressed in 40 U.S.C. § 34 (1970) against the execution of a contract for the rental of any building in the District of Columbia for governmental purposes until an appropriation has been made is comprehensive and applies to all uses, whether Government transient or long term. *See* 35 Comp. Gen. 314 (1955), 49 *id.* 305 (1969), and B–159633, May 20, 1974, as well as cases cited in these decisions. However, the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490 (1970) assigns the responsibility for all phases of building space management to the Administrator, General Services Administration (GSA), including the acquisition of space through lease or rental arrangement within the District of Columbia for other agencies. Pursuant to its authority, GSA has promulgated Federal Property Management Regulations in title 41 of the Code of Federal Regulations. In 41 C.F.R. § 101–17.101–4 (1974), GSA has set forth the procedures that agencies must follow in obtaining short-term use of conference and meeting facilities. This section provides:

> *§ 101–17.101–4 Short-term use of conference and meeting facilities.*
>
> Agencies having a need for facilities for short-term conferences and meetings shall contact GSA informally to make their requirements known. GSA will determine if suitable Government-owned facilities are available in the desired area and, if so, will notify the requesting agency of its assignment. If no suitable facilities are available, GSA will assist or advise agencies in arranging for the use of privately owned facilities when agencies have authority to contract by purchase order or other means. *Payment for use of privately owned conference or meeting rooms is, in fact, payment for the services and furnishings that are provided.* Such services and furnishings, in addition to the facilities (auditorium,

conference room, meeting room, etc.), would include chairs (already placed as requested by the user), rostrum with tables and chairs, posting of notices on appropriate building bulletin board, amplifier system, screen and motion picture projector, and other special equipment needed. GSA may obtain privately owned conference and meeting facilities by service contract on an hourly rate basis where combined requirements of the Federal agencies in a particular area would justify an open end service contract for such space for intermittent use periods or for an extended period of time. [Italic supplied.]

We note from the above-quoted regulation that the procurement of the short-term use of conference and meeting facilities is considered to be a service contract rather than a rental or lease contract. It is a general principle of law that the interpretation by an agency of a statute which it is charged to administer is entitled to great weight. *United States* v. *Jackson*, 280 U.S. 183 (1930); *New York Central Securities Co.* v. *United States*, 287 U.S. 12 (1932); *United States* v. *American Trucking Assoc., Inc.*, 310 U.S. 534 (1940); *Levinson* v. *Spector Motor Co.*, 330 U.S. 649 (1947); *Udall* v. *Tollman*, 380 U.S. 1 (1965); *United States* v. *City of Chicago*, 400 U.S. 8 (1970). Hence, we are of the option that GSA, as the agency charged with the administration of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490 (1970), has authority to construe the procurement of short-term use of conference and meeting facilities as a service contract rather than a rental contract. Under this construction, the procurement of short-term use of conference and meeting facilities as set forth in 41 C.F.R. § 101–17.101–4 would not be precluded by the aforementioned prohibition in 40 U.S.C. § 34 (1970), against the execution of a contract by a Government agency for rental of any building in the District of Columbia for governmental purposes unless pursuant to specific appropriation authority. We have never before fully considered the above-quoted regulation in deciding questions involving agency procurement of the use of short-term conference facilities in the District of Columbia and therefore our holdings that apply the prohibition against the rental of space in the District of Columbia contained in 40 U.S.C. § 34 (1970) for such purposes, as set forth in 35 Comp. Gen. 314 (1955); 49 *id.* 305 (1969), and B–159633, May 20, 1974, will not be followed in the future.

In view of the foregoing, Federal agencies may now procure the short-term use of conference and meeting facilities providing they comply with the requirement of 41 C.F.R. § 101–17.101–4 for the procurement of such facilities. However, the legislative history of the OTA indicates that the intent of Congress was to consider OTA as a part of Congress and OTA staff as "congressional staff." H.R. Report No. 92–1436, 92d Cong., 2d Sess., 10–11 (1972). As such, the OTA would not come within the GSA definition of a "Federal agency"

as set forth in 41 C.F.R. § 101–17.003–23 and thus would not be required to comply with the provisions of 41 C.F.R. § 101–17.101–4, concerning the procurement of short-term use of conference and meeting facilities.

Also, we are of the opinion that the authority of the OTA is sufficiently broad so as to enable it to reimburse a panel member the cost he incurs in sponsoring a panel meeting at the COSMOS Club. In this connection, 2 U.S.C. § 475(a) (Supp. III, 1973) provides as follows:

§ 475. *Powers of Office of Technology Assessment.*

* * * * * * *

The Office shall have the authority, within the limits of available appropriations, to do all things necessary to carry out the provisions of this chapter, including, but without being limited to, the authority to—

* * * * * * *

(2) enter into contracts or other arrangements as may be necessary for the conduct of the work of the Office with any agency or instrumentality of the United States, with any State, territory, or possession or any political subdivision thereof, or with any person, firm, association, corporation, or educational institution, with or without reimbursement, without performance or other bonds, and without regard to section 5 of Title 41 * * *.

The above-quoted statute authorizes the OTA to enter into arrangements with any person as may be necessary for the conduct of its work and the accomplishment of its mission. Hence, we are of the opinion that the OTA has authority to reimburse the sponsors of short-term panel meetings at the COSMOS Club. However, since the panel members are authorized actual subsistence not to exceed $50 per day, the cost of any meals consumed by panel members at the COSMOS Club and reimbursed to the sponsoring panel member, should serve to reduce the $50 per day actual subsistence limit on a pro rata basis.

[B–183291]

Travel Expenses—Delays—Rest Entitlement

Deduction of $37.50 from employee's claim for travel costs incurred due to overnight stop en route via air from Port Angeles, Washington, to Grand Canyon, Arizona, is correct. Federal Travel Regulations do not provide for rest stops, regardless of length of travel, when travel is within the continental United States, and this Office has never approved rest stops unless travel during normal periods of rest is involved.

In the matter of a claim for travel expenses, June 16, 1975:

This action is a request by an authorized certifying officer of the Pacific Northwest Region, National Park Service, Department of the Interior, for a decision on the propriety of certifying for payment a claim of $37.50 representing per diem in lieu of subsistence and

taxicab fare which was deducted from the travel voucher submitted by Mr. Sherman D. Knight, an employee at Olympic National Park.

The record shows that Mr. Knight traveled under Travel Authorization number TA950050086 from Port Angeles, Washington, to Grand Canyon, Arizona, and return, to attend a seminar which began on October 7, 1974. Mr. Knight was authorized average cost of a night's lodging plus $12 en route to and from Grand Canyon and a fixed rate of $12 while at Grand Canyon. Travel was to begin on or about October 6, 1974.

Mr. Knight actually departed on Saturday, October 5, 1974, leaving Port Angeles by Pearson Airlines at 6 a.m., arriving in Seattle at 7 a.m., and then departing Seattle at 10:30 a.m. by Western Airlines, arriving at Las Vegas at 1:59 p.m. Mr. Knight stayed overnight in Las Vegas and departed on Sunday, October 6, 1974, for Grand Canyon, arriving at 3:30 p.m. The return trip from Grand Canyon to Port Angeles was accomplished in 1 day, leaving Grand Canyon October 11, 1974, at 12:30 p.m., with several stops en route and arriving in Port Angeles at 10:45 p.m.

Utilizing airline schedules in effect at the time of the trip, Mr. Knight could have departed from Port Angeles on Sunday, October 6, 1974, at 6:30 a.m. via Western Airlines, arriving at Seattle at 7 a.m., then departed from Seattle at 10:30 a.m., arriving at Las Vegas at 1:59 p.m., and (by commuter flight) departed from Las Vegas at 5 p.m., arriving at Grand Canyon at 6:30 p.m.

Thirty-seven dollars and fifty cents was deducted from the amount claimed on Mr. Knight's travel voucher as a disallowance of per diem and taxi fares in Las Vegas. The certifying officer concluded that the early departure was for the employee's personal convenience. Mr. Knight objects to this deduction as it indicates that he should have traveled for approximately 13 hours on Sunday, October 6, 1974, to reach Grand Canyon. He contends the layover should not be considered a personal convenience but instead a stopover required for a reasonable length working day.

There are no provisions in the Federal Travel Regulations, FPMR 101–7, which provide for rest stops while an employee is traveling within the continental United States. With respect to travel outside the United States, FPMR 101–7, para. 1–7.5(e), states:

> *Time changes during air travel.* When an individual travels direct between duty points which are separated by several time zones and at least one of the duty points is outside the coterminous United States, per diem entitlement is not interrupted by reason of a rest period allowed the individual en route or at destination under appropriate agency rules.

Although there is no general rule with respect to stopovers for rest stops on long air flights, each case must be determined on its own merits

[*see* B–164709, August 1, 1968]. This Office has never approved payment for a rest stop unless travel during normal periods of rest is involved. The length of time required for travel between two points is not the determining factor as to whether a rest stop will be permitted. The determining factor is the hours of the day at which the employee must travel. *See* B–164709, *supra.*

FPMR 101–7, para. 1–7.5(d), limits per diem to the time period required for "uninterrupted travel by a usually traveled route." However, this Office does not consider the regulation to require travel during normal hours of rest if sleeping accommodations are unavailable. *See* B–181363, August 23, 1974; B–164709, *supra;* B–128736, August 3, 1956. If sleeping accommodations are available or if night travel is not involved, per diem for a rest stop is not permitted. *See* B–135092, March 10, 1958.

The instant case did not involve travel outside the United States so the significant time zone change exception is not applicable, nor did it involve night travel as is required by our decisions. The journey could have been completed in 1 day with an arrival time of 6:30 p.m. The circumstances of this case do not indicate that a rest stop is permissible. Federal Travel Regulations, FPMR 101–7, paras. 1–2.5(b) and 1–7.5(d), indicate that the costs of travel interrupted for the convenience of the employee are to be borne by the employee. We find no basis to question the determination of the certifying officer that the stopover was for the convenience of the employee. As stated, there are no provisions in the Federal Travel Regulations which permit interruption of travel for rest stops when air travel begins and ends within the continental United States. Furthermore, this Office in construing the regulations has never permitted an employee to delay travel unless travel during normal periods of rest is involved. Accordingly, the deduction of $37.50 as determined by the certifying officer is correct.

[B–171630]

Housing and Urban Development Department—Repairs on Defaulted Mortgage Properties—Authority To Make Advancements From Insurance Fund for Reimbursement

Under provisions of 12 U.S.C. 1713(k) Secretary of Housing and Urban Development (HUD) may advance moneys for purpose of making necessary repairs to multifamily projects covered by mortgages which have gone into default and been assigned to him, provided that either default is cured or title to property acquired within reasonable time. After mortgage has gone into default and been assigned to Secretary of HUD, he may, in accordance with broad authority contained in 42 U.S.C. 3535(i), restructure mortgage to defer portion of monthly principal and interest payment to end of mortgage term so as to cure default.

In the matter of the scope of authority granted Secretary of Housing and Urban Development to advance sums "pending" acquisition of multifamily projects in default, June 18, 1975:

This decision to the Secretary of Housing and Urban Development (HUD) is in response to a letter from HUD's Office of General Counsel dated March 12, 1975, requesting a legal opinion as to whether section 207(k) of the National Housing Act, as amended, 12 U.S. Code § 1713 (k) (1970) contains sufficient legal authority to permit HUD to advance moneys from its Insurance Fund for the purpose of making certain necessary repairs to multifamily projects after the insured mortgages for the projects had gone into default and subsequently been assigned to the Secretary.

The need for such authority was explained in HUD's letter as follows:

> * * * It has been our practice in dealing with the mortgagors of these multifamily projects to first attempt to work out an arrangement to bring the mortgage current. In the event that such attempts prove unsuccessful, the Secretary has then pursued a policy of foreclosing on the property or acquiring a deed in lieu of foreclosure.
>
> We are concerned that the effect of continuing this policy will have adverse consequences for both the low and moderate income tenants residing in the individual projects and the community at large. There is a risk that when HUD acquires title and then proceeds to resell the project, the new owners will no longer operate the project for low and moderate income families, but rather will increase the rental charges to effectively force the existing tenants to leave the project. Further, we believe that many nonprofit mortgagors have a deep commitment to the community in which their project is located.
>
> In order to assist those nonprofit mortgagors who have evidenced sound management capabilities to retain the ownership of their projects, and to insure that the projects retain their low and moderate income characteristics—policies which we feel are consistent with the policy of the National Housing Act—we are considering revising our procedures when a mortgage is assigned. More specifically, we are presently considering a proposal to be applied to subsidized multifamily projects which satisfy certain criteria whereby a portion of the monthly principal and interest payments would be deferred to the end of the mortgage terms.
>
> It is further believed, however, that additional funds must also be expended on these projects to provide for needed repairs and improvements. Such repairs are necessary to prevent further deterioration of the building and to insure that the project continues as a viable economic entity. We envision advancing funds to finance these improvements directly from the appropriate Insurance Fund, either the General Insurance Fund or the Special Risk Fund, depending on the section under which the project was insured. Such sums will be added to the mortgage debt. It appears that obtaining loans from the appropriate Insurance Fund is the only feasible source for obtaining money to finance these needed repairs, there being both practical and legal problems preventing loans from other sources.

The provisions of law that HUD would rely on as authority for the proposed procedure are 12 U.S.C. § 1713(k) and section 905 of the Housing and Urban Development Act of 1970, 42 U.S.C. § 3535(i). The latter code provision reads as follows:

> Except as such authority is otherwise expressly provided in any other Act administered by the Secretary, the Secretary is authorized to—* * * (5) consent to the modification with respect to the rate of interest, time of payment of any installment of principal or interest, security, or any other term of any contract or agreement to which he is a party or which has been transferred to him * * *.

We were informally advised by representatives of HUD that it is pursuant to the broad authority provided the Secretary in the last quoted provision of law that HUD proposes to restructure or recast mortgages (which upon default have been assigned to the Secretary) so that a portion of the monthly principal and interest payments would be deferred to the end of the mortgage term so as to cure the default by the mortgagor.

We would agree that under section 905 the Secretary may modify the terms of a mortgage assigned to him in the manner proposed in order to permit the mortgagor to cure his default on such mortgage.

As to your specific question, *i.e.*, whether section 207(k) of the National Housing Act, as amended, 12 U.S.C. § 1713(k) (1970) contains sufficient legal authority to permit HUD to advance moneys from its appropriate Insurance Fund for the purpose of making repairs to multifamily projects after the insured mortgage on a project has gone into default and has been subsequently assigned to the Secretary of HUD, that section provides as follows:

> The Secretary is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Secretary at any sale under foreclosure may, in his discretion, for the protection of the General Insurance Fund, bid any sum up to but not in excess of the total unpaid indebtedness secured by the mortgage, plus taxes, insurance, foreclosure costs, fees, and other expenses, and may become the purchaser of the property at such sale. The Secretary is authorized to pay from the General Insurance Fund such sums as may be necessary to defray such taxes, insurance, costs, fees, and other expenses in connection with the acquisition or foreclosure of property under this section. Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

Directing our attention to the final sentence of this provision, HUD's letter of March 12, 1975, makes the following argument concerning the proper interpretation of this provision:

> A strict interpretation of the "preserve or protect" clause would limit advances from the Insurance Funds to actions taken in an interim period during which HUD is preparing to acquire title by foreclosure or by a deed in lieu of foreclosure. The proposal to defer principal and interest does not contemplate that HUD anticipate the acquisition of title in the near future, but rather the purpose of the proposal is to enable the present mortgagor to continue to own and operate the project for the remaining term of the mortgage. Under this view, the word "pending" has a limiting effect, restricting actions taken by the Secretary under this clause to those actions where acquisition of title is about to occur in the near future.
>
> A more liberal view of Section 207(k)—and the one we feel best comports with the underlying policy of the National Housing Act—would permit the Secretary to take all reasonably necessary steps to preserve or protect the lien on the mortgaged property. Since the money to finance these improvements will be advanced only after an analysis is made as to what repairs are necessary to prevent further deterioration of the project and to insure that the project

complies with our minimum housing standards, the cost of the improvements should be considered as an expense necessary to preserve and protect our lien of the mortgage. The "pending" clause should not be construed as a limitation on the Secretary's discretionary power to act. Rather, the word "pending" should be interpreted to mean "until," and should not be considered as constraining the Secretary to act only where he intends to acquire title within a short period of time. In other words, where the Secretary is the mortgagee, he may use whatever reasonable steps are necessary to preserve and protect the lien of the mortgage *until* title is acquired; once he has acquired title, the Secretary's rights are defined by Section 207(*l*).

We would like to further bring to your attention an observation with respect to the history of section 207(k). Prior to 1964 this section required the Secretary to foreclose a multifamily project within one year of default. This provision was deleted by the Housing Act of 1964. The legislative history for this deletion is sparse. The effect of the deletion, however, is consistent with the more liberal view of the meaning to be accorded the "preserve or protect" clause, as it would seem to evidence Congressional intent that the Secretary must have broad discretionary power to determine when to foreclose and when to forbear. It is essential for the Secretary, in order to provide effective administration, to be able to assert the same rights as a private mortgagee when a mortgage is assigned to him, which includes the right to loan funds to make needed repairs.

The original language of the last quoted code provision required the Commissioner of the Federal Housing Administration (FHA) to initiate foreclosure proceedings within 1 year after default unless the "defaulted" property had been voluntarily conveyed to HUD prior thereto. The specific language that established the 1-year period was set forth in the second sentence of the original provision and read as follows:

* * * The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner: *Provided,* That the foregoing provisions shall not be construed in any manner to limit the power of the Commissioner to foreclose on the mortgaged property after the expiration of such period, or the right of the mortgagor to reinstate the mortgage by the payment, prior to the expiration of such period, of all delinquencies thereunder.

However, section 108 of the Housing Act of 1964, approved September 2, 1964, Public Law 88-560, 78 Stat. 769, 776, amended 12 U.S.C. § 1713(k) by deleting this sentence from the provision. An examination of the following Congressional explanation for such deletion is relevant to our consideration:

ELIMINATION OF MANDATORY ACQUISITION OR FORECLOSURE WITHIN 1 YEAR OF MULTIFAMILY PROJECT IN DEFAULT

Section 505 of the bill would eliminate the requirement in existing law that FHA acquire title to the project or commence foreclosure of an assigned mortgage within 1 year from the date of default in a mortgage insured by the FHA covering a multifamily housing project.

Elimination of this requirement would make it possible, in some instances, to work out arrangements with mortgagors under which a defaulted mortgage could eventually be reinstated. *The deletion of the 1-year requirement would give FHA latitude to consider each case on its own merits and to take such action as is required in each case.*

For example, situations arise where the economic conditions of a locality decline and as a result of the decline vacancies occur in rental housing. Often the mortgagors of multifamily projects find that they can no longer meet their

amortization payments, and the mortgages go into default. One year from the date of default, the FHA must acquire title to the project, or commence foreclosure action, regardless of the fact that at the end of that year the economic conditions of the area may be improving and within 2 or 3 months hence rental accommodations may be in large demand. Under existing law the Commissioner has no flexibility in situations of this type.

Acquisition of a multifamily housing project by foreclosure is, at best, a drawn-out and costly procedure. The foreclosure process has many weaknesses. Projects are usually operated by court-appointed receivers who cannot be expected to have as much interest in the project as the mortgagor. Once a project is acquired by FHA, contracts are let to managing agents who also do not have the same interest as the mortgagor. The FHA often goes to considerable expense to fix up a project and then sells it at a price less than the outstanding balance of the mortgage. The purchasers are frequently speculators with no long-range interest in developing soundly operated projects. *Foreclosure should therefore be avoided whenever possible and where the mortgagor can be expected within a reasonable amount of time to achieve project income that will permit curing the default.*

The committee believes that this amendment is in keeping with the new authority which would be vested in the FHA Commissioner by section 101 of the bill, *supra*, which deals with forebearance for home mortgagors.

The committee has been advised that if the 1-year requirement is eliminated, the FHA would not hold foreclosure action or action to acquire title in abeyance indefinitely, but where there is no hope of reinstatement or the project is being mismanaged, foreclosure would be undertaken as soon as possible after a default. *In this connection the committee wishes to explain that the primary purpose of the amendment is to give the FHA the discretion to work with a mortgagor, in a promising case only, for a reinstatement of the loan. See* S. Report No. 1265, 88th Cong., 2d Sess. 39, 40 (1964). [Italic supplied.]

The above-quoted legislative history discloses that the purpose of the 1964 amendment was to give HUD some flexibility to consider each default case on its merits and to enable it in some instances to work out arrangements with mortgagors under which the defaulted mortgages could be reinstated, rather than to have HUD acquire title at the end of the 1-year default period, without regard to whether the mortgagor might be able to cure the default within a reasonable time after the expiration of the 1-year period. The legislative history makes it clear that foreclosure should be avoided whenever possible. However, the legislative history also makes clear that foreclosure should be waived only where the mortgagor "can be expected within a *reasonable* amount of time to achieve project income that will permit curing the default" [Italic supplied], and that FHA "would not hold foreclosure action or action to acquire title in abeyance indefinitely." In this connection note the statement in the quoted legislative history to the effect that the amendment contemplated the Secretary not acquiring title or foreclosing on the property where it appeared that at the end of the first year from date of default, economic conditions might be improving and that within "2 or 3 months hence rental accommodations may be in large demand." Thus, it would appear from the tenor of the legislative history that the 1964 amendment to the section in question contemplated that the Secretary would not forbear acquiring title if the default would not be, or was not, cured within a reasonable period of time after the expiration of a 1-year period.

Taking the foregoing into consideration, it is our view that the language of section 207(k) will legally permit the Secretary of HUD to advance money from the appropriate Insurance Fund to make necessary repairs to property covered by mortgages assigned to him upon default, until (1) the default is cured (either by the mortgage being brought current or by it being recast to defer a portion of the monthly principal and interest payments to the end of the mortgage term) or (2) title to the property is acquired by HUD, provided that the default is cured or title is acquired by the Secretary within a reasonable period of time after the expiration of 1 year from the date of the default. What constitutes a reasonable period of time would depend on the facts and circumstances in each case. Further, once the default is cured and the loan reinstated there would be no basis for the Secretary using the Insurance Fund to keep the property in repair.

The question presented is answered accordingly.

[B–182745]

Vehicles—Hire—Home to Work Transportation—Government Employees—Temporary Emergency Measure—Public Transportation Strike

Although hiring of vehicles for home to work transportation for Government employees is generally prohibited by 31 U.S.C. 638a, prohibition does not preclude such action where, as a temporary emergency measure, it is in Government interest to transport certain Social Security Administration employees to work during public transportation strike.

In the matter of the use of Government vehicles, June 19, 1975:

This decision is in response to a request by the Commissioner of Social Security for our opinion on the propriety of the rental of buses by the Social Security Administration (Administration) for the purpose of transporting employees from predetermined pick-up points to their offices at the Western Program Center (Center), San Francisco, California, during a public transportation strike. The Commissioner has also requested our opinion regarding the liability of the certifying officer for payments made to the bus company.

On July 1, 1974, the San Francisco, California area experienced a public transportation strike which had a crippling effect on the operations of the Center since many employees lived across the bay and relied upon public transportation as a means of commuting to and from work. To reach San Francisco from these areas it is necessary to cross the Oakland Bay Bridge which is approximately 10 miles long.

The Center receives approximately 13 percent of the national weekly Social Security claims receipts. When the total work force is on hand, approximately 88 percent of the weekly receipts are completed. On

the first day of the strike approximately 96 employees from across the bay were absent from their duty station. The Administration determined that transporting these employees to the Center was essential to the processing of claims of Social Security recipients dependent upon weekly payments from the Administration. Therefore, in order to provide a temporary means of transportation for such employees until they had adequate time to obtain other means of transportation, the Center contracted with Gateway Bus Lines to transport such employees from predetermined pick-up points in Oakland, Berkley, and Richmond. On the first day of the transportation program, the number of absent employees was only 16. The program was in effect from July 2 until July 19, 1974 at a cost of $5,136. Three separate invoices were submitted for certification and payment. The first two invoices, each for $2,025, were certified and paid. Upon submission of the third invoice for $1,086, the certifying officer questioned the legality of the program and refused to certify the invoice.

By letter dated November 22, 1974, the Commissioner of Social Security has requested our advice as to the legality of payments made to Gateway Bus Lines in view of the fact that the temporary transportation program appears to violate the statutory prohibition against the leasing or hiring of vehicles by the Government for the transportation of employees between their domiciles and places of employment. In this connection 31 U.S. Code § 638a (1970) provides:

(*a*) *Purchase or hire of vehicles.*
Unless specifically authorized by the appropriation concerned or other law, no appropriation shall be expended to purchase or hire passenger motor vehicles for any branch of the Government other than those for the use of the President of the United States, the secretaries to the President, or the heads of the executive departments enumerated in section 101 of Title 5.

* * * * * * *

(*c*) *Maximum purchase price of vehicles; determination of completely equipped vehicle; purchase of additional systems and equipment; use for official purposes; penalties.*
Unless otherwise specifically provided, no appropriation available for any department shall be expended—

* * * * * * *

(2) 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.

* * * * * * *

Any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft, or of any passenger motor vehicle or aircraft leased by the Government, for other than official purposes or otherwise violates the provisions of this paragraph shall be suspended from duty by the head of the department concerned, without compensation, for not less than one month, and shall be suspended for a longer period or summarily removed from office if circumstances warrant.

The above provision specifically recognized the well established rule that a Government employee must bear the cost of daily travel between

his home and place of employment. However, in construing this general prohibition of the use of Government vehicles for home to work transportation, this Office has recognized that its primary purpose is to prevent the use of Government vehicles for the personal convenience of the employee. We have long held that use of a Government vehicle does not violate the intent of the above statute where use of the vehicle is deemed to be in the interest of the Government. We have also 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. *Use of Government Vehicles*, 54 Comp. Gen. 855 (1975) and 25 *id.* 844 (1946).

In the circumstances it is clear that the transportation program was a temporary emergency measure. Accordingly, we believe the Administration could exercise some discretion in effecting such a temporary emergency measure involving a Government interest which transcends considerations of personal convenience. However, we recommend that in the future, if similar temporary emergency measures are necessary, all employees benefitting from the transportation program be charged fares commensurate with those charged by common carriers for such services.

Accordingly, the third and final invoice from Gateway Bus Lines may be certified for payment and there is no liability on the part of the certifying officer in connection with her certification of the first two vouchers processed.

[B–183486]

Contracts—Specifications—Defective—Cancellation of Invitation

Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Government's requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Government's needs.

In the matter of Essex Electro Engineers, Inc.; Cummins Diesel Engines, Inc., June 19, 1975:

Essex Electro Engineers, Inc. (Essex), the low bidder under IFB CG–52460–A, protests the rejection of its bid as nonresponsive.

The subject IFB was issued by the Department of Transportation, United States Coast Guard, for furnishing five emergency standby power systems in accordance with Coast Guard Specification No. 950, dated December 17, 1974. On the March 4, 1975 opening date 12 bids were received and opened. Essex was low with a unit price of $116,880. The contracting officer determined that the four lowest bidders were nonresponsive in that the engines offered to power the generators did

not meet the horsepower requirements of the specification. Two of these bidders offered engines identical to that offered by Essex.

The Coast Guard informed Essex that its bid had been rejected. Counsel for Essex disputed the Coast Guard's evaluation and requested the agency to review its determination. The Coast Guard again evaluated the Essex bid in the context of Essex's arguments as to the responsiveness of its bid and affirmed its determination to reject the Essex bid. Counsel then timely protested to our Office. Cummins Diesel Engines, Inc., has also protested the rejection of its third low bid.

This protest is concerned with the interpretation of the following portion of the engine specification:

> The engine shall have a continuous horsepower rating (as shown by the engine manufacturer's published performance curves) of at least 10 percent and not more than 25 percent in excess of that required to drive the generator and all engine and generator auxiliaries at rated generator speed, when the generator is delivering its full output at rated power factor, all at the altitude and ambient temperatures specified.

The Coast Guard determined that the engine offered by Essex and two other bidders, the General Motors Detroit Diesel 16V71T engine, does not develop sufficient horsepower to meet the specification. This determination was based on the view that "continuous horsepower rating" as required by the specification is equivalent to the manufacturer's horsepower rating for prime power application. Accordingly, the agency evaluated the engine offered by Essex by using Detroit Diesel Bulletin No. E4–7165–32–2 which indicates a prime power rating of 560 horsepower. This rating is well below the 654 horsepower rating which the Coast Guard calculates as the minimum needed to satisfy the specification requirements.

Essex's position is that in interpreting the horsepower rating requirements of the specification the agency has confused the power rating for standby application with the rating for prime power application and has erroneously assumed that the industry has only one continuous horsepower rating for both applications. In this connection counsel directs our attention to the fact that the specification clearly states in several places that it is for an "emergency standby power system." Further, counsel has supplied this Office with a copy of Detroit Diesel's published performance data and power curves No. E4–7165–32–1 which states that the rated power of the engine offered is 750 horsepower "Guaranteed Within 5%." The data indicates that "This rating applies to engines used for standby electric power systems which must deliver rated power continuously for the interval between interruption and restoration of the normal power source."

In further support of its position, Essex notes that another engine manufacturer, Caterpillar Corporation, in Bulletin LEX 21408 de-

fines continuous horsepower rating differently depending on whether the application is prime power or standby power as follows:

> Prime Power—for continuous electrical service.
> Standby Power—for continuous electrical service during interruption of normal power.

Finally Essex directs our attention to IFB CG–52, 633–A, issued by the Coast Guard for two "Prime Power Systems" in accordance with Coast Guard Specification No. 951, December 23, 1974, as a further illustration of the difference between prime power and standby power systems.

From the above the protester concludes that since the "engine manufacturer's published performance curves show that the 16V71T engine has a continuous power rating of 750 horsepower for the standby systems being procured, the agency's determination that the engine's continuous rating is 560 horsepower is incorrect and the Essex bid is, in fact responsive to the invitation."

We believe that counsel's position has merit. The agency has not provided our Office with any evidence which, in our view, supports its position that the industry considers that the horsepower rating of an engine for a prime power application is always equal to its "continuous" rating. To the contrary, it is our understanding that diesel engines of the type here in question are used in many different applications; to power pumps, to drive generators for prime power or standby power and the like, and that an identical engine model may be rated by its manufacturer at differing horsepower levels depending upon its particular use.

Although the agency insists that the intent of the specification was to obtain an engine rated by the manufacturer for continuous operation it is our view that the specification as it relates to engine horsepower rating is less than completely clear. It appears to us that the phrase "continuous horsepower rating" read in the context of an emergency standby power generating system, may be reasonably interpreted, as Essex and two other bidders did, as meaning a continuous rating for the interval between interruption and the restoration of normal power since as we understand it, a standby unit only operates during such intervals. On the other hand, we do not believe the other bidders who interpreted the specification as requiring a horsepower rating for continuous operation acted unreasonably either. The fact is that the specification as written seems to lend itself to conflicting interpretations.

We have held in similar situations that where a solicitation so inadequately expresses the Government's requirements as to ensnare the average bidder into submitting a nonresponsive bid, the solicitation should be canceled and resolicited under terms which clearly reflect

the Government's needs. 52 Comp. Gen. 842, 846 (1973), *Science Management Corporation (Decision Studies Group)*, B–181281, July 3, 1974. As written, the subject specification cannot be considered to clearly express the Coast Guard's stated need for an engine-generator set rated by the manufacturer for continuous operation. The need for the resolicitation of this procurement is illustrated by the fact that the four lowest bidders were determined to be nonresponsive to the engine rating portion of the specification.

In view of the above it is clear that Cummins' protest which concerns the responsiveness of its bid and the nonresponsiveness of the bid of Johnson and Towers, Inc., is moot and need not be considered at this time.

Accordingly, we are recommending by separate letter of today to the Secretary of Transportation that the Coast Guard cancel IFB CG–52460–A and resolicit the procurement in terms which clearly state the agency's requirements for engine power rating.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91–510, 31 U.S. Code 1172.

[B–175275]

Compensation—Overtime—Actual Work Requirement—Exception—Backpay Arbitration Award

Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B–175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed.

In the matter of backpay for overtime assignment denied in violation of labor-management agreement, June 20, 1975:

This is a joint request for an advance decision received from Captain W. C. Klemm, USN, Commanding Officer, Naval Ordnance Station, Louisville, Kentucky, and from Mr. James W. Seidl, President, Local Lodge 830, International Association of Machinists and Aerospace Workers (IAM & AW), as to whether the Department of the Navy may pay backpay to Mr. Gerald Owen, an employee of the Naval Ordnance Station, because he was denied an overtime assignment in violation of the basic agreement between the Naval Ordnance Station and Local Lodge 830. Normally, formal decisions on such

matters would be rendered only on the request of the head of the agency or the head of the national union involved. However, in view of the importance of the matter and its Government-wide application, we are treating the request as if it had been made by the Secretary of the Navy or the head of the IAM & AW.

Captain Klemm's and Mr. Seidl's joint submission shows that on Saturday, November 23, 1974, and on Sunday, November 24, 1974, Mr. Gerald Owen was denied an overtime assignment in violation of the terms of a labor-management agreement between the Naval Ordnance Station, Louisville, and Local Lodge 830, IAM & AW. The union filed a grievance on Mr. Owen's behalf but the Naval Ordnance Station refused to pay Mr. Owen for the overtime assignments even though it agreed that Mr. Owen would have been assigned to perform the overtime if the labor-management agreement had not been violated.

The Naval Ordnance Station states its willingness to pay Mr. Owen for the overtime assignments if it is determined that such payment would be legal. The Naval Ordnance Station maintains, however, that there is no authority under the Back Pay Act, 5 U.S. Code § 5596 (1970), to pay Mr. Owen for overtime work he did not actually perform. The Naval Ordnance Station relies on Decision of the Federal Labor Relations Council (FLRC) No. 73A–46, September 24, 1974, in which the FLRC stated that the law precludes an employee from receiving overtime pay where no work has been performed by the employee. The union, on the other hand, believes that Comptroller General decisions 54 Comp. Gen. 312 (1974) and 54 *id.* 403 (1974) lead to the conclusion that backpay is allowable in this case.

The Naval Ordnance Station and the union agree that management violated the labor-management agreement. There is no dispute over the facts in the case or the interpretation of the labor–management agreement. The dispute is solely over the legality of the backpay remedy for the admitted violation of the labor–management agreement.

The above-cited FLRC decision, No. 73A–46, September 24, 1974, was based on several previous Comptroller General decisions which had held that since the authority for payment of overtime compensation contemplates the actual performance of duty during the overtime period, an employee who had not performed the overtime could not be entitled to overtime pay. 42 Comp. Gen. 195 (1962); 46 *id.* 217 (1966); 47 *id.* 358, 359 (1968). With respect to the "no work, no pay" policy, we held in our older decisions that the withdrawal or reduction in pay referred to in the Back Pay Act, now codified in 5 U.S.C. § 5596 (1970), meant the actual withdrawal or reduction of pay or allowances which the employee had previously received or was entitled to. These holdings were subsequently applied in B–175867, June 19,

1972, where the employee involved was deprived of the opportunity to work overtime by failure to comply with a union agreement. In essence such application of the "no work, no pay" rule was made because the improper personnel action was one of omission. We stated in B–175867, June 19, 1972, *supra*, that the improper denial of the opportunity to perform overtime to the aggrieved employee was not an unjustified or unwarranted personnel action under 5 U.S.C. § 5596.

Section 5596 of 5 U.S. Code, the authority under which an agency may retroactively adjust an employee's compensation, provides, in part, as follows:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. §§ 550.803 (d) and (e) (1974) which provide:

(d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.

(e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

We have in our more recent cases held that a violation of a mandatory provision in a labor-management agreement which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, as long as the provision was properly included in the agreement. Accordingly, the Back Pay Act, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating the employee for pay, allowances or differentials he would have received but for the violation of the collective bargaining agreement. 54 Comp. Gen. 312 (1974) and 54 *id.* 435 (1974). Thus, if an agency bargains away its right to exercise its discretion on a matter that is normally discretionary with the agency, the agency is bound by

the nondiscretionary policy expressed in the labor-management agreement just as it would be bound by its own mandatory regulations.

As previously mentioned, in our early decisions, even when overtime was not involved, we held that the omission or failure to take action for an improper reason did not entitle the employee to backpay. Thus, where an employee was denied a promotion for an improper reason, it was held that the employee was not entitled to backpay. *See* 48 Comp. Gen. 502 (1969). (*Cf.* 50 Comp. Gen. 581 (1971) where it was held that an employee who performed the duties of a GS–11 position, but was appointed to a GS–9 position because of racial or sex discrimination, was entitled to backpay because the employee was deliberately misclassified in violation of law and regulations.)

We have since reexamined our prior position that omission or failure to take action for an improper reason did not entitle the employee to backpay. In 54 Comp. Gen. 312(1974), *supra*, and 54 *id.* 403 (1974) we overruled our previous decisions that held that omission or failure to promote for an improper reason could not be the basis for an award of backpay. In those cases we held that failure to timely promote in violation of a labor-management agreement could be considered an unjustified or unwarranted personnel action and that an employee could be awarded a retroactive promotion with backpay upon a finding by the appropriate authority that the employee had undergone an unjustified or unwarranted personnel action and, that but for such improper action, would have been promoted at a prior date. More recently we held that a finding by appropriate authority, which may be the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR), that an employee has undergone an unjustified or unwarranted personnel action as a result of an unfair labor practice and that such action resulted directly in depriving the employee of pay and allowances he would otherwise have received but for such action, would entitle the employee to backpay. *See* 54 Comp. Gen. 760 (1975).

It is now our view, therefore, that an unjustified personnel action may involve acts of omission as well as commission, whether such acts involve a failure to promote in timely fashion or a failure to afford an opportunity for overtime work in accordance with requirements of agency regulations or a collective bargaining agreement. Therefore, under the Back Pay Act, an agency may retroactively grant backpay, allowances, and differentials to an employee where he has undergone an unjustified or unwarranted personnel action, even though such action was one of omission rather than one of commission.

In the instant case the employee was deprived of overtime work in violation of a labor-management agreement—an act of omission. If the agency had not improperly assigned the work, the employee would have worked and received overtime compensation. In view of this and

our decisions holding that an act of omission may form the basis of an award for backpay, we now hold that the employee may be awarded backpay for the overtime lost under the provisions of the Back Pay Act. Our decision B–175867, June 19, 1972, will no longer be followed. Of course the amount of payment must be determined by appropriate authority and an award made in accordance with the provisions of 5 U.S.C. § 5596 and implementing regulations.

[B–182342]

Appropriations—Availability—Television Set—Environmental Protection Agency Ship

In view of fact that crew and scientists aboard Environmental Protection Agency ship, *Roger R. Simon*, are confined for extended periods without any common recreational facilities and that they are unable to personally provide their own portable televisions due to the ship's configuration, appropriated funds may be used to purchase television set and special antenna and rotor should responsible EPA official find it necessary for most efficient and economical performance of the ship's functions.

In the matter of the purchase of a television set for installation on Environmental Protection Agency ship, June 20, 1975:

The Assistant Administrator of the Environmental Protection Agency (EPA) for Planning and Management presents for our consideration two questions concerning the purchase of a television set for installation on a ship owned by that agency. The vessel, *Roger R. Simon*, is operated as Government-furnished property under contract with the Great Lakes Laboratory, State University of New York, Buffalo. The contract provides for the University to operate the ship and to furnish a crew, but any major pieces of equipment for the ship are to be purchased by the EPA.

The ship gathers and evaluates water samples collected in the Great Lakes. *See* 33 U.S. Code §§ 1251, 1254(f), 1258 (Supp. II, 1972). The ship's personnel consists of 10 University-supplied crewmen and from 5 to 10 EPA scientists. A normal cruise lasts from 7 to 15 days, ordinarily without putting into dock during the duration of the cruise. The EPA scientists on board are furnished lodging and meals and are, consequently, only compensated $1 per diem and the vessel moves from sampling point to sampling point after the scientists' normal work hours.

It is against this background that both the EPA scientists and the ship's crew request the installation of a television in the ship's lounge. In support of their request, they assert the following arguments:

(a) No other common recreational facilities are available on the ship.
(b) Limited space and the need for a special antenna and rotor prevents individuals providing portables of their own.
(c) The EPA employees are, in a sense, captive on board and their per diem has been reduced to $1.00 per day since lodging and meals are provided. A tele-

vision is commonly provided as a part of commercial lodging throughout the United States.

Furthermore, EPA's Assistant Administrator asserts his preference for this expense rather than other alternatives such as lengthening the cruise to allow frequent docking which would permit the crew to use commercial lodgings and facilities, but would substantially increase the cost to the Government in both time and money.

The two questions presented are:

1. Under the circumstances described above, may the Agency procure a television set or reimburse the contractor for providing a set out of appropriated funds?
2. If the answer to the first question is negative, can miscellaneous contributed funds under 33 USC 1155 or 42 USC 219 be utilized for such a purpose?

The general rule concerning the use of appropriated funds for recreational or entertainment purposes is found at 18 Comp. Gen. 147 (1938):

While the furnishing of recreational facilities may be highly desirable, particularly in a place such as referred to in your letter [Midway Island], they constitute expenses which are personal to the employees and which are not permitted to be furnished from appropriated funds unless provided in the appropriation either specifically or by necessary implication.

Since we are unable to discover a specific appropriation for the purpose requested here, the issue here is whether the expenditure of $400 for a television may be considered a necessary expense for carrying out the purposes of the EPA appropriation. We explained the phrase, "necessary implication," in our decision published at 27 Comp. Gen. 679 (1948):

It may be stated as a general rule that the use of appropriated funds for objects not specifically set forth in the appropriation act but having a direct connection with and essential to the carrying out of the purposes for which the funds were appropriated is authorized. *Id.* at 681.

We have held that the expenditure of appropriated funds for recreational or entertainment purposes was permissible in a few instances. For example, attention is directed to B–173009, July 20, 1971, where a Federal Aviation Administration appropriation for "the construction and furnishing of quarters and related accommodations" was interpreted "as including certain limited recreation facilities such as tennis courts and playground facilities" in an isolated sector of the Panama Canal Zone. In 41 Comp. Gen. 264 (1961), we held that a provision in the American-Mexican Treaty Act of 1950, 22 U.S.C. 277d–1 note (taken together with its legislative history), specifically authorizing the construction of recreational facilities for "officers, agents, and employees of the United States," was sufficiently broad to include, "by implication," the employees' families and consequently that the purchase of playground equipment for the children of the employees was authorized. Approval was also extended to a proposal to pay the costs

of transportation involved in shipping musical instruments, billiard and ping pong tables, baseball equipment, and other similar equipment obtained from surplus military stock to Weather Bureau installations in the Arctic. Pursuant to 15 U.S.C. § 328 the military departments were authorized to transfer without charge surplus equipment and supplies which are necessary for the establishment, maintenance and operation of Arctic weather stations. In our decision, B–144237, November 7, 1960, we stated:

> In the present case, however, in view of the isolated locations of these Arctic weather stations, the confinement to the stations of the employees during a large part of the year, the consequent problem of adjustment of employees to environment, and the difficulties of removing and replacing employees who are unable so to accommodate themselves, it seems reasonable to consider that equipment intended to alleviate those conditions has a direct connection with and is essential to the efficient and successful operation of the network. Furthermore, under these circumstances, and considering that the tours of duty are relatively short together with the attendant turnover in personnel, it appears unreasonable to expect or require that the employees purchase and transport this equipment to the stations at their personal expense.

Also, in connection with the use of appropriated funds by the Corps of Engineers to purchase ping pong paddles and balls for use on board a seagoing dredge, we held in B–61076, dated February 25, 1947, that:

> * * * The appropriation sought to be charged herein does not authorize specifically the purchase of recreational equipment for employees engaged in river and harbor work. However, in view of the facts set forth in your letter and the determination by the Chief of Engineers that the furnishing of a well-equipped recreation room for the use of crews on seagoing dredges, such as those operating under the jurisdiction of the New York District, is necessary in order "for the Engineer Department at large to compete successfully with commercial vessels in the labor market" and to maintain the efficiency and preserve the morale of the crews working on such dredges, this office is not required to object to the administrative determination that the objectives of the proposed expenditure reasonably may be said to be, by implication, within the purview of the appropriation for the maintenance and improvement of river and harbor works.

In view of the above-discussed decisions and the unusual factual circumstances involving this ship, if it is administratively determined that a television set is essential for the most economical and efficient performance of the ship's functions, we would not object to the proposed expenditure in the instant case.

In view of our answer to the first question, we need not consider the second question.

[B–183288]

Contracts — Negotiation — Requests for Proposals — Protests Under—Closing Date—Date for Receipt of Initial Proposals

Where offeror submitted initial basic proposal conforming to request for proposals (RFP) and initial alternate proposals taking exception to RFP requirement, protest filed after rejection of alternate proposals—seeking amendment of RFP to eliminate stated requirement—is untimely, because protests against apparent improprieties in RFP must be filed prior to closing date for receipt of initial proposals.

In the matter of Hewlett-Packard Company, June 23, 1975:

Hewlett-Packard Company (H–P) protested to our Office on May 23, 1975, against a requirement for "two work stations per system" as set forth in the Scope of Work of request for proposals (RFP) No. DAAH01–74–R–0877, issued by the United States Army Missile Command, Redstone Arsenal, Alabama. The RFP called for five Laboratory Automated Calibration Systems (LACS) to provide computerized calibration for electronic equipment. No award has been made.

For the reasons which follow, we find the protest to be untimely.

A chronology of pertinent dates follows:

December 6, 1974: Closing date for receipt of initial proposals. H–P submits a basic proposal and three alternate proposals. Several other offerors submit proposals.

February 12, 1975: H–P sends the following message to the contracting officer:

HEWLETT PACKARD FEELS THAT THE LACS PROCUREMENT DISCRIMINATES AGAINST COMPETITION BY REQUIRING TWO WORK STATIONS AT EACH LABORATORY. INFORMATION AVAILABLE ON ACTUAL WORKLOADS INDICATES A REQUIREMENT FOR ONLY ONE WORK STATION AT SEVERAL SITES AND FOR MORE THAN TWO AT OTHERS.

HP'S ALTERNATIVE PROPOSALS IN ITS DEC. 6 LACS RESPONSE SHOWED HOW ACTUAL WORKLOAD AT EACH LAB COULD BE HANDLED AT FAR LOWER COST BY SINGLE WORK STATION SYSTEMS. WE UNDERSTAND THESE ALTERNATIVES ARE CONSIDERED NON-RESPONSIVE TO THE LETTER OF THE RFP.

HP THEREFORE REQUESTS THAT THE LACS RFP BE AMENDED TO ELIMINATE THE REQUIREMENT FOR TWO WORK STATIONS PER SYSTEM AND TO BASE SELECTION CRITERIA ON THE ABILITY OF EACH PROPOSALS TO HANDLE THE ACTUAL WORKLOADS AT EACH LABORATORY. HP REQUESTS THIS AMENDMENT IN ORDER TO PERMIT THE LACS PROCUREMENT TO BE TRULY COMPETITIVE AND TO MINIMIZE OVERALL PROGRAM COST.

February 14, 1975: The contracting officer by letter to H–P denies the request that the RFP be amended, stating that the two-station requirement is based upon an analysis conducted by the Army Metrology and Calibration Center (AMCC), which is of the firm opinion that two work stations are required.

March 11, 1975: An H–P message again requests amendment of the RFP and requests a copy of the AMCC analysis supporting the two-station requirement.

March 28, 1975: Closing date for receipt of best and final offers.

April 1, 1975: The contracting officer's letter to H–P affirms the Army's refusal to amend the RFP and advises that the AMCC analysis could be obtained by request under the Freedom of Information Act.

April 7, 1975: H–P requests the AMCC analysis under the Freedom of Information Act.

May 15, 1975: H–P receives the AMCC analysis, allegedly after the close of its business day.

May 23, 1975: H–P files its notice of protest with GAO.

May 29, 1975: The statement of the specific grounds of H–P's protest is received at GAO.

In its detailed statement of protest, H–P contends that the two-work-station requirement arbitrarily restricts competition and "* * * assures selection of one supplier whose equipment most closely approximates the specification * * *." H–P further alleges that the AMCC analysis was the sole ground for the refusal to amend the RFP. The protester indicates that it did not know the basis for protest until it received the AMCC analysis on May 15, 1975. H–P contends in some detail that the analysis contains errors in two key areas. H–P therefore requests that the RFP be amended to eliminate the multistation approach and to allow one work station, or, alternatively, that the RFP be canceled.

We note that H–P's above-quoted February 12, 1975, message to the contracting officer specifically makes reference to the fact that the H–P alternate offers varied from the two-station requirement; that they were considered by the Army to be nonresponsive; and that H–P *therefore* is requesting that the two-station requirement be eliminated. We further note that the February 12 message does not explicitly protest against the Army's rejection of the H–P alternate offers. Rather, it indicates that amendment of the RFP is necessary in order to have a truly competitive environment. Thus, it appears that H–P as of February 12, 1975, was contending that one of the premises of the competition among itself and the other offerors—namely, the two-station requirement—should be changed. H–P had apparently indicated compliance with this requirement in its initial basic offer.

Protests against apparent improprieties in an RFP must be filed prior to the closing date for receipt of proposals. *See* 4 C.F.R. § 20.2(a) (1974). Where the impropriety is apparent in the RFP as originally issued, we believe the "closing date" must be properly taken as referring to the closing date for receipt of initial proposals. See, in this regard, *BDM Services Company*, B–180245, May 9, 1974, and *Salvat & Company*, B–181721, August 30, 1974. The apparent nature of the alleged impropriety in the present case is evident from the fact that H–P submitted alternate proposals showing, in its words, "* * * how actual workload * * * could be handled at far lower cost by single work station systems." Under the circumstances, a protest filed after the initial closing date, which is directed at attempting to amend the RFP so as to change the competitive premises upon which the protester's basic proposal was submitted, must be regarded as untimely and not for consideration.

[B-182576]

Contracts—Negotiation—Competition—Discussion with All Offerors Requirement—Proposal Revisions

Even where cost evaluation was conducted on basis of procurement of 100 computer terminals, when, in context of requirements contract (especially one not containing compensatory variation of quantity clause), estimated quantity becomes a contractual minimum of 100, there has been a definite and significant change in Government's requirements which should have been communicated to each prospective contractor. Change in minimum lease period from 1 to 2 years, deletion of contractor maintenance requirement, and determination to award total quantity in only one category where two categories had been set forth should have similarly been communicated to offerors.

Contracts—Negotiation—Changes, etc.—Recompeting Procurement Recommended

Where in course of final discussion with sole offeror remaining in competitive range contract being negotiated has significantly changed from request for proposals (RFP) under which competitive range was determined, in absence of compelling reason, contracting officer must take action to amend RFP and seek new offers.

In the matter of Computek Inc.; Ontel Corporation, June 25, 1975:

On December 27, 1973, request for proposals (RFP) No. NIH-74-P(62)-132-CC was issued by the National Institutes of Health (NIH) seeking offers to provide cathode-ray tube (CRT) computer terminals. As set out in the initial letter to possible offerors, the objective of the RFP was to establish sources for CRT terminals so that the NIH computer center would be able to supply its users with adequate and compatible computer terminals in a minimum amount of time. A requirements-type contract was contemplated.

The solicitation contemplated the possibility of lease, purchase and lease with option to purchase arrangements and requested that the offerors submit their offers on each basis.

With this lease possibility in mind the RFP stated that:

> This contract will be effective for one year from the date of the contract award and will be subject to two succeeding annual renewals. The total length of the contract will not exceed thirty-six (36) months (including renewal options).

The RFP set forth that the proposals would be evaluated with the following relative points to be awarded:

Technical (maximum)	250
Cost (maximum)	85
Total	335

With regard to technical evaluation, the RFP set forth a number of (A) mandatory features, (B) mandatory optional features, and (C) desired optional features. These were broken down and scored as follows:

	Maximum weight
Terminal Evaluation of "MANDATORY STANDARD FEATURES" and "MANDATORY OPTIONAL FEATURES" (to include the following considerations)	
* * * * * * *	
Sub-Total	150
Desired (not required) Options to Standard Features:	
* * * * * * *	
Sub-Total	75
Other Considerations:	
1. The offerors commitment on maintenance, delivery schedule, terminal discontinuance requirements and terms or conditions which exceed minimum requirements of the solicitation proposed by the offeror	25
Subtotal	25
Total	250

The cost evaluation, on the other hand, was conducted in accordance with the RFP only with regard to the mandatory procurement features. Purely desired optional features were not included in the evaluation of costs.

Seven proposals were received in response to the RFP. During the period from March 2 through July 11, 1974, the seven offers were evaluated. The three offerors whose proposals did not satisfy the RFP's mandatory technical requirements were not requested to perform a line demonstration and were not, therefore, evaluated beyond an initial review. *See* 41 C.F.R. § 101–32.402–12 (1974).

The four firms which were evaluated received the following scores:

	Technical (250)	Cost (85)	Total (335)	Total Possible
Delta Data	233	72	305	335
Megadata	218	67	285	335
Computek	205	70	275	335
Ontel	141	85	226	335

After this scoring, it was determined that further discussions with the vendors would not result in any significant changes in the point ratings. Thus, for an offeror to supplant Delta Data Systems Corp. (Delta Data), the highest technical and second low cost proposer, it would have to have been on the basis of cost. However, since the RFP assigned a much greater weight to technical scoring than to cost (250 vs. 85), Delta's lead of 15 points was seen by the agency as too great for any other offeror to overcome on the basis of cost.

Consequently, further negotiations were conducted with Delta Data, the only firm deemed in the competitive range. These discussions concentrated on the "procurement of the ideal mix of terminal features offered and the best price therefor." A contract with Delta Data was

entered into on September 19, 1974. Unsuccessful offerors were not advised of the rejection of their respective proposals until receipt of a letter from HEW dated October 11, 1974, after which a debriefing was held.

Two protests were subsequently lodged with our Office on the following grounds:

1. the agency's failure to negotiate with all offerors actually within a competitive range;
2. the agency's failure to communicate changes in the Government's requirements to all offerors;
3. the failure to communicate changes in the Government basis for evaluation; and
4. errors in technical scoring.

For reasons that will become apparent *infra*, our discussion will be restricted to the first three arguments.

At the outset, we note the chronology of this protest:

11/ 7/74	Protest of Ontel received
11/12/74	Protest of Computek received
11/14/74	Additional material for Computek received
12/10/74	Received letter from HEW saying that report would be sent to GAO no later than 1/24/75
12/11/74	GAO sent letter to HEW stating that delay until 1/24/75 was unreasonable
1/ 6/75	GAO advised by HEW that report would be submitted by 1/17/75
1/17/75	HEW requested 2-week extension to submit report
1/29/75	GAO contacted HEW Assistant Secretary for Administration regarding receipt of report
2/11/75	GAO received HEW report—sent out for comment
2/18/75	Computek requested additional information; additional information sent
3/10/75	Received last comments from protester
3/19/75	Received last comments from interested parties
4/ 7/75	Conference on protest held at GAO

Federal Procurement Regulations (FPR) § 1-3.805-1 (2nd ed., amend. 118, September 1973) provides that after receipt of initial proposal, discussions should be held with all responsible offerors within a competitive range, price and other factors considered. Our Office has not objected to the exclusion from the competitive range of those offerors with whom meaningful negotiations cannot be conducted, e.g., 50 Comp. Gen. 679, 684 (1971).

As to the exclusion of offerors from the competitive range, the agency states that:

At first glance it might appear that Delta's lead in technical points is not overwhelming and that the other two firms remain within competitive range. On

closer inspection, however, this is not the case. Delta Data leads with 233 points in the technical review, Megadata is in second place with 218, and Computek has 205. Further, the technical review, involving terminal demonstrations and discussions with technical representatives from each of the bidders, indicates that *further discussion with the vendors will not result in any significant change in the point ratings.* Thus, if another bidder were to gain the overall lead it would have to be on the basis of superior cost performance. Since the RFP assigned a much greater weight to technical performance than it did to cost, Delta's lead of 15 points is too great to be overcome on the basis of possible cost adjustments.

We expect that due to the need to select a terminal with certain options, *the prices will change during final contract negotiations. Since all three of the bidders would need to make substantially similar changes their final costs of each terminal can be expected to change by approximately the same proportion leaving the cost scores relatively the same.* To understand what it would take for another bidder to overtake Delta Data, consider the following: Megadata is Delta's nearest competitor technically. For Megedata to draw even in overall points, Delta's cost would have to increase 56% even if we assume Megadata's costs did not increase at all. And if we assume a 25% increase in Megadata's cost (from 4100.00 to 5125.00) then Delta Data would have to increase more than 95% (from 3210.00 to 6223.00) for the two companies to be even on total points. [Italic supplied.]

The effects of the negotiations solely with Delta Data are as follows: HEW (1) changed the quantity provision of the requirements contract from an estimated quantity of 135 units to a *guaranteed minimum* purchase of 100 units; (2) definitized the optional features which it wanted on the units; (3) negotiated a new price with Delta; (4) increased the guaranteed rental period from 1 year to a "minimum of two years;" (5) accepted a contractor-proposed discontinuance clause whereby termination of the lease at any time before the end of 2 years would result in payment by the Government of the item's purchase price less any rental paid to that point; and (6) changed the RFP provision regarding maintenance, which was originally to be a contractor's requirement under the contract, into an item which would be included in another contract.

It is a fundamental principle of Federal procurement law that the solicitation be drafted in such a manner so as to inform all offerors of what will be required of them under the contract in order that all offerors can compete on an equal basis. *DPF Incorporated*, B-180292, June 5, 1974, 74-1 CPD ¶ 303, September 12, 1974, 74-2 CPD ¶ 159, and cases cited therein. *See* FPR § 1-3.802(c) (2nd ed., amend. 118, September 1973).

Consonant with this provision is FPR § 1-3.805-1(d) (FPR Circ. 1, 2nd ed., June 1964) which stated that:

When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. * * * *See* 49 Comp. Gen. 402 (1969).

In this regard, we feel that HEW should have apprised other offerors of all such changes in the Government's requirements thereby ensuring the adequacy of competition.

The agency argues that there were no changes to its stated requirements. Specifically, it references the fact that the cost evaluation was done on the basis that 100 machines would be procured. This may be, but, as noted by the protester, with which we agree, that in the context of a requirements contract, especially one which does not contain a compensatory variation of quantity clause,[1] when an estimated quantity becomes a contractual minimum, there has been a definite and significant change in the Government's requirements. See generally *Hyde & Norris/ t/a Traveler's Inn Motor Lodge*, B-180360, May 20, 1974, 74-1 CPD ¶ 272. Moreover, the change of the minimum lease period from 1 year to 2 years is clearly a substantial change in requirements as is the deletion of the contractor maintenance requirement, the evaluation of which was included in scoring technical proposals. In view of these changes, the import of the other modifications made during the Delta Data negotiations need not be specifically characterized as requiring amendment of the RFP, since we have noted at least three areas which mandated such action.

Moreover, since the RFP initially sought offers on two types of terminals—teletype compatible terminals (type I) and an editing terminal (type II), we feel that it was improper for the agency not to have amended the solicitation so as to inform each of the seven original offerors that only type II terminals would be evaluated for award. The language in the RFP which the agency relies on to support its actions in this regard is as follows:

> Offerors may propose to supply terminals in either or both categories and may propose as many different CRT's as he wishes in either category as long as each type proposed is substantially different from the other types proposed. *A single model can satisfy both categories if it has all of the mandatory standard and mandatory optional features for both categories.* [Italic supplied.]

Contrary to the interpretation of the agency, we view this provision as merely stating that an offeror may, if it chooses, propose the same basic model for each category of terminals provided it contains the features required for *both* categories. It does not say that the agency specifically reserves the right to select which category it will purchase. Indeed, page 4 of the RFP states "Two types of CRT terminals are required." Therefore, a firm proposing a unit containing only the features required of one type, such as Ontel's offer of type I equipment, may have been unduly prejudiced by the fact that it was deter-

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[1] Contract contained following variation clause:
2. QUANTITIES. Quantities in this schedule are only the estimated requirements for the contract period. The Contractor will be required to furnish all supplies or services ordered during the contract period at the unit prices shown in the contract. The National Institutes of Health will order from the Contractor all such supplies or services specified in the contract as required during the contract period, except emergency requirements which cannot be obtained from the contractor. In the event no need arises for the supplies or services specified in the contract, or the National Institutes of Health desires to order such supplies or services from another Government Agency, the Government shall not be held liable for failure to secure same under the contract.

mined that only type II units would be evaluated for award. Neither do we think that the agency's reliance upon clause 10(c) of standard form 33A, regarding ultimate determination to award quantities less than those specified, relieved it from its duty to advise offerors of the type unit which would be evaluated.

As our Office has held in the past, no prospective contractor can intelligently compute its offer without being informed beforehand of what will be required of it and all the factors which will materially affect the cost of the work or the ability to perform. *DPF Incorporated, supra.* Here, all offerors were not afforded the opportunity to propose on a common basis. Moreover, many of the changes that occurred in the Government requirements between the date of issuance of the RFP and the award of the Delta Data contract, as noted above, were clearly and unduly prejudicial to other offerors.

We recognize that the contracting officer may have believed that since there was only one firm in the competitive range, it was not prejudicial for the Government to modify its requirements to suit the demands of that offeror and, indeed, in his view, almost incumbent upon the Government to do so. This can be seen in the following statement:

> 6. Regarding the discontinuance charge made a part of the contract with Delta Data, every attempt was made by the Contracting Officer and members of the negotiating team to exclude the provision. However, *the contractor was adamant on the issue.* It is our understanding that such provisions are common in the industry especially when the Government leases specially modified equipment. Such specially modified equipment cannot be readily re-sold by contractors as would be the case with equipment not specially modified. *Also, lending institutions require such provisions before they will finance small business firms such as Delta Data* when they are involved in leasing of specially modified equipment. [Italic supplied.]

This view, however, ignores the fact that all offerors must have an equal opportunity to propose to meet the Government's actual requirement. Where, in the course of final discussions, it becomes obvious that the contract requirements being negotiated with the sole offeror remaining in the competitive range have significantly changed from the RFP requirements under which the competitive range was determined, in the absence of a compelling reason, the contracting officer must take action under FPR § 1–3.805–1(d), *supra,* to amend the RFP and seek new offers. The failure to do so in the instant case was improper.

We thus feel that the award made to Delta Data was improper for the reasons that the agency (1) initially failed to amend the RFP with regard to the requirement for type II terminals; and (2) did not reopen negotiations upon the significant revisions of the Government's requirements. In view of the referenced discontinuance charge, we do not believe that termination of this contract for convenience would be in the Government's best interest. However, we do recommend that

HEW not exercise either the purchase option or the rental option for the third year of the subject contract.

We have by separate letter of today advised HEW that in future solicitations we anticipate that the agency will afford all offerors an equal opportunity to compete for the awards and will clearly state to all offerors what its needs actually are.

[B-182804]

Leaves of Absence—Sick—Substitution for Annual Leave

Employee entitled to use sick leave specifically requested that such time be charged to annual leave. After annual leave is granted, employee may not thereafter have such leave charged to sick leave and be recredited with the amount of annual leave previously charged for purposes of lump-sum payment upon separation for retirement.

In the matter of a change of annual leave to sick leave—retroactive, June 25, 1975:

The Federal Bureau of Investigation, Department of Justice, requests a decision as to whether absence which could have been charged to sick leave but was charged to annual leave at employee's request may thereafter be changed to sick leave with the annual leave included in a lump-sum payment upon separation for retirement.

The agency states the circumstances to be as follows:

On July 1, 1974, Mr. Whitwam suffered injuries in an automobile accident which required his absence from duty on sick leave until August 5, 1974. Thereafter, through October 9, 1974, it was necessary for him to be absent due to his injuries at irregular intervals. At his request, certain of this sick leave was charged to annual leave although he had several hundred hours of accrued sick leave to his credit. Specifically, annual leave was used in lieu of sick leave on the following dates:

4 hours on August 16, 1974
32 hours from August 20 through August 23, 1974
8 hours on October 1, 1974
8 hours on October 9, 1974

After making application for retirement, Mr. Whitwam requested that the above 52 hours of annual leave which had been taken in lieu of sick leave be recharged to sick leave and such annual leave be included in his lump-sum annual leave payment. This request was denied in view of your Decisions B-142571 dated April 20, 1960. and B-164346 dated June 10, 1968. Mr. Whitwam has protested this Bureau's decision, stating that in view of Public Law 93-181, dated December 14, 1973, and Public Law 93-350, dated July 12, 1974, he does not think these two decisions are now valid. He has requested this matter be presented to the General Accounting Office for a decision.

In 31 Comp. Gen. 524 (1952) it was recognized that absence due to illness may be charged to accrued annual leave if timely requested by the employee and approved by the administrative office concerned. The charge for leave in Mr. Eugene W. Whitwam's absence appears to accord with that decision. There is nothing in the case as presented to indicate any misunderstanding on the part of the employee or administrative error by the agency in the matter.

The decisions cited by the agency, B–142571, April 20, 1960, and B–164346, June 10, 1968, hold that sick leave may not be retroactively substituted for annual leave granted specifically at the employee's request.

Public Law 93–181, approved December 14, 1973 (5 U.S.C. 5551, Supp. III, 1973) amended Title 5, U.S. Code, in pertinent part to improve the administration of the leave system for Federal employees. It provides for restoration of annual leave that was lost for the reasons set forth in the law, none of which relate to Mr. Whitwam's request. In this connection the Civil Service Commission in its FPM Letter No. 630–22 dated January 11, 1974, presents information on and transmits regulations implementing Public Law 93–181. In pertinent part letter 630–22 in item 5a(3)(c) at page 6 states as follows:

(c) *CSC Guidelines.* Employees always have had the option of using annual leave in place of sick leave (or nonpay status) when the absence is related to illness and nothing in the new law prohibits this use. Employees may now have annual leave that was forfeited because of illness restored for later use * * *.

As we read the record Mr. Whitwam has not lost any annual leave due to forfeiture. Rather it would appear that he has used annual leave in lieu of sick leave in a manner to which he is entitled and now changes his mind and would like to substitute sick leave for annual. For the reasons set forth in B–142571 and B–164346, he cannot do that.

With reference to Public Law 93–350 approved July 12, 1974, 88 Stat. 355, which amended Title 5, U.S. Code, concerning the retirement of certain law enforcement and firefighter personnel, there appears to be no causal connection with Mr. Whitwam's request to retroactively substitute sick leave for annual leave previously granted.

Since Mr. Whitwam specifically requested that the absences in question be charged to annual leave, there is no authority upon which a substitution of sick leave for annual could be based. Accordingly, the agency denial of Mr. Whitwam's request is sustained.

[B–183716]

Bids—Invitation for Bids—Clauses—Method of Award—Discount

METHOD OF AWARD clause of invitation for bids (IFB) required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively include indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unnecessary.

General Accounting Office—Contracts—Recommendation for Corrective Action

Recommendation to General Services Administration is made that future solicitations requiring bidders to indicate percentage either as addition to, or deduc-

tion from, established rate schedules should provide bidders with bidding schedule compatible with *METHOD OF AWARD* clause.

In the matter of General Services Administration—request for advance decision, June 25, 1975:

On November 19, 1974, invitation for bids (IFB) 10PN-GPS-5640 was issued by the General Services Administration (GSA), for motor vehicle rental (without driver) for the period March 1, 1975, or date of award, through February 29, 1976, covering several service areas. Nineteen bids were received in response to the IFB and opened on December 10, 1974.

The *METHOD OF AWARD* clause in the instant IFB provides:

METHOD OF AWARD: Award will be made to the responsible offeror who offers the lowest price in the form of a single percentage as a deduction from or addition to the stated rate schedule offered for each service area for all rental periods specified (i.e. daily, hourly, weekly mileage) for each type of vehicle.

Deletion or changes to the prices shown in the offer schedules will be the cause for rejection of the offer for that vehicle for that service area. In order to be considered for an award, offeror must insert a percentage indicating whether it is a deduction or an addition, the word "net" or "0" in the offer schedule for the service area and type of vehicle for which he intends an offer. In absence of either a percentage, "net" or "0," it will be deemed that "no bid" is intended.

The bidding schedules contain a single column entitled "Offeror's Single Discount," adjacent to stated rate schedules, enabling bidders to insert their bids in the form of a percentage "net," or "0."

Upon evaluation of the bids, the contracting officer believed that six bidders had made mistakes by the omission of indicators (e.g., "plus" or "minus") to the percentages inserted in the "Offeror's Single Discount" column. Three of those bidders, who are not the subject of this particular matter, were notified of the suspected mistake. Two confirmed that the percentage indicator should have been a "minus" or "negative" and were awarded contracts for certain areas. The remaining bidder indicated that it intended a "plus" 10-percent discount and was not awarded a contract.

The contracting officer requested from the three other bidders, Dollar A Day Rent-A-Car, Huling Rent-A-Car, and Thrifty Rent-A-Car, verification of their bids and documentation to establish the alleged mistakes. Thereafter, the contracting officer, in a "Findings and Determination" dated March 6, 1975, stated:

* * * All offerors alleging a mistake confirmed this by letter and all confirmed their intended offer as a percentage deduction from rates contained in the solicitation.

* * * * * * *

It is obvious from an examination of the offers submitted that an error was made. It is the opinion of the contracting officer that it is equally obvious on the face of the bid, the bid actually intended.

However, by letter dated January 23, 1975, counsel for licensees of the Airways Rent-A-Car System (Airways) protested to GSA that the

mistake corrections should not be permitted and that the bidders were, in essence, nonresponsive.

As a result of the foregoing, the contracting officer has recommended that these bidders be permitted to correct their bids. However, due to the doubtful nature of this matter, the General Counsel of GSA has requested an advance decision pursuant to the Federal Procurement Regulations § 1–2.406–3(e) (June 1964, Circ. 1) from our Office.

The GSA General Counsel, relying upon B–157429, August 19, 1965, has also recommended correction of the bids in question. Counsel for Airways has argued to the contrary, i.e., that the mistakes should not be entitled to correction, placing reliance upon 52 Comp. Gen. 604 (1972). Our Office, however, does not view the question presented as one for resolution under the mistake in bid procedures and the decisions of our Office thereunder. The above decisions involved situations where bidders had omitted portions of bids called for by the terms of the various invitations and our Office examined overall patterns of bidding to establish and permit correction of the omitted portions under the mistake in bid procedures. We concluded that to have converted obvious clerical errors into matters of nonresponsiveness would have been patently inconsistent with the reported facts.

In our opinion, the instant situation can be distinguished from the above cases in that here, we are not dealing with the omission of required items in bids. Rather, the bidders' responses were in full compliance with the *METHOD OF AWARD* clause of the IFB since the heading of the column in which their bids were placed was clearly labeled "discount." While we recognize that the *METHOD OF AWARD* clause would appear to contemplate that a bidder insert affirmative indicators with the percentages, the "discount" column heading in the bidding schedules obviated the necessity for such an affirmative indication when bidding in a negative manner. Thus, there was no necessity for the bidders to have further indicated that the inserted percentages were of a negative nature. In our opinion, an affirmative act, such as, for example, the placing of a "+" in front of a bid would have been necessary to bid an increased amount, negating the effect of the "discount" heading of the bid column. As mentioned above, at least one other bidder employed this method of bidding.

Moreover, in view of the above, our Office cannot agree with counsel for Airways that the bids in question were nonresponsive.

Therefore, the bids in question should be considered for award. This decision does not adversely affect the determinations made as to the acceptance or rejection of the three other bids mentioned above, as, we understand from GSA, the results remain the same.

However, to avoid questions like this from arising in future procure-

ments, we recommend that solicitations of this nature be drafted so as to provide prospective bidders with a bidding schedule compatible with the *METHOD OF AWARD* clause.

[B-153784]

Pay—Retired—Effective Date—Mandatory—Rear Admirals

Several rear admirals, both upper and lower half, are to be mandatorily retired under provisions of 10 U.S.C. 6394 on July 1, 1975, and as a result of retirement of rear admirals (upper half) on that date, some retiring rear admirals (lower half) would be entitled to basic pay as a rear admiral (upper half) in accordance with 37 U.S.C. 202, if considered to be serving on active list subsequent to the retirement of the rear admirals (upper half). These rear admirals are not entitled to compute retired pay on basis of rear admiral (upper half) since they also are to be mandatorily retired on July 1, 1975, and as a result will not be serving in that grade on the active list on that date.

In the matter of the retired grade of rear admirals retired under 10 U.S.C. 6394, June 26, 1975:

This action is in response to letter dated June 13, 1975, from the Secretary of the Navy, requesting an advance decision concerning the proper rate of pay to be used in computing the retired pay of certain rear admirals (lower half) who are to be mandatorily retired effective July 1, 1975.

The Secretary states that a board, which convened in November 1974 under the provisions of 10 U.S. Code 6394, recommended that several officers in the grade of rear admiral be retired and that this recommendation was approved on December 4, 1974. The Secretary also indicates that the date of mandatory retirement for these officers is July 1, 1975, in accordance with 10 U.S.C. 6394(f). It is noted that four of these officers are rear admirals (lower half) who, if deemed to be on the active list on July 1, 1975, would be entitled to be advanced to the pay grade of rear admiral (upper half) before actual retirement as a result of the other retirement actions effective on that date.

It is indicated that prior administrative procedure for retirements under 10 U.S.C. 6394 has been accomplished in a manner similar to the holding in 9 Comp. Gen. 512 (1930), construing the application of the Uniform Retirement Date Act, 5 U.S.C. 8301; that is, removal of the officer from the active list at 2400 hours, June 30, 1975, and retiring him effective at 0000 hours on July 1, 1975. The Secretary suggests that the four officers referred to above could be advanced to the higher pay grade of 0–8, rear admiral (upper half), immediately after 0000 hours, July 1, 1975, and precisely at 0001 hours that day, be retired.

The Secretary also indicates that if prior procedures are followed these officers will be denied advancement to the higher pay grade be-

cause they will no longer be on the active list, and further, that it could be considered unfair and inequitable if they should be denied because of an instant in time, advancements which they have earned and which are substantial in value. The Secretary notes that an exception for such unique cases appears recognized in law, citing 2 Am. Jur. 2d, *Administrative Law*, 193 (1962) as having possible application.

The Secretary states that it is understood that retaining these four officers on the active list for a few moments or hours past 0000 hours, July 1, 1975, would not entitle them to active duty pay for July 1, 1975, based upon the decision in 9 Comp. Gen. 512 (1930); however, it is believed that such action would entitle them to be advanced to the pay grade of rear admiral (upper half) and would appear to authorize their retired pay to be computed on the basis of that higher pay grade.

On the assumption that the foregoing proposed action is to be taken, a decision is requested as to whether the retired pay of the four officers may be computed on the basis of the basic pay of rear admiral (upper half) 0–8.

Under the provisions of 10 U.S.C. 6394(f), an officer recommended for retirement under the provisions of 10 U.S.C. 6394 and where such recommendation is approved by the President, shall be retired on the first day of any month set by the Secretary, but not later than the first day of the seventh month after the date of approval by the President.

On the basis of the facts stated in the Secretary's letter, it appears that July 1, 1975, is the first day of the seventh month following the date of approval by the President. As a result, no later month may be designated by the Secretary.

The retired pay of officers retired under the provisions of 10 U.S.C. 6394 is computed in accordance with 10 U.S.C. 6394(h), which provides in part as follows:

> (h) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title * * *.

Thus, it will be seen that an officer retired under the above-cited provisions must have his retired pay computed on the basis of basic pay of the grade in which he was retired.

The rate of basic pay of officers of the Navy serving in the rank of rear admiral is determined under the provisions of 37 U.S.C. 202. Generally, the rank of rear admiral includes all officers serving in that rank, but there are two divisions in the rank of rear admiral for pay purposes, entitlement to the pay of the lower half (0–7) or upper half (0–8) being contingent on the numerical position of the individual on the list of rear admirals on the active list of the line of the Navy.

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Under the provisions of 37 U.S.C. 202(a), in order for an officer to become entitled to basic pay as a rear admiral (upper half), he must be serving on the active list.

It appears from the Secretary's letter that the positions of the four officers on the list would be changed so as to give rise to entitlement to basic pay of a rear admiral (upper half) on July 1, 1975, as the result of the retirement of other officers serving in grade of rear admiral (upper half), effective that date.

In this regard, we do not agree with the position taken that the officers may be continued on the active list for a short period on July 1, 1975, in order to be considered serving in the grade of rear admiral (upper half) for the purposes of establishing a basis for increased retired pay. Under the provisions of 10 U.S.C. 6394(f), as viewed in light of the facts presented in the Secretary's letter, it is required that officers involved must be retired effective July 1, 1975. That is, their retirements are effective on that date and they become entitled to retired pay commencing that date and no entitlement to active duty pay and allowances exists at that time.

In this connection, this Office has held that the retirement of a military or naval officer effects a complete severance from active service and his rights, benefits, and privileges as an officer on the active list terminate upon the effective date of his retirement. 24 Comp. Gen. 291 (1944). It is our view that 10 U.S.C. 6394(f) as applied to the officers concerned in the present case mandates their retirement on July 1, 1975, and that effective that date they will not be entitled to the rights, benefits, and privileges as officers on the active list. We find no basis under which we could hold that an officer may be on active duty for part of a day and in a retired status for the remainder of that day.

Furthermore, it is our view that 2 Am. Jur. 2d, *Administrative Law*, 193 (1962), is not for application here. That section discusses the necessity of equality of treatment among all those affected where discretionary administrative action is permitted or authorized. While 10 U.S.C. 6394 does permit the exercise of discretion on the part of the Secretary as to when affected members are to be retired, such authority is limited by the mandate that the latest date retirement shall occur is the "first day of the seventh month," which in this case would be July 1, 1975. Therefore, since no administrative action was taken on or before May 31, 1975 (the last date that the Uniform Retirement Date Act, *supra*, could be used to effect a retirement prior to July 1, 1975), then by operation of law the members in question are retired effective July 1, 1975.

Accordingly, the secretarial action proposed in this case is not authorized and the question presented is answered in the negative.

[B-183819]

Appropriations—Availability—Unexpended Balances—Replacement Programs

Where unexpended balance of funds appropriated for purposes of a former adjustment assistance program is transferred to the Secretary of Commerce to be used for a replacement program of adjustment assistance, while legislative authority to continue to administer the former program is preserved, the funds remain available for care and preservation of collateral and for honoring guarantees made under the former program.

In the matter of the availability of funds transferred to Secretary of Commerce for purposes of Trade Act of 1974 to administer loans and guarantees made under predecessor statute, June 26, 1975:

This decision is in response to a request by the General Counsel of the Department of Commerce. The question posed is as follows:

Whether unexpended balances of funds appropriated under the Trade Expansion Act, which are transferred to the Secretary of Commerce under § 256(c) of the Trade Act to carry out his functions under Chapter 3 thereof ("Adjustment Assistance for Firms"), may be used for the care and preservation of collateral securing direct loans or guaranteed loans and/or to honor guarantees made or authorized under the Trade Expansion Act.

Under title III of the Trade Expansion Act of 1962, approved October 11, 1962, Public Law 87-794, 19 U.S. Code §§ 1901-1920 (1970), the Secretary of Commerce was authorized to provide adjustment assistance, including financial assistance, to firms in a domestic industry which has been or may be seriously injured by competition with imports as a result in major part of concessions granted under trade agreements. 19 U.S.C. § 1901. According to the General Counsel, approximately 15 loans and 3 guarantees of loans were made or authorized under the 1962 act. Where the loans or guarantees are secured by collateral, the Department may have to incur expenses for "care and preservation," *i.e.*, for the purpose of protecting the collateral or the Government's lien, such as purchase of prior liens, insurance costs, custodial care, and appraisals. Also, expenditures may be necessary to honor guarantees made under the 1962 act.

The Trade Act of 1974, approved January 3, 1975, Public Law 93-618, 88 Stat. 1978 (19 U.S.C. 2101), repealed most of the adjustment assistance provisions of the 1962 act (section 602(e), Public Law 93-618, 88 Stat. 2072), and substituted new adjustment assistance provisions. Title II, ch. 3, Public Law 93-618, §§ 251 *et seq.* (19 U.S.C. 2341). The 1974 act provides that:

The unexpended balances of the appropriations authorized by section 312(d) of the Trade Expansion Act of 1962 are transferred to the Secretary to carry out his functions under this chapter [dealing with adjustment assistance for firms]. Section 256(c), Public Law 93-618, 88 Stat. 2033 (19 U.S.C. 1912).

No specific savings clause or winding-down authority is provided in the 1974 act with respect to the continued administration of out-

standing loans or guarantees under the 1962 act. Thus, the question arises, since unexpended balances of appropriations under the 1962 act have been transferred to the Secretary for carrying out his functions under the 1974 act, whether these same funds remain available for care and preservation expenses related to loans and guarantees made under the 1962 act, and for honoring guarantees.

We note that various provisions of the 1962 act have not been repealed, including: section 316 (19 U.S.C. § 1916), providing authority for the Secretary to require security for loans or guarantees and, in effect, to care for and preserve such security; section 318 (19 U.S.C. § 1918), imposing recordkeeping and other requirements on recipients of adjustment assistance; and section 320 (19 U.S.C. § 1920), allowing the Secretary to sue and be sued in connection with adjustment assistance. Congress has thus preserved the legislative authority for servicing adjustment assistance loans and guarantees under the 1962 act, while repealing the authority for new commitments thereunder.

Section 256(c), transferring the appropriations balances, was added to H.R. 10710, 93d Congress, the bill which became the 1974 act, by the Senate Committee on Finance. The Committee report does not discuss the addition of section 256(c). S. Report No. 93-1298, 147-148 (1974).

In view of the wording of section 256(c), the funds transferred thereby cannot be used for expenses related to loans and guarantees under the 1962 act, notwithstanding that they were originally appropriated for that purpose, unless those expenses can be considered to be related to functions of the Secretary under title II, chapter 3, of the 1974 act. The General Counsel of the Department, in a memorandum submitted with his request, takes the view that they are so related. He relies in part on the inclusion, in title II, chapter 3, of the 1974 act, of section 263(c), 88 Stat. 2034, 2035 (19 U.S.C. 1902) which provides that:

> Any certification of eligibility of a firm under section 302(c) of the Trade Expansion Act of 1962 made before the effective date of this chapter shall be treated as a certification of eligibility made under section 251 of this Act on the date of enactment of this Act; except that any firm whose adjustment proposal was certified under section 311 of the Trade Expansion Act of 1962 before the effective date of this chapter may receive adjustment assistance at the level set forth in such certified proposal.

The memorandum states in this respect that:

> It is clear that the Secretary has the continuing authority and responsibility to admiuister the loans and guarantees made or authorized under the TEA [Trade Expansion Act of 1962]. The relevant provisions of the TEA were not repealed. Furthermore, by virtue of § 263(c), Congress sought to provide a bridge for those cases which were under consideration at the time that the TA [Trade Act of 1974] became effective. Specifically, in § 263(c) Congress authorized the Secretary to provide funds to firms at the level authorized when their adjustment proposals were approved under the TEA. Therefore, based on the foregoing, it is evident that Congress recognized that loans and guarantees

made or authorized under the TEA would require continuing attention and left that responsibility with the Secretary.

A narrow interpretation of § 256(c) would define the Secretary's "functions under this chapter" to be limited to the rendering of *new* adjustment assistance under the TA and the maintenance thereof. Such an interpretation would preclude the use of the remaining funds for the maintenance of the existing loan and guarantee portfolio.

It is our view that a narrow interpretation of § 256(c) would not carry out the intent of Congress. Congress could not have intended that the recovery on the existing TEA loans and guarantees, and the security therefor, be diminished or jeopardized by denying the use of funds originally appropriated for that purpose.

The fact that the relevant TEA provisions were not repealed, can be considered to be in the nature of a savings clause. The absence of an explicit savings clause can easily be explained by the rush in which the TA was enacted. * * *.

With respect to the use of the transferred funds to honor guarantees authorized under the TEA, § 263(c) of the TA specifically authorizes the Secretary to provide adjustment assistance to firms at the level originally authorized under the TEA. Guarantees constitute contingent liabilities and payment is deferred until demand is made on those guarantees by the lending institution. The level originally authorized under a guarantee is the amount of contingent liability assumed by the government. Even though reserves are established for the purpose of paying guarantees, there appears to be no prohibition against payment of the full liability from the transferred funds, to the extent the reserves established for such purpose are not adequate to meet the liabilities. Any other interpretation would suggest the need for setting contingency reserves at 100 per cent of the outstanding guarantees, a practice which we believe is not required and which the Congress could view as fiscally irresponsible.

The result, were we to hold that the transferred funds are not available for the purposes in question, could be that the United States would be deprived of the value of collateral because it could not expend funds for the purpose of preserving it, and also that commitments to provide adjustment assistance to firms, in the form of guarantees, could not be honored. We would be reluctant to rule in a manner which would cause such severe consequences without some indication that the Congress was aware that, by transferring the unexpended balance for adjustment assistance under the 1962 Act, it would in effect abrogate existing commitments under prior law. We find no evidence of such awareness. Rather, to the extent that the legislative history of the 1974 act offers any indication of congressional intent with respect to the existing program, it tends to suggest that Congress did not intend to curtail the continued administration of the existing adjustment assistance program. The Senate Finance Committee report on H.R. 10710, 93d Congress, which became the Trade Reform Act of 1974, states in this respect that:

> The Committee firmly believes that the Federal Government bears a special responsibility to workers and firms adversely affected by increased imports * * *. Accordingly, the Committee's bill reaffirms the role of firm adjustment assistance and adopts the basic provisions of the House bill which were directed at improving both the substance and procedure of the present program. S. Report No. 93–1298, 143 (1974).

Moreover, as noted above, the Congress expressly preserved, in enacting the 1974 act, those sections of the 1962 act which give the Secretary authority to service existing loans. See also section 263(c)

of the 1974 act, *supra*, intended as a transitional provision for applications for assistance under the 1962 act which were under consideration at the effective date of the new adjustment assistance provisions. H. Report No. 93–571, 63–4 (1973). It would be anomalous to conclude, in effect, that assistance could be provided, under the 1974 act, for firms certified as eligible under the 1962 act procedures, by virtue of section 263(c), but that nevertheless guarantees made to applicants previously certified as eligible under the 1962 act could not be honored.

In somewhat analogous circumstances, we have held that an appropriation "for expenses necessary to carry out the purposes of the National Science Foundation Act of 1950 as amended" could be used for preliminary expenses of a new program not within the 1950 act but which the National Science Foundation (NSF) was charged with administering and for which no other funds were then available. 46 Comp. Gen. 604 (1967). We said therein that the new duties imposed upon the Foundation "* * * bear a relationship to the purposes for which appropriations have been provided sufficient to justify the use of [NSF] appropriations for expenditures related to * * *" the new duties. *Id.* at 606. Similarly, in this instance, the duties imposed upon the Secretary with respect to the continued administration of adjustment assistance under the 1962 act bear a relationship to the purposes of chapter 3 of title II of the 1974 act, the new adjustment assistance provision, sufficient to justify the use of the transferred balance of appropriations in order to care for and preserve collateral and honor guarantees with respect to commitments made under the 1962 act.

Accordingly, the question presented is answered in the affirmative.

[B–183629]

Contracts—Negotiation—Requests for Proposals—Basic Ordering Type Agreements

Department of Health, Education, and Welfare's (HEW) proposed use of a basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved.

In the matter of the Department of Health, Education and Welfare's use of basic ordering type agreement procedure, June 27, 1975:

By letter of April 7, 1975, the Deputy Assistant Secretary for Grants and Procurement Management, Department of Health, Education, and Welfare (HEW) has requested an advance decision concerning an HEW proposal to establish procedures for the use of a

series of "Basic Ordering Agreements" (BOA) as a mechanism for the procurement of expert services for studies, research and evaluation. Our opinion is sought inasmuch as the proposed procedures are somewhat similar to those proposed by the Department of Agriculture in connection with its proposal to enter into a series of "Master Agreements" for the procurement of consulting services which was considered and rejected in *Department of Agriculture's use of Master Agreement*, 54 Comp. Gen. 606 (1975). The Deputy Assistant Secretary is of the view that the circumstances in which HEW proposes to use the BOA-type procedures are significantly distinct from those considered in the Agriculture Department case and warrant our approval.

In the Agriculture case, that Department sought to alleviate the administrative burden and delay incident to evaluating the large number of proposals it had been receiving in response to solicitations for consulting services. The Department had issued a request for proposals which would be used to select the ten most qualified firms in each of eight subject matter areas. Each firm so qualified would receive a "Master Agreement" which for the 1-year period of its operation would entitle it to compete for particular task assignments issued thereunder. In this manner, the Department would be assured of receiving no more than ten proposals and would be assured in advance that all offerors possessed the capability to perform. In that decision we stated that the validity of any procedure limiting the extent of competition is dependent upon whether it unduly restricts competition or whether the restriction serves a bona fide need of the Government. We there distinguished several legitimate forms of prequalification such as a "Qualified Products List" (QPL) or "Qualified Manufacturers List" (QML) from the type proposed by Agriculture as follows:

> While the QPL/QML-type procedures referred to above are similar to those proposed under the Department of Agriculture's Master Agreement in that all involve a form of prequalification, they differ in several critical respects. Under QPL/QML-type procedures, no manufacturer or producer is necessarily precluded from competing for a procurement for which he is able to provide a satisfactory product and such manufacturer or producer may become eligible to compete at any time that it demonstrates under applicable procedures that it is able to furnish an acceptable item meeting the Government's needs. Under the procedures proposed by the Department of Agriculture, disqualification of an offeror would not be predicated upon a finding that it could not provide a satisfactory study, but that other firms could in all likelihood furnish a study of superior quality. Whereas disqualification under the QPL/QML-type procedures is based on a determination as to a potential offeror's ability to furnish the particular item needed by the Government, the Master Agreement would exclude a potential offeror upon a general finding as to the relative qualification of that firm to perform consulting services in the general area in which the Government might require a study. Moreover, we point out that the QPL/QML-type procedures have been sanctioned based not merely on a showing of administrative expediency, but on a showing that the restrictive procedures were essential to assure the procurement of a satisfactory end product. The Department of Agriculture has offered no such evidence as to essentiality for restricting competition, but has indicated only that obtaining maximum competition is administratively burdensome.

HEW urges that, rather than restricting competition, its proposed use of BOAs is designed to elicit the maximum competition practicable in those instances where, due to exigency a noncompetitive award might otherwise be made. HEW states that its use of the BOA procedures would be limited to exigency situations and that where time will otherwise permit, full competition under conventional procurement practices will be obtained. In presenting its proposal HEW explains the BOA procedure and its application as follows:

> The proposed BOAs are designed to assist the Office of the Assistant Secretary for Planning and Evaluation (ASPE) in responding to requirements placed upon that office by external organizations such as the Congress, the White House, and interagency committees. These requirements must often be met within time constraints which are sufficiently restrictive as to preclude either performance in-house or by contract if normal procurement procedures were to be employed
>
> The efforts to be contracted for are in the areas of Health Care Financing and Delivery; Health Care Resources and Planning; Elementary and Secondary Education; Postsecondary Education; Program Impact and Income Distribution; Research and Evaluation Methodology; and, Income Maintenance.
>
> While the exact nature of each task to be performed under the BOA cannot be defined, we have attempted to achieve a high degree of specificity as is required by FPR 1-3.410-2(a). Also maximum competition was sought in the first instance. A brief description of the process employed is presented below by way of illustration.
>
> The competitive process used to establish the BOAs commences with the solicitation, from an unlimited number of sources, of technical proposals in any of the seven areas. Technical proposals respond to an example task for each scientific area. Proposals are evaluated in accordance with weighted criteria established for each set of specifications. Each evaluation is conducted as formally and thoroughly as though the competition were for a funded requirement. The solicitation imposes no restrictions regarding the geographical location of potential awardees.
>
> Business proposals are also solicited, which consist of hourly rates for well defined categories of labor. Following a program determination of technical acceptability or unacceptability, business proposals are opened and a determination is made concerning the reasonableness of the proposed prices. BOAs are then awarded to all offerors whose proposals are determined to be within the competitive range from both a technical and business standpoint. In effect, we are simulating what would be a typical requirement as contemplated by the BOA and not looking only at "responsibility issues."

At the outset we wish to point out that HEW's use of the term "Basic Ordering Agreement" is not in consonance with the definition of that term as defined at subparagraph 1-3.410-2 of the Federal Procurement Regulations. While the agreement as proposed by HEW resembles a basic ordering agreement in that it sets forth the basic terms and conditions to be applicable to orders placed thereunder as well as a description of the types of services to be ordered, etc., its proposed use is not for the purpose for which a true basic ordering agreement is intended. Subparagraph 1-3.410-2(b) provides for use of a basic ordering agreement "where specific items, quantities, and prices are not known at the time of execution of the agreement but where past experience or future plans indicate that a substantial number of requirements for items or services of the type covered by the basic ordering agreement will result in procurements from the contractor

during the term of the agreement." HEW does not contemplate the placing of any specific requirement with the recipient of its BOA-type agreements, but rather that those receiving agreements will be eligible to compete for such requirements as do arise.

As with the Master Agreement procedure offered by the Department of Agriculture, the BOA-type procedure proposed by HEW involves prequalification of offerors. In general we have objected to prequalification of offerors on the basis that the use of such a procedure is inconsistent with the requirement for full and free competition. 52 Comp. Gen. 569 (1973). As in the Agriculture Department case where the only justification offered for a prequalification procedure was the need to reduce the administrative burden of making large numbers of solicitations available or evaluating large numbers of offers, we have held prequalification procedures to be unduly restrictive of competition. *See* 53 Comp. Gen. 209 (1973) involving the National Highway Traffic Safety Administration's proposal to establish a "Qualified Offerors List" and 52 Comp. Gen. 569, *supra*, involving the use of a negotiation exception for the purpose of prequalifying firms.

We have not, however, objected to a prequalification procedure where it has been shown to serve a legitimate need of the procuring activity and not mere expediency. Thus in 36 Comp. Gen. 809 (1957) we upheld the use of a Qualified Products List based on our concurrence with the administrative finding that the Government's need to obtain products of reliable quality could not be met other than through prequalification testing procedures where the testing necessary was so extensive that, as a practical matter, it could not be performed within the time constaints of a procurement. Similar considerations militated toward our approval of the use of a Qualified Manufacturers List in B–135504, May 2, 1958, and of the National Aeronautics and Space Administration's practice of prequalifying microcircuitry manufacturers by means of production line certification procedures in 50 Comp. Gen. 542 (1971).

HEW's proposal for implementing BOA-type procedures for establishing sources eligible to submit offers for particular task assignments is a form of prequalification procedure. However, the HEW proposal differs from that of the Department of Agriculture in that it does not limit the number of firms to be awarded BOA-type agreements but provides for the award of such agreements to all firms found to be within the competitive range. Moreover, HEW proposes, to limit its use of the BOA-type procedure to an area where in all likelihood award on a sole source basis would otherwise be made. In this context HEW's prequalification procedure which will assure a source of competent offerors from whom proposals can be elicited in a short

time frame should in fact enhance competition. For this reason we agree with HEW's view that its proposed use of a BOA-type procedure in the situation where it might otherwise make award on a sole source basis is not legally objectionable. B–167494, September 15, 1969.

For the foregoing reasons we will impose no objection to HEW's implementation of the BOA-type procedures proposed at this time. We do, however, reserve the right to reconsider its propriety based upon review of that Department's experience.

[B–181359]

Contracts—Protests—Burden of Proof—Protester

In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release information on its requirements, protestor should have pursued disclosure request under Freedom of Information Act.

Contracts—Negotiation—Sole Source Basis—Justification

Decision is affirmed that blanket offer by protestor to provide laundry system is insufficient to show arbitrariness of noncompetitive procurement from only source believed capable of furnishing system meeting Army's requirements.

In the matter of Allen and Vickers, Inc., June 30, 1975:

Allen and Vickers, Inc., has requested reconsideration of our Office's decision which denied its protest against the sole-source procurement of an automated laundry system from American Laundry Machinery (ALMI) by the Walter Reed Army Medical Center (WRAMC) (*Allen and Vickers, Inc., et al.*, 54 Comp. Gen. 445 (1974)).

Our decision rejected the protester's contentions (1) that WRAMC had overstated its minimum needs; (2) that Allen and Vickers could, in any event, furnish a system meeting WRAMC's requirements; and (3) that some components of the system should have been procured competitively.

The request for reconsideration goes essentially to the second of these issues. Allen and Vickers alleges that it did not have a fair opportunity to show that it could furnish a system meeting WRAMC's requirements. The protester's request for reconsideration states in pertinent part:

Please consider that we and others were aware several years ago that there would be a new laundry provided for the Walter Reed Army Medical Center. We met with designated authorities several times prior to any design effort. Each time we were told that when that stage of planning was reached, we would be given the opportunity to offer suggestions and recommend plans. Part of our

protest is based on the fact that all the while, plans were being made and being made with a sole supplier contrary to what we were being told.

* * * * * * *

* * * We and others were never given the opportunity to consider WRAMC objectives or to submit a proposal. There are other "sole sources of supplies," the purchase of which would provide the automated laundry processing desired. Also, if ALMI could provide a proposal *in time* to qualify for appropriated funds so could we and other companies, *HAD THE OPPORTUNITY TO DO SO BEEN GIVEN TO US.*

* * * * * * *

To summarize: Many months before the decision to purchase the new laundry, we met several times with designated authorities. We were told that when the point in planning for the WRAMC laundry equipment was reached, we would be asked to submit our proposal. *BECAUSE WE WERE NOT GIVEN THIS OPPORTUNITY, WE DO PROTEST THE PROCEDURE USED TO MAKE THE SELECTION THAT HAS BEEN MADE.*

In addition, in a subsequent letter the protester offers to submit a proposal, stating that it will be comparable to the ALMI proposal in all respects; that it will offer a fully automated system; that it will offer batch processing integrity; that it will involve only minor changes to the laundry building; and that it will save the Government a substantial amount of money. The protester states it will submit such a proposal if it is provided with a complete set of drawings and specifications and if the Government promises to give its proposal fair and adequate consideration.

Certain background facts involved in the protest bear repetition here. WRAMC conducted an investigation of laundry systems and equipment and made on-site visits to observe several systems in operation. WRAMC determined that only the ALMI system could meet its requirements. We understand that a notice regarding WRAMC's procurement of the system from ALMI was published in the Commerce Business Daily in April 1974. It was apparently at about this time that the protester became aware of the sole-source procurement and made an inquiry to WRAMC. By WRAMC's letter dated May 17, 1974, Allen and Vickers was forwarded a copy of the solicitation and advised that WRAMC was conducting negotiations with ALMI. Allen and Vickers then protested to WRAMC, by letter dated May 23, 1974, and to our Office by letter dated May 28, 1974. Based upon a determination of urgency, WRAMC proceeded with an award to ALMI in June 1974 notwithstanding the pendency of the protest.

It was with due regard to the foregoing circumstances that our Office stated in its earlier decision:

* * * the protester points out that it learned of the present procurement only shortly before the contract award and, therefore, that it is difficult to suggest specific components which would make up an acceptable system.

We can appreciate the problems involved in attempting to develop on short notice a detailed proposal offering to supply a system, especially in view of the fact that WRAMC spent a number of months developing its requirements and selecting a system. Nevertheless, it is incumbent on the protester to sub-

stantiate its allegation that it could have been an alternative source of supply and, thus, that the procurement should have been competitive. We think that the protester's blanket offer to meet the requirements is insufficient substantiation. * * *

Where a contracting agency justifies a sole-source procurement on the basis that only one source of supply can meet its requirements, the protester must meet the heavy burden of presenting evidence which shows that such action is arbitrary, capricious and an abuse of procurement discretion. See, generally, *BioMarine Industries et al.*, B–180211, August 5, 1974; *Hughes Aircraft Company*, 53 Comp. Gen. 670 (1974). Also, we have held that where an RFP requires offerors to submit detailed technical proposals, a blanket offer of compliance is not an adequate substitute. 53 Comp. Gen. 1 (1973).

Moreover, we are of the view that the burden rests on the protester to obtain such information from the contracting agency which it deems necessary to make out its case. In this regard, we note that Allen and Vickers' initial letter of protest to WRAMC, dated May 23, 1974, does not complain of any refusal by WRAMC to respond to prior requests for information or documents, nor does it specifically make any requests along these lines. We would also note that this letter does not specifically complain either of a failure by WRAMC to fulfill promises to allow the protester to participate in the planning of the laundry system, or of a failure by WRAMC to provide a promised opportunity to Allen and Vickers to submit a proposal. Since the May 23, 1974, letter formed the basis of Allen and Vickers' May 28, 1974, protest to our Office, these allegations were thus not brought before our Office in connection with the original statement of protest.

In this regard, we believe that it is desirable, from a standpoint of sound procurement policy, for an agency to give consideration to the views of potential offerors which desire an opportunity to compete prior to initiating a sole-source procurement. In this connection, we believe the agency should, upon request, make available to interested potential offerors existing performance standards which it believes only a sole source of supply can meet. See the discussion in *BioMarine Industries*, *supra*.

However, if the agency refuses to make available to potential offerors information concerning the requirements, it must be noted that potential offerors have a disclosure remedy under the Freedom of Information Act, 5 U.S. Code § 552 (1970). In the present case, assuming that prior to April 1974 WRAMC failed to fulfill promises to Allen and Vickers to participate in the formulation of the laundry system requirements, it would appear that the protester should have proceeded at that time to obtain the pertinent information from the agency.

As noted, the initial protest did not specify the protester's complaints of improper actions by WRAMC in the preproposal phase of

the procurement. At various points during the protest—for example, at page 5 of its July 18, 1974, letter commenting upon the Army's report—Allen and Vickers did make reference to futile attempts to obtain necessary information from WRAMC. However, there is no indication in the record that the protester either before or during the protest pursued its remedies under the Freedom of Information Act to obtain information. Instead, Allen and Vickers relied in effect upon a blanket offer to meet the requirements. As indicated *supra*, this is insufficient substantiation for the protester's position.

In this light, the protester's offer to submit a proposal at this time relates to matters which should have been presented in its original protest. The same observation applies to the protester's mention in its request of additional system components which were not presented in connection with its protest—for example, Patterson-Kelly waste water heat reclaimers and the Challenge model DFSII dryer.

In addition, Allen and Vickers in its request continues to object to several aspects of WRAMC's statement of minimum needs. For example, the protester again asserts that it is costly and inefficient to wash 35-pound laundry loads in large capacity washers. Also, Allen and Vickers challenges a WRAMC statement concerning estimated downtime of equipment. In this regard, we do not believe that the protester has presented any new evidence which would require revision of our holding that the statement of minimum needs has not been shown to be without a reasonable basis.

Allen and Vickers also contends that our decision made an erroneous statement that the Voss Archimedia washer allows intermixture of washing solutions and therefore is of doubtful suitability for WRAMC's needs. We note that the contracting officer, as indicated in the Army's supplemental report dated March 17, 1975, is of the view that our decision's statement was technically correct. Even assuming that it is incorrect, it does not establish the validity of Allen and Vickers' protest against the ALMI system, as the washer is but one component of the laundry system.

In view of the foregoing, we do not believe the protester has demonstrated any errors of fact or law in our prior decision, and the decision is accordingly affirmed.

[B–181810]

Pay—Submarine Duty—Absence Periods—Training and Rehabilitation

Legislative history of 37 U.S.C. 301(a)(2) demonstrates intent by Congress to encourage volunteers for Navy's nuclear submarine fleet and not to provide officers for entire submarine fleet including fleet of conventional submarines. Therefore, submarine duty pay authorized in act may be paid to officers previously qualified in submarines as enlisted members, while attending Submarine

Officers' Basic Course or Submarine Officers' Indoctrination Course, only if being prepared as prospective crewmembers for Navy's advanced (nuclear powered) submarine fleet.

Military Personnel—Training—Advance—Nuclear-Powered Submarine

Submarine duty pay authorized in 37 U.S.C. 301(a)(2) may be paid to officers qualified in submarines as enlisted members while attending courses of instruction specifically preparing them for positions of increased responsibility in Navy's advanced submarine fleet, because legislative history demonstrates intent of act was to encourage volunteers from the Navy's conventional submarine fleet for duty in its nuclear submarine fleet by continuing submarine pay while in training to anyone qualified in submarines and already receiving such incentive pay.

In the matter of submarine duty pay, June 30, 1975:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller), requesting an advance decision on questions concerning the entitlement of certain officers to submarine duty pay under the circumstances set forth in Department of Defense Military Pay and Allowance Committee Action No. 508.

The questions are as follows:

1. Is an officer, who was formerly an enlisted member and qualified for submarine duty as an enlisted member, entitled to submarine duty pay while attending the Submarine Officers' Basic Course (A–2E–0028) or the Submarine Officers' Indoctrination Course (A–2E–0029)?
2. Would a member, after accepting a commission, be entitled to submarine duty pay as an officer while undergoing periods of instruction to prepare for assignment to a submarine of advanced design or for a position of increased responsibility on a submarine? The member is qualified in submarines as an enlisted member but has not qualified in submarines as an officer.

The Committee Action makes reference to section 106 of Executive Order 11157, which reads in pertinent part:

(a) As determined by the Secretary of the Navy, members who, pursuant to competent orders, are attached to a submarine which is in an active status and members qualified in submarines who, pursuant to competent orders, are assigned as prospective crew members of a submarine under construction or are receiving instruction to prepare for assignment to a submarine of advanced design or for a position of increased responsibility on a submarine shall be entitled to receive incentive pay for the performance of submarine duty. In the case of nuclear-powered submarines this entitlement shall include periods of training and rehabilitation after assignment thereto. * * *

The Committee Action states that the above language requires that the member be "qualified in submarines" and allows the Secretary of the Navy to identify courses of instruction which may be included under such authority, in order to permit a member to be eligible to receive submarine pay. It is suggested, therefore, in the Committee Action that the issue to be resolved is whether qualification in submarines as an enlisted member may be considered to satisfy the requirement of "qualified in submarines" for officers undergoing instruction and otherwise entitled to submarine pay.

The Committee Action states that a review of the legislative background of Public Law 88–132, approved October 2, 1963, 77 Stat. 215,

section 6 of which amended 37 U.S. Code 301(a) to permit payment of submarine pay to personnel qualified in submarines while receiving instruction to prepare for assignment to a submarine of advanced design or for a position of increased responsibility on a submarine, clearly indicates that it was enacted to diminish the loss of submarine duty pay upon transition from conventional to nuclear submarines during the attendant required training.

It is asserted in the Committee Action that a member, qualified for submarine duty as an enlisted member and pursuing training for assignment to a submarine as an officer, is preparing for a position of increased responsibility on a submarine. It is further stated that the majority of the officers assigned to billets not requiring nuclear power training on Fleet Ballistic Missile submarines are commissioned through the Navy Enlisted Scientific Education Program, and that these officers provide a wealth of needed experience and stability in the junior officer structure. The Committee Action states, therefore, that the entitlement to submarine pay while undergoing the Submarine Officers' Basic Course and the Submarine Officers' Indoctrination Course is considered imperative in order to attract these officers to duty as a volunteer aboard advanced submarines.

Subsection (a)(2) of 37 U.S.C. 301, as presently amended and codified, provides in part that a member is entitled to incentive pay for hazardous duty required by orders, hazardous duty meaning duty:

> (2) as determined by the Secretary concerned, on a submarine (including, in the case of nuclear-powered submarines, periods of training and rehabilitation after assignment thereto), or in the case of personnel qualified in submarines * * * as a prospective crew-member of [a] submarine being constructed, and during periods of instruction to prepare for assignment to a submarine of advanced design or a position of increased responsibility on a submarine;

Senate Report No. 387, 88th Cong., 1st Sess. 22–23 (1963), indicates that a basic change in the law was needed at that time because:

> Under existing law a member of the Navy who is in receipt of submarine pay while assigned to a conventional submarine and who volunteers for duty on a nuclear powered submarine loses his submarine pay during the period while undergoing necessary instruction to prepare him for duties to a nuclear submarine. * * * * * * The Navy, therefore, is being confronted with difficulties in maintaining its nuclear submarine force on an all-volunteer basis. The best source of quality and experience for the nuclear submarines is from those already trained in conventional submarines. * * *

Mr. Bates, of the House Committee on Armed Services, speaking on the amendment at that time, also indicated an understanding that it was intended to enable the Navy to get well-qualified volunteers for service on its nuclear submarines from members already experienced in conventional submarines. Mr. Bates said:

> We all know and realize the importance of our submarine fleet. This essential element of our defense posture is being expanded, and conventional submarines are giving way to vastly more complicated, nuclear-powered, missile-firing submarines. The conversion and strengthening of our submarine fleet requires extensive *retraining* of individuals now qualified in and assigned to conventional submarines * * *.

> The limitations of existing law have seriously hampered the Navy in obtaining sufficient volunteers from personnel qualified in submarines. The reason is one of pure economics. Officers and men already qualified in submarines and receiving submarine pay, cannot afford to voluntarily give up their submarine pay while undergoing training for assignment to submarines of advanced design.
>
> The bill now before the House will correct this inequity by authorizing, in the case of personnel already qualified in submarines, the payment of submarine pay during periods of instruction to prepare for assignment to a submarine of advanced design, or a position of increased responsibility on a submarine. * * * [Italic supplied.] 109 Cong. Rec. 8054 (1963).

The House Committee on Armed Services also indicated that it understood the amendment as being designed to assure that the Navy could get qualified personnel for its new nuclear submarine force. In H.R. Report No. 208, 88th Cong., 1st Sess. 21 (1963), it is stated that:

> * * * It is considered eminently reasonable by the committee that personnel already trained in conventional submarines should not lose their incentive pay while training for *advanced submarine duty*. Its enactment should assist the Navy in obtaining and maintaining the best trained and best motivated crews in the world *for our nuclear submarine force*. [Italic supplied.]

It seems reasonably clear that the purpose for enacting the basic amendment to 37 U.S.C. 301(a)(2) was to enable the Navy to staff its new, advanced submarines with personnel already qualified in conventional submarines. It is our view, therefore, that former enlisted members who are already qualified in submarines and are taking the Submarine Officers' Basic Course or the Submarine Officers' Indoctrination Course for preparation to become officers in the Navy's advanced submarine fleet are entitled to receive submarine duty pay during such schooling. However, any members not taking these courses for the specific purpose of preparing for a position as an officer on a submarine of advanced design (any nuclear-powered submarine) may not receive such pay. The first question presented is answered accordingly.

With regard to the second question, the legislative history demonstrates an intent that anyone "qualified in submarines" and already receiving submarine duty pay should continue to receive such pay while being specifically trained for a position on a submarine of advanced design or for a position of increased responsibility on such a submarine. We feel that the language of the statute and the aforementioned Executive order are sufficiently broad to permit payment of submarine incentive pay as authorized under the provisions of 37 U.S.C. 301(a)(2) to newly commissioned officers, qualified in submarines as enlisted members, while receiving such training. Such an interpretation of the act will help to carry out the legislative intent to overcome the reluctance of many conventional submariners to volunteer for such duty by allowing their submarine pay to continue while receiving training. The second question presented is answered accordingly.

[B–182577]

Contracts — Negotiation — Requests for Proposals — Protests Under—Timeliness

Protest against refusal of agency to consider proposal for award of production contract from firm which, although not selected as development contractor, independently develops allegedly comparable product is timely under 4 C.F.R. 20.2(a). Although solicitation leading to award of development contracts warned that production contract would be awarded only to development contractor, protester could not know for certain that it would not be permitted to submit proposal until it was so notified after issuance of solicitation for production contract.

Contracts—Research and Development—Production and Development Combination Propriety

Refusal of Air Force to consider proposal from protester for TACAN was not unduly restrictive of competition contrary to maximum competition mandate of 10 U.S.C. 2304(g) where development contracts provided that follow-on production would be limited to development contractor (dual prototype method of contracting), since Air Force has demonstrated that such restriction was reasonably necessary to assure that prototype selected would meet technical and cost objectives and because testing of protester's equipment could not be accomplished within time constraints of procurement.

In the matter of Hoffman Electronics Corporation, June 30, 1975:

This procurement calls into question the propriety of restricting competition for the award of production contracts to development contractors under the Department of Defense's "prototype" or "parallel development" method of procuring major defense systems when another company claims and attempts to demonstrate that it has developed and can furnish equipment comparable to the prototypes furnished by the development contractors.

The equipment involved is a solid-state airborne TACAN (designated as AN/ARN–XXX) set designed to replace existing vacuum tube type sets in Air Force aircraft. The Air Force, in 1972, conducted a competitive procurement (request for proposals (RFP) F19628–73–R–0025) leading to the award of contracts calling for the development of this type of new TACAN at a design-to-cost goal of $10,000 per set. Five companies, including Hoffman Electronics Corporation, submitted offers. Although Hoffman's proposal was one of three found to be in the competitive range, awards were made, in April 1973, to General Dynamics Corporation Electronics Division and to the Collins Radio Company (now the Collins Radio Group of Rockwell International). The solicitation and the resulting development contracts contained a provision stating that follow-on production contracts would be "limited only to contractors selected for participation" in the development efforts.

On September 19, 1974, the Air Force, through the Electronic Systems Division, Air Force Systems Command, issued RFP F19628–

74–R–0078 which solicited proposals from Collins and General Dynamics for an initial production contract involving either 500 or 1,000 TACAN sets. This RFP also contained a statement restricting the procurement to the two development contractors. Hoffman requested and received a copy of the RFP, but by letter dated October 23, 1974, and received by Hoffman on October 28, 1974, Hoffman was told by the Air Force that a proposal from Hoffman would not be considered. Hoffman then protested to this Office, claiming that it had developed a comparable TACAN and was entitled to an opportunity to compete.

The Air Force states that under this dual prototype method of contracting, the award of a production contract is a subsequent phase of a procurement that was initiated by the award of competitively negotiated development contracts. According to the Air Force, the competition sought and obtained prior to the award of the development contracts satisfies all statutory and regulatory requirements for competition. In fact, the Air Force states, this procurement method "enables an agency to retain a competitive aspect a step further in the award process" since two contractors remain in competition for a production award through the development phase of a procurement. Accordingly, the Air Force believes it need not permit Hoffman to compete at this juncture.

Hoffman, on the other hand, claims that the restriction on the production award is contrary to the statutory requirement for maximum competition, particularly since, according to Hoffman, General Dynamics and Collins have not achieved "key requirements of the development contract." Hoffman claims that it "is in the best position to satisfy the Government's needs" since its TACAN, which it developed at its own expense, is currently in production and is equal to and interchangeable with the TACANs developed by General Dynamics and Collins.

The threshold question is whether Hoffman's protest is timely. The bid protest procedures governing this procurement require that protests based on solicitation defects which are apparent prior to the closing date for receipt of proposals be filed prior to the closing date. In other cases, the procedures require the filing of a protest not later than 5 days after the basis for protest is known or should have been known. 4 C.F.R. § 20.2(a) (1974 ed.). The Air Force and Collins state that since the development RFP warned that a production contract would be awarded only to a development contractor, any objections Hoffman had to that provision should have been registered prior to the award of the development contracts rather than after completion of the development phase in which Hoffman had actively but un-

successfully competed for a development contract without having objected to the production award limitation. The Air Force also asserts that subsequent to the award of the development contracts, Hoffman was informed verbally in February and May 1974 that it would not be permitted to submit a production proposal and therefore was on notice at least from those dates of the Air Force's intention. Hoffman claims, however, that it was in no position to protest until after RFP-0078 was issued and it was formally denied an opportunity to compete for the production contract.

We believe the protest is timely. In essence, Hoffman is protesting not against the restriction *per se*, but against its use in circumstances, which Hoffman believes exists here, where development goals were not met and where a firm other than the development contractors had developed independently a product satisfying the agency's requirements. In this connection, our decisions have recognized that agencies are not precluded from awarding contracts to firms other than those to which a solicitation appears to limit the procurement. *See* 48 Comp. Gen. 605, 610 (1969); 52 *id.* 546 (1973); B-176861, January 24, 1973; B-177949(1), June 15, 1973. Accordingly, despite the language contained in RFP-0025 and the informal indications that Hoffman received in February and May 1974, Hoffman could not actually know it would not be permitted to compete for the production contract until after the Air Force refused to consider Hoffman's proposal under RFP-0078. Therefore, Hoffman was not required to protest until after receipt of the Air Force's decision to restrict the procurement, and since it did so prior to the closing date for receipt of proposals under RFP-0078, we must view the protest as timely. However, for reasons explained below, we believe the protest should be denied.

With regard to the merits of the protest, the Air Force believes that its procurement objectives under the Airborne TACAN program cannot be satisfied unless the competition for a production contract is limited to the development contractors. It also denies Hoffman's allegations regarding the failure of the development contractors to attain certain goals and regarding the acceptability of Hoffman's TACAN.

The contracting officer reports that the Airborne TACAN program originated in 1972 with requirements for competitive development of a state-of-the-art TACAN subject to the "then innovative procurement techniques such as design-to-cost, failure-free warranty, and life cycle costing * * *." Originally, priced options for limited production were to be included in the development contracts so that there could be a "price limited 'fly-off'" resulting in selection for production of "the superior unit from the development." However, although "the approach of having contractors commit to production price ahead of

prototype selection was altered * * * the concept remained that production prices, when received, would come only from the development contractors." According to the contracting officer, "This would retain the application of 'try before buy,' would retain the ability to examine economic risk factors in avionics procurements, and would assure the Government procurement of a known product at a known price." The contracting officer states that these objectives "cannot be satisfied if a proposal is permitted by a company not involved in the development effort."

This is further explained by the contracting officer as follows:

> When the Air Force decided to enter into the present dual development program it did so due to the sophisticated and advanced nature of the product desired. It was realized to insure the confidence necessary to make a clear and informed decision to commit the large amount of Government funds required to procure the production quantities of TACAN sets the Air Force would be required to constantly oversee and test the prototypes through their development phase. It is the belief of the Contracting Officer that without this type of surveillance and constant qualification testing there could be no assurance that the desired goals of the program could be attained. The restriction of awarding the production phase to one of the development contractors was based on this need for confidence in the proposer's product.

In support of its protest, Hoffman states that it developed its own solid-state TACAN, now designated the AN/ARN-113, which in 1972 was installed in the C-9B aircraft and on which "a complete Government witnessed Qualification Test Program in accordance with MIL-E-5400 for Class II equipment" was conducted. Subsequently, "Hoffman developed and produced additional mount-adapters and converters, which utilized the identical bearing and range couplers and digital to analog conversion circuitry, but with the sheet metal exterior conforming to the specific contours" of tube type TACANs. According to Hoffman, these items, together with the receiver/transmitter of the AN/ARN-113, were bought by the Air Force and denominated the AN/ARN-84(V). This AN/ARN-84(V), according to Hoffman, was nearly identical to the AN/ARN-113 and therefore the Air Force "saw no need to repeat" the MIL-E-5400 Class II testing. Thus, states Hoffman, "the AN/ARN-84(V) had been qualified by similarity to the AN/ARN-113."

Furthermore, Hoffman asserts that there is data within the Air Force which verifies the qualification of the AN/ARN-84(V). Hoffman admits that its TACAN has been formally tested only to the less stringent reliability requirements, but claims that the TACAN is subjected to a "burn in" at the higher test level prior to delivery, and that the Air Force can easily verify that AN/ARN-84(V) production units have in effect been tested at the higher level for more than a year; Hoffman also offers to guarantee that its TACAN will pass "full tests * * * within two months after award of a contract to it." In

addition, Hoffman claims there is no need for it to furnish a prototype, and asserts that its current price for the AN/ARN-84(V) is not indicative of what it might offer in response to a solicitation with a design-to-cost requirement.

In support of this claim, Hoffman has submitted copies of documents which purportedly indicate that the Air Force has accepted and approved qualification test data furnished by Hoffman under its AN/ARN-84(V) contract. Hoffman also refers to the "thousands of hours flown" by the AN/ARN-84(V) in Air Force aircraft and the data resulting therefrom as providing a reliable indication of the performance capability of its TACAN in actual operation. In essence, Hoffman claims that there is already available sufficient test and operational data to enable the Air Force to evaluate the AN/ARN-84(V).

The Air Force, on the other hand, claims that "there remains serious doubts as to performance capability" of the Hoffman TACAN. According to the Air Force, any design difference between the AN/ARN-113 and AN/ARN-84(V), "no matter how apparently slight, can cause significant differences in performance. Only in unusual urgent circumstances would qualification of important aircraft navigation equipment be made by similarity rather than direct test." The Air Force further claims that:

(1) the test data furnished does not "really support" the conclusion that the Hoffman AN/ARN-113 passed the MIL-E-5400 Class II qualification tests;

(2) the Hoffman TACAN has not been tested against stringent environmental and reliability requirements imposed on the prototypes. In this regard, the Air Force points out that the prototypes were tested for mean time between failure (MTBF) within a temperature range of −54 to 71 degrees centigrade with a "confidence factor" of 90 percent, while the Hoffman TACAN was tested within a range of −54 to 55 degrees centigrade with an 80 percent confidence factor;

(3) there are differences between the ARN-XXX specification and the AN/ARN-84(V) with respect to "burn in" time, automatic self-testing, and mean time to repair, which means that the prototypes and the Hoffman TACAN have been tested against different standards and requirements, all of which directly "relate to user confidence;"

(4) the 400 AN/ARN-84(V) sets now flying "do not represent a quasi-certification of the equipment" because "the full range of data accumulated * * * do not indicate that the set meets the program objectives for field reliability;"

(5) the AN/ARN-84(V) is being delivered at a price in excess of $18,000, well over the $10,000 per set design-to-cost goal.

The Air Force sums up its position as follows:

> The Air Force has very little confidence that the Hoffman product can meet the qualification standards already met by the development prototypes at its present cost and zero confidence that these standards can be met within the design-to-cost goal. In addition, the time necessary to allow Hoffman to prepare a proposal, prepare a prototype that would allegedly meet the qualification standards and allow for Air Force testing comparable to that performed on the prototypes would delay this urgently needed program a prohibitive amount of time. This would also mean that because of the delay the Air Force would be forced to buy more of the AN/ARN-84(V) sets to fulfill its requirements. * * *

In addition, the Air Force points out that the restriction on the production phase of this TACAN procurement is a reasonable one since "prototype contracting constitutes a rational response to the problems posed by the more traditional methods of procurement" and is supported by the Congress, the Commission on Government Procurement (COGP), and a Department of Defense (DOD) Directive.

In the past, we have recognized that the use of dual prototype contracting has merit. *See* Report B-39995, "Evaluation of Two Proposed Methods For Enhancing Competition In Weapons Systems Procurement," July 14, 1969. We also note that its use is consistent with COGP recommendations concerning development of alternative systems by competing contractors. *See* 2 Report of the Commission on Government Procurement 79-86. As noted above, the Air Force feels that by employing the parallel development approach to the program, it was able to sustain a competitive range of two active competitors for the production award instead of committing itself, at an earlier point in time, to a single source.

The validity of the Air Force's restriction on competition in this case must be measured against the requirement of 10 U.S. Code 2304 (g) (1970) that proposals shall be solicited "from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." We have recognized that this requirement for maximum competition "is the cornerstone of the competitive system." 53 Comp. Gen. 209, 211 (1973). At the same time, we have also recognized that restrictions on competition may be imposed when the legitimate needs of the agency so require. *See* 53 Comp. Gen. 102 (1973). Thus, a determination as to whether a limitation on competition is proper turns not on the restrictiveness *per se* of the limitation, but on whether the limitation is *unduly* restrictive under the circumstances. 53 Comp. Gen. 102, *supra;* 53 *id.* 209, *supra.*

In applying these principles we have regarded as unduly restrictive of competition the establishment of a qualified offerors list, 53 Comp. Gen. 209, *supra*, and other methods of prequalifying offerors. *Department of Agriculture's Use of Master Agreement*, 54 Comp. Gen. 606 (1975); *VAST, Inc.*, B-182844, January 31, 1975; *METIS Corpora-*

tion, 54 Comp. Gen. 612 (1975). We have also objected to sole-source procurements when the circumstances did not justify noncompetitive awards. *See*, *e.g.*, 52 Comp. Gen. 987 (1973) and 54 *id.* 58 (1974).

On the other hand, we have upheld as not unduly restrictive the use of two-step procurement, 40 Comp. Gen. 40 (1960); qualified products lists, 36 Comp. Gen. 809 (1957), 50 *id.* 542 (1971), and *Stewart-Warner Corporation*, B-182536, February 26, 1975; a qualified manufacturers list, B-135504, May 2, 1958 (discussed in 53 Comp. Gen. 209, 211, *supra*); procurements restricted to previous suppliers or suppliers of items previously approved by agency technical personnel, 52 Comp. Gen. 546, *supra*, and B-177949(1), *supra;* a requirement to demonstrate prior manufacture of a complex system meeting specified performance requirements, 49 Comp. Gen. 857 (1970); and various solicitation provisions regarding product experience, 48 Comp. Gen. 291 (1968); geographic requirements, 54 Comp. Gen. 29 (1974) and 53 *id.* 522 (1974); requirements for State and local licenses, 53 Comp. Gen. 51 (1973); restrictions based on possible conflicts of interest, 51 Comp. Gen. 397 (1972) and *Gould, Inc., Advanced Technology Group*, B-181448, October 15, 1974; and other allegedly restrictive requirements. *See*, *e.g.*, 52 Comp. Gen. 640 (1973).

Here the record shows that the Air Force restricted the competition for the TACAN production contract to the development contractors because of its determination that the data and testing information obtained during the course of the development contract was essential to assure that the prototypes selected for the production contract would meet the technical and cost objectives of this program. The Air Force insists that in order to obtain sufficient data to evaluate the acceptability of the Hoffman TACAN to the extent that the other two TACANs have been evaluated under the controlled environment of the development contract, it would need about 6 to 9 months. Although Hoffman vigorously disputes this estimate, we are not in a position to disagree with the Air Force's technical judgment. The extent to which testing of a product is necessary to determine if the product would meet an agency's needs is a matter within the sound discretion of the agency. 52 Comp. Gen. 778 (1973); *Parametric Industries, Inc.*, B-180800, July 25, 1974; *Stewart-Warner Corporation*, B-182536, February 26, 1975. Under the circumstances, we must conclude that the Air Force's restriction of competition was reasonable.

With regard to Hoffman's assertions regarding the alleged failure of the development prototypes to meet the objectives of the Airborne TACAN program, the Air Force maintains that the goals have been met, and we do not find that the record establishes anything to the contrary. As to Hoffman's claim that it is entitled to see the specifications

developed by Collins aand General Dynamics pursuant to their development contracts, we agree with the Air Force that the specifications are applicable only to each development contractor's TACAN and need not be made available to other parties prior to the award of a production contract.

Accordingly, Hoffman's protest is denied.

[B-183501]

Contracts—Negotiation—Requests for Proposals—Timeliness

Protest against sole-source award which is filed prior to closing date for receipt of proposals is timely under 4 C.F.R. 20.2(a), notwithstanding fact that contract was awarded prior to date of filing.

Contracts—Negotiation—Sole Source Basis—No Justification—Determinable Factors

Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on detemination that only that item could satisfy agency's minimum needs.

Contracts—Negotiation—Awards—Prior to Request for Proposals Closing Date—Improper

Award of contract, prior to request for proposals closing date for receipt of proposals, upon receipt of proposal by only offeror solicited was improper since such action precluded consideration of proposals by other firms not directly solicited and denied such firms equal opportunity to compete.

In the matter of Precision Dynamics Corporation, June 30, 1975:

Precision Dynamics Corporation (Precision) has protested against the sole-source award of a contract to Hollister, Incorporated (Hollister) by the Veterans Administration (VA) Marketing Center, Hines, Illinois, for quantities of a 7/16-inch wide (2 line) patient identification band. In substance, it is Precision's position that the sole-source procurement stemmed from an unwarranted restriction on competition which in turn resulted in an unjustifiably high price for the procured items. For the reasons indicated below, the protest is sustained.

Request for proposals No. M1-Q173-75 was issued on March 10, 1975, and specified that offers would be received until "11 AM March 28, 1975 or until negotiation is completed." Page 1 of the solicitation carried the notation "SOLE SOURCE—ALL ITEMS PAGE 8." Page 8 contained a 9-line description of the identification band, including the words "(Iden-A-Band) Hollister, Inc., No. 6709." On March 20, 1975, award was made to Hollister on the basis of a proposal submitted by that firm on the previous day. Subsequently, by letter dated March 21, 1975, Precision forwarded to the purchasing activity two

proposals, each offering a different identification band manufactured by the protester. The letter stated that the "proposals are submitted in response to Request for Proposal No. M1–Q173–75 as equivalent products or as unsolicited proposals to provide products that meet the needs underlined in [the solicitation.]" The letter also stated that a protest would be filed against any sole-source award to Hollister. Precision's protest was filed on March 24, as a result of which the VA directed Hollister to suspend performance pending resolution of the protest.

The contracting officer states that the protest is untimely because it was filed after the award was made. He further stated that the products offered by Precision did not conform to the product description of the RFP and therefore could not be accepted.

We do not agree that the protest is untimely. Although award was made on March 20, the RFP indicated that proposals would be received at least until March 28. The bid protest procedures applicable to this procurement provide that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that date. 4 C.F.R. § 20.2(a) (1974). Since the protest was filed on March 24, it cannot be regarded as untimely.

We do agree with the contracting officer that the bands offered by the protester do not conform to the item description in the RFP. However, this does not compel the conclusion that the award to Hollister was valid.

Sole-source awards are authorized in circumstances when needed supplies or services can be obtained from only one person or firm. Federal Procurement Regulations (FPR) 1–3.210(a)(1) (1964). However, because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, see FPR 1–3.101, agencies must adequately justify determinations to procure on a sole-source basis. Such determinations, while subject to close scrutiny, see e.g., *Winslow Associates*, 53 Comp. Gen. 478 (1974) and B–178740, May 8, 1975; *BioMarine Industries; General Electric Company*, B–180211, August 5, 1974, will be upheld if there is a reasonable or rational basis for them. *Winslow Associates*, B–178740, *supra; H. J. Hansen Company*, B–181543, March 28, 1975; *North Electric Company*, B–182248, March 12, 1975.

In applying these principles, our Office has recognized that noncompetitive awards may be made where the minimum needs of the Government can be satisfied only by items or services which are unique, B–175953, July 21, 1972; where time is of the essence and only one known source can meet the Government's needs within the required time frame, 52 Comp. Gen. 987 (1973), *Hughes Aircraft Company*, 53

id. 670 (1974), *California Microwave, Inc.*, 54 *id.* 231 (1974); where data is unavailable for competitive procurement, B–161031, June 1, 1967; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment, B–152158, November 18, 1963 and B–174968, December 7, 1972. On the other hand, we have objected to sole-source procurements when the circumstances did not justify noncompetitive awards. 52 Comp. Gen. 987 (1973) and *Environmental Protection Agency sole-source procurements*, 54 *id.* 58 (1974).

Here, the VA justifies the sole-source award on the basis of 41 U.S. Code 252(c)(10) and FPR 1–3.210(a)(1), which permit the negotiation of a contract on a sole-source basis when it is impracticable to secure competition because supplies can be obtained from only one person or firm. The "Determination and Findings" prepared by the contracting officer to support the award to Hollister on a sole-source basis reads, in its entirety as follows:

> We find that there are several I.D. Bands Available, however they differ in characteristics depending on the manufacturer. The item produced by Hollister has been found by a sufficient number of our Hospitals to be superior to other ID Bands in the following reports:
> (a) Band is tamper proof
> (b) It is leak proof
> (c) Item is patented and available, to our knowledge, from Hollister Inc., only
> This item has been approved for use in VA Hospitals.
> We have determined that procurement through negotiation under the provisions of FPR 1–3.210(a)(1) is best method of procurement.

This document does not state that the Hollister band is needed to satisfy the Government's minimum needs. Rather, it indicates only that the Hollister band is "superior" and "approved for use in VA Hospitals." This suggests, and other documents in the record support, the conclusion that the determination to negotiate sole source was based merely on the preference of VA medical personnel for the Hollister identification band. However, a preference for a particular item, even when that item has proven to be superior to other similar items, cannot support a sole-source award unless only that item can satisfy the Government's needs. *See* 50 Comp. Gen. 209 (1970), in which we objected to an intended sole-source procurement of sterilizers.

While we have consistently recognized that Government procurement officials are generally in the best position to know the Government's needs and to determine whether the product offered meets those needs, *East Bay Auto Supply*, 53 Comp. Gen. 771 (1974), we find nothing in the record which would enable us to conclude that the Government's minimum needs could be satisfied only by Hollister. In addition, we note that the VA procures 4-line bands on a com-

petitive basis, and that the VA has paid less for competitively purchased 4-line bands than it must pay Hollister for its 2-line bands. We do not understand why the supposedly superior characteristics of the Hollister band should warrant a sole-source buy of 2-line bands when those same characteristics do not warrant a sole-source purchase of 4-line bands. Moreover, Precision's counsel asserts that both Precision and the other known company in the field in fact produce two 2-line bands. *See*, in this connection, 47 Comp. Gen. 175 (1967) and 44 *id.* 27 (1964). In addition, while Hollister has suggested reasons why a 2-line band is more advantageous than a 4-line band, we note that the VA has not offered any reason why its needs for patient identification bands cannot be satisfied entirely by competitively acquired 4-line bands.

In view of the above, we must conclude that the noncompetitive award to Hollister was not justified. We are therefore recommending that the contract be terminated for the convenience of the Government and that the VA should procure all these items competitively.

In addition, we are also expressing our concern to the Administrator of the VA over the RFP provision which states that offers would be received until March 28, 1975 or "until negotiation is completed." FPR 1-3.802(c) requires RFPs to "specify a date and time for submission of proposals." The provision utilized in this procurement obviously does not specify a firm date. It is also ambiguous in that it can be read to indicate either that proposals submitted after March 28 might be considered (if negotiations had not been completed) or that proposals submitted as late as March 28 might not be considered (if negotiations with other offerors had been completed prior to that date). Here it is apparent that, in view of the sole-source restriction, the provision was intended to authorize and was in fact utilized by VA to award to the sole source prior to March 28. However, it is well established that agencies are not precluded from awarding a contract to a firm other than the one to which a solicitation appears to limit the procurement. 52 Comp. Gen. 546 (1973); *NORTEC Corporation*, B-180429, May 23, 1974; B-176861, January 24, 1973; B-177949 (1), June 15, 1973. Accordingly, the use of this provision may well deny potential offerors an equal opportunity to compete if award is made to a sole source prior to a specific date set forth in the RFP. For these reasons, we are recommending that the provision not be used in subsequent procurements.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the Congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. 1172.

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ABSENCES (*See* **LEAVES OF ABSENCE**)

ACCOUNTABLE OFFICERS

Accounts

Irregularities, etc.

Administrative authority to resolve

Amount increased Page

Limitation of $150 on administrative resolution of irregularities in accountable officers accounts, authorized by GAO letter of August 1, 1969, B–161457, to Heads of Federal Departments and Agencies, cannot be eliminated, but may be increased to $500 without appreciable risk to the interests of Government. Letter increasing limitation is being issued and amendment to 7 GAO 28.14 will be forthcoming 112

Bonding elimination

Liability

Insurer *v.* bailee

GAO does not agree that elimination of bonding of accountable officers pursuant to act of June 6, 1972, Pub. L. 92–310, 86 Stat. 201, reduced basic liability of officer from that of insurer liable with or without negligence, to that of bailee responsible only for performing duties with degree of care, caution, and attention which prudent person normally exercises in handling own affairs 112

Relief

Negligence

What constitutes

Regarding complaint that GAO is too strict in interpretation of negligence in cases of relief of accountable officers and suggestion that standard of such care as reasonably prudent and careful man would take of his own property under like circumstances be used, GAO is no more strict than law requires and uses suggested standard, but because of difference of opinion in application of standard GAO may sometimes construe negligence in circumstances where agency involved does not ... 112

ADMINISTRATIVE DETERMINATIONS

Undue influence

Statement that awardee was given quality points for areas of proposal containing errors is unfounded as record shows that all proposal deficiencies were rectified during discussions and that awardee was downgraded in areas where its proposal was less desirable than others submitted, moreover, unsubstantiated allegation that awardee received extra quality points for proposal presentation is not supported by record, and therefore, cannot be accepted 775

ADMINISTRATIVE DETERMINATIONS—Continued
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Unsuccessful offeror's statement that one of joint venturers and Navy were involved in improper discussions during negotiation process is unfounded, as is contention that one of joint venturers participated in formulation of RFP for design and construction of family housing units on a turnkey basis. Furthermore, there are no regulations which prohibit on-site contractor from competing for additional award at same location ---- 775

ADMINISTRATIVE ERRORS
Compensation. (*See* **COMPENSATION, Administrative errors**)

ADVERTISING
Advertising *v.* negotiation
Mess attendant services

Total small business set-aside for mess attendant services pursuant to 10 U.S.C. § 2304(a)(1) (1970) and ASPR § 1–706.5 (1973 ed.) should have been conducted by process known as Small Business Restricted Advertising since Navy has not demonstrated that use of this method was not possible ---- 809

AGENCY
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Voluntary services
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Responsibiility of persons dealing with agents

An employee who has reported to new official duty station in Washington, D.C., and thereafter returns to his old duty station in Los Angeles, California, to settle his rental agreement and to complete his moving arrangements is not entitled to additional travel expenses for this purpose even though erroneously advised otherwise ---- 301

Contractors
Status

As matter of policy, GAO generally will not consider protests against awards of subcontracts by prime contractors, even where prime contract is of cost-reimbursement type, whether or not subcontract has been awarded. However, GAO will consider subcontract protests where prime contractor is acting as Government's purchasing agent; Government's active or direct participation in subcontractor selection has net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in Government's approval of subcontract award is shown; subcontract award is "for" Government; or agency requests advance decision. 51 Comp. Gen. 803, modified ---- 767

AGENTS—Continued
Government—Continued
Government liability for acts beyond authority
Civilian personnel matters Page

Former employee appointed to manpower shortage position who was authorized reimbursement for expenses of sale and purchase of residence, temporary quarters subsistence expenses, and per diem for family, is not entitled to reimbursement for such expenses and must refund any amounts already paid because appointees are not entitled to such reimbursement and he was not transferred without break in service or separated as result of reduction in force or transfer of function to entitle him to such reimbursement under 5 U.S.C. § 5724a and Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations 747

Not responsible for collection of private debts

Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzelement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts... 424

Of private parties
Authority
Contracts
Signatures

Allegation that bidder, whose bid included properly executed certification by corporate secretary under corporate seal that signer of bid was authorized to do so, must submit additional evidence indicating Board of Directors authorized execution of bid is rejected, as contracting officer, who has primary responsibility to determine sufficiency of evidence of signer's authority, indicates certification execution was adequate and in conformance with bid and protester has not submitted evidence why this conclusion is unreasonable 686

AGRICULTURE DEPARTMENT
Forest Service
Boundary Waters Canoe Area
Appropriations
Acquisition of land

Congress having authorized appropriations not to exceed $4.5 million for acquisition of land by purchase or condemnation in Boundary Waters Canoe Area, 16 U.S.C. 577h, and having appropriated that amount, only such funds may be used for particular land acquisition 799

Gifts to educators

Voucher covering cost of decorative key chains given to educators attending Forest Service-sponsored seminars, with intent that Sawtooth National Recreation Area and FS symbols on key chains would generate future responses from participants and depict positive association between SNRA and FS, may not be certified for payment, since such items are in nature of personal gifts and, thus, expenditure therefor would not constitute necessary and proper use of appropriated funds. 976

AGRICULTURE DEPARTMENT—Continued
Rural Electrification Administration
Loans to cooperatives
Federal law applicability Page

Rural electric cooperatives, acting pursuant to loan guaranteed by Rural Electrification Administration (REA), are not Federal instrumentalities and therefore are not subject to the Buy American Act and implementing directives which require application of 12 percent differential to price offered by foreign firm under certain circumstances. Applicable law is Rural Electrification Act of 1938, as implemented by REA, which requires application of only 6 percent differential 791

Rural electric cooperatives, acting pursuant to "Informal Competitive Bidding" procedures approved by REA, were not obligated to evaluate revised proposal submitted by higher of two offerors after cooperatives inquired about possible reduction in price. Moreover, it appears that even had revised proposal been evaluated, selection of contractor would not have been affected 791

School lunch and milk programs
Cash payments in lieu of commodities

Department of Agriculture has authority under National School Lunch Act, as amended by Public Law 93-326, to make cash payments to States for school lunch program in lieu of donating any commodities, where distribution of donated commodities is not possible, since such authority is expressly recognized and affirmed in conference report on Public Law 93-326 and is otherwise consistent with statutory language and legislative history 192

AIRCRAFT
Carriers
Property damage, loss, etc.
International carriage
Warsaw Convention applicability

Air carrier's claim for amount administratively deducted to reimburse Govt. for loss of personal effects is proper for allowance where action at law was not brought by the Dept. of the Air Force within 2 years as required by Article 29 of Warsaw Convention. The 6-year statute of limitation in 28 U.S.C. 2415 does not abrogate holding in *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422; 145 Ct. Cl. 1 (1959) 633

ALASKA
Employees
Separation, etc.
Returned to U.S. for separation by retirement
No reimbursement for real estate expenses

Employee located in Alaska whose position was abolished was returned to continental U.S. for separation by retirement. His claim for reimbursement of real estate expenses in selling his Alaska residence is not allowable since pertinent statutes and regulations permit such reimbursement only when there is a permanent change of duty station. Return from Alaska for purpose other than assuming a new Govt. position does not constitute a permanent change of station. Returning exployees in these circumstances are considered as in the same category as "new appointees" under 5 U.S.C. 5724(d), and new appointees are not eligible for real estate allowances 991

ALLOWANCES
Cost-of-living allowances
Military personnel. (*See* STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.)
Dislocation allowance. (*See* MILITARY PERSONNEL, Dislocation allowance)
Evacuation allowances
Military personnel. (*See* FAMILY ALLOWANCES, Evacuation)
Military personnel
Basic allowance for quarters (BAQ). (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))
Cost-of-living allowances. (*See* STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.)
Dislocation allowance
Members with dependents. (*See* TRANSPORTATION, Dependents, Military personnel, Dislocation allowance)
Excess living costs outside United States, etc. (*See* STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.)
Housing. (*See* STATION ALLOWANCES, Military personnel, Housing)
Quarters allowance. (*See* QUARTERS ALLOWANCE)
Monetary in lieu of transportation. (*See* MILEAGE, Military personnel, As being in lieu of all other expenses)
Station. (*See* STATION ALLOWANCES)
Temporary lodgings. (*See* STATION ALLOWANCES, Military personnel, Temporary lodgings)

AMERICAN SAMOA
Per diem rates. (*See* SUBSISTENCE, Per diem, Rates, American Samoa)

ANNUAL LEAVE (*See* LEAVES OF ABSENCE, Annual)

APPOINTMENTS
Administrative function
Back Pay Act not applicable Page
The Back Pay Act of 1966, 5 U.S.C. 5596, is applicable only to Federal employees and does not apply to unsuccessful applicants for employment. Therefore, while Asst. Secretary of Labor for Labor-Management Relations is authorized to take affirmative action when he finds that an agency has engaged in an unfair labor practice in hiring, he has no authority to direct agency to make appointment under the Back Pay Act 760

Career conditional
Travel to first duty station
Former employee appointed to manpower shortage position who was authorized reimbursement for expenses of sale and purchase of residence, temporary quarters subsistence expenses, and per diem for family, is not entitled to reimbursement for such expenses and must refund any amounts already paid because appointees are not entitled to such reimbursement and he was not transferred without break in service or separated as result of reduction in force or transfer of function

APPOINTMENTS—Continued
Career conditional—Continued
Travel to first duty station—Continued Page
to entitle him to such reimbursement under 5 U.S.C. § 5724a and Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations 747

Manpower shortage category
Travel expenses. (*See* **TRAVEL EXPENSES, First duty station, Manpower shortage**)
Retroactive
Correction
Back Pay Statute
Retroactive correction of an appointment date may be accomplished under provisions of Back Pay Statute, 5 U.S.C. 5596 and implementing regulations where agency committed a procedural error by failing to follow provisions of administrative regulations requiring that retirement and reappointment be included in same action to preclude a break in service which was not intended, and where the break in service was only 1 nonworkday 1028

APPROPRIATIONS
Agriculture Department
Forest Service
Land acquisition
Boundary Waters Canoe Area
Congress having authorized appropriations not to exceed $4.5 million for acquisition of land by purchase or condemnation in Boundary Waters Canoe Area, 16 U.S.C. 577h, and having appropriated that amount, only such funds may be used for particular land acquisition 799

Availability
Compensation
Previously waived
Claim of former Commissioner of Commission on Marihuana and Drug Abuse for compensation previously waived by him is for payment if otherwise proper since an employee may not be estopped from claiming and receiving such compensation when his right thereto is fixed by or pursuant to law. Should additional claims from other Commissioners be submitted, they may also be paid. However, should no balance remain in the applicable appropriation account, a deficiency appropriation would be necessary before payment could be made 393

Contracts
Base bid and additive items
Recording
FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available for base bid and additive bid items when amount of funding is in doubt. Therefore, when actual funding available increases prior to award from cancellation of another procurement, funds properly made available therefrom to civilian agency for general construction use may be reallocated to affect determination of amount of additive items to be included for award 320

APPROPRIATIONS—Continued
Availability—Continued
Expenses incident to specific purposes
Necessary expenses Page

Govt. agency may, within appropriation limits, assume risk of loss for contractor-owned property which is used solely in performance of Govt. contracts since reimbursement for loss of property arising during performance of Govt. contract is necessary and proper expense chargeable to appropriation supporting Govt. contract. B–168106 dated July 3, 1974, modified---- 824

There is no authority for CSC to issue regulations authorizing payment of travel and transportation expenses of members of the immediate family of honor award recipients to attend award ceremonies as such expenses are not considered "necessary expense" under 5 U.S.C. 4503---- 1054

Gifts
To educators

Voucher covering cost of decorative key chains given to educators attending Forest Service-sponsored seminars, with intent that Sawtooth National Recreation Area and FS symbols on key chains would generate future responses from participants and depict positive association between SNRA and FS, may not be certified for payment, since such items are in nature of personal gifts and, thus, expenditure therefor would not constitute necessary and proper use of appropriated funds---- 976

Necessary expenses. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)
Objects other than as specified
Recoupment of setoff of union dues

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. 623 (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---- 921

Recreation facilities
Equipment for employees. (*See* **WELFARE AND RECREATION FACILITIES, Civilian personnel, Authority**)
Retirement fund losses
Agency liability

Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health cannot obtain reimbursement from a Federal agency whose certifying officer certified erroneous information on Standard Form 2806 leading to overpayment to a former employee from the Civil Service Retirement Fund, 5 U.S.C. 8348. Reimbursement by agency would violate 31 U.S.C. 628 which prohibits expenditures of appropriated funds except solely for objects for which respectively made---- 205

Television set
Environmental Protection Agency ship

In view of fact that crew and scientists aboard EPA ship, *Roger R. Simon*, are confined for extended periods without any common recreational facilities and that they are unable to personally provide their own

APPROPRIATIONS—Continued
Availability—Continued
Television set—Continued
Environmental Protection Agency ship—Continued Page
portable televisions due to the ship's configuration, appropriated funds may be used to purchase television set and special antenna and rotor should responsible EPA official find it necessary for most efficient and economical performance of the ship's functions ---------- 1075

Unexpended balances
Replacement programs
Where unexpended balance of funds appropriated for purposes of a former adjustment assistance program is transferred to Secretary of Commerce to be used for a replacement program of adjustment assistance, while legislative authority to continue to administer former program is preserved, funds remain available for care and preservation of collateral and for honoring guarantees made under former program ------ 1093

Deficiencies
Antideficiency Act
Violations
Overobligations
Since amount of judgment in condemnation action has exhausted special appropriation for acquisition of land leaving amount still owing to former owners and since neither permanent indefinite appropriation for judgments, 31 U.S.C. 724a (1970), nor any other monies are available to pay judgment, obligation in excess of available appropriations has been created in violation of Antideficiency Act, 31 U.S.C. 665 (1970) and deficiency appropriation to pay claim should be requested ---------- 799

Fiscal year
Jury fees
Retroactive increases
Retroactive increased fees payable for jury service after the 30th day are chargeable to the appropriation for the fiscal year in which jury service was rendered ---------- 472

Funds which lose identity as Federal funds
Grants-in-aid, etc.
Per diem entitlements of the employees in American Samoa classified as General Schedule employees are same as those of any Federal employee under title 5 of the United States Code, regardless of whether expenses are paid out of appropriated funds or commingled grant and local moneys. However, restrictions in title 5 would not apply to employees of the Samoan Government. Under Article II of the Samoan Constitution, the Samoan Legislature could establish per diem rates or vest the Governor with authority to do so ---------- 260

Impounding
General Accounting Office interpretation of
Impoundment Control Act of 1974
GAO interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C.G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be used in deciding whether to treat impoundment as rescission or deferral;

APPROPRIATIONS—Continued
Impounding—Continued
General Accounting Office interpretation of—Continued
Impoundment Control Act of 1974—Continued Page

the C.G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C.G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C.G. is to report to Congress when President has failed to transmit a required message; and the C.G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability 453

Limitations
Leasing expenditures

In performing its centralized leasing functions pursuant to Federal Property and Administrative Services Act of 1949, as amended, GSA's imposition of freeze on monies appropriated to Judiciary for fiscal year 1975 for new leases is consistent with Congressional intent of GSA's appropriation act for 1975 to limit monies expended for leasing for all of Federal Govt 944

Specific dollar limitation *v.* general language

Specific dollar limitation in 16 U.S.C. 577h for specific land acquisition must take precedence over more general language and authority conferred by Land and Water Conservation Fund Act of 1965 which authorizes appropriations for acquisitions of "inholdings within existing boundaries of wilderness, wild and canoe areas" 799

Necessary expense availability. (*See* **APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses**)
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 Govt.'s assumption of risk of loss of Govt. contractor's equipment and facilities unless available appropriations are sufficient to cover Govt.'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 824

Sec. 1311, Supplemental Appropriation Act of 1955
Liability under pending litigation

Court order, entered prior to expiration of availability period for fiscal year 1973 Food Stamp Program appropriation, which required that the impounded balance of such appropriation be recorded as obligated under 31 U.S.C. 200(a)(6), as a liability which might result from pending litigation, was effective to obligate the impounded 1973 appropriation balance and thereby prevent its lapse. Therefore, 1973 balance so obligated may be used during fiscal year 1976 without further appropriation action 962

ARBITRATION

Award

Basis

Compromise settlement Page

Arbitration award based on compromise settlement by union and Office of Economic Opportunity that grants employee retroactive promotion, but makes increased pay for higher level position prospective, is improper to the extent that it does not provide for backpay since salary is part of position to which employee is appointed and may not be withheld. Thus, employee is entitled to backpay incident to retroactive promotion under provisions of 5 U.S.C. 5596 538

Collective bargaining agreement

Violation

Agency implementation

Regarding weight GAO should give to binding arbitration award in which arbitrator found that agency had violated collective bargaining agreement concerning promotions from within agency, absent finding that award is contrary to applicable law, appropriate regulation, Executive Order No. 11491, or decisions of this Office, GAO believes that binding arbitration award must be given the same weight as any other exercise of administrative discretion, i.e., authority to implement award should be refused only if agency head's own decision to take same action would be disallowed 312

Consistent with law, regulations and GAO decisions

While GAO would have no objection to processing retroactive promotion in accordance with arbitrator's award to employee of Defense Supply Agency, there is no legal basis under which promotion may be effective retroactive to July 1, 1969, as ordered by arbitrator. Since arbitrator's award was based on finding that agency had not afforded employee priority consideration due him for promotion, effective date of retroactive promotion must conform with one of dates on which a position was filled for which employee was entitled to priority consideration but did not receive it and date is determined to be July 22, 1969 ... 435

Under provisions of 31 U.S.C. 74 and 82d, agency heads and authorized certifying officers have statutory right to seek decision from this Office on propriety of payments. Hence, agency may legitimately delay implementation of a determination by Asst. Secretary of Labor for Labor-Management Relations involving expenditure of funds pending Comptroller General decision 760

Denial of overtime assignment

Violation of collective bargaining agreement

Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B-175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed 927

ARBITRATION—Continued
Award—Continued
Exception to
Filed with FLRC Page

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, agency can also file exception to arbitration award with Federal Labor Relations Council (FLRC) under regulations promulgated by that agency. Decisions by the Comptroller General are binding on agency, the FLRC and Assistant Secretary of Labor for Labor Management Relations 921

Grant of retroactive promotion
Implementation by agency
Back Pay Act

Arbitration award providing retroactive effective dates of promotions and compensation for 3 Office of Economic Opportunity employees may be implemented under Back Pay Act, 5 U.S.C. 5596, since arbitrator found that bargaining agreement had been breached which incorporated by reference agency regulation requiring promotion requests to be processed in 8 days 403

Implementation by agency
No legal authority

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 921

Not automatic

GAO decision authorizing retroactive promotion following arbitrator's award should not be construed as meaning that any award of an arbitrator, even if made pursuant to a binding arbitration agreement, may automatically be implemented by agency involved. While GAO is concerned with giving meaningful effect to Executive Order 11491, arbitrator's awards must be consistent with law, regulation and decisions of this Office and where there is doubt as to whether an award may properly be implemented, a decision from this Office should be sought.. 312

Retroactive promotion
Back Pay Act

Where arbitrator's award cannot be legally implemented and contains no findings and conclusions, our Office favors returning it to arbitrator with our objections and for modification. However, where this is unfeasible, this Office will in special cases modify the award to conform to requirements of law and regulations 538

Modification

Arbitrator's effective date of June 29, 1973, for retroactive promotion based on earlier findings of grievance examiner cannot be sustained since evidence shows agency head had not exercised his discretion to promote employee until July 7, 1973. Thus, award is modified to make

ARBITRATION—Continued
Award—Continued
Modification—Continued Page
effective date of retroactive promotion at beginning of first pay period after July 7, 1973, when official authorized to make appointments acted ---------- 538

Retroactive promotion with backpay
Entitlement
Arbitration award based on compromise settlement by union and Office of Economic Opportunity that grants employee retroactive promotion, but makes increased pay for higher level position prospective, is improper to the extent that it does not provide for backpay since salary is part of position to which employee is appointed and may not be withheld. Thus, employee is entitled to backpay incident to retroactive promotion under provisions of 5 U.S.C. 5596 ---------- 538

Violation of collective bargaining agreement
Employee who agency admits was not promoted to a position to which she would have been promoted had the agency not violated certain provisions of a collective bargaining agreement between the agency and a labor union, may be retroactively promoted back to the time she would have been promoted had there not been a violation and paid commensurate backpay since agency acceptance of the agreement made the provision a nondiscretionary agency policy and violation was unwarranted and unjustified personnel action under Back Pay Act, 5 U.S.C. § 5596. 48 Comp. Gen. 502; B–175867, June 19, 1972; B–181972, Aug. 28, 1974, and other conflicting decisions, modified ---------- 312

Following arbitrator's determination that agency had not given employee priority consideration for promotion in accordance with Federal Personnel Manual and collective bargaining agreement and that had such consideration been given, employee would have been promoted, agency accepted arbitrator's findings and appealed only that portion of award granting employee retroactive promotion and backpay. Since agency did not question arbitrator's finding that employee would have been promoted but for agency's unwarranted personnel action, GAO would have no objection to processing retroactive promotion and paying backpay under 5 U.S.C. 5596 in accordance with 54 Comp. Gen. 312 ---- 435

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 ---- 921

Employee personnel actions
Unfair labor practices which involve personnel actions by agency directly affecting employees may be regarded as unjustified or unwarranted personnel actions under Back Pay Act, 5 U.S.C. 5596 (1970), and Asst. Secretary of Labor for Labor-Management Relations may order agency to pay such backpay allowances, differentials, and other substantial financial employee benefits as are authorized under 5 CFR, part 550, subpart H, provided it is established that, but for the unfair labor practice, the harm to the employee would not have occurred ---- 760

ARBITRATION—Continued
Employee personnel actions—Continued
Prearbitration action Page
Collective bargaining agreement provides that certain IRS 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, GAO 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 888

ASSIGNMENT OF CLAIMS (*See* **CLAIMS, Assignments**)

ATTORNEYS
Fees
Employee litigation
Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with U.S 22

Employee transfer expenses. (*See* **OFFICERS AND EMPLOYEES, Transfer, Relocation expenses, Attorney fees**)

AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AUTOMOBILES
Transportation. (*See* **TRANSPORTATION, Automobiles**)

AWARDS
Contract awards. (*See* **CONTRACTS, Awards**)
Honor
Travel expenses to attend award ceremonies
Dependents of honor award recipients
There is no authority for CSC to issue regulations authorizing payment of travel and transportation expenses of members of the immediate family of honor award recipients to attend award ceremonies as such expenses are not considered "necessary expense" under 5 U.S.C. 4503 .. 1054

BANKRUPTCY
Contractors
Prospective
The filing of a petition under Chapter XI of the Bankruptcy Act does not in itself require a finding that petitioner is not a responsible prospective contractor 276

BIDDERS
Invitation right
Failure to solicit bids
All bids discarded
Where contracting agency failed to solicit incumbent contractor, one of limited number of manufacturers of items being procured, and failed to

BIDDERS—Continued
Invitation right—Continued
Failure to solicit bids—Continued
All bids discarded—Continued Page
synopsize procurement in Commerce Business Daily, its determination to cancel solicitation and readvertise for bids on basis that requirement for full and free competition was precluded was not improper---------- 973

Incumbent contractor
Refusal to provide incumbent laundry contractor with copy of IFB and opportunity to bid on successor contract because of doubts as to incumbents' capacity to perform is tantamount to premature nonresponsibility determination---------- 29
Failure to furnish copy of IFB to incumbent contractor and solicitation of only three sources afford grounds to recommend that solicitation be canceled so as to provide wider opportunity to bid under new IFB--- 29

Qualifications
Bankruptcy effect
Contracting officer did not arbitrarily determine firm to be responsible, although it was undergoing Chapter XI arrangement, in view of favorable preaward surveys concluding that firm had financial and other resources adequate for performance of the contract---------- 276

Capacity, etc.
Determination
Where IFB provides for offerors' furnishing information as to experience in designing and producing items comparable to item being procured, record will be examined to determine if bidder to whom award was made meets experience requirement and rule that affirmative determinations of responsibility will not be reviewed except where there are allegations that contracting officer's actions in finding bidder responsible are tantamount to fraud is distinguished---------- 509

Premature
Refusal to provide incumbent laundry contractor with copy of IFB and opportunity to bid on successor contract because of doubts as to incumbents' capacity to perform is tantamount to premature nonresponsibility determination---------- 29

Small business concerns
Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustained because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR § 1-1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government---------- 696

Defaulted contractor
Replacement contract
Defaulted contractor may properly compete on reprocurement, since Govt. 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---------- 853

BIDDERS—Continued
Qualifications—Continued
Experience
Propriety of evaluation Page
Since phrase "similar or related" as used in "Qualifications" evaluation standard of RFP permits rational interpretation that phrase means similar experience from "functional or operational" viewpoint as well as similar experience from purely "content" viewpoint, "Qualifications" rating given successful offeror, which lacked similar "content" experience but possessed similar "functional" experience, cannot be questioned. 681

Geographical location requirement
Ninety-mile geographic restriction in IFB cannot justify exclusion of incumbent contractor, located at distance of 165 miles, since requirement pertains to responsibility which may be complied with after bid opening and before award 29

Preaward surveys
Negative
Based on detailed review of arguments propounded, invitation for bids and referenced purchase description, prior decision that IFB required successful bidder to provide "commercial, off-the-shelf" item at date set for delivery is affirmed. Contracting officer's affirmative determination of low bidder's responsibility based on erroneous interpretation of specification in face of strongly negative preaward survey was not reasonable exercise of procurement discretion 715

Unsatisfactory
In situation where it becomes evident in preaward survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price. Modified by 54 Comp. Gen. 715 499

Prequalification of bidders
Propriety
Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms 606

Prior unsatisfactory service
Award nevertheless
Allegation that contractor may not be responsible because it did not perform satisfactorily under prior contract and was not in compliance with Equal Employment Opportunity regulations will not be considered, since no fraud has been alleged or demonstrated 421

BIDDERS—Continued
Qualifications—Continued
Prior unsatisfactory service—Continued
Defaulted contractor bidding on replacement contract Page
Where reprocurement is for account of defaulted contractor, principles governing formal advertising are not applicable. And award to low responsive, responsible bidder—previously defaulted contractor—is proper since award price is not in excess of its defaulted contract price.. 853

Responsiveness *v.* responsibility. (*See* **BIDDERS, Responsibility *v.* bid responsiveness**)
Small business concerns
Certification referral procedure
Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustained because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR § 1–1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government 696

State, etc., licensing requirements
Whether action of nonprofit, State-created institution affiliated with educational institution in bidding for other than research and development contract was ultra vires in violation of Massachusetts law enabling its establishment, like matter of general compliance with State and local licensing requirements, is for resolution between the bidder and State. Furthermore, bidder's authority to perform work in various States is matter for determination by those jurisdictions 480

Subcontracting
In view of agency's past unsatisfactory experience with subcontractor attempts to provide court reporting services under prime contract, agency may impose reasonable limitations on prime contractor's right to subcontract all or part of such work 645

Subcontractors
Where successful offeror submitted qualifications of two alternative subcontractors for evaluation with its proposal and contracting officer verified offeror's ability to commit highest evaluated of two subcontractors, even though offeror had made no firm commitment to either, merely having obtained firm quotes from both, unlike listing of subcontractor requirements in formally advertised invitations by certain Federal agencies, award was not improper since neither applicable procurement regulations nor RFP required firm subcontractor commitment or precluded proposal of alternate subcontractors and Govt. had right to approve subcontractors 468

Tenacity and perseverance
Administrative determination accepted
In absence of appeal by Small Business Administration
Where SBA declines to appeal contracting officer's determination of nonresponsibility as to bidder's tenacity, perseverance or integrity, GAO

BIDDERS—Continued
Qualifications—Continued
Tenacity and perseverance—Continued
Administrative determination accepted—Continued
In absence of appeal by Small Business Administration—Con. Page
will no longer undertake to review the contracting officer's determination in the absence of a compelling reason to justify such a review, such as a showing of fraud or bad faith by procuring officials. 49 Comp. Gen. 600, modified 703

Responsibility *v.* bid responsiveness
Refusal to provide incumbent laundry contractor with copy of IFB and opportunity to bid on successor contract because of doubts as to incumbents' capacity to perform is tantamount to premature nonresponsibility determination 29
Ninety-mile geographic restriction in IFB cannot justify exclusion of incumbent contractor, located at distance of 165 miles, since requirement pertains to responsibility which may be complied with after bid opening and before award 29
Based on detailed review of arguments propounded, invitation for bids and referenced purchase description, prior decision that IFB required successful bidder to provide "commercial, off-the-shelf" item at date set for delivery is affirmed. Contracting officer's affirmative determination of low bidder's responsibility based on erroneous interpretation of specification in face of strongly negative preaward survey was not reasonable exercise of procurement discretion 715

Bid deviations
Method of Award clause of IFB required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively include indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unnecessary 1087

Information
Confidential
Low bidder's request that information required by invitation be kept confidential did not render bid nonresponsive or violate requirement that bids be publicly opened, since information pertained to bidder's capability to perform contract (responsibility), rather than to price, quantity and delivery terms of bid, and FPR 1-1.1207 provides that information pertaining to responsibility shall not be released outside Government and shall not be made available for inspection by other bidders 340
Right to invitation. (*See* **BIDDERS, Invitation right**)

BIDS
Acceptance time limitation
Bids offering different acceptance periods
Where IFB for copper cathodes stated that bids offering less than 72-hour acceptance period will be considered nonresponsive, bid offering 2-calendar-day acceptance period is nonresponsive. Requirement for

BIDS—Continued
Acceptance time limitation—Continued
Bids offering different acceptance periods—Continued Page
adherence to specified acceptance period is material since bidder offering lesser period would be in more advantageous position than complying bidders, particularly for item subject to fluctuating market prices. Moreover, nonresponsive bid may not be corrected after bid opening since rules permitting correction of mistakes in bids are for application only when the bid as submitted is responsive 750
Additives. (*See* **BIDS, Aggregate *v.* separable items, prices, etc., Additives**)

Aggregate *v.* separable items, prices, etc.
Additives
Disclosure requirements
While ASPR § 2-201(b)(x1i) (1974 ed.) requires disclosure of order of selection priority of additive items, FPR has no similar provision and, therefore, IFB issued by civilian agency need not reveal priority of additive items, and failure to indicate priority, with resultant post bid opening discretionary selection of additive items, does not render award of additive items invalid 320

Appropriation availability
FPR, unlike ASPR, imposes no duty on contracting officer to record amount of funds available for base bid and additive bid items when amount of funding is in doubt. Therefore, when actual funding available increases prior to award from cancellation of another procurement, funds properly made available therefrom to civilian agency for general construction use may be reallocated to affect determination of amount of additive items to be included for award 320

All or none
Prohibition in invitation
Cost increase
Prohibition in IFB of all-or-none bids to encourage competition in situation where contracting officer believes one supplier has a monopoly and is acting in restraint of competition through use of all-or-none bids is improper since net effect is simply to increase cost to Government of items on which competition exists. Competitive items should be readvertised. Sole-source items should be subject of separate negotiated procurement 395

Ambiguous
Two possible interpretations
Absent
Although protester contends bidding same price for item requiring life testing as was bid for items not requiring testing raises doubt as to bidder's intention to perform testing, there is no basis to reject bid, since bid on every item in IFB, without exception being stated, was responsive, contracting officer obtained verification of bid and reaffirmation of verification against possible error in bid, and there was no ambiguity on face of bid as to intended price 509

Bond. (*See* **BONDS, Bid**)
Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

BIDS—Continued

Buy American Act

Price differential

Addition of 6% or 12% in evaluation Page

Rural electric cooperatives, acting pursuant to loan guaranteed by Rural Electrification Administration (REA), are not Federal instrumentalities and therefore are not subject to the Buy American Act and implementing directives which require application of 12 percent differential to price offered by foreign firm under certain circumstances. Applicable law is Rural Electrification Act of 1938, as implemented by REA, which requires application of only 6 percent differential..... 791

"Buying in"

Not basis for bid rejection

Where bidder increased its prices for second and third year options 700 to 900 percent over base prices but only first year prices were considered in evaluation, charge by second low bidder of "buying-in" is insufficient reason to reject low bid since there is no guarantee that options will be exercised; also contracting officer will determine reasonableness of option prices under ASPR 1-1505(d)..... 206

Cancellation. (*See* **BIDS, Discarding all bids**)

Competitive system

Delivery provisions

Changed conditions

Bidder, performing transportation services under contract having less stringent delivery schedule than new IFB bid upon, did not obtain competitive advantage on new IFB, since bid was on stringent schedule in new IFB; however, fact that advantage was not obtained does not affect determination to cancel IFB, since there was subsequent change in delivery requirement that provided basis for cancellation..... 955

Discarding all bids to create competition. (*See* **BIDS, Discarding all bids, Competition insufficient**)

Effect of erroneous awards

No corrective action recommended on contract awarded improperly where due to nature of item procured (lease of relocatable office building) and circumstances presently existing (principally fact that incumbent contractor has already received payment for transporting, setting up and taking down buildings) there appears to be little room for price competition on any reprocurement..... 242

Equal bidding basis for all bidders

Where IFB for copper cathodes stated that bids offering less than 72-hour acceptance period will be considered nonresponsive, bid offering 2-calendar-day acceptance period is nonresponsive. Requirement for adherence to specified acceptance period is material since bidder offering lesser period would be in more advantageous position than complying bidders, particularly for item subject to fluctuating market prices. Moreover, nonresponsive bid may not be corrected after bid opening since rules permitting correction of mistakes in bids are for application only when the bid as submitted is responsive..... 750

Allegation that inclusion of patent and latent defect clause contravenes full and free competition requirement of 10 U.S.C. 2305 is without merit because clause lends itself to only one reasonable interpretation—to

BIDS—Continued
Competitive system—Continued
Equal bidding basis for all bidders—Continued Page
discover all patent defects and account for them in bid price—and this requirement does not preclude bidders from competing equally on basis of own reasoned judgment ---- 978

Delivery requirements
Area scheduling
Contention by bidder that it was aware of "area scheduling" requirement and would not have bid differently if included in IFB is not dispositive of issue of whether award should have been made under IFB, since to permit award on "area scheduling" would have resulted in contract which was not same offered to competition and more stringent requirement in IFB may have restricted competition ---- 955

Exclusion of current contractors
Where contracting agency failed to solicit incumbent contractor, one of limited number of manufacturers of items being procured, and failed to synopsize procurement in Commerce Business Daily, its determination to cancel solicitation and readvertise for bids on basis that requirement for full and free competition was precluded was not improper ---- 973

Federal aid, grants, etc.
Equal Employment Opportunity programs
Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged ---- 6

Government property furnished
Not prejudicial to other bidders
No reasonable basis is found to support conclusion that alleged availability to some bidders of Government-furnished specialized testing equipment adversely affected competition under GSA solicitation for repair services, since record indicates Government-furnished equipment in possession of bidders was recalled before bid opening, and solicitation terms provided that contractor would be responsible to furnish all necessary equipment ---- 120

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Profit *v.* nonprofit organizations
Fact that Lowell Technological Institute Research Foundation is nonprofit, State-created institution affiliated with educational institution does not preclude it from competing for Government contract involving other than research and development in competition with commercial concerns since unrestricted competition on all Government contracts is required by laws governing Federal procurement in absence of any law or regulation indicating a contrary policy ---- 480

BIDS—Continued

Competitive system—Continued

Replacement of defaulted contract Page

Defaulted contractor may properly compete on reprocurement, since Govt. 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 ---------- 853

Where reprocurement is for account of defaulted contractor, principles governing formal advertising are not applicable. And award to low responsive, responsible bidder—previously defaulted contractor—is proper since award price is not in excess of its defaulted contract price ---- 853

Restrictions on competition

Prequalification of bidders

Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms ------ 606

Subcontractors

Even though subcontracting methods of Government prime contractor, who is not purchasing agent, are generally not subject to statutory and regulatory requirements governing Government's direct procurements, contracting agency should not approve subcontract award if, after thorough consideration of particular facts and circumstances, responsible Government contracting officials find that proposed award would be prejudicial to interests of Government. "Federal norm" is frame of reference guiding agency's determinations as to reasonableness of prime contractor's procurement process, although propriety and necessity of variation from details of "Federal norm" is recognized ---------- 767

Affiliates

Parts procurement IFB clause which provides that, under cost-reimbursement segment of contract, contractor will not be able to furnish parts to Govt. at price which includes markup from affiliates is unduly restrictive and unreasonably derived, since provision would reduce likelihood that contractor would buy from affiliates and ASPR guidelines recognize affiliates, entitlement to recover more than cost in comparable situations where there is price competition as clause contemplates ------- 1050

Unbalanced bids

Contention by second low bidder that low bidder violated competitive bidding system by relying on past experience in unbalancing bid and ignoring Government estimates included in IFB is not sufficient reason to cancel IFB and readvertise when procuring agency believes that estimates are correct and properly reflect work which will be required under contract ---------- 206

BIDS—Continued

Discarding all bids

Changed conditions, etc.

Delivery requirements Page

Change in time required for delivery of unaccompanied baggage from 2-day requirement to less stringent condition was a significant change and compelling reason to cancel IFB after bid opening 955

Compelling reasons only

Cancellation of IFB after opening is improper where award under solicitation may be made, provided agency is able to determine from evaluation of low bid, as supplemented by data, that tendered equipment would satisfy actual needs of agency 237

Competition insufficient

Where contracting agency failed to solicit incumbent contractor, one of limited number of manufacturers of items being procured, and failed to synopsize procurement in Commerce Business Daily, its determination to cancel solicitation and readvertise for bids on basis that requirement for full and free competition was precluded was not improper 973

Prices excessive

Government estimate

Where contracting officer canceled initial solicitation partly upon determination that all otherwise acceptable bids were considerably higher than Government estimate, fact that Government estimate used for that determination was within range of reasonably to be anticipated prices as demonstrated by majority of bids received upon resolicitation, and was in line with low but nonresponsive bid received under initial solicitation, substantiates propriety of cancellation 699

Readvertisement justification

General Accounting Office direction

Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt's needs 1068

Integrity of competitive system

While determination to cancel solicitation and resolicit using extended delivery dates should not in general be made where initial delivery dates will satisfy Government requirement, cancellation and resolicitation on basis of extended delivery schedule was not improper where contracting officer found that earlier delivery dates had unnecessarily restricted competition 699

Reinstatement

Cancellation of invitation unjustified

Reinstatement of canceled invitation is proper course of action when to do so is not prejudicial to any bidder, and no cogent or compelling reason exists to have warranted initial cancellation. Moreover, reinstatement is favored when needs of Government can be served under original IFB 145

BIDS—Continued
Discarding all bids—Continued
Reinstatement—Continued
Cancellation of invitation unjustified—Continued Page

Cancellation of IFB after opening is improper where award under solicitation may be made, provided agency is able to determine from evaluation of low bid, as supplemented by data, that tendered equipment would satisfy actual needs of agency ---- 237

Specifications
Conflicting provisions

Where all bidders, except one not low bidder, were nonresponsive to IFB because of conflicting bid acceptance provisions, there is no objection to cancellation and resolicitation under proper IFB; however, where all bidders for transportation service awarded under another IFB were nonresponsive because of similar conflict, there is no objection to continuation of awards in view of agency contention that it would not be in Govt.'s interest to terminate and since no bidder was prejudiced by awards and none has protested awards ---- 955

Discounts
Varying discounts offered
Propriety

Method of Award clause of IFB required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively include indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unnecessary ---- 1087

Evaluation
Aggregate *v.* separable items, prices, etc.
All or none bid

"All or none" bid on Army fire extinguisher procurement reserving bidder's right to quote a revised unit price if award made for lesser quantities than stated in invitation for bids (IFB) is not considered nonresponsive where solicitation neither authorized nor prohibited "all or none" bid since Armed Services Procurement Regulation 2-404.5 provides that unless IFB so states bid is not rendered nonresponsive by fact that bidder specifies that award will be accepted only on all, or a specified group, of items included in invitation. Moreover, reservation to quote revised unit price on lesser quantities may properly constitute part of "all or none" qualification ---- 416

Base bid low

$200,000 amount for Force Account Work, a line item in base bid schedule available for additional work over and above that called for in IFB (contingent sum), was included in evaluation of base bids, and not used to provide funds for award of additive items, as contended by protester ---- 320

BIDS—Continued
Evaluation—Continued
Aggregate *v.* separable items, prices, etc.—Continued
"No charge" notation evaluation
Effect of dashes Page

Low bidder who inserted dashes rather than prices for some of the dining facilities to be priced for kitchen police services but who also bid a high per meal price for an estimated 10 million plus meals has submitted a responsive bid since the dashes were, in effect, "no charge" bids covering unpriced dining facilities where only the high per meal price would be payable by Government. Contract awarded to higher bidder should be terminated for convenience of Government 345

Alternate bases bidding
Fiscal *v.* multi-year procurement

Because it included nonrecurring costs in first program year, multi-year bid deviated from requirement that like items be priced same for each program year. Bid may nevertheless be accepted if otherwise proper under analogous rationale applicable to single year procurement with option provisions because no other bidder was prejudiced, since bid was low on all program years and low overall. B–161231, June 2, 1967, will no longer be followed to the extent it is inconsistent with rationale herein 967

Bidders' qualifications. (*See* **BIDDERS, Qualifications**)
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
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. GAO 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 901

Estimates
Government cost estimate
Excessive

Preparation of Government cost estimate (GCE) found to be in accordance with FPR § 1–18.108 (1971 2d ed., amend. 95) which provides that Government estimate need only be as detailed as prospective contractor's bid; and where bids greatly exceed GCE, procuring activity is placed on notice of possible error in estimate, and review and revision, if necessary, is appropriate 320

Foreign product differential. (*See* **BIDS, Buy American Act, Price differential**)
Geographical location of bidder's facilities. (*See* **BIDDERS, Qualifications, Geographical location requirement**)
Options
Additional quantities
Appropriation availability extent

In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirement" for option years was not established nor was there reasonable certainty that funds would be available to permit exercise of options. See ASPR 1–1503 242

BIDS—Continued
Evaluation—Continued
Options—Continued
Additional quantities—Continued
Limitations Page

Bid submitted which contained price for base quantity and greater price for option quantity in derogation of IFB provision imposing ceiling limitation on option quantity (option price was not to exceed price bid on base quantity) may not be considered for award since deviation would be prejudicial to all bidders who submitted bids in conformance with option ceiling provision ---------- 476

Basic bid weight

Option provision should be corrected to: (1) warn bidders of consequences of failure to abide by its terms; (2) clarify whether requirement that option prices be no higher than initial quantity refers to first program year or each year; and (3) exclude contingency in option price that covers possibility that option may be exercised when costs exceed bid price thereby avoiding payment of premium by Govt. in cost of firm quantity ---------- 967

Status

Solicitation stating contractor must accept all orders, but that offeror can indicate by checking box whether it will or will not accept orders under $50, and which provides blank where offeror can indicate specific minimum amount below $50, means that bidders are offered three options: to accept all orders less than $50; to refuse all such orders; or to accept orders under $50 but above a specified minimum. However, since provision is somewhat confusing, agency should consider revision to provide clarity ---------- 120

Government cost estimate. (*See* **BIDS, Evaluation, Estimates, Government cost estimate**)

Guarantees
Invitation requirement

Bid, agreeing to comply with guaranty requested by Government on condition equipment is installed and operated in accordance with later instructions of bidder, is not a qualified bid in view of IFB requirement that successful bidder furnish contractor representative to instruct agency as to use of equipment and is, therefore, responsive ---------- 237

Informal competitive bidding
Rural Electrification Administration
Rural electric cooperatives

Rural electric cooperatives, acting pursuant to "Informal Competitive Bidding" procedures approved by REA, were not obligated to evaluate revised proposal submitted by higher of two offerors after cooperatives inquired about possible reduction in price. Moreover, it appears that even had revised proposal been evaluated, selection of contractor would not have been affected ---------- 791

Invitation for bids
Cancellation
Change in delivery requirements

Change in time required for delivery of unaccompanied baggage from 2-day requirement to less stringent condition was a significant change and compelling reason to cancel IFB after bid opening ---------- 955

BIDS—Continued
Invitation for bids—Continued
Cancellation—Continued
Change in delivery requirements—Continued Page

Bidder, performing transportation services under contract having less stringent delivery schedule than new IFB bid upon, did not obtain competitive advantage on new IFB, since bid was on stringent schedule in new IFB; however, fact that advantage was not obtained does not affect determination to cancel IFB, since there was subsequent change in delivery requirement that provided basis for cancellation---------- 955

Justification

Where contracting officer canceled initial solicitation partly upon determination that all otherwise acceptable bids were considerably higher than Government estimate, fact that Government estimate used for that determination was within range of reasonably to be anticipated prices as demonstrated by majority of bids received upon resolicitation, and was in line with low but nonresponsive bid received under initial solicitation, substantiates propriety of cancellation---------- 699

Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt.'s needs---------- 1068

Preservation of competitive system

When low bidder proposed post-bid opening change from brand name to "or equal" color in brand name or equal IFB, contracting officer acted imprudently in accepting, without verification, allegation that brand name was not available, since another bidder bid on basis of brand name color and if not available proper course would have been cancellation of IFB and readvertising to permit all bidders opportunity to submit bids on new basis---------- 593

Clauses
Method of award
Discount

METHOD OF AWARD clause of IFB required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively include indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unnecessary---------- 1087

Errors
Disclosure

Contention that activity's failure to disclose known errors in solicitation invalidates IFB is not sustained when IFB included seven changes, deviations and waiver forms detailing patent defects discovered by procuring activity and activity states it possesses no further knowledge of any patent defects---------- 978

BIDS—Continued
Invitation for bids—Continued
Requirements
Price range estimate
Construction contracts Page

Estimated price range, required by FPR § 1-18.109 (1971 2d ed., amend. 95) to be placed in IFB's for construction projects expected to exceed $25,000 does not establish absolute ceiling for award, and since IFB does not prevent making of award if estimated price range ceiling is exceeded, and all bidders exceeded ceiling, proposed award in amount in excess of ceiling is not questioned 320

Late
Mishandling determination
Telegraphic bid. (*See* **BIDS, Late, Telegraphic, Mishandling by Government**)
Telegraphic
Delay due to Government Telex machine malfunction

Telegraphic bid transmitted to procuring agency before bid opening but not transcribed due to Govt. Telex machine malfunction cannot properly be classified as lost bid as protester can establish, without use of self-serving statements, time of bid transmission and receipt as well as contents of bid 999

Untranscribed
Due to Government Telex machine malfunction

Untranscribed telegraphic bid (due to Govt. Telex machine malfunction) should not be rejected as late bid, even though ASPR 7-2002.2 appears to indicate opposite result in determining possible mishandling by Govt. due to lack of requisite acceptable evidence of time of receipt and question concerning whether "receipt" occurred, since to do so would contravene intent and spirit of late bid regulation. Conclusion is reached in view of fact that mishandling in transcription of telegraphic bid and resultant failure of Govt. installation to have actual control over bid or evidence of time of receipt does not appear to have been contemplated by ASPR 7-2002.2 999

Transmission by other than mail

Late bid, even though late due to mishandling by personnel of Government installation, may not be considered for award since late bid was sent via commercial carrier rather than via the mails 304

Mistakes
Allegation after award. (*See* **CONTRACTS, Mistakes**)
Correction
Still lowest bid

While GAO has right of review with respect to bid correction after bid opening but prior to award, it will not question administrative determination permitting correction unless such determination has no reasonable basis. Therefore, correction, pursuant to FPR 1-2.405-2 on basis clerical mistake was apparent on face of bid, will not be disturbed where such determination was reasonable and relative standing of bids remains unchanged and corrected bid remains low 340

BIDS—Continued
Mistakes—Continued
Correction—Continued
Unit price error Page
Bid which stated monthly price for estimated square footage to be serviced instead of unit price based upon square footage is correctable as clerical error apparent on face of bid since correct unit price is determinable from bid by division of monthly price by estimated square feet stated in bid and no other intended unit price is logical or reasonable--- 686
Unconscionable to take advantage of
Rule
In case where other bids received are 58 and 132 percent, respectively, above low bid, award to low bidder after asking for and receiving verification in accordance with ASPR 2-406 is not unconscionable, since mistake is not so great that Govt. can be said to be "*obviously* getting something for nothing." *Matter of Yankee Engineering, Company Inc.*, B-180573, June 19, 1974, distinguished---------- 545
Verification
Adequacy
Although protester contends bidding same price for item requiring life testing as was bid for items not requiring testing raises doubt as to bidder's intention to perform testing, there is no basis to reject bid, since bid on every item in IFB, without exception being stated, was responsive, contracting officer obtained verification of bid and reaffirmation of verification against possible error in bid, and there was no ambiguity on face of bid as to intended price---------- 509
Totality of information on record reasonably supports conclusion, disputed by bidder, that contracting officer, who suspected mistake in bid, did request bidder to verify its bid and that bidder did so; contracting officer's failure to document verification request does not necessitate finding that verification request was not sufficient---------- 545
Bid price
Contracting officer, who reasonably had no suspicion of specific mistake in bid and who informs bidder of complete basis for his general suspicion that bidder might have made mistake, i.e., wide disparity among three lump-sum bids submitted, and requested and received verification from bidder, has fulfilled ASPR 2-406 verification duty; verification request requires no special language and contracting officer need not specifically state that he suspects mistake, so long as he apprises bidder of mistake which is suspected and basis for such suspicion-------- 545
Government responsibility
Although contracting officer should disclose Govt. estimate to bidder when requesting bid verification, failure to disclose sketchy, informal "control estimate," prepared for budgetary purposes only, does not violate ASPR 2-406 verification requirements---------- 545
Oral
Request
Low bidder, who is requested to verify bid over a week prior to award after being informed of large disparity between bids received, was not required to give insufficient "on the spot" confirmation and had sufficient time to review bid for possible mistakes---------- 545

BIDS—Continued
Modification
After bid opening
Color substitution
"Or equal" for brand name Page
Contractor who was permitted after bid opening to substitute "or equal" color for brand name color bid should have awarded contract terminated, since substitution is beyond contemplation of IFB requirements and procurement law 593

Nonresponsive bidder
Partial bidder who after bid opening sought to revise its offer by bidding on total requirement may not do so since bidders may not vary their bids after opening on competitive basis 416

Restrictive of competition
When low bidder proposed post-bid opening change from brand name to "or equal" color in brand name or equal IFB, contracting officer acted imprudently in accepting, without verification, allegation that brand name was not available, since another bidder bid on basis of brand name color and if not available proper course would have been cancellation of IFB and readvertising to permit all bidders opportunity to submit bids on new basis 593

Multi-year
Alternate bases
Because it included nonrecurring costs in first program year, multi-year bid deviated from requirement that like items be priced same for each program year. Bid may nevertheless be accepted if otherwise proper under analogous rationale applicable to single year procurement with option provisions because no other bidder was prejudiced, since bid was low on all program years and low overall. B–161231, June 2, 1967, will no longer be followed to the extent it is inconsistent with rationale herein 967

Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Opening
Public
Information disclosure
Where direct labor hour capacity stated in bids is necessary to determine entitlement to award under solicitation's progressive awards provision, GAO believes this information should have been read aloud at bid opening along with bidders' names, discount terms, and prices; but even if failure to do so was improper, procedural deficiency does not compromise protester's rights, and in any event information could have been obtained by taking advantage of opportunity to examine bids 120

Options
Evaluation. (*See* **BIDS, Evaluation, Options**)
Exercise of option. (*See* **CONTRACTS, Options**)
Price higher than basic bid
Bid submitted which contained price for base quantity and greater price for option quantity in derogation of IFB provision imposing ceiling limitation on option quantity (option price was not to exceed price bid on base quantity) may not be considered for award since deviation would be prejudicial to all bidders who submitted bids in conformance with option ceiling provision 476

BIDS—Continued
Options—Continued
Provisions
Correction Page
Option provision should be corrected to: (1) warn bidders of consequences of failure to abide by its terms; (2) clarify whether requirement that option prices be no higher than initial quantity refers to first program year or each year; and (3) exclude contingency in option price that covers possibility that option may be exercised when costs exceed bid price thereby avoiding payment of premium by Govt. in cost of firm quantity ---- 967

Quantity ranges
Solicitation stating contractor must accept all orders, but that offeror can indicate by checking box whether it will or will not accept orders under $50, and which provides blank where offeror can indicate specific minimum amount below $50, means that bidders are offered three options: to accept all orders less than $50; to refuse all such orders; or to accept orders under $50 but above a specified minimum. However, since provision is somewhat confusing, agency should consider revision to provide clarity ---- 120

Preparation
Costs
Recovery
Costs incurred by firm in attempt to persuade agency to expand specifications are not properly to be considered as bid preparation costs. 937
Submission of unsolicited proposal where offeror knew that consideration of proposal was contingent upon item offered complying with agency requirements does not give rise to compensable bid preparation cost claim where agency had not advised offeror that item would meet agency's needs. Expenses incurred in preparing proposal cannot be recouped for failure of above-noted contingency, for under circumstances, submission of unsolicited proposal did not give rise to any obligation to fairly and honestly consider proposal ---- 937
In brand name or equal solicitation where agency had no reasonable basis to determine that offered item was not "equal," determination to reject bid must be found to be arbitrary and capricious. Accordingly, bidder is entitled to bid preparation costs ---- 1021
Expenses incurred by bidder-claimant in researching specifications, reviewing bid forms, examining cost factor and preparing draft and actual bid are compensable bid preparation expenses ---- 1021

Prerequisite requirements
While Federal courts have granted recovery of proposal preparation costs when proposals have not been fairly and honestly considered for award, they have done so only when arbitrary or capricious actions have been established, and failure to so establish these prerequisites bars recovery ---- 161

Option bids
Warning in solicitation that materially unbalanced bids may be rejected as nonresponsive is not sufficient to apprise bidders how option bids should be prepared because provision lacks guidelines or standards as to what constitutes "materially unbalanced" ---- 242

BIDS—Continued

Prices

Discernible pattern

Bid responsiveness Page

METHOD OF AWARD clause of IFB required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively include indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unnecessary ---------- 1087

Excessive

Allegation

Not supported by records

Protester's allegation that prices quoted by low bidder were excessive and violate invitation provision, implementing P.L. 92-463, which requires that rates bid for a page copy of transcript be actual cost of duplication, based upon unsubstantiated inference in bidder's manner of bidding, is not supported by record since bidder has furnished satisfactory explanation as to its manner of bidding and its prices are consistent with those of other bidders on this and prior procurements for same service ---------- 340

Firm

Not offered

Where two bidders inserted clauses in their bids providing for changes in price of equipment to be furnished if certain circumstances occur, bidders have not offered firm-fixed prices and bids must be rejected as nonresponsive ---------- 237

Unprofitable

Allegation by second low bidder that acceptance of unbalanced bid will restrict ability of contracting officer to obtain required services because of losses contractor would incur on "No Charge" items is refuted by statement of low bidder that all work orders will be honored and, also, possibility of unprofitable bid is no basis for rejection of otherwise acceptable bid. Moreover, Government has right to default contractor for improper services ---------- 206

Protests. (*See* **CONTRACTS, Protests**)

Qualified

Acceptance time difference

Where IFB for copper cathodes stated that bids offering less than 72-hour acceptance period will be considered nonresponsive, bid offering 2-calendar-day acceptance period is nonresponsive. Requirement for adherence to specified acceptance period is material since bidder offering lesser period would be in more advantageous position than complying bidders, particularly for item subject to fluctuating market prices. Moreover, nonresponsive bid may not be corrected after bid opening since rules permitting correction of mistakes in bids are for application only when the bid as submitted is responsive ---------- 750

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BIDS—Continued
Qualified—Continued
Agreement to comply with guaranty
Invitation requirement Page
Bid, agreeing to comply with guaranty requested by Government on condition equipment is installed and operated in accordance with later instructions of bidder, is not a qualified bid in view of IFB requirement that successful bidder furnish contractor representative to instruct agency as to use of equipment and is, therefore, responsive 237
All or none
Definite quantities
"All or none" bid on Army fire extinguisher procurement reserving bidder's right to quote a revised unit price if award made for lesser quantities than stated in invitation for bids (IFB) is not considered nonresponsive where solicitation neither authorized nor prohibited "all or none" bid since Armed Services Procurement Regulation 2-404.5 provides that unless IFB so states bid is not rendered nonresponsive by fact that bidder specifies that award will be accepted only on all, or a specified group, of items included in invitation. Moreover, reservation to quote revised unit price on lesser quantities may properly constitute part of "all or none" qualification 419
Evaluation. (*See* **BIDS, Evaluation, Aggregate** *v.* **separable items, prices, etc.**)
Interpretation of qualification
Protest of bidder on partial quantity against award to only other and high bidder (bidding "all or none") is denied since "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Government although partial award could be made at lower unit cost. Moreover, award to higher priced "all or none" bidder in lieu of partial award to low bidder and resolicitation of remaining quantity was not illegal as contracting officer determined higher price was nevertheless reasonable 416
Bid nonresponsive
Contractor who was permitted after bid opening to substitute "or equal" color for brand name color bid should have awarded contract terminated, since substitution is beyond contemplation of IFB requirements and procurement law 593
Dollar minimum
Bids indicating bidders would not accept orders less than $50, and containing insertions of "$500.00" and "$100.00" in blank calling for specific minimum amount under $50, were properly rejected by contracting officer, since defects pertain to material provision and are not waivable irregularities under FPR 1-2.405 120
Prices
Not firm-fixed
Bid nonresponsive
Where two bidders inserted clauses in their bids providing for changes in price of equipment to be furnished if certain circumstances occur, bidders have not offered firm-fixed prices and bids must be rejected as nonresponsive 237

BIDS—Continued
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Discarding all bids. (*See* **BIDS, Discarding all bids**)
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Discrepancy between bid and bid bond Page
Contracting personnel's erroneous advice that bidder would receive award cannot estop Government's rejection of nonresponsive bid 271
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Resolicitation
Recommendation withdrawn
Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified 483
Responsiveness
Responsiveness *v.* bidder responsibility
Information required in IFB on bidders' design and production experience for "comparable items" (silver-zinc battery cells of configuration being procured) is matter of responsibility rather than responsiveness, since request recognized information was related to responsibility and was required only after bid opening 509
Samples. (*See* **CONTRACTS, Specifications, Samples**)
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Agents
Authority. (*See* **AGENTS, Of private parties, Authority, Contracts, Signatures**)
Status
Allegation that bidder, whose bid included properly executed certification by corporate secretary under corporate seal that signer of bid was authorized to do so, must submit additional evidence indicating Board of Directors authorized execution of bid is rejected, as contracting officer, who has primary responsibility to determine sufficiency of evidence of signer's authority, indicate certification execution was adequate and in conformance with bid and protester has not submitted evidence why this conclusion is unreasonable 686
Specifications. (*See* **CONTRACTS, Specifications**)
Subcontracts
Limitations on subcontracting
In view of agency's past unsatisfactory experience with subcontractor attempts to provide court reporting services under prime contract, agency may impose reasonable limitations on prime contractor's right to subcontract all or part of such work 645
Surplus property. (*See* **SALES, Bids**)
Two-step procurement
Discontinuance and contract negotiated
Propriety
Determination to limit 1974 utility aircraft two-step procurement to turboprop aircraft, based on agencies' determination of minimum needs, guidance from congressional committees, and contracting officer's belief

BIDS—Continued
Two-step procurement—Continued
Discontinuance and contract negotiated—Continued
Propriety—Continued Page

that fuel shortages require procurement of more economical turobprops is not objectionable. Fact that protester's turbofan jets were found most cost effective under 1972 canceled RFP does not demonstrate unreasonableness of 1974 determination and fact that receipt of single acceptable offer results in sole-source procurement does not prove specifications were drafted to cause this result 97

Equal bidding basis for all bidders

While solicitation under two-step formally advertised procurement provided contracting officer with authority to request additional information from offerors of proposals which were considered reasonably susceptible of being made acceptable, fact that protester was not afforded opportunity to revise or modify its proposal was not improper since procuring activity reasonably determined proposal unacceptable and that it could not be made acceptable by clarification or additional information, but would require major revision 612

First step
Evaluation criteria

Contracting officer's rejection of technical proposal submitted under first step of two-step formally advertised procurement was proper exercise of discretion since proposal was determined unacceptable and there is no evidence of record that the determination was unreasonable or made in bad faith. Since evaluation and overall determination of technical adequacy of proposal is primarily function of procuring activity, which will not be disturbed in absence of clear showing of unreasonableness or an abuse of discretion, judgment of agency's technical personnel will not be questioned where such judgment has a reasonable basis merely because there are divergent technical opinions as to proposal acceptability 612

Unbalanced
Not automatically precluded

Allegation by second low bidder that acceptance of unbalanced bid will restrict ability of contracting officer to obtain required services because of losses contractor would incur on "No Charge" items is refuted by statement of low bidder that all work orders will be honored and, also, possibility of unprofitable bid is no basis for rejection of otherwise acceptable bid. Moreover, Government has right to default contractor for improper services 206

Low bidder who inserted dashes rather than prices for some of the dining facilities to be priced for kitchen police services but who also bid a high per meal price for an estimated 10 million plus meals has submitted a responsive bid since the dashes were, in effect, "no charge" bids covering unpriced dining facilities where only the high per meal price would be payable by Government. Contract awarded to higher bidder should be terminated for convenience of Government 345

Proof of collusion or fraud
Not essential element

Proof of collusion or fraud on part of bidder offering mathematically unbalanced bid is not essential element in determining to reject bid 242

BIDS—Continued
Unbalanced—Continued
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Fact that low bidder has unbalanced its bid by bidding "No Charge" for over 50 percent of the 505 line items being procured is not sufficient reason to reject bid as nonresponsive where: IFB did not prohibit "No Charge" bids; bidder has verified bid; bid is otherwise acceptable; and, bidder is responsible ---- 206
Warning in solicitation that materially unbalanced bids may be rejected as nonresponsive is not sufficient to apprise bidders how option bids should be prepared because provision lacks guidelines or standards as to what constitutes "materially unbalanced" ---- 242

BONDS
Bid
Bonding company. (*See* **BONDS, Bid, Surety**)
Discrepancy between bid and bid bond
Bid nonresponsive
Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since IFB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid ---- 271

Surety
Underwriting limitation
Allegation that bid bond is invalid because bonding company exceeded underwriting limitation is unsupported since Treasury Department circular shows underwriting limit of $3,547,000 per risk for bonding company and bid bond was for $462,036 ---- 345
Submission with bid of required bid guarantee issued in excess of Treasury Department underwriting limitation (and not reinsured) does not render bid nonresponsive as bid bond in excess of such limit is not void *per se* and amount of authorized bond limit is sufficient to cover difference between low acceptable bid and second low acceptable bid, and Government is accordingly protected by valid surety obligation. Failure of bond to reflect surety's liability limit is waived as minor informality because power of attorney of attorney-in-fact signing bid for surety expressly stated surety's liability limit by attorney ---- 686

Government employees
Surety's liability
Employee's assets
Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts ---- 424

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"Other safe bonds"
Investments
Land-grant funds Page
For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

Payment
Miller Act coverage
Surety's status
Right of United States to collect tax indebtedness of contractor by offsetting obligation against retainages under Govt. contract is superior to claim of payment bond surety or contractor 823

BUY AMERICAN ACT
Applicability
Rural electric cooperatives
Rural electric cooperatives, acting pursuant to loan guaranteed by Rural Electrification Administration (REA), are not Federal instrumentalities and therefore are not subject to the Buy American Act and implementing directives which require application of 12 percent differential to price offered by foreign firm under certain circumstances. Applicable law is Rural Electrification Act of 1938, as implemented by REA, which requires application of only 6 percent differential 791
Bids. (*See* **BIDS, Buy American Act**)
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CANAL ZONE GOVERNMENT
Employees
Overtime
Fair Labor Standards Act *v.* other pay laws
Civil Service Commission's interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of Title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle to harmonize statutes dealing with the same subject whenever possible, and is consistent with congressional intent 371

CHECKS
Credited to depositor's account
Depositary bank
Holder in due course
Depositary bank which credits Government checks to depositor's account and allows withdrawals of the amount of the deposit without notice of any defects is holder in due course, entitled to receive payment of checks in full from Treasury Dept. without setoff for tax or other debts owing by the payee, notwithstanding stop order placed on payment 397

CHECKS—Continued
Endorsements
Powers of attorney
Special
Without time limitation Page
Special power of attorney in favor of responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of payee, may be executed without time limitation as to validity, since recent court cases, applying Treasury regulations which provide that death of grantor revokes power and that presenting bank guarantees all prior indorsements as to both genuineness and capacity, afford adequate protection to Government against risk of loss. Modifies 48 Comp. Gen. 706, 17 *id.* 245 and other similar decisions-- 75

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Metropolitan area
Tachikawa and Yokota Air Bases in Japan, although not part of Tokyo City, are part of the Tokyo Metropolitan area and therefore are subject to the per diem rates applicable for Tokyo---------- 234

CIVIL SERVICE COMMISSION
Civil Service Retirement and Disability Fund
Refund overpayments
Erroneous agency certifications
Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health cannot obtain reimbursement from a Federal agency whose certifying officer certified erroneous information on Standard Form 2806 leading to overpayment to a former employee from the Civil Service Retirement Fund, 5 U.S.C. 8348. Reimbursement by agency would violate 31 U.S.C. 628 which prohibits expenditures of appropriated funds except solely for objects for which respectively made- 205

CLAIMS
Assignments
Contracts
Assignee's right to payment
Without Government set-off
Where assignee bank, acting in its own capacity, makes loan to contractor and in return receives assignment of contractor's claim against Government on specific contract and pledge of future receivables but is not fully repaid the amount of its loan out of funds of contract and/or receivables of contractor, if further funds become due under contract, assignee is entitled to amount of such fund which will cause loan to be fully repaid without setoff by Government---------- 137

Set-off. (*See* **SET-OFF, Contract payments, Assignments**)
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Third party dealing with assignee bank under assignment of claim can obtain same but has no greater rights than assignee bank had----- 137

Validity of assignment
Assignee's loan not for contract performance
Bank not assignee of claim under Assignment of Claims Act which loaned money to contractor after subject contract was completed is not entitled to protection of the no-setoff provision of Assignment of Claims

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Assignee's loan not for contract performance—Continued Page

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Assignee's right to payment

Fact that third party repaid assignee bank (a principal in loan to contractor) the sum outstanding on loan made by bank to Government contractor, who in turn assigned bank its Government contract and also pledged all future receivables, is not determinative of Government's obligation to pay assignee-principal or that bank's rights to receive additional monies, as Government is stranger to transactions between assignee-principal and third party..... 137

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Lease payments
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Assignment of lease payments under Government leases for computer equipment to lease financing company which purchases title to equipment should be recognized since purchaser of equipment may be regarded as financing institution under Assignment of Claims Act..... 80

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Claim for relief by fixed-price Govt. contractor suffering inflationary pressures is not extraordinary claim for consideration under Meritorious Claims Act..... 1031

Set-off. (*See* **SET-OFF**)
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Weekend or holiday vehicle detention charges for overdimensional shipments are proper only when the carrier has a valid highway permit for the day preceding and the day following the Saturday, Sunday or holiday. Expenses incurred through the use of a transceiver to obtain State highway permits are properly reimbursable, but only where proven..... 308

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Even though request for reversal of audit action is addressed to Transportation and Claims Division, settlement action, disallowing claims, is ripe for review by Comptroller General where record shows Division adequately responded to all of claimant's grounds for reversal.. 89

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Investments Page
For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of the established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

COMMERCE DEPARTMENT
Appropriation availability
Unexpended balance
Trade Expansion Act
Replacement program
Where unexpended balance of funds appropriated for purposes of a former adjustment assistance program is transferred to Secretary of Commerce to be used for a replacement program of adjustment assistance, while legislative authority to continue to administer former program is preserved, funds remain available for care and preservation of collateral and for honoring guarantees made under former program .. 1093

COMPENSATION
Additional
Court reporters
Maximum limitation
Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum 251

Administrative errors
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Retroactive salary adjustment
Employees, placed in lower grade at time of appointment than they would have been placed in had there not been an administrative failure to carry out a nondiscretionary agency policy, may have their appointments retroactively changed to the higher grade and paid appropriate back pay. While general rule is that retroactive changes in salary may not be made in absence of a statute so providing, GAO has permitted retroactive adjustments in cases where errors occurred as the result of a failure to carry out a nondiscretionary administrative policy 69

Back pay. (*See* **COMPENSATION, Removals, suspension, etc., Back pay**)
Double
Exemptions
Dual Compensation Act
Independent officers' organizations
The pay of a retired Regular Naval officer employed by the Naval Academy Athletic Association (NAAA) is not subject to reduction under the Dual Compensation Act since it appears that NAAA is a private, voluntary association not established pursuant to any law or regulation and therefore it cannot be regarded as a nonappropriated fund instrumentality of the United States 518

COMPENSATION—Continued

Increases

Promotions. (*See* **COMPENSATION, Promotions**)

Jury duty

Fees. (*See* **COURTS, Jurors, Fees**)

Inclusion of premium pay in compensation payable Page

Because it would be a hardship on Federal Aviation Administration (FAA) employees called for weekday jury duty whose tours of duty include work on Saturdays or Sundays, or both, to require them to work their regularly scheduled weekend days in addition to serving on juries on 5 weekdays, the FAA may establish a policy to permit those employees to be absent on weekends without charge to annual leave and with payment of premium pay normally received by them for work on Saturdays and Sundays 147

Military pay. (*See* **PAY**)

Missing, interned, captured, etc., employees

Overtime

Computation

Dept. 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. Proper amount of overtime compensation is determined by computing average amount of overtime performed by other employees similarly situated during period employee was interned. In this case, overtime must terminate on date when the office where 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. Modified by 55 Comp. Gen. (B–183107, Aug. 12, 1975) . 934

Night work

Wage board employees, (*See* **COMPENATION, Wage board employees, Night differential**)

Overpayments

Waiver. (*See* **DEBT COLLECTIONS, Waiver**)

Overtime

Actual work requirement

Exception

Backpay arbitration award

Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B–175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed 1071

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Reemployed annuitant
Computation Page

In computing aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. 5547, amount of annuity for pay period received by reemployed annuitant is to be included. See 32 Comp. Gen. 146 (1952)---- 247

Early reporting and delayed departure
Guards
Overtime claim
Retroactive period

Although decision 53 Comp. Gen. 489, B–158549, January 22, 1974, authorized payment of 15 minutes uniform changing and additional travel time to guards in Region III, General Services Administration, through period up to February 28, 1966, guards assigned to Baltimore area may be paid such overtime to December 23, 1970, inasmuch as the regulation requiring that uniforms be changed at assigned lockers, applicable in Baltimore, was not amended to permit wearing of uniforms to and from work until that date---- 11

Employees of Canal Zone Government
Fair Labor Standards Act *v.* other pay laws

Civil Service Commission's interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of Title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle to harmonize statutes dealing with the same subject whenever possible, and is consistent with congressional intent---- 371

Preliminary and postliminary duties. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)
Standby, etc., time
Home as duty station

Vessel employees of the Panama Canal Company are protected by the Fair Labor Standards Act, but under the act they need not be compensated for off-duty time spent at home awaiting telephone notification- 617

Traveltime
Congested traffic

Time spent in travel outside of his scheduled workday by wage board employee in return travel to official duty station after receiving medical examination at temporary duty station, although delayed by congested traffic, does not constitute travel away from official duty station occasioned by event which could not be scheduled or controlled administratively as contemplated by 5 U.S.C. 5544(a)(iv) as condition for payment of overtime compensation, since such travel outside regular duty hours was not necessitated by congested traffic but resulted from scheduling of medical examination which was within administrative control and, therefore, is not compensable as overtime---- 515

Wage board employees, (*See* **COMPENSATION, Wage board employees, Overtime, Traveltime**)

COMPENSATION—Continued

Preliminary and postliminary duties

Overtime. (*See* **COMPENSATION, Overtime, Early reporting and delayed departure**)

Prevailing wage employees. (*See* **COMPENSATION, Wage board employees**)

Promotions

Effective date

Retroactive Page

While GAO would have no objection to processing retroactive promotion in accordance with arbitrator's award to employee of Defense Supply Agency, there is no legal basis under which promotion may be effective retroactive to July 1, 1969, as ordered by arbitrator. Since arbitrator's award was based on finding that agency had not afforded employee priority consideration due him for promotion, effective date of retroactive promotion must conform with one of dates on which a position was filled for which employee was entitled to priority consideration but did not receive it and date is determined to be July 22, 1969.... 435

Arbitrator's effective date of June 29, 1973, for retroactive promotion based on earlier findings of grievance examiner cannot be sustained since evidence shows agency head had not exercised his discretion to promote employee until July 7, 1973. Thus, award is modified to make effective date of retroactive promotion at beginning of first pay period after July 7, 1973, when official authorized to make appointments acted.... 538

Retroactive

Administrative error

Collective bargaining agreement

Collective bargaining agreement provides that certain IRS 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, GAO 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.. 888

Rule

While GAO would have no objection to processing retroactive promotion in accordance with arbitrator's award to employee of Defense Supply Agency, there is no legal basis under which promotion may be effective retroactive to July 1, 1969, as ordered by arbitrator. Since arbitrator's award was based on finding that agency had not afforded employee priority consideration due him for promotion, effective date of retroactive promotion must conform with one of dates on which a position was filled for which employee was entitled to priority consideration but did not receive it and date is determined to be July 22, 1969.. 435

Temporary

Retroactive

Civilian employee, assigned temporarily to perform the duties of a higher level position, may be retroactively temporarily promoted for that

COMPENSATION—Continued
Promotions—Continued
Temporary—Continued
Retroactive—Continued Page

period since provision in collective bargaining agreement in effect at the time provided that employees so assigned for more than one pay period would be temporarily promoted. If such provision is valid under Executive Order 11491, then agency acceptance of agreement made provision a nondiscretionary agency policy and General Accounting Office has permitted retroactive changes in salary when errors occurred as the result of a failure to carry out a nondiscretionary agency policy ------- 263

"Two step increases"

Concerning proper step in grade in which employee should be placed upon processing retroactive promotion, there is no legal basis for placing him in step 10 of GS–13 as ordered by arbitrator. Under 5 U.S.C. 5334(b) an employee who is promoted to higher grade is entitled to basic pay at lowest rate of higher grade which exceeds his existing rate of basic pay by two step increases. Since employee was in grade GS–12, step 7, on effective date of retroactive promotion, he is only entitled to promotion to grade GS–13, step 4---------- 435

Rates
Highest previous rate
Adjustment
Retroactive

In setting a pay rate under the authority of section 531.203(c), title 5, Code of Federal Regulations—highest previous rate rule—an agency may not require an employee to terminate agency and court actions initiated by him to resolve grievances with the agency in exchange for the employee receiving the benefit of the highest rate, although within agency discretion, since such agency action constitutes an unwarranted exercise of its discretion and a rate set at the minimum of the grade under such circumstances may be adjusted retroactively to the highest previous rate to accord with agency recommendation for correction---- 310

New appointees
Agency policy

Employees, placed in lower grade at time of appointment than they would have been placed in had there not been an administrative failure to carry out a nondiscretionary agency policy, may have their appointments retroactively changed to the higher grade and paid appropriate back pay. While general rule is that retroactive changes in salary may not be made in absence of a statute so providing, GAO has permitted retroactive adjustments in cases where errors occurred as the result of a failure to carry out a nondiscretionary administrative policy--------- 69

COMPENSATION—Continued
Removals, suspensions, etc.
Back pay
Arbitration award
Page
Arbitration award providing retroactive effective dates of promotions and compensation for 3 Office of Economic Opportunity employees may be implemented under Back Pay Act, 5 U.S.C. 5596, since arbitrator found that bargaining agreement had been breached which incorporated by reference agency regulation requiring promotion requests to be processed in 8 days 403
Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B–175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed. 1071
Nonselection due to discrimination
Agency determined applicant's nonselection was based on discrimination. Although applicant declined subsequent offer of position, she is entitled to backpay from date of nonselection to declination of offer. Applicable retirement deductions should be made against gross salary entitlement even though amount payable is reduced by interim earnings. 622
Unfair labor practices
Unfair labor practices which involve personnel actions by agency directly affecting employees may be regarded as unjustified or unwarranted personnel actions under Back Pay Act, 5 U.S.C. 5596 (1970), and Asst. Secretary of Labor for Labor-Management Relations may order agency to pay such backpay allowances, differentials, and other substantial financial employee benefits as are authorized under 5 CFR, part 550, subpart H, provided it is established that, but for the unfair labor practice, the harm to the employee would not have occurred 760
Violations tantamount to suspension
Retroactive correction of an appointment date may be accomplished under provisions of Back Pay Statute, 5 U.S.C. 5596 and implementing regulations where agency committed a procedural error by failing to follow provisions of administrative regulations requiring that retirement and reappointment be included in same action to preclude a break in service which was not intended, and where the break in service was only 1 nonworkday 1028
Deductions from back pay
Outside earnings
Evidence requirement
Where volume of nonofficial part-time teaching, lecturing and writing of Federal employee prior to separation may be equal to such activity during interim between separation and restoration which would eliminate need that interim earnings be deducted from backpay under 5 U.S.C. 5596, affidavit by employee based on limited records and recollection

COMPENSATION—Continued
Removals, suspensions, etc.—Continued
Deductions from back pay—Continued
Outside earnings—Continued
Evidence requirements—Continued Page

as to his belief of such activity is not sufficient to establish volume when agency requested detailed listing showing date, place, and duration of each lecture and date and citation of each article. Agency is entitled to specificity requested 288

Severence 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 905

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 905

Military retired pay entitlement effect

National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service 212

Resignation prior to involuntary separation

Although employee resigned after receipt of general *announcement* by agency of proposed reduction-in-force action and publication of general news items, he is not entitled to severance pay since notice failed to meet requirements for a general reduction-in-force *notice* under 5 CFR 351.804 and 550.706(a)(2), and his separation may not be regarded as involuntary within meaning of sec. 550.706 for purpose of entitlement to severance pay 154

Where employee resigned prior to receipt of specific notice of involuntary separation or general notice of proposed transfer or abolition of all positions in his competitive area, as required in applicable regulations for entitlement to severance pay, neither failure of agency to grant him leave without pay status prior to resignation nor its action in

COMPENSATION—Continued
Severence pay—Continued
Resignation prior to involuntary separation—Continued Page
granting such leave to other employees provides basis for his entitlement to severance pay if not otherwise eligible since granting of leave without pay is not matter of right but a matter for agency's discretion 154

Traveltime
Overtime compensation status. (*See* **COMPENSATION, Overtime, Traveltime**)

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 greater than one-half. Prior interpretation was made by the CSC 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 890

Overtime
Traveltime
Time spent in travel outside of his scheduled workday by wage board employee in return travel to official duty station after receiving medical examination at temporary duty station, although delayed by congested traffic, does not constitute travel away from official duty station occasioned by event which could not be scheduled or controlled administratively as contemplated by 5 U.S.C. 5544(a)(iv) as condition for payment of overtime compensation, since such travel outside regular duty hours was not necessitated by congested traffic but resulted from scheduling of medical examination which was within administrative control and, therefore, is not compensable as overtime 515

Prevailing rate employees
Public Law 92-392
CSC seeks GAO concurrence in application of 47 Comp. Gen. 773 (1968) to prevailing rate employees. Retroactive adjustments to wages of prevailing rate employees are governed by 5 U.S.C. 5344 which places limitations on those categories of employees entitled to such adjustments. Employees separated prior to date wage increase is ordered into effect may have wages and/or lump-sum leave payments adjusted only if they died or retired between effective date of increase and date increase ordered into effect (and then only for services rendered during this period) or if they are in the service of the Govt. actively or on terminal leave status on date increase is ordered into effect 655

Transfer to Classification Act positions
Periodic step increases
Holding in 39 Comp. Gen. 270 (1959) that wage adjustments for prevailing rate employees under 5 U.S.C. 1082(7) (1958 ed.) were administratively granted and thus equivalent increases for periodic step increases for prevailing rate employees transferring into classified positions will no longer be followed since the prevailing rate system enacted by Public Law 92-392 may be considered a statutory wage system 305

COMPENSATION—Continued

Waivers

Subsequent salary claims

Appropriation availability Page

Claim of former Commissioner of Commission on Marihuana and Drug Abuse for compensation previously waived by him is for payment if otherwise proper since an employee may not be estopped from claiming and receiving such compensation when his right thereto is fixed by or pursuant to law. Should additional claims from other Commissioners be submitted, they may also be paid. However, should no balance remain in the applicable appropriation account, a deficiency appropriation would be necessary before payment could be made 393

What constitutes

Intergovernmental Personnel Act detail reimbursement

When a State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating assignment agreement required under 5 CFR 334.105 nor for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference, according to legislative history, to salary of State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to meaning used in Federal personnel statutes, that is, that term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part 210

CONFLICT OF INTEREST STATUTES

Contract validity

Award of contract to national association which will evaluate work of its membership is not illegal, notwithstanding potential conflict of interest, since neither RFP nor FPR contains prohibition against conflict of interest and statutes in United States Code are not directed against immediate kind of situation 421

Violation determination

Contract award

No law or regulation precludes an award to national association which it is contended will be in conflict of interest because one goal of project under contract is to enjoin parents to lobby for improved education for handicapped children and for increased funds for purpose, the recipients of which funds would be association members 421

CONTRACTING OFFICERS

Regulation compliance

Failure of agency to comply with requirement in agency regulations that it notify GAO that award will be made notwithstanding protest does not affect legality of award 955

CONTRACTING OFFICERS—Continued

Defaulted

Reprocurement

Standing Page

Defaulted contractor, who was furnished reprocurement solicitation because of Freedom of Information Act, has no standing to be considered for award, as award at increased price would be tantamount to modification of defaulted contract without any consideration therefor to Government 161

Development

Selection

Protest against refusal of agency to consider proposal for award of production contract from firm which, although not selected as development contractor, independently develops allegedly comparable product is timely under 4 CFR 20.2(a). Although solicitation leading to award of development contracts warned that production contract would be awarded only to development contractor, protester could not know for certain that it would not be permitted to submit proposal until it was so notified after issuance of solicitation for production contract 1107

Incumbent

Failure to solicit bids

Where contracting agency failed to solicit incumbent contractor, one of limited number of manufacturers of items being procured, and failed to synopsize procurement in Commerce Business Daily, its determination to cancel solicitation and readvertise for bids on basis that requirement for full and free competition was precluded was not improper 973

Joint ventures. (*See* **JOINT VENTURES**)

On-site

Competing for additional award

Unsuccessful offeror's statement that one of joint venturers and Navy were involved in improper discussions during negotiation process is unfounded, as is contention that one of joint venturers participated in formulation of RFP for design and construction of family housing units on a turnkey basis. Furthermore, there are no regulations which prohibit on-site contractor from competing for additional award at same location .. 775

Responsibility

Contracting officer's affirmative determination accepted

Exceptions

Conflict of interest

GAO will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case 686

CONTRACTING OFFICERS—Continued
Responsibility—Continued
Contracting officer's affirmative determination accepted—Continued
Exceptions—Continued
Distinguished Page

Where IFB provides for offerors' furnishing information as to experience in designing and producing items comparable to item being procured, record will be examined to determine if bidder to whom award was made meets experience requirement and rule that affirmative determinations of responsibility will not be reviewed except where there are allegations that contracting officer's actions in finding bidder responsible are tantamount to fraud is distinguished---------- 509

Fraud

GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud---------- 66

Protest questioning offeror's experience relates to matter of responsibility as defined in ASPR 1-903, and will not be considered since contracting officer determined offeror responsible and GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determinations, except for actions by procuring officials which are tantamount to fraud---------- 363

Allegation that contractor may not be responsible because it did not perform satisfactorily under prior contract and was not in compliance with Equal Employment Opportunity regulations will not be considered, since no fraud has been alleged or demonstrated---------- 421

Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith---------- 681

Issue concerning whether awardee is nonresponsible for allegedly failing to offer finished product which meets quality of product initially offered will not be considered by GAO, since practice of reviewing protests involving contracting officer's affirmative determination of responsibility has been discontinued absent showing of fraud in finding---- 775

Reasonableness

Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis---------- 499

"Turnkey" housing developers

Unsuccessful offeror's statement that one of joint venturers and Navy were involved in improper discussions during negotiation process is unfounded, as is contention that one of joint venturers participated in formulation of RFP for design and construction of family housing units on a turnkey basis. Furthermore, there are no regulations which prohibit on-site contractor from competing for additional award at same location- 775

CONTRACTS
Amounts
Indefinite
Requirements contracts. (*See* **CONTRACTS, Requirements**)

CONTRACTS—Continued

Page

Appropriations

Availability. (*See* **APPROPRIATIONS, Availability, Contracts**)

Assignments. (*See* **CLAIMS, Assignments, Contracts**)

Automatic Data Processing Systems. (*See* **EQUIPMENT, Automatic Data Processing Systems**)

Awards

Advantage to Government

Single *v.* multiple awards

Protest of bidder on partial quantity against award to only other and high bidder (bidding "all or none") is denied since "all or none" bid lower in aggregate than any combination of individual bids available may be accepted by Government although partial award could be made at lower unit cost. Moreover, award to higher priced "all or none" bidder in lieu of partial award to low bidder and resolicitation of remaining quantity was not illegal as contracting officer determined higher price was nevertheless reasonable ---- 416

Cancellation

Erroneous awards

Bid evaluation base

Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1–1004 (b) and 3–501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated --- 375

Bidder responsibility

In situation where it becomes evident in pre-award survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price. Modified by 54 Comp. Gen. 715 ---- 499

Continuation

Not prejudicial to other bidders

Where all bidders, except one not low bidder, were nonresponsive to IFB because of conflicting bid acceptance provisions, there is no objection to cancellation and resolicitation under proper IFB; however, where all bidders for transportation service awarded under another IFB were nonresponsive because of similar conflict, there is no objection to continuation of awards in view of agency contention that it would not be in Govt.'s interest to terminate and since no bidder was prejudiced by awards and none has protested awards ---- 955

Erroneous

Cancellation. (*See* **CONTRACTS, Awards, Cancellation, Erroneous awards**)

Termination of contract

Protest by bidder that it had been awarded contract and was later advised such award was made through administrative error is beyond authority of GAO because if there was valid contract, then it may be

CONTRACTS—Continued
Awards—Continued
Erroneous—Continued
Termination of contract—Continued Page

that it was constructively terminated for convenience and matter would be for resolution as termination for convenience claim which is contract administration ---- 955

Improper
Corrective action
Not recommended
Competition not available

No corrective action recommended on contract awarded improperly where due to nature of item procured (lease of relocatable office building) and circumstances presently existing (principally fact that incumbent contractor has already received payment for transporting, setting up and taking down buildings) there appears to be little room for price competition on any reprocurement ---- 242

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Awards**)
Notice
Form of notice

Allegations that procuring activity delayed its handling of protest in order to proceed with award under ASPR 2-407.8(b)(3) (1974 ed.) and that procuring activity did not comply with ASPR provision have no merit since even if this Office had been furnished complete administrative report within timel imits provided in Interim Bid Protest Procedures and Standards, it is doubtful that a decision would have been rendered by date upon which award needed to be made; furthermore, receipt by protester of oral, rather than written notice of award as provided by ASPR, has no effect upon legality of award ---- 978

To unsuccessful bidders

Contracting officer is not required to follow 5-day notification rule to enable unsuccessful offerors to file protest concerning small business size status as provided in ASPR § 1-703(b)(1) (1973 ed.), in view of exception in ASPR § 3-508.2(b) (1973 ed.) which permits awards on basis of urgency without prior notice ---- 586

Protest pending

Where award is made by agency after protest filed at GAO but before agency received notice of protest, agency did not act improperly even though, due to decision on merits of protest, it appears that protester may have been prejudiced by award ---- 499

Failure to notify GAO
Legality of award

Failure of agency to comply with requirement in agency regulations that it notify GAO that award will be made notwithstanding protest does not affect legality of award ---- 955

Resolicitation
Recommendation withdrawn

Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified ---- 483

CONTRACTS—Continued
Awards—Continued
Small business concerns
Certifications
Denial
Effect Page

Where SBA declines to appeal contracting officer's determination of nonresponsibility as to bidder's tenacity, perseverance or integrity, GAO will no longer undertake to review the contracting officer's determination in the absence of a compelling reason to justify such a review, such as a showing of fraud or bad faith by procuring officials. 49 Comp. Gen. 600, modified 703

Failure to request

Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustained because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR § 1–1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government 696

Competitive advantage effect

Total small business set-aside for mess attendant services pursuant to 10 U.S.C. § 2304(a)(1) (1970) and ASPR § 1–706.5 (1973 ed.) should have been conducted by process known as Small Business Restricted Advertising since Navy has not demonstrated that use of this method was not possible 809

Fair proportion to small business concerns
Subcontracting

Protest against award of section 8(a) subcontract in which it is alleged that SBA's 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 GAO. However, since the matters raised in the protest concern SBA's administration of sec. 8(a) program, they will be considered by GAO in its continuing audit review of SBA activities .. 913

Size
Conclusiveness of determination

GAO is without jurisdiction to question small business status of bidder since 15 U.S.C. 637(b)(6) makes the determination of the Small Business Administration of such matters conclusive 206

Buy American Act
Canadian purchases

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with

CONTRACTS—Continued
Buy American Act—Continued
Canadian purchases—Continued Page
respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety 44
Contention that award to Canadian firm would violate ASPR 6–502(d) is not supported where evidence presented does not demonstrate that "performance in Canadian Government-owned or controlled installations" is contemplated 363

Cancellation
Failure to rescind
Effect on timeliness of protest
Protest filed with GAO on December 16 after contracting agency failed to rescind cancellation of IFB at December 11 meeting requested by protester within 5 days of notice of cancellation is timely under 4 CFR 20.2(a) (1974), since filed within 5 days of adverse agency action (failure to rescind cancellation) 955

Clauses
Restrictive
Parts procurement IFB clause which provides that, under cost-reimbursement segment of contract, contractor will not be able to furnish parts to Govt. at price which includes markup from affiliates is unduly restrictive and unreasonably derived, since provision would reduce likelihood that contractor would buy from affiliates and ASPR guidelines recognize affiliates' entitlement to recover more than cost in comparable situations where there is price competition as clause contemplates 1050

Competitive system
Master agreement
Use of list
Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms ... 606

Conflict of interest prohibitions
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Conflicts of interest prohibitions**)
Cost-reimbursement. (*See* **CONTRACTS, Cost-type**)

CONTRACTS—Continued

Cost-type

Negotiation. (*See* **CONTRACTS, Negotiation, Cost-type**)

Subcontracts

Social Security

Medicare Part "B" program Page

GAO will not consider on merits protest of award of automatic data processing subcontract by health insurance carrier administering Medicare Part "B" program pursuant to cost reimbursement type contract with Social Security Administration (SSA), since SSA's subcontract selection approval involved no fraud or bad faith; carrier is not SSA's purchasing agent; SSA's procurement procedure guidance, review of RFP, attendance at offeror's conference and negotiation sessions, and other involvement in subcontract procurement process did not have net effect of causing or controlling subcontractor selection; and procurement was not "for" Government 767

GAO will not consider on merits protest of award of automatic data processing subcontract by health insurance carrier administering Medicare Part "B" program pursuant to cost reimbursement type contract with Social Security Administration (SSA) by virtue of protester's allegations that contractual and regulatory requirements that carrier conduct proper cost analysis before awarding subcontract were not complied with, since enforcement of such requirements are contract administration matters appropriate for SSA's resolution and not proper for GAO's resolution absent evidence indicating fraud or bad faith 767

Damages

Government liability

Contractor's property

Govt. agency may, within appropriation limits, assume risk of loss for contractor-owned property which is used solely in performance of Govt. contracts since reimbursement for loss of property arising during performance of Govt. contract is necessary and proper expense chargeable to appropriation supporting Govt. contract. B–168106 dated July 3, 1974, modified 824

Where amount of contractor's commercial work is insignificant when compared to amount of Govt. work and Govt. as practical matter is bearing entire risk of loss of contractor's property in that Govt. is, in essence, paying full insurance premium under its cost-type contract, no compelling reason is seen why Govt. may not, within appropriation limits, agree to assume such risk of loss. B–168106 dated July 3, 1974, modified .. 824

Definiteness requirement

Because of statutory prohibitions against entering into obligations in excess of appropriations contract may not provide for Govt.'s assumption of risk of loss of Govt. contractor's equipment and facilities unless available appropriations are sufficient to cover Govt.'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 824

CONTRACTS—Continued
Damages—Continued
Liquidated
Delays
Military duty Page

Liquidated damage provision of employment contract between Veterans Administration and physician which required physician to perform period of obligated service in return for specialty training is found valid and enforceable. Military service of physician suspended contract of employment obligations and his induction into Air Force did not rescind contract. Certification of no extra-VA professional activities found inapplicable to issue of abrogation of contract---------- 728

Data, rights, etc.
Disclosure
Timely protest requirement

Protest that Air Force RFP violated protester's proprietary rights is untimely as protester made no attempt to object to alleged disclosure of data until after award of contract approximately five months after protester became aware of RFP's specifications---------- 44

Default
Procurement from another source
Competitive bidding. (*See* **BIDS, Competitive system, Replacement of defaulted contract**)
Defaulted contractor's bid

Defaulted contractor, who was furnished reprocurement solicitation because of Freedom of Information Act, has no standing to be considered for award, as award at increased price would be tantamount to modification of defaulted contract without any consideration therefor to Government---------- 161

Defaulted contractor may properly compete on reprocurement, since Govt. 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---------- 853

Reprocurement
Government procurement statutes
Not for consideration

When reprocurement is for account of defaulted contractor, statutes governing procurements by Government are not applicable, therefore, questions concerning procurement policy and regulations are not properly for consideration---------- 161

Where reprocurement is for account of defaulted contractor, principles governing formal advertising are not applicable. And award to low responsive, responsible bidder—previously defaulted contractor—is proper since award price is not in excess of its defaulted contract price. 853

Termination of contract
Effect of prior recommendation

Recommendation for convenience termination which is contained in affirmation of prior decision presupposes that contractor is satisfactorily performing contract in accordance with its terms. Recommendation should not take precedence over any possible termination for default action should such action be appropriate and necessary---------- 715

CONTRACTS—Continued

Discounts

Erroneous rate

Clerical error Page

Where contractor submitted invoices which stated discount terms of ⅛ of 1 percent for payment within 20 days, although contract provided for discount of 1/10 of 1 percent for 20 days, and Govt. paid within 20 days and took discount offered on invoices, contractor may be refunded difference between discount rates in amount of $7,908.87, as record indicates discount rate on invoices resulted from clerical error and not from voluntary increase in rate and contractor did not acquiesce in deduction of higher rate 1004

Disputes

Conflict between administrative report and contractor's allegations

In absence of any evidence to contrary, contracting officer's statement that no telegram prohibiting "offset bid" was ever sent to any party must be accepted 586

Contract Appeals Board decision

Acceptance of fact determinations

Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies 24

Failure to follow administrative procedure

Protest by bidder that it had been awarded contract and was later advised such award was made through administrative error is beyond authority of GAO because if there was valid contract, then it may be that it was constructively terminated for convenience and matter would be for resolution as termination for convenience claim which is contract administration 955

Equal employment opportunity requirements. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Escallation clauses

Absence of

Where party requests no-cost cancellation of fixed-price supply contract on basis of sovereign acts of Government (dollar devaluation and embargo) and general inflation, although contract does not contain either escalation or excuse by failure of presupposed condition clause, fact that contract did contain changes, Government delay of work and default clauses is sufficient to establish all rights and duties of parties without resort to Uniform Commercial Code 527

Limitation

Contention that contracting officer arbitrarily set escalation limit in fixed-price contract should have been raised prior to bid opening as required by 4 CFR 20.2, and not in midst of contract performance 1031

CONTRACTS—Continued
Escallation causes—Continued
Purpose Page
Inclusion of price escalation clause which limited price increase to 25 percent of original price was not done by mutual mistake since Govt. did not intend to compensate contractor for all increases in costs but rather merely intended to share the risk of possible price increase with contractor 1031

Federal Supply Schedule
Mandatory use requirement
Defense Department
Without GSA approval, the Navy lacked authority to procure reels of instrumentation recording tape valued in excess of $5,000 and of a type not covered by a Federal Supply Schedule (FSS) contract, because the Federal Property Management Regulations require procurements in those circumstances to be approved by GSA 488

Waiver
The item procured by the Navy on a sole-source basis was "similar" to that available through protester's FSS contract, within the meaning of 41 C.F.R. § 101–26.401–3 (1973), and therefore the Navy should have requested GSA to waive the requirement for use of the FSS 488

Increased costs
Fixed price
Freight rate increase
Where a contractor has entered into a fixed price contract with the Government and there is a subsequent increase in transportation expenses as a result of a freight rate increase, the contractor and not the Government must bear the increased expense 559

Inflation
Claim for relief by fixed-price Govt. contractor suffering inflationary pressures is not extraordinary claim for consideration under Meritorious Claims Act 1031

Freight rate increase
Fixed-price contracts. (*See* **CONTRACTS, Increased costs, Fixed price, Freight rate increase**)
Government activities
Sovereign capacity
Request for no-cost cancellation of contract option because of increased costs of performance not granted where alleged cause for cost increase due to (1) acts done by Government in its sovereign capacity (dollar devaluation and embargo), and (2) tremendous inflationary pressures, because contract contained no basis for such cancellation. Moreover, mere fact that contract performance becomes burdensome or even results in loss due to unanticipated rises in material costs does not entitle fixed-price contractor to relief 527

Inflation
Fixed-price contracts. (*See* **CONTRACTS, Increased costs, Fixed price, Inflation**)
Nondiscrimination
Compliance
Although protester alleges that it was requested to furnish Equal Employment Opportunity (EEO) information indicative of award 2 weeks

CONTRACTS—Continued
Increased costs—Continued
Nondiscrimination—Continued
Compliance—Continued Page

before proposed awardee in furtherance of allegation of improper manipulation of funding available for additive items and record contains conflicting information as to when EEO information was obtained from bidders, once additional funding became available, increasing amount of additive items to be included for award and displacing protester as low bidder, it was appropriate to secure EEO information from resulting low bidder 320

Service Contract Act of 1965
Amendments
Minimum wage, etc., determinations
Rates under prior contracts

Where October 1973 Service Contract Act minimum wage and fringe benefit determination issued for GSA solicitation is based on May 1973 survey data covering manufacturing and nonmanufacturing employees in locality, contention that determination should have specified conformable rates developed under prior contracts between bidder and Air Force in same locality which contained wage determination based on May 1972 survey data is without merit, since act provides that determinations are to be in accordance with prevailing rates in locality 120

Wage adjustments
Jurisdiction

Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies 24

Withholding unpaid wages, overtime, etc.
Employees not covered by labor stipulations. (*See* **CONTRACTS, Payments, Withholding, Unpaid wages of employees not covered by labor stipulations**)
Leases. (*See* **LEASES**)
Manning requirements
Negotiated contracts
Evaluation of requirement. (*See* **CONTRACTS, Negotiation, Evaluation factors, Manning requirements**)
Mess attendant services
Small business set-aside
Procurements
Small business restricted advertising

Total small business set-aside for mess attendant services pursuant to 10 U.S.C. § 2304(a)(1) (1970) and ASPR § 1-706.5 (1973 ed.) should have been conducted by process known as Small Business Restricted Advertising since Navy has not demonstrated that use of this method was not possible 809

CONTRACTS—Continued
Mistakes
Allegation before award. (*See* BIDS, Mistakes)
Contracting officer's error detection duty
Notice of error
Lacking
Page
Contractor's claim for correction of contract price to include Nurse Call/PA/Intercom cost is denied, since contracting officer did not have actual or constructive notice of possible error prior to award in only bid received, as bid price was considered reasonable although considerably higher than Government estimate, and Engineering Service recommended that award be made 507

Price range
Contracting officer, who reasonably had no suspicion of specific mistake in bid and who informs bidder of complete basis for his general suspicion that bidder might have made mistake, i.e., wide disparity among three lump-sum bids submitted, and requested and received verification from bidder, has fulfilled ASPR 2-406 vertification duty; verification request requires no special language and contracting officer need not specifically state that he suspects mistake, so long as he apprises bidder of mistake which is suspected and basis for such suspicion. 545

Sufficiency of verification
Contracting officer, who suspected mistake in low bid and requested verification but failed to mention unsuccessful bidder's doubts that low bidder could meet IFB specifications, did not contribute to low bidder's failure to detect its omission of site installation costs from bid price and did not violate ASPR 2-406 verification requirements, since these doubts formed no part of basis for contracting officer's suspicion of mistake and did not relate to site installation costs 545

Mutual
Modification of contract. (*See* CONTRACTS, Modification, Mutual mistake)
Price escalation clause inclusion
Reformation of contract on grounds of mutual mistake is permissible only when there has been mutual mistake as to past or present material fact. Mistakes pertaining to future events, such as degree of cost escalation in fixed-price contract containing limited escalation provision, do not constitute grounds for reformation 1031

Modification
Facilitation of defense effort
Review jurisdiction of GAO
Our Office cannot review agency's findings under Pub. L. 85-804 since we are not one of Govt. agencies authorized by statute or implementing Executive orders to modify contracts without consideration 1031

Mutual mistake
Price adjustment
Where company's mistaken proposal to repair roofs was based on misinformation given it by Government's agent and also on its own negligence in not studying blueprints and specifications thoroughly enough, the position of the parties is that of persons who have made a mutual mistake as to material fact and contract may be reformed to allow additional compensation for repairing correct contract area 497

CONTRACTS—Continued
Modification—Continued
Reformation after payment
Subsequent court decisions Page
Settlement agreements regarding payments for value engineering may not be reformed to conform with judicial interpretation of contract provisions in subsequent court case not involving this contractor, the court case not indicating that it would have retroactive effect on other cases-- 928

Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Administrative determination
In view of agency's primary responsibility with respect to determinations of highly technical nature, GAO will not disturb award where record reasonably supports administrative determination that successful offeror's technical approach was best operational and most cost effective method-- 363

Agreements between DOD and Canada
General Accounting Office consideration
Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety---------- 44

Assignments
Offers or proposals
Validity of assignment
Sale, etc., of business
While provisions of anti-assignment statutes are not applicable to assignment of proposals, rationale for position that transfer or assignment of proposals is prohibited unless such transfer is effected by operation of law to legal entity which is complete successor in interest to original offeror is analogous to that of such statutes and "by operation of law" should be interpreted as including by merger, corporate reorganization, sale of an entire business, or that portion of business embraced by proposal, or other means not barred by anti-assignment statutes---------- 580

Auction technique prohibition
Disclosure of price, etc.
Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. 521---------- 16

CONTRACTS—Continued
Negotiation—Continued
Awards
Cancellation Page

Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1–1004(b) and 3–501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated--- 375

Delay

Notwithstanding protester's appeal to agency under Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, for further documentation relative to merits of its protest, GAO will not refrain from issuing decision pending appeal, where record shows that further delay in issuing decision could harm agency procurement process and protester already has received substantial portion of agency documents--------- 783

Erroneous
Prior to request for proposals closing date

Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on determination that only that item could satisfy agency's minimum needs---------- 1114

Notice

Contracting officer is not required to follow 5-day notification rule to enable unsuccessful offerors to file protest concerning small business size status as provided in ASPR § 1–703(b)(1) (1973 ed.), in view of exception in ASPR § 3–508.2(b) (1973 ed.) which permits awards on basis of urgency without prior notice---------- 586

Prejudice alleged
Speculative

Even though deficiencies exist in RFP, any possible prejudice caused by deficiencies is only speculative and question whether awardee would have been other than party selected cannot be appropriately resolved; moreover, given nature and state of procurement, termination for convenience would not be economically feasible at this time---------- 775

Prior to request for proposals closing date
Improper

Award of contract, prior to RFP closing date for receipt of proposals, upon receipt of proposal by only offeror solicited was improper since such action precluded consideration of proposals by other firms not directly solicited and denied such firms equal opportunity to compete-- 1114

Propriety

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---------- 930

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Propriety—Continued
Evaluation of proposals Page

GAO finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors---------- 44

While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution---------- 44

In RFP setting forth Government's best estimate of workload and skill requirements (115 man-years of effort) and further indicating that 115 level is not fixed but significant deviation must be adequately explained, award to contractor proposing 104 man-years is not improper since RFP places no man-year floor to limit proposers and ultimate determination of reasonableness and feasibility of any offeror's proposing significantly less than 115 man-years is that of technical evaluators. Moreover, 6 of 7 proposers proposed less than 106 man-years and contractor is now performing satisfactorily at or below 104 man-year level---------- 352

Failure to negotiate with all offerors

Even where cost evaluation was conducted on basis of procurement of 100 computer terminals, when, in context of requirements contract (especially one not containing compensatory variation of quantity clause), estimated quantity becomes a contractual minimum of 100, there has been a definite and significant change in Govt.'s requirements which should have been communicated to each prospective contractor. Change in minimum lease period from 1 to 2 years, deletion of contractor maintenance requirement, and determination to award total quantity in only one category where two categories had been set forth should have similarly been communicated to offerors---------- 1080

Small business concerns

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---------- 930

Bidder qualifications. (*See* **BIDDERS, Qualifications**)
"Buying in"
Legality

In cost reimbursement situation award to offeror submitting lowest cost cannot be considered "buy-in" (offering cost estimate less than anticipated cost with expectation of increasing costs during performance) because agency was aware of what realistic estimate cost of contractor's performance was before award and made award based on that knowledge- 352

CONTRACTS—Continued
Negotiation—Continued
Changes, etc.
Recompeting procurement recommended Page
Where in course of final discussion with sole offeror remaining in competitive range contract being negotiated has significantly changed from RFP under which competitive range was determined, in absence of compelling reason, contracting officer must take action to amend RFP and seek new offers ---- 1080

Competition
Basic ordering type agreements
Enhancing competition
Dept. HEW's proposed use of basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved ---- 1096

Changes in price, specifications, etc.
So long as offerors were advised to base production unit cost estimates on cumulative average costs for 241 production units, there was no unfair advantage in permitting one offeror, by insertion of special clause, to make its proposed cost contingent on accuracy of projected production figure, since clause makes explicit what is already implicit in proposal instructions. Also, model contract provision furnished to offerors specifically states that equitable adjustment will be made in production unit price for any Government change in production quantity affecting production unit cost ---- 169

Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version ---- 681

Contracting officer's duty to secure
FAA's publication of qualification criteria in Commerce Business Daily to assure that only qualified firms received copies of RFTP appears to be unduly restrictive of competition and should be eliminated from future procurements in absence of appropriate justification on basis that prequalification of offerors is in derogation of principal tenet of competitive system that proposals be solicited in such manner as to permit maximum competition consistent with nature and extent of services or items to be procured ---- 612

Discussion with all offerors requirement
Actions not requiring
GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Actions not requiring—Continued Page

further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness 60

Use in Mission Suitability evaluation of manning and staffing guideline, developed by evaluation board based on its knowledge of work requirements, is not improper, and its judgment in downgrading protester's proposal because of technician demotions and staff salary reductions, while proposing to substantially retain present work force, resulting in low skill mix and expected difficulties in personnel retention, is not unreasonable. Insufficient basis exists to conclude that NASA erred in regarding proposal deficiencies as coming within exception to 10 U.S.C. § 2304(g) requirement for "written or oral discussions," or that exception itself represented failure to comport with statute. Modified (correction) by 54 Comp. Gen. 1009 562

Upon further consideration, decision is affirmed that insufficient basis exists to conclude NASA failed to conduct written or oral discussions required by 10 U.S.C. 2304(g). Controverted areas of protester's proposals—low level of effort; planned demotions of technicians; and salary reductions of key personnel—were deficiencies, not strengths, ambiguities, or uncertainties, and agency could reasonably judge that deficiencies were not required to be discussed under circumstances present 1009

Basis of discussion

Unsuccessful offeror's statement that one of joint venturers and Navy were involved in improper discussions during negotiation process is unfounded, as is contention that one of joint venturers participated in formulation of RFP for design and construction of family housing units on a turnkey basis. Furthermore, there are no regulations which prohibit on-site contractor from competing for additional award at same location 775

"Meaningful" discussions

While protester presents general challenge to NASA procedure of conducting "discussions" with offerors in competitive range, with "negotiations" limited to definitization of contract with selected offeror, charging that procedure violates statutory and regulatory requirements for meaningful negotiation with all offerors in range and abridges requirement for common cutoff date, after review of discussions conducted here, and adherence to common cutoff date for proposal revisions, it cannot be concluded that procedures leading to selection of offeror found significantly superior in mission suitability, and lower in cost than protester, varied materially from requirements of 10 U.S.C. 2304(g) 408

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Proposal revisions Page

Even where cost evaluation was conducted on basis of procurement of 100 computer terminals, when, in context of requirements contract (especially one not containing compensatory variation of quantity clause), estimated quantity becomes a contractual minimum of 100, there has been a definite and significant change in Govt.'s requirements which should have beeen communicated to each prospective contractor. Change in minimum lease period from 1 to 2 years, deletion of contractor maintenance requirement, and determination to award total quantity in only one category where two categories had been set forth should have similarly been communicated to offerors---- 1080

Technical transfusion or leveling

Air Force not required to notify other offerors of waiverof specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3-805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion---- 44

Procuring agency did not act improperly in not advising protester of preference for "refinements" design approach of successful offeror since agency's statement, in response to protest concerning lack of meaningful technical negotiations, that it would have "violated ASPR" if it had influenced change in protesting offeror's design approach indicates that "technical transfusion" of competing offeror's superior design approach would have occurred---- 169

Failure of agency in negotiated procurement to include reference to particular design in questions/clarifications propounded to unsuccessful offeror is not objectionable as GAO has held where, as here, agency is interested in offeror's independent approach and there is risk of disclosing one offeror's approach to another offeror, technical discussions may be curtailed---- 363

Written or oral negotiations

Failure to conduct oral discussions or written communications with offerors to extent necessary to resolve uncertainties relating to work requirements or price to be paid violates requirement for meaningful negotiations---- 530

Effect of negotiation procedures

While solicitation under two-step formally advertised procurement provided contracting officer with authority to request additional information from offerors of proposals which were considered reasonably susceptible of being made acceptable, fact that protester was not afforded opportunity to revise or modify its proposal was not improper since procuring activity reasonably determined proposal unacceptable and that it could not be made acceptable by clarification or additional information, but would require major revision---- 612

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Exclusion of other firms Page
Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on determination that only that item could satisfy agency's minimum needs ---- 1114

Impracticable to obtain
Production methods selection
Refusal of Air Force to consider proposal from protester for TACAN was not unduly restrictive of competition contrary to maximum competition mandate of 10 U.S.C. 2304(g) where development contracts provided that follow-on production would be limited to development contractor (dual prototype method of contracting), since Air Force has demonstrated that such restriction was reasonably necessary to assure that prototype selected would meet technical and cost objectives and because testing of protester's equipment could not be accomplished within time constraints of procurement ---- 1107

Propriety
Method of conducting negotiations
Contrary to concept implicit in negotiated procurements and statutory requirement (10 U.S.C. 7361(c)(2) (1970)) for maximum competition for award of ship salvage contract, evaluation of competitive proposals should not have involved consideraion of incumbent's east coast capabilities in selecting awardee for west coast contract and should have recognized historical cost importance of ship husbanding in evaluation scheme ---- 375

Contention that individual tailoring by AF of statement of work in R&D procurement resulted in submission of noncompetitive high price is denied because protester did not show how individual differences in statement of work caused price increase attributable to differences in individually tailored statement of work ---- 735

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 ---- 930

Request for proposals closing date
Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on determination that only that item could satisfy agency's minimum needs ---- 1114

Conflict of interest prohibitions
Status of offeror
Award of contract to national association which will evaluate work of its membership is not illegal, notwithstanding potential conflict of interest, since neither RFP nor FPR contains prohibition against conflict of interest and statutes in United States Code are not directed against immediate kind of situation ---- 421

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data
Availability to technical evaluation panel Page
Since there is no requirement that offeror's cost proposals be made available to technical evaluation panel, whose function is to evaluate technical merit of proposals against evaluation criteria set forth in solicitation, the failure to do so provides no basis for disturbing award..... 1035

Field pricing support reports
Contracts in excess of $100,000
Requirement in ASPR 3-801.5(b) that field pricing support report be requested prior to negotiation of contract in excess of $100,000 was complied with in production cost area even though procurement contracting officer only requested review of offeror's proposed escalation rate for the period in question, the learning curve to be applied in production, and the make-up of the production unit cost estimate, since ASPR 3-801.5 (b)(3) provides that contracting officer has right to stipulate "specific areas for which input (field pricing support) is required."..... 169

Labor costs
Direct
Where RFP allows flexibility to offerors in developing proposals for site support services, apparently contemplating individual approaches, reasonableness of agency's normalization in probable cost evaluation of certain direct labor costs is in doubt, because normalization is not keyed to individual approaches and may encourage inflated technical proposals. Modified (correction) by 54 Comp. Gen. 1009..... 562

National Aeronautics and Space Administration procedures
Normalization of proposed costs
Where objections to NASA evaluation of Mission Suitability, RFP's most important evaluation criterion, are not sustained, but review casts doubts on reasonableness of normalization of certain costs and reevaluation might increase cost differential between offerors—considering that source selection of higher cost offeror for award of cost-plus-award-fee contract is based on significant mission suitability superiority, reasonbleness of cost, and lack of significant cost difference among offerors—Source Selection Official should judge whether those doubts are of sufficient impact to justify cost reevaluation or reconsideration of selection decision. Modified (correction) by 54 Comp. Gen. 1009..... 562

Price negotiation techniques
Negotiations with unsuccessful offeror as to system weight discrepancy should have, at least, indirectly made it aware that cost estimate was questionable; nevertheless it would have been preferable to have advised offerors that submitted cost proposals were considered generally unrealistic and to convey specifics of cost estimate discrepancies so long as another offeror's unique technical and cost approach would not be disclosed..... 169

"Realism" of cost
Elimination, without formal advice to offerors, of cost realism standard as applied to preproduction development costs, does not require conclusion that selection of technically superior offeror, whose evaluated

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
"Realism" of cost—Continued Page
unit production cost was within RFP design-to-production-cost limitation but whose development costs were high, was improper under cost evaluation scheme of RFP ---- 169
Cost realism evaluation which contained improper upward adjustment for erroneously determined omission of cost for two employees was not prejudicial to protester's position for even assuming all other cost adjustments to protester's proposal were erroneous with the exception of State tax, proper evaluation of awardee's costs would have indicated that it had proposed lower realistic cost than protester ---- 352
Objection to upward NASA cost adjustment in offeror's cost proposal, made because NASA perceived deficiency in offeror's response of RFP spare parts formula, is untimely because record shows clear disagreement between offeror and agency at close of discussion, as to realism to RFP terms and adequacy of response thereto, and inaction by agency in failing to accede to protester's objection by date established for receipt of revised proposals notified offeror that it must timely protest. Also, other objections to cost adjustments, even if sustained, do not alter relative ranking of offerors ---- 408
Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version ---- 681
Reasonableness of proposed cost
Cost proposals offered on cost-reimbursement basis should be subject to independent cost projection to determine realism and reasonableness of proposed costs since evaluated costs provide sounder basis for determining most advantageous proposal ---- 530
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 Govt. 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 ---- 896
Where GAO previously judged probable cost evaluation to be doubtful in certain respects, actions taken by NASA source selection official—in considering certain cost data and reaching determination that neither cost reevaluation nor reconsideration of selection decision is warranted—are responsive to intent of GAO recommendation. Under circumstances, additional analysis in area of application of G&A cost rates does not appear to be required ---- 1009
Upward cost adjustment
Upon review, agency's upward cost adjustments (for low skill mix, project management and staff costs, and G&A) were not improper since, based on Government cost estimate, evaluation board could properly

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
Upward cost adjustment—Continued Page
compensate for deficiencies in protester's approach. Also, no objection is found to downward treatment of proposed fee. Modified (correction) by 54 Comp. Gen. 1009 ---- 562

Wages below minimum effect
Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates, during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version ---- 681

Cost-plus-incentive-fee contracts
Evaluation
Failure of procuring agency to resolve before award discrepancy between award price on cost-plus-incentive-fee basis of development contract and Government cost estimate for development work was inconsistent with ASPR 3-405.4(b) contemplating negotiation of realistic target cost to provide incentive to contractor to earn maximum fee through ingenuity and effective management ---- 169

Cost-type
Award on basis other than price
Unsuccessful offeror's protest based on ground that it should have been selected for award of cost-type contract because it proposed the lowest cost is denied since agency reasonably determined that technically superior offer was most advantageous to Government ---- 783

Technical/cost justification
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" ---- 896

Cut-off date
Common cut-off date requirement
While protester presents general challenge to NASA procedure of conducting "discussions" with offerors in competitive range, with "negotiations" limited to definitization of contract with selected offeror, charging that procedure violates statutory and regulatory requirements for meaningful negotiation with all offerors in range and abridges requirement for common cutoff date, after review of discussions con-

CONTRACTS—Continued
Negotiation—Continued
Cut-off date—Continued
Common cut-off date requirement—Continued Page

ducted here, and adherence to common cutoff date for proposal revisions, it cannot be concluded that procedures leading to selection of offeror found significantly superior in mission suitability, and lower in cost than protester, varied materially from requirements of 10 U.S.C. 2304(g)---- 408

Compliance with formalities

Once requirement for meaningful negotiations has been met and best and final offers have been submitted, it is incumbent upon agency to evaluate these offers, and agency's failure to disclose quantum of subsequent cost realism adjustments, with opportunity for offerors to point out errors, does not constitute failure to have meaningful negotiations. Negotiation process cannot be indefinitely extended for purpose of providing offeror opportunity to take issue with cost realism analysis--- 352

Reopening negotiations

Protest that no award can be made under RFP (issued by NASA's Langley Research Center for support services on a cost-plus-award-fee basis) because all proposals expired 120 days after date of submission of original proposals, while agency concludes that proposals expire 120 days after receipt of best and final offers, need not be decided since all offerors, including protester, subsequently revived offers even if they had expired_ 783

Discussion requirement
Competition. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)
Reopening negotiation justification

Where in course of final discussion with sole offeror remaining in competitive range contract being negotiated has significantly changed from RFP under which competitive range was determined, in absence of compelling reason, contracting officer must take action to amend RFP and seek new offers---------- 1080

Duration, etc.

Offeror's purported post-closing date consent to certain contract clauses which were incorporated into RFP by reference and to which offeror had not objected in its initial proposal, did not constitute the conduct of discussions---------- 276

Evaluation factors

Where cancellation of 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 an FPMR provision stating that "separate charges" will not be considered in evaluating offers—is of interest for future procurements. Therefore, question is referred to GSA so it can consider whether FPMR provision should be revised---------- 872

Additional factors
Not in request for proposals

Consideration of additional evaluation factors not contained in RFP was improper since prospective offerors are entitled to be advised of evaluation factors which will be applied to their proposals---------- 530

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Administrative determination Page
Absent clear showing of lack of rational basis for technical judgment reached by procurement activity that proposed design is state-of-art advancement within design-to-production cost limitation of RFP, GAO, on record, as supplemented by comments from interested parties, finds no reason to question judgment exercised by activity ---- 169
Question concerning whether unsuccessful offeror's proposal was unfairly downgraded does not warrant reevaluation by our Office since record presents evidence in rebuttal to this contention, and determination of relative desirability of proposal is properly function of procuring activity and evaluation appears to have neither been arbitrary nor capricious; nor will GAO substitute its judgment for contracting official's as to which areas should be evaluated without clear showing of unreasonableness, favoritism, or violation of procurement statutes and regulations ---- 775
Protest by unsuccessful offeror that its proposal was unfairly evaluated is not substantiated where record shows there was no arbitrary abuse of discretion, or violation of regulation or statute by agency. Determination of relative desirability and technical adequacy of proposals is primarily function of agency which enjoys a reasonable range of discretion in evaluation and in determination of which proposal is to be accepted for award as in the best interest of the Government ---- 783
All offerors informed requirement
Where reading of evaluation factors statement in NASA RFP gives reasonably clear indication of relative importance of various factors, requirement that offerors be informed of importance of cost in relation to technical and other factors is satisfied. Description of statement of work as "level of effort" did not establish cost as overriding evaluation factor, because offerors were asked to exercise flexibility and discretion in proposing support services of greater scope and complexity than those performed under predecessor contract ---- 1009
Competitive advantage precluded
Contrary to concept implicit in negotiated procurements and statutory requirement (10 U.S.C. 7361(c)(2) (1970)) for maximum competition for award of ship salvage contract, evaluation of competitive proposals should not have involved consideration of incumbent's east coast capabilities in selecting awardee for west coast contract and should have recognized historical cost importance of ship husbanding in evaluation scheme ---- 375
Conformability of equipment, etc.
Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Cost analysis
Normalized treatment
NASA's normalized treatment in probable cost analysis of costs proposed by offerors for payment of New Mexico Gross Receipts Tax is not objectionable, because tax and agency's treatment of costs for tax payment are factors applicable to all offerors, and cited state revenue ruling does not indicate with certainty that continuation of incumbent contractor's privileged tax position is certain. Modified (correction) by 54 Comp. Gen. 1009 ---- 562

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Cost realism Page
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 Govt. 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 ---- 896
Not prejudicial
Cost realism evaluation which contained improper upward adjustment for erroneously determined omission of cost for two employees was not prejudicial to protester's position for even assuming all other cost adjustments to protester's proposal were erroneous with the exception of State tax, proper evaluation of awardee's costs would have indicated that it had proposed lower realistic cost than protester ---- 352
Criteria
Administrative determination
Lacking independent technical and cost analysis of relative merits of competing proposals in "band 8" approaches and operational effectiveness of system without band 8 requirement, GAO cannot question agency's decision to eliminate band 8 requirement in order to preserve design-to-production cost constraint or subsequent decision, based on possible future importance of requirement to partially restore band 8 coverage via option technique ---- 169
In RFP setting forth Government's best estimate of workload and skill requirements (115 man-years of effort) and further indicating that 115 level is not fixed but significant deviation must be adequately explained, award to contractor proposing 104 man-years is not improper since RFP places no man-year floor to limit proposers and ultimate determination of reasonableness and feasibility of any offeror's proposing significantly less than 115 man-years is that of technical evaluators. Moreover, 6 of 7 proposers proposed less than 106 man-years and contractor is now performing satisfactorily at or below 104 man-year level ---- 352
Contrary to ASPR
Use of evaluation factor, dollars per quality point ratio, not indicated in RFP, treats cost in manner other than offerors were led to believe upon reading § 1C.14 "Evaluation Criteria," and therefore, is in contravention of ASPR § 3-501 which requires full disclosure in RFP of method of evaluation ---- 775
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 ---- 896
Responsiveness of proposal
GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria—Continued
Responsiveness of proposal—Continued Page

evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506 44

Data, rights, etc.
Technical transfusion

Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3-805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion 44

Erroneous evaluation
Alleged

Contention that award to offeror who received greatest number of points upon technical evaluation was improper because scores of only one of five panel members clearly favored that offeror's proposal is without merit since function of technical evaluation panel is to score proposals in terms of evaluation factors set forth in solicitation and not to arrive at consensus as to which offeror should receive award. Since source selection authority had information regarding individual as well as total scores, determination to award on basis of highest total point score and lowest price was not improper 1035

Factors other than price
Greatest value to Government

Unsuccessful offeror's protest based on ground that it should have been selected for award of cost-type contract because it proposed the lowest cost is denied since agency reasonably determined that technically superior offer was most advantageous to Government 783

Relative importance of price

RFP which failed to list relative importance of price vis-a-vis listed evaluation factors should be amended where record indicates such failure resulted in prejudice to competing offerors 530

Technical acceptability

GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factors other than price—Continued
Technical acceptability—Continued Page

primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness ---- 60

Although GAO recognizes that cost should be considered in determining most advantageous proposal in negotiated procurement, protester's proposal was properly rejected as technically unacceptable even though proposed cost was low ---- 60

Elimination, without formal advice to offerors, of cost realism standard as applied to preproduction development costs, does not require conclusion that selection of technically superior offeror, whose evaluated unit production cost was within RFP design-to-production-cost limitation but whose development costs were high, was improper under cost evaluation scheme of RFP ---- 169

In view of agency's primary responsibility with respect to determinations of highly technical nature, GAO will not disturb award where record reasonably supports administrative determination that successful offeror's technical approach was best operational and most cost effective method ---- 363

Manning requirements
Dollar/hour ratio

Where RFP requires offeror's dollar/hour ratio to exceed offeror's basic labor expense, offer containing dollar/hour of $3.77 and basic labor expense of $3.41 is acceptable ---- 586

Government estimated basis

Low offer for mess attendant services which proposed use of 64.5 percent of Government's estimate without presenting detailed justification required by RFP as to why offeror could perform at that level was improperly accepted; fact that incumbent contractor submitted offer of 73.9 percent of estimate, that Small Business Administration representative felt offeror could perform at that level, and that offeror was successful subcontractor at another base does not constitute contemplated justification ---- 586

Propriety

Use in Mission Suitability evaluation of manning and staffing guideline, developed by evaluation board based on its knowledge of work requirements, is not improper, and its judgment in downgrading protester's proposal because of technician demotions and staff salary reductions, while proposing to substantially retain present work force, resulting in low skill mix and expected difficulties in personnel retention, is not unreasonable. Insufficient basis exists to conclude that NASA erred in regarding proposal deficiencies as coming within exception of 10 U.S.C. § 2304(g) requirement for "written or oral discussions," or that exception itself represented failure to comport with statute. Modified (correction) by 54 Comp. Gen. 1009 ---- 562

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Method of evaluation
Technical evaluation panel Page

Since appointment of panel members on the technical evaluation panel is matter within administrative discretion of agency, lack of parents' representation does not provide basis for objection to award of contract. 1035

Technical proposals

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. 896

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 896

Options

Procedural validity of option technique in development contract is unquestionable, since ASPR 1–1501 specifically provides for use of appropriate option provision in research and development contracts, and ASPR 1–1504(c), (d), and (e), contrary to contention of protesting concern, provide that options are to be evaluated only if, unlike the subject procurement, the Government intends to exercise option at time of award or if contract is fixed-price 169

Price in excess of RFP ceiling

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. 521 16

Point rating
Evaluation guidelines

Statement that awardee was given quality points for areas of proposal containing errors is unfounded as record shows that all proposal deficiencies were rectified during discussions and that awardee was downgraded in areas where its proposal was less desirable than others submitted, moreover, unsubstantiated allegation that awardee received extra quality points for proposal presentation is not supported by record, and therefore, cannot be accepted 775

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Point rating—Continued
Evaluation guidelines—Continued Page

Contention that award to offeror who received greatest number of points upon technical evaluation was improper because scores of only one of five panel members clearly favored that offeror's proposal is without merit since function of technical evaluation panel is to score proposals in terms of evaluation factors set forth in solicitation and not to arrive at consensus as to which offeror should receive award. Since source selection authority had information regarding individual as well as total scores, determination to award on basis of highest total point score and lowest price was not improper ---- 1035

Propriety of evaluation

Statement that awardee was given quality points for areas of proposal containing errors is unfounded as record shows that all proposal deficiencies were rectified during discussions and that awardee was downgraded in areas where its proposal was less desirable than others submitted, moreover, unsubstantiated allegation that awardee received extra quality points for proposal presentation is not supported by record, and therefore, cannot be accepted ---- 775

Protester's allegation of an inconsistency between technical point score and narrative portion of selection statement is unfounded because source selection statement is amply justified in light of the assigned technical point ratings ---- 783

Price elements for consideration
Cost estimates

On procurement record showing that protesting offeror's cost proposal, encompassing cost elements that are required to be examined under procedures for cost analysis set forth in ASPR 3-807.2(c), was analysed by evaluators in arriving at offeror's rating in cost area; that during course of negotiations several inquiries were made of protesting concern about cost proposal; and that consideration was given to reports submitted by field pricing support activities, GAO cannot conclude there was failure to achieve minimum standard of cost analysis under cited regulation ---- 169

Negotiations with unsuccessful offeror as to system weight discrepancy should have, at least, indirectly made it aware that cost estimate was questionable; nevertheless it would have been preferable to have advised offerors that submitted cost proposals were considered generally unrealistic and to convey specifics of cost estimate discrepancies so long as another offeror's unique technical and cost approach would not be disclosed ---- 169

Cost proposals offered on cost-reimbursement basis should be subject to independent cost projection to determine realism and reasonableness of proposed costs since evaluated costs provide sounder basis for determining most advantageous proposal ---- 530

NASA's normalized treatment in probable cost analysis of costs proposed by offerors for payment of New Mexico Gross Receipts Tax is not objectionable, because tax and agency's treatment of costs for tax payment are factors applicable to all offerors, and cited State revenue ruling does not indicate with certainty that continuation of incumbent contractor's privileged tax position is certain. Modified (correction) by 54 Comp. Gen. 1009 ---- 562

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Price elements for consideration—Continued
Cost estimates—Continued Page

Protest by unsuccessful offeror that its proposal was unfairly evaluated is not substantiated where record shows there was no arbitrary abuse of discretion, or violation of regulation or statute by agency. Determination of relative desirability and technical adequacy of proposals is primarily function of agency which enjoys a reasonable range of discretion in evaluation and in determination of which proposal is to be accepted for award as in the best interest of the Government---- 783

Where GAO previously judged probable cost evaluation to be doubtful in certain respects, actions taken by NASA source selection official—in considering certain cost data and reaching determination that neither cost reevaluation nor reconsideration of selection decision is warranted—are responsive to intent of GAO recommendation. Under circumstances, additional analysis in area of application of G&A cost rates does not appear to be required---- 1009

Dollar/hour ratio

Where RFP requires offeror's dollar/hour ratio to exceed offeror's basic labor expense, offer containing dollar/hour of $3.77 and basic labor expense of $3.41 is acceptable---- 586

Price primary consideration

Prudent offeror in negotiated procurement should have realized that, in accordance with RFP direction for offerors to submit proposals on most favorable terms from technical and cost considerations, price, especially with regard to fixed-price award ultimately selected, would still have significant importance in selecting proposed contractor, notwithstanding prior agency expressions of concern about lowness of wage rates proposed by offeror for cost-type award contemplated earlier in procurement---- 681

Prior experience

While protester contends that agency is prejudiced against it because of agency's past actions and alleged conflict of interest on part of agency employees, record indicates no bias on agency's part in evaluation of proposals or selection of awardee. Moreover, claims of similar nature previously have been investigated by Department of Justice and it appears no grounds existed for prosecution---- 44

Propriety of evaluation

GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506---- 44

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Propriety of evaluation—Continued Page

Rejection of revised proposal is not improper since determination as to whether proposal is technically acceptable is primarily matter for administrative discretion and record does not show agency conclusion that protester's proposed approach contains deficiencies which present unacceptable risk that proposed system would not meet desired standards is unreasonable---- 60

Question concerning whether unsuccessful offeror's proposal was unfairly downgraded does not warrant reevaluation by our Office since record presents evidence in rebuttal to this contention, and determination of relative desirability of proposal is properly function of procuring activity and evaluation appears to have neither been arbitrary nor capricious; nor will GAO substitute its judgment for contracting official's as to which areas should be evaluated without clear showing of unreasonableness, favoritism, or violation of procurement statutes and regulations---- 775

Standard items
Normalization of prices

Where objections to NASA evaluation of Mission Suitability, RFP's most important evaluation criterion, are not sustained, but review casts doubts on reasonableness of normalization of certain costs and reevaluation might increase cost differential between offerors—considering that source selection of higher cost offeror for award of cost-plus-award-fee contract is based on significant mission suitability superiority, reasonableness of cost, and lack of significant cost difference among offerors—Source Selection Official should judge whether those doubts are of sufficient impact to justify cost reevaluation or reconsideration of selection decision. Modified (correction) by 54 Comp. Gen. 1009---- 562

Superior product offered

Absent clear showing of lack of rational basis for technical judgment reached by procurement activity that proposed design is state-of-art advancement within design-to-production cost limitation of RFP, GAO, on record, as supplemented by comments from interested parties, finds no reason to question judgment exercised by activity---- 169

Unsuccessful offeror's protest (based on ground that it should have been selected for award of cost-type contract because it proposed the lowest cost is denied since agency reasonably determined that technically superior offer was most advantageous to Government---- 783

Tax benefits

NASA's normalized treatment in probable cost analysis of costs proposed by offerors for payment of New Mexico Gross Receipts Tax is not objectionable, because tax and agency's treatment of costs for tax payment are factors applicable to all offerors, and cited State revenue ruling does not indicate with certainty that continuation of incumbent contractor's privileged tax position is certain. Modified (correction) by 54 Comp. Gen. 1009---- 562

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Timeliness of consideration Page
GAO finds no evidence in record to support allegation that Air Force aided other offerors in price revisions or that such revisions resulted from other than proper negotiation process. Although protester contends time extension for award was made to benefit awardee, record indicates Air Force needed additional time to evaluate proposal revisions submitted pursuant to negotiations with all offerors 44

Wage rates
Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version 681

Field pricing support reports
Contracts in excess of $100,000
Requirement in ASPR 3-801.5(b) that field pricing support report be requested prior to negotiation of contract in excess of $100,000 was complied with in production cost area even though procurement contracting officer only requested review of offeror's proposed escalation rate for the period in question, the learning curve to be applied in production, and the make-up of the production unit cost estimate, since ASPR 3-801.5(b)(3) provides that contracting officer has right to stipulate "specific areas for which input (field pricing support) is required" 169

Manning requirements
Evaluation. (*See* **CONTRACTS, Negotiation, Evaluation factors, Manning requirements**)
Novation agreements
Effect on offers or proposals
While provisions of anti-assignment statutes are not applicable to assignment of proposals, rationale for position that transfer or assignment of proposals is prohibited unless such transfer is effected by operation of law to legal entity which is complete successor in interest to original offeror is analogous to that of such statutes and "by operation of law" should be interpreted as including by merger, corporate reorganization, sale of an entire business, or that portion of business embraced by proposal, or other means not barred by anti-assignment statutes 580

Offers or proposals
Assignments
Where protester attempted to substitute itself as offeror of proposal submitted by other firm before contract award, contracting officer did not act unreasonably in refusing to allow substitution although protester could have been recognized as successor in interest in light of all circumstances 580

Best and final
Once requirement for meaningful negotiations has been met and best and final offers have been submitted, it is incumbent upon agency to

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued Page
evaluate these offers, and agency's failure to disclose quantum of subsequent cost realism adjustments, with opportunity for offerors to point out errors, does not constitute failure to have meaningful negotiations. Negotiation process cannot be indefinitely extended for purpose of providing offeror opportunity to take issue with cost realism analysis---- 352

Additional round
Protest that no award can be made under RFP (issued by NASA's Langley Research Center for support services on a cost-plus-award-fee basis) because all proposals expired 120 days after date of submission of original proposals, while agency concludes that proposals expire 120 days after receipt of best and final offers, need not be decided since all offerors, including protester, subsequently revived offers even if they had expired---- 783

Deviations
Informal *v.* substantive
Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. 521---- 16

Offeror's purported post-closing date consent to certain contract clauses which were incorporated into RFP by reference and to which offeror had not objected in its initial proposal, did not constitute the conduct of discussions---- 276

In RFP setting forth Government's best estimate of workload and skill requirements (115 man-years of effort) and further indicating that 115 level is not fixed but significant deviation must be adequately explained, award to contractor proposing 104 man-years is not improper since RFP places no man-year floor to limit proposers and ultimate determination of reasonableness and feasibility of any offeror's proposing significantly less than 115 man-years is that of technical evaluators. Moreover, 6 of 7 proposers proposed less than 106 man-years and contractor is now performing satisfactorily at or below 104 man-year level---- 352

Evaluation
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,

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Evaluation—Continued
Conflict between evaluators—Continued Page

that proposals were "essentially equal;" that differences between proposals were not substantial; and that proposals offered "equal chance of program success." ... 896

Mess attendant services
Man-hour estimates

Low offer for mess attendant services which proposed use of 64.5 percent of Government's estimate without presenting detailed justification required by RFP as to why offeror could perform at that level was improperly accepted; fact that incumbent contractor submitted offer of 73.9 percent of estimate, that Small Business Administration representative felt offeror could perform at that level, and that offeror was successful subcontractor at another base does not constitute contemplated justification ... 586

In Navy mess attendant solicitation, where successful offeror proposes to use 64.5 percent of Government estimate with no justification as to why job can be performed at that level and contracting officer admits that if there were more time available for negotiations Government estimate might have been in need of downward revision, under ASPR § 3-805.4(c) (DPC #110, May 30, 1973) failure to reopen negotiation on amended estimate coupled with award on basis of unsubstantiated low offer requires that contract be terminated for convenience of Government ... 586

Prequalification of offerors
Basic ordering type agreements
Approval

Dept. HEW's proposed use of basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved ... 1096

Restrictive of competition

FAA's publication of qualification criteria in Commerce Business Daily to assure that only qualified firms received copies of RFTP appears to be unduly restrictive of competition and should be eliminated from future procurements in absence of appropriate justification on basis that prequalification of offerors is in derogation of principal tenet of competitive system that proposals be solicited in such manner as to permit maximum competition consistent with nature and extent of services or items to be procured ... 612

Prices
Unprofitable

No provision of law prevents award of contract to low offeror even though quoted prices may be unrealistically low or result in unprofitable contract ... 84

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Qualifications of offerors
Experience Page

Since phrase "similar or related" as used in "Qualifications" evaluation standard of RFP permits rational interpretation that phrase means similar expcrience from "functional or operational" viewpoint as well as similar experience from purely "content" viewpoint, "Qualifications" rating given successful offeror, which lacked similar "content" experience but possessed similar "functional" experience, cannot be questioned_ 681

Revisions
Evaluation

Rural electric cooperatives, acting pursuant to "Informal Competitive Bidding" procedures approved by REA, were not obligated to evaluate revised proposal submitted by higher of two offerors after cooperatives inquired about possible reduction in price. Moreover, it appears that even had revised proposal been evaluated, selection of contractor would not have been affected_____ 791

Substitute offeror

Where protester attempted to substitute itself as offeror of proposal submitted by other firm before contract award, contracting officer did not act unreasonably in refusing to allow substitution although protester could have been recognized as successor in interest in light of all circumstances_____ 580

Unbalanced
Not automatically precluded

Upon confirmation of apparently unbalanced offer for preparation of technical publication data, acceptance is proper, as fact that offer may be unbalanced does not render it unacceptable nor of itself invalidate award of contract to low offeror in absence of evidence of irregularity or substantial doubt that award will in fact result in lowest cost to Government_____ 84

Preward surveys
Favorable

Contracting officer did not arbitrarily determine firm to be responsible, although it was undergoing Chapter XI arrangement, in view of favorable preaward surveys concluding that firm had financial and other resources adequate for performance of the contract_____ 276

Prices
"Buy-ins"

GAO examination of technical and price evaluation of awardee's proposal indicates evaluation was reasonable and in accord with stated evaluation criteria. Although selected design has no operational history or actual cost basis, and has yet to undergo testing procedure, RFP contemplated development contract, including testing thereunder, and did not require item to have been aircraft tested. Furthermore, GAO finds record supports agency's conclusion that successful offeror's low price is reasonable because of unique design, type of materials used, and employment of low cost production processes; also, Canadian Commercial Corporation certified reasonableness of awardee's prices pursuant to ASPR 6-506_____ 44

CONTRACTS—Continued
Negotiation—Continued
Prices—Continued
Dollar/hour ratio Page
Where RFP requires offeror's dollar/hour ratio to exceed offeror's basic labor expense, offer containing dollar/hour of $3.77 and basic labor expense of $3.41 is acceptable ---- 586

Reduction
Low offeror's substantial reduction of original prices following negotiations provides no reasonable basis to conclude that offeror was supplied with additional information by agency, for it is not uncommon for offerors to offer substantial price reductions in final stages of negotiations, even without change in Government's requirements ---- 84

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Public exigency
Competition sufficiency
Notwithstanding informality of Forest Service's methods of negotiating procurement under public exigency exception, including failure to contact potential supplier, award was not improper. See B–178693, September 14, 1973, which permitted reasonable restriction of number of potential competitors by virtue of circumstances of urgency. Moreover, Forest Service viewed our earlier decision in matter as temporarily not declaring its specification to be restrictive and unreasonably precluding use of protester's helicopter ---- 390

Reopening
Recommendation withdrawn
Recommendation in 54 Comp. Gen. 16 that negotiations be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling is withdrawn in light of contracting agency's position that to do so would not be in best interests of Government based upon significant termination costs ---- 521

Requests for proposals
Administrative determination
Good faith
Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of RFP for air conditioners was arbitrary, since Govt. knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers ---- 215

Advance release
Prejudicial
Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1–1004(b) and 3–501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated ---- 375

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Amendment
Equal competitive basis for all offerors Page

Where, after receipt of proposals, procurement agency decides that it has a preference for a particular approach to satisfy its needs, RFP should be amended to afford all offerors an equal opportunity to revise their proposals and to participate in meaningful negotiations. See ASPR § 3-805.4 (1974 ed.)---- 530

Propriety

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. 521---- 16

Protest

Where offeror submitted initial basic proposal conforming to RFP and initial alternate proposals taking exception to RFP requirement, protest filed after rejection of alternate proposals—seeking amendment of RFP to eliminate stated requirement—is untimely, because protests against apparent improprieties in RFP must be filed prior to closing date for receipt of initial proposals---- 1077

Basic ordering type agreements

Dept. HEW's proposed use of basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved---- 1096

Buy American Act
Restriction not for application
Canadian offeror

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulations' propriety---- 44

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Cancellation Page

Allegation that cancellation of RFP was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Govt.'s needs without modifications does not justify recovery of proposal preparation and related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not made in bad faith or arbitrarily or capriciously, since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established---------- 215

Before canceling an RFP involving lease of computer equipment, Navy had ascertained that alternative source of supply within Govt. 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---------- 872

Defective
Evaluation factors

Use of evaluation factor, dollars per quality point ratio, not indicated in RFP, treats cost in manner other than offerors were led to believe upon reading § 1C.14 "Evaluation Criteria," and therefore, is in contravention of ASPR § 3-501 which requires full disclosure in RFP of method of evaluation---------- 775

Deficient

Even though deficiencies exist in RFP, any possible prejudice caused by deficiencies is only speculative and question whether awardee would have been other than party selected cannot be appropriately resolved; moreover, given nature and state of procurement, termination for convenience would not be economically feasible at this time---------- 775

Evaluation criteria

So long as offerors were advised to base production unit cost estimates on cumulative average costs for 241 production units, there was no unfair advantage in permitting one offeror, by insertion of special clause, to make its proposed cost contingent on accuracy of projected production figure, since clause makes explicit what is already implicit in proposal instructions. Also, model contract provision furnished to offerors specifically states that equitable adjustment will be made in production unit price for any Government change in production quantity affecting production unit cost---------- 169

Expiration date

Protest that no award can be made under RFP (issued by NASA's Langley Research Center for support services on a cost-plus-award-fee basis) because all proposals expired 120 days after date of submission of original proposals, while agency concludes that proposals expire 120 days after receipt of best and final offers, need not be decided since all offerors, including protester, subsequently revived offers even if they had expired---------- 783

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Expiration date—Continued Page

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---- 930

Master agreement
Use of list

Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms---- 606

Minimum needs requirement
Same for all offerors

Where, after receipt of proposals, procurement agency decides that it has a preference for a particular approach to satisfy its needs, RFP should be amended to afford all offerors an equal opportunity to revise their proposals and to participate in meaningful negotiations. See ASPR § 3-805.4 (1974 ed.)---- 530

Offer
Additional information

While solicitation under two-step formally advertised procurement provided contracting officer with authority to request additional information from offerors of proposals which were considered reasonably susceptible of being made acceptable, fact that protester was not afforded opportunity to revise or modify its proposal was not improper since procuring activity reasonably determined proposal unacceptable and that it could not be made acceptable by clarification or additional information, but would require major revision---- 612

Omissions
Prejudicial

RFP which failed to list relative importance of price vis-a-vis listed evaluation factors should be amended where record indicates such failure resulted in prejudice to competing offerors---- 530

Preparation costs

Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of RFP for air conditioners was arbitrary, since Govt. knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers---- 215

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Preparation costs—Continued Page

Allegation that cancellation of RPF was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Govt.'s needs without modifications does not justify recovery of proposal preparation and related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not made in bad faith or arbitrarily or capriciously, since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established 215

For offeror recommended for award prior to cancellation of 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 ... 872

Costs incurred by firm in attempt to persuade agency to expand specifications are not properly to be considered as bid preparation costs. 937

Submission of unsolicited proposal where offeror knew that consideration of proposal was contingent upon item offered complying with agency requirements does not give rise to compensable bid preparation cost claim where agency had not advised offeror that item would meet agency's needs. Expenses incurred in preparing proposal cannot be recouped for failure of above-noted contingency, for under circumstances, submission of unsolicited proposal did not give rise to any obligation to fairly and honestly consider proposal 937

Proposal deviations

Contract should not have been awarded to offeror who quoted option price in excess of ceiling in RFP, since it was prejudicial to other offerors and contrary to best interests of Government, and therefore, negotiations should be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling, notwithstanding action will amount to auction technique, as GAO does not believe that improper award must be allowed to stand solely to avoid implications of auction situation. Modified by 54 Comp. Gen. 521 16

Disqualification of offeror

GAO does not believe agency acted unreasonably in pointing out by letter 24 deficiencies in protester's technical proposal rather than conducting "give and take" oral negotiations, or in failing to negotiate further when revised proposal was also considered deficient, as there is no inflexible rule used in construing the requirement in 10 U.S.C. 2304(g) for written or oral discussions, rather extent and content of discussions is primarily for agency determination. Furthermore, it would be unfair for agency to help one offeror through successive rounds of discussions to bring its proposal up to level of other adequate proposals where offeror's revised proposal contains large number of uncorrected deficiencies resulting from offeror's lack of competence, diligence or inventiveness 60

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under
After award
Prior to closing date Page

Protest against sole-source award which is filed prior to closing date for receipt of proposals is timely under 4 CFR 20.2(a), notwithstanding fact that contract was awarded prior to date of filing---- 1114

Burden of proof

In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release information on its requirements, protester should have pursued disclosure request under Freedom of Information Act---- 1110

Closing date
Date for receipt of initial proposals

Where offeror submitted initial basic proposal conforming to RFP and initial alternate proposals taking exception to RFP requirement, protest filed after rejection of alternate proposals—seeking amendment of RFP to eliminate stated requirement—is untimely, because protests against apparent improprieties in RFP must be filed prior to closing date for receipt of initial proposals---- 1077

Timeliness

Although untimely filed under its Interim Bid Protest Procedures and Standards, GAO considers protests which raise significant issues concerning procurement agency's partiality toward incumbent to prejudice of other competitors for award of ship salvage contract---- 375

Objection to upward NASA cost adjustment in offeror's cost proposal, made because NASA perceived deficiency in offeror's response to RFP spare parts formula, is untimely because record shows clear disagreement between offeror and agency at close of discussion, as to realism of RFP terms and adequacy of response thereto, and inaction by agency in failing to accede to protester's objection by date established for receipt of revised proposals notified offeror that it must timely protest. Also, other objections to cost adjustments, even if sustained, do not alter relative ranking of offerors---- 408

Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request---- 1009

Protest against refusal of agency to consider proposal for award of production contract from firm which, although not selected as development contractor, independently develops allegedly comparable product is timely under 4 CFR 20.2(a). Although solicitation leading to award of development contracts warned that production contract would be awarded only to development contractor, protester could not know for certain that it would not be permitted to submit proposal until it was so notified after issuance of solicitation for production contract---- 1007

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Requirements statement sufficiency Page
Claim for recovery of $3,530 in proposal preparation, preaward and cancellation costs based on allegation that issuance of RFP for air conditioners was arbitrary, since Govt. knew similar units were available from another agency's inventory, is denied, since no evidence is found showing solicitation was issued in bad faith; and, even if judged by reasonable basis standard, contracting officer's unequivocal statement that he had no indication when RFP was issued that settlement of dispute was in prospect, which would have effect of making available default termination inventory, indicates reasonable basis for soliciting offers ... 215
Restrictive of competition
Although protest on basis of sole-sourcing is directed nominally against prime contractor, in actuality it is against restrictive requirement in Government RFP and is therefore within class described in section 20.1(a) of Interim Bid Protest Procedures and Standards and for consideration by GAO ... 231
Specification requirements
Prudent offeror in negotiated procurement should have realized that, in accordance with RFP direction for offerors to submit proposals on most favorable terms from technical and cost considerations, price, especially with regard to fixed-price award ultimately selected, would still have significant importance in selecting proposed contractor, notwithstanding prior agency expressions of concern about lowness of wage rates proposed by offeror for cost-type award contemplated earlier in procurement ... 681
Waiver
Air Force not required to notify other offerors of waiver of specification requirements prompted by competing offeror's unique technical approach and to allow offerors opportunity to submit proposal revisions for technical evaluation pursuant to ASPR 3–805.4. As agency indicates offeror's approach was breakthrough in state of art, GAO holds that providing other offerors opportunity to submit revised proposal would have improperly involved technical transfusion ... 44
Statement of work
Air Force use of internal pamphlet designed to aid in drafting of statements of work is not objectionable since it is only internal administrative document that does not affect measure of actions, which is Armed Services Procurement Regulation ... 735
Submission date
Where offeror submitted initial basic proposal conforming to RFP and initial alternate proposals taking exception to RFP requirement, protest filed after rejection of alternate proposals—seeking amendment of RFP to eliminate stated requirement—is untimely, because protests against apparent improprieties in RFP must be filed prior to closing date for receipt of initial proposals ... 1077
Timeliness
Protest against sole-source award which is filed prior to closing date for receipt of proposals is timely under 4 CFR 20.2(a), notwithstanding fact that contract was awarded prior to date of filing ... 1114

CONTRACTS—Continued
Negotiations—Continued
Requests for proposals—Continued
Unsolicited
Preparation costs Page
Submission of unsolicited proposal where offeror knew that consideration of proposal was contingent upon item offered complying with agency requirements does not give rise to compensable bid preparation cost claim where agency had not advised offeror that item would meet agency's needs. Expenses incurred in preparing proposal cannot be recouped for failure of above-noted contingency, for under circumstances, submission of unsolicited proposal did not give rise to any obligation to fairly and honestly consider proposal 937

Requests for quotations
Failure to solicit
Notwithstanding informality of Forest Service's methods of negotiating procurement under public exigency exception, including failure to contact potential supplier, award was not improper. See B–178693, September 14, 1973, which permitted reasonable restriction of number of potential competitors by virtue of circumstances of urgency. Moreover, Forest Service viewed our earlier decision in matter as temporarily not declaring its specification to be restrictive and unreasonably precluding use of protester's helicopter 390

Responsibility of offeror
Administrative determination
Contracting officer did not arbitrarily determine firm to be responsible, although it was undergoing Chapter XI arrangement, in view of favorable preaward surveys concluding that firm had financial and other resources adequate for performance of the contract 276

Sole source basis
Broadening competition
Factors used to justify sole-source procurement of public education and information programs such as: nonprofit organization's makeup; fact that organization would utilize volunteers in performance; organization's rapport and understanding of State and local Government, key memberships, respected position, community support and coalition approach do not represent proper justification for noncompetitive procurements irrespective of fact that nonprofit organization could quote lower price since statutes require full and free competition consistent with what is being procured 58
Although protest on basis of sole-sourcing is directed nominally against prime contractor, in actuality it is against restrictive requirement in Government RFP and is therefore within class described in section 20.1(a) of Interim Bid Protest Procedures and Standards and for consideration by GAO 231

Justification
Decision is affirmed that blanket offer by protester to provide laundry system is insufficient to show arbitrariness of noncompetitive procurement from only source believed capable of furnishing system meeting Army's requirements 1100

CONTRACTS—Continued
Negotiation—Continued
Sole source basis—Continued
No justification
Determinable factors Page

Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on determination that only that item could satisfy agency's minimum needs 1114

Requests for proposals issuance

Contracting agency acted reasonably in restricting component of end item in RFP to previous manufacturer where detailed manufacturing drawings were not available and agency determined that it would add undue risk to timely completion of total procurement to allow protester to design product to existing data 231

Specifications. (*See* **CONTRACTS, Specifications**)
Two-step procurement

Determination to limit 1974 utility aircraft two-step procurement to turboprop aircraft, based on agencies' determination of minimum needs, guidance from congressional committees, and contracting officer's belief that fuel shortages require procurement of more economical turboprops is not objectionable. Fact that protester's turbofan jets were found most cost effective under 1972 canceled RFP does not demonstrate unreasonableness of 1974 determination and fact that receipt of single acceptable offer results in sole-source procurement does not prove specifications were drafted to cause this result 97

Though stated laundry system requirements, including need for independent batch processing, are questioned, agency determination of minimum needs is not shown to be without reasonable basis. Protester's blanket offer to supply acceptable system, including proposed use of washer and extractor not shown to meet requirements, provides insufficient basis to question determination to procure sole-source (10 U.S.C. § 2304(a)(10), ASPR § 3–210.2(i) (1973 ed.)) from only concern offering acceptable system. However, in future laundry system procurements, use of two-step advertising procedure might be desirable 445

Specifications conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Subcontracts
Qualifications of subcontractors

Where successful offeror submitted qualifications of two alternative subcontractors for evaluation with its proposal and contracting officer verified offeror's ability to commit highest evaluated of two subcontractors, even though offeror had made no firm commitment to either, merely having obtained firm quotes from both, unlike listing of subcontractor requirements in formally advertised invitations by certain Federal agencies, award was not improper since neither applicable procurement regulations nor RFP required firm subcontractor commitment or precluded proposal of alternate subcontractors and Govt. had right to approve subcontractors 468

CONTRACTS—Continued
Negotiation—Continued Page

Technical acceptability of equipment, etc., offered. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

Technical evaluation panel
Members
Absence

Regarding contention that importance of attending final evaluation was not stressed to one of five panel members who chose not to attend, and that incumbent contractor would have received higher technical score if that member had been present, nothing in record indicates that nature of notification given that member was different from that given other panel members. In view thereof, and since there is no regulation precluding panel's functioning with less than all five members, no impropriety in conduct of technical evaluation is shown---------- 1035

Appointment

Since appointment of panel members on the technical evaluation panel is matter within administrative discretion of agency, lack of parents' representation does not provide basis for objection to award of contract---------- 1035

Two-step procurement
Criteria

While solicitation under two-step formally advertised procurement provided contracting officer with authority to request additional information from offerors of proposals which were considered reasonably susceptible of being made acceptable, fact that protester was not afforded opportunity to revise or modify its proposal was not improper since procuring activity reasonably determined proposal unacceptable and that it could not be made acceptable by clarification or additional information, but would require major revision---------- 612

First step
Technical approaches

Contracting officer's rejection of technical proposal submitted under first step of two-step formally advertised procurement was proper exercise of discretion since proposal was determined unacceptable and there is no evidence of record that the determination was unreasonable or made in bad faith. Since evaluation and overall determination of technical adequacy of proposal is primarily function of procuring activity, which will not be disturbed in absence of clear showing of unreasonableness or an abuse of discretion, judgment of agency's technical personnel will not be questioned where such judgment has a reasonable basis merely because there are divergent technical opinions as to proposal acceptability---------- 612

Wage increases
Agency's *v.* protester's version

Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version---------- 681

CONTRACTS—Continued

Options

Criteria for exercise of option Page

Option provision should be corrected to: (1) warn bidders of consequences of failure to abide by its terms; (2) clarify whether requirement that option prices be no higher than initial quantity refers to first program year or each year; and (3) exclude contingency in option price that covers possibility that option may be exercised when costs exceed bid price thereby avoiding payment of premium by Govt. in cost of firm quantity ---- 967

Duration

Computation

In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirement" for option years was not established nor was there reasonable certainty that funds would be available to permit exercise of options. See ASPR 1–1503 ---- 242

Exercised

Performance

Cases dealing with agency decision to exercise option (46 Comp. Gen. 874 (1967); B–151759, November 11, 1963) are distinguishable from instant case regarding whether to require performance of already exercised option ---- 527

Not to be exercised

Negotiated procurement not justified

"Award" made to party after competitive negotiation by incorporating item in question into party's then current contract containing option provision was improper—since it is incongruous for contract negotiated out of urgency to contain option provision. Therefore, option should not be exercised ---- 390

Payments

Assignments. (*See* **CLAIMS, Assignments, Contracts**)

Discounts. (*See* **CONTRACTS, Discounts**)

Effect of subsequent court decisions

Settlement agreements regarding payments for value engineering may not be reformed to conform with judicial interpretation of contract provisions in subsequent court case not involving this contractor, the court case not indicating that it would have retroactive effect on other cases ---- 928

Withholding

Unpaid wages of employees not covered by labor stipulations

Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies ---- 24

CONTRACTS—Continued

Price adjustment

Extraordinary contractual relief

Public Law 85–804 Page

Our Office cannot review agency's findings under Pub. L. 85–804 since we are not one of Govt. agencies authorized by statute or implementing Executive orders to modify contracts without consideration 1031

Fixed-price contract

Escalation clause

Inclusion of price escalation clause which limited price increase to 25 percent of original price was not done by mutual mistake since Govt. did not intend to compensate contractor for all increases in costs but rather merely intended to share the risk of possible price increase with contractor 1031

Rule

Request for no-cost cancellation of contract option because of increased costs of performance not granted where alleged cause for cost increase due to (1) acts done by Government in its sovereign capacity (dollar devaluation and embargo), and (2) tremendous inflationary pressures, because contract contained no basis for such cancellation. Moreover, mere fact that contract performance becomes burdensome or even results in loss due to unanticipated rises in material costs does not entitle fixed-price contractor to relief 527

Where a contractor has entered into a fixed price contract with the Government and there is a subsequent increase in transportation expenses as a result of a freight rate increase, the contractor and not the Government must bear the increased expense 559

Privity

Subcontractors

Award "for" Government

As matter of policy, GAO generally will not consider protests against awards of subcontracts by prime contractors, even where prime contract is of cost-reimbursement type, whether or not subcontract has been awarded. However, GAO will consider subcontract protests where prime contractor is acting as Government's purchasing agent; Government's active or direct participation in subcontractor selection has net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in Government's approval of subcontract award is shown; subcontract award is "for" Government; or agency requests advance decision. 51 Comp Gen. 803, modified 767

Protests

Abeyance pending court action

Consideration nonetheless by General Accounting Office

Where issues involved in request for reconsideration are before court of competent jurisdiction, decision on reconsideration generally will not be issued. However, since parties consented to issuance of TRO, after receiving assurance that decision on reconsideration would be issued expeditiously within period of contemplated restraining order, and court was fully aware of both pendency of reconsideration and commitment to issue decision before expiration of TRO, decision on reconsideration is issued 715

CONTRACTS—Continued
Protests—Continued
Abeyance pending court action—Continued
Consideration nonetheless by General Accounting Office—Continued Page

Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request 1009

Temporary restraining order

Even though many issues involved in subcontract protest are before court of competent jurisdiction, GAO will still render decision, since temporary restraining order (TRO) issued by court clearly contemplates GAO decision in matter. However, as matter of policy, decision will not consider merits of subcontract protest. Court was made fully cognizant of this possibility prior to TRO's issuance 767

Even though subcontracting methods of Government prime contractor, who is not purchasing agent, are generally not subject to statutory and regulatory requirements governing Government's direct procurements, contracting agency should not approve subcontract award if, after thorough consideration of particular facts and circumstances, responsible Government contracting officials find that proposed award would be prejudicial to interests of Government. "Federal norm" is frame of reference guiding agency's determinations as to reasonableness of prime contractor's procurement process, although propriety and necessity of variation from details of "Federal norm" is recognized 767

Abeyance pending protester's appeal to agency
Exception

Notwithstanding protester's appeal to agency under Freedom of Information Act, 5 U.S.C. § 552 *et. seq.*, for further documentation relative to merits of its protest, GAO will not refrain from issuing decision pending appeal, where record shows that further delay in issuing decision could harm agency procurement process and protester already has received substantial portion of agency documents 78

Administrative reports
Timeliness

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 20.5 835

Allegations that procuring activity delayed its handling of protest in order to proceed with award under ASPR 2-407.8(b)(3) (1974 ed.) and that procuring activity did not comply with ASPR provision have no merit since even if this Office had been furnished complete administrative report within time limits provided in Interim Bid Protest Procedures and Standards, it is doubtful that a decision would have been rendered by date upon which award needed to be made; furthermore, receipt by protester of oral, rather than written notice of award as provided by ASPR, has no effect upon legality of award 978

Protests—Continued
Negotiations—Continued
After award Page
Allegation that agency improperly failed to conduct discussions was dismissed as untimely since it was filed almost two months after award was made ---- 276

After bid opening
Protest after bid opening that IFB is restrictive is untimely, since Interim Bid Protest Procedures and Standards provide that apparent improprieties in solicitations must be protested prior to bid opening ---- 509
Allegation that sec. 8(a) award of 50 percent of solicitation quantity of cargo nets violates SBA's policy of restricting sec. 8(a) awards to no more than 20 percent of Govt.'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 ---- 913

Award prejudicial
Although untimely filed under its Interim Bid Protest Procedures and Standards, GAO considers protests which raise significant issues concerning procurement agency's partiality toward incumbent to prejudice of other competitors for award of ship salvage contract ---- 375

Burden of proof
Protester
In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release inforamtion on its requirements, protester should have pursued disclosure request under Freedom of Information Act ---- 1100

Conferences
Section 20.9 of Interim Bid Protest Procedures and Standards does not impose time limits within which conference must be either requested or held and we have determined that value of holding conference in this case outweighed possible detrimental effects that delay might have occasioned ---- 978

Contract administration
Not for resolution by GAO
Protest against award of section 8(a) subcontract in which it is alleged that SBA's 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 GAO. However, since the matters raised in the protest concern SBA's adminstration of sec. 8(a) program, they will be considered by GAO in its continuing audit review of SBA activities ---- 913

CONTRACTS—Continued
Protests—Continued
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Conflict of interest

Page

GAO will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case 686

Fraud

GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud 66

Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith 681

Issue concerning whether awardee is nonresponsible for allegedly failing to offer finished product which meets quality of product initially offered will not be considered by GAO, since practice of reviewing protests involving contracting officer's affirmative determination of responsibility has been discontinued absent showing of fraud in finding 775

Reasonableness

Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis 499

Court solicited aid

Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request 1009

Improperly rejected

In situation where protester after award received copy of awardee's proposal on May 21 and noted alleged deficiency therein, protest filed more than 5 working days thereafter is not untimely because (1) agency had scheduled debriefing conference for May 28 and (2) protest was filed within 5 working days of debriefing. 4 CFR 20.2(a) (1974) urges protesters to seek resolution of complaints with contracting agency and does not require filing of protest at GAO where it was reasonable to withhold protest until contracting agency explained its position at debriefing 468

CONTRACTS—Continued
Protests—Continued
Information evaluation
Sufficiency of submitted information Page
Notwithstanding protester's appeal to agency under Freedom of Information Act, *5 U.S.C.* § 552 *et seq.*, for further documentation relative to merits of its protest, GAO will not refrain from issuing decision pending appeal, where record shows that further delay in issuing decision could harm agency procurement process and protester already has received substantial portion of agency documents---- 783

Notice
To contractors
Protest filed within five days of protester's reading announcement of procurement action in trade publication but not within five days of earlier appearance in same publication of article which revealed procurement actions is not untimely, since trade publication article is not of nature to have put protester on actual or constructive notice of procurement---- 196

Oral
Where telefax message protesting solicitation's 90-mile geographic restriction is received at GAO at 8:20 a.m. and bids are opened at 2 p.m. same day, protest is timely filed since section 20.2(a) of GAO Bid Protest Procedures and Standards, which requires protests against apparent solicitation improprieties to be filed before bid opening, states protest is "filed" at time of receipt by GAO. Portion of protest objecting to denial of opportunity to submit bid is timely because filed within 5 working days of adverse agency action—rejection by agency of bidder's oral protests---- 29

Persons, etc., qualified to protest
Persons, etc., with financial interest
Day Care Parents' Association
Dept. of Labor Day Care Parents' Association is an "interested party" under 4 CFR 20.1 for purpose of protesting Dept. of Labor's award of contract for operation of day care center where fees paid by its members account for approximately 15 percent of total operating cost of center and nearly one-third of contract price---- 1035

Preparation
Costs
Noncompensable
Expenses incurred by bidder-claimant subsequent to bid opening to enlighten contracting officer of true facts and/or to pursue protest are not expenses incurred in undertaking bidding process but are noncompensable protest costs---- 1021

Protester
In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release information on its requirements, protester should have pursued disclosure request under Freedom of Information Act---- 1100

CONTRACTS—Continued
Protests—Continued
Procedures
Contracting agency requirements Page
Section 20.9 of Interim Bid Protest Procedures and Standards does not impose time limits within which conference must be either requested or held and we have determined that value of holding conference in this case outweighed possible detrimental effects that delay might have occasioned ---- 978

Information disclosure
Withholding from protester of certain procurement information furnished by agency in connection with protest does not establish that protest procedure is unfair. Where protester does not avail itself of disclosure remedy under Freedom of Information Act, but relies instead on information made available through agency's protest reports, and agency indicates withholding of procurement sensitive information is appropriate, withholding by GAO of such information is proper under bid protest procedures ---- 1009

Interim Bid Protest Procedures and Standards
Where offeror selected for award under 1972 negotiated utility aircraft procurement makes timely oral protest to agency after Jan. 29, 1973, cancellation of RFP but agency neither sustains nor responds to protest, after reasonable time has elapsed protester is charged with notice of adverse agency action. Subsequent protest to GAO, filed when resolicitation is issued 13 months later, is untimely in regard to portions asserting invalidity of cancellation, resulting invalidity of resolicitation, and protester's demand for award under 1972 canceled RFP. Moreover, GAO consideration of untimely issues is not justified under good cause and significant issue provisions of 4 CFR 20.2(b) ---- 97

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 ---- 930

Protest filed with GAO on December 16 after contracting agency failed to rescind cancellation of IFB at December 11 meeting requested by protester within 5 days of notice of cancellation is timely under 4 CFR 20.2(a) (1974), since filed within 5 days of adverse agency action (failure to rescind cancellation) ---- 955

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 ---- 835

Specification adequacy
Allegations first made after award of contract that RFP was ambiguous and that RFP's failure to procure transcribing equipment was arbitrary and exhibited favoritism are untimely pursuant to section 20.2(a) of GAO Interim Bid Protest Procedures and Standards, which provides protests based upon alleged improprieties in soliciation apparent prior to closing date for receipt of proposals shall be filed prior to closing date for receipt of proposals. 4 CFR § 20.2(a) (1970) ---- 44

CONTRACTS—Continued
Protests—Continued

Subcontractor protests Page

As matter of policy, GAO generally will not consider protests against awards of subcontracts by prime contractors, even where prime contract is of cost-reimbursement type, whether or not subcontract has been awarded. However, GAO will consider subcontract protests where prime contractor is acting as Government's purchasing agent; Government's active or direct participation in subcontractor selection has net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in Government's approval of subcontract award is shown; subcontract award is "for" Government; or agency requests advance decision. 51 Comp. Gen. 803, modified 767

Technical deficiencies

Administrative determination conclusiveness criticized

Contentions that technical data package fails to fall within standards of NAVMAT Notice for utilization of patent and latent defects clause and ASPR 1-108 or 1-109 was not followed for use of subject clause are not substantiated since use of patent and latent defects clause is authorized in two different situations, and this procurement comes within purview of one of these situations and use of clause is authorized by ASPR 1-108(a)(vii) 978

Timeliness

Where telefax message protesting solicitation's 90-mile geographic restrictions is received at GAO at 8:20 a.m. and bids are opened at 2 p.m. same day, protest is timely filed since section 20.2(a) of GAO Bid Protest Procedures and Standards, which requires protests against apparent solicitation improprieties to be filed before bid opening, states protest is "filed" at time of receipt by GAO. Portion of protest objecting to denial of opportunity to submit bid is timely because filed within 5 working days of adverse agency action—rejection by agency of bidder's oral protests 29

Protest after bid opening that IFB is restrictive is untimely, since Interim Bid Protest Procedures and Standards provide that apparent improprieties in solicitations must be protested prior to bid opening 509

Protest regarding negotiation rather than formal advertising of Navy mess attendant contracts filed after receipt of proposals is untimely under 4 C.F.R. § 20.1, *et seq.* (1974). However, due to widespread interest, matter will be considered significant issue under 4 C.F.R. § 20.2 (1974) 809

Allegation that sec. 8(a) award of 50 percent of solicitation quantity of cargo nets violates SBA's policy of restricting sec. 8(a) awards to no more than 20 percent of Govt.'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 913

Protest filed with GAO on December 16 after contracting agency failed to rescind cancellation of IFB at December 11 meeting requested by protester within 5 days of notice of cancellation is timely under 4 CFR 20.2(a) (1974), since filed within 5 days of adverse agency action (failure to rescind cancellation) 955

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued Page

Protest filed by high bidder—during consideration of protest of low bidder against determination of bid nonresponsiveness by agency—against possible acceptance of second low bid based on alleged nonresponsiveness on face of bid is untimely and will not be considered on merits because high bidder, at latest, knew of nonresponsiveness determination and low bidder's protest almost 1 month prior to filing of protest ---- 967

Considered on merits

Under 4 C.F.R. § 20.2(a), requiring bid protests to GAO to be filed within 5 days after basis of protest is known or should have been known, protest received on the morning of the 6th day although untimely is considered on merits because the protest raises issues with respect to the interpretation of 10(c) of SF 33A and decision on issues raised may be significant to procurement practices and procedures. 4 C.F.R. 20.2(c) - 416

Contract award notice effect

Protest filed within five days of protester's reading announcement of procurement action in trade publication but not within five days of earlier appearance in same publication of article which revealed procurement actions is not untimely, since trade publication article is not of nature to have put protester on actual or constructive notice of procurement ---- 196

Negotiated contract

Allegation that agency improperly failed to conduct discussions was dismissed as untimely since it was filed almost two months after award was made ---- 276

Objection to upward NASA cost adjustment in offeror's cost proposal, made because NASA perceived deficiency in offeror's response to RFP spare parts formula, is untimely because record shows clear disagreement between offeror and agency at close of discussion, as to realism of RFP terms and adequacy of response thereto, and inaction by agency in failing to accede to protester's objection by date established for receipt of revised proposals notified offeror that it must timely protest. Also, other objections to cost adjustments, even if sustained, do not alter relative ranking of offerors ---- 408

In situation where protester after award received copy of awardee's proposal on May 21 and noted alleged deficiency therein, protest filed more than 5 working days thereafter is not untimely because (1) agency had scheduled debriefing conference for May 28 and (2) protest was filed within 5 working days of debriefing. 4 CFR 20.2(a) (1974) urges protesters to seek resolution of complaints with contracting agency and does not require filing of protest at GAO where it was reasonable to withhold protest until contracting agency explained its position at debriefing ---- 468

Complaint (filed May 1, 1974) relating to solicitation defects is untimely under protest procedures because it was not filed prior to final closing date for negotiated procurement on April 17, 1974; complaint relating to alleged improper negotiation procedures is untimely filed since it was not made within 5 days from date basis of complaint was known. Consequently, complaints are not for consideration ---- 681

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Negotiated contract—Continued Page

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 ---- 930

Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request ---- 1009

Solicitation improprieties

Allegations first made after award of contract that RFP was ambiguous and that RFP's failure to procure transcribing equipment was arbitrary and exhibited favoritism are untimely pursuant to section 20.2(a) of GAO Interim Bid Protest Procedures and Standards, which provides protests based upon alleged improprieties in solicitation apparent prior to closing date for receipt of proposals shall be filed prior to closing date for receipt of proposals. 4 C.F.R. § 20.2(a) (1970) ---- 44

Issues regarding failure to indicate relative weights of evaluated subcriteria in RFP and failure of RFP to indicate relative weight of cost factor in relation to technical factors are untimely as § 20.2(a) of the Interim Bid Protest Procedures and Standards requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to closing date for receipt of proposals be filed prior to closing date ---- 775

Apparent prior to bid opening

Contention that IFB failed to provide special instructions concerning the order of selection priority of additive items is untimely raised and will not be considered by GAO as 4 C.F.R. § 20.2(a) (1974) cautions bidders that protests based upon alleged improprieties in solicitation apparent prior to bid opening, must be filed prior to bid opening ---- 320

Two-step procurements

Where offeror selected for award under 1972 negotiated utility aircraft procurement makes timely oral protest to agency after Jan. 29, 1973, cancellation of RFP but agency neither sustains nor responds to protest, after reasonable time has elapsed protester is charged with notice of adverse agency action. Subsequent protest to GAO, filed when resolicitation is issued 13 months later, is untimely in regard to portions asserting invalidity of cancellation, resulting invalidity of resolicitation, and protester's demand for award under 1972 canceled RFP. Moreover, GAO consideration of untimely issues is not justified under good cause and significant issue provisions of 4 CFR 20.2(b) ---- 97

Recommendations
Reporting to Congress
Contract matters

Contractor who was permitted after bid opening to substitute "or equal" color for brand name color bid should have awarded contract terminated, since substitution is beyond contemplation of IFB requirements and procurement law ---- 593

CONTRACTS—Continued

Reformation. (*See* **CONTRACTS, Modification**)

Requests for quotations

Negotiation of procurement. (*See* **CONTRACTS, Negotiation, Requests for quotations**)

Requirements

Not established

Option years Page

In procurement for rental of relocatable office buildings with 2-year base period and three 1-year options where agency estimates that it may take 2 to 5 years to fund and construct more permanent facilities, "known requirement" for option years was not established nor was there reasonable certainty that funds would be available to permit exercise of options. See ASPR 1-1503 242

Progressive awards

To insure supply

Low bidder found to be nonresponsible to perform full amount of labor hours capacity specified in its bid was properly excluded from award consideration under IFB provision which called for progressive awards to low responsible, responsive bidders until Govt.'s estimated needs were satisfied; however, if some amount of Govt.'s requirements were not contracted for after following award procedure in IFB, agency could reconsider responsibility of low bidder for award of some quantity of hours less than maximum specified in bid, provided bid was not otherwise qualified, since under IFB instructions and conditions, Govt. reserves right to make award for quantity less than quantity offered 120

Specification deviation

Not permitted

Contract clause which states that "when helicopters in addition to the *one under contract* are required * * * the Contractor agrees to furnish * * * [same] if available [at a rate set out in the IFB]" does not allow for supplying of helicopters at any base other than one under contract. More permissive interpretation would render competitive bidding process virtual nullity and allow its circumvention at whim of contracting officer 390

Research and development

Basic ordering type agreements

Prequalification of offerors

Dept. HEW's proposed use of basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved 1096

Competition sufficiency

Contention that individual tailoring by AF of statement of work in R&D procurement resulted in submission of noncompetitive high price is denied because protester did not show how individual differences in statement of work caused price increase attributable to differences in individually tailored statement of work 735

CONTRACTS—Continued

Research and development—Continued

Conflict of interest prohibitions Page

No law or regulation precludes an award to national association which it is contended will be in conflict of interest because one goal of project under contract is to enjoin parents to lobby for improved education for handicapped children and for increased funds for purpose, the recipients of which funds would be association members---------- 421

Costs

Analysis

Evaluation factors

Primary reliance on independent, "parametric" cost analysis in evaluating projected production unit costs of offerors in determining successful offeror for award of development contract under "design-to-production-unit cost" concept was not unreasonable since: (1) DOD guidelines for award of development contract terms proposed production unit cost estimates of offerors "inconclusive" at development state; (2) each competing offeror's cost proposal was equally and thoroughly analyzed with "parametric" estimate; and (3) substantial cost additions to each offeror's proposal were made---------- 169

Minimum standard

On procurement record showing that protesting offeror's cost proposal, encompassing cost elements that are required to be examined under procedures for cost analysis set forth in ASPR 3-807.2(c), was analyzed by evaluators in arriving at offeror's rating in cost area; that during course of negotiations several inquiries were made of protesting concern about cost proposal; and that consideration was given to reports submitted by field pricing support activities, GAO cannot conclude there was failure to achieve minimum standard of cost analysis under cited regulation---------- 169

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."---------- 896

Design

Superiority, deficiencies, etc.

Procuring agency in source selection process did not disregard procurement guideline directing offerors to design system for protection against certain threats where award was made to offeror receiving excellent rating for protection against threats in question rather than to protesting concern which received rating of "adequate" for same threats- 169

CONTRACTS—Continued

Research and development—Continued

"Level of effort" Page

Where reading of evaluation factors statement in NASA RFP gives reasonably clear indication of relative importance of various factors, requirement that offerors be informed of importance of cost in relation to technical and other factors is satisfied. Description of statement of work as "level of effort" did not establish cost as overriding evaluation factor, because offerors were asked to exercise flexibility and discretion in proposing support services of greater scope and complexity than those performed under predecessor contract ---- 1009

Optional technique

Procedural validity of option technique in development contract is unquestionable, since ASPR 1–1501 specifically provides for use of appropriate option provision in research and development contracts, and ASPR 1–1504 (c), (d), and (e), contrary to contention of protesting concern, provide that options are to be evaluated only if, unlike the subject procurement, the Government intends to exercise option at time of award or if contract is fixed-price ---- 169

Participation prohibitions

Fact that Lowell Technological Institute Research Foundation is nonprofit, State-created institution affiliated with educational institution does not preclude it from competing for Government contract involving other than research and development in competition with commercial concerns since unrestricted competition on all Government contracts is required by laws governing Federal procurement in absence of any law or regulation indicating a contrary policy ---- 480

Price factor

Failure of procuring agency to resolve before award discrepancy between award price on cost-plus-incentive-fee basis of development contract and Government cost estimate for development work was inconsistent with ASPR 3–405.4(b) contemplating negotiation of realistic target cost to provide incentive to contractor to earn maximum fee through ingenuity and effective management ---- 169

Production and development combination propriety

Refusal of Air Force to consider proposal from protester for TACAN was not unduly restrictive of competition contrary to maximum competition mandate of 10 U.S.C. 2304(g) where development contracts provided that follow-on production would be limited to development contractor (dual prototype method of contracting), since Air Force has demonstrated that such restriction was reasonably necessary to assure that prototype selected would meet technical and cost objectives and because testing of protester's equipment could not be accomplished within time constraints of procurement ---- 1107

Statement of work

Air Force use of internal pamphlet designed to aid in drafting of statements of work is not objectionable since it is only internal administrative document that does not affect measure of actions, which is Armed Services Procurement Regulation ---- 735

CONTRACTS—Continued
Research and development—Continued
Statement of work—Continued
Individual tailoring Page
Provision in ASPR § 4-105(a) permitting individual tailoring of statements of work for R&D exploratory development is intended to impart the particularity of individual R&D procurements and type of effort desired thereunder, not to incorporate agency's opinion of individual proposer's relative strengths and weaknesses 735

Resolicitation
Recommendation withdrawn
Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified 483

Sales. (*See* **SALES**)
Samples. (*See* **CONTRACTS, Specifications, Samples**)
Service Contract Act. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)
Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurements. (*See* **CONTRACTS, Negotiation, Sole source basis**)
Specifications
Adequacy
Minimum needs standard
Reasonable
Though stated laundry system requirements, including need for independent batch processing, are questioned, agency determination of minimum needs is not shown to be without reasonable basis. Protester's blanket offer to supply acceptable system, including proposed use of washer and extractor not shown to meet requirements, provides insufficient basis to question determination to procure sole-source (10 U.S.C. § 2304(a)(10), ASPR § 3-210.2(i) (1973 ed.)) from only concern offering acceptable system. However, in future laundry system procurements, use of two-step advertising procedure might be desirable 445

Ambiguous
Clarification
Solicitation stating contractor must accept all orders, but that offeror can indicate by checking box whether it will or will not accept orders under $50, and which provides blank where offeror can indicate specific minimum amount below $50, means that bidders are offered three options: to accept all orders less than $50; to refuse all such orders; or to accept orders under $50 but above a specified minimum. However, since provision is somewhat confusing, agency should consider revision to provide clarity 120

Method of award clause
METHOD OF AWARD clause of IFB required that bidders insert percentages indicating deductions or additions to rate schedules in column headed "Offeror's Single Discount." Failure of bidders to affirmatively in-

CONTRACTS—Continued
Specifications—Continued
Ambiguous—Continued
Clarification—Continued
Method of award clause—Continued Page

clude indicators, e.g., "plus" or "minus" with percentages, did not render bids nonresponsive. Bidders complied with clause since column heading was labeled "discount" which obviated necessity for further indication that inserted percentages were of negative nature. Mistake in bid procedures is inapplicable because situation does not involve omission of items required in bid by IFB and resort to examination of bidding patterns is unecessary ---- 1087

Recommendation to GSA is made that future solicitations requiring bidders to indicate percentage either as addition to, or deduction from, established rate schedules should provide bidders with bidding schedule compatible with *METHOD OF AWARD* clause ---- 1087

Discarding all bids

Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt.'s needs ---- 1068

Patent and latent defect clause

Contrary to allegations that purchase description, drawings and sample are not sufficiently definite and complete to satisfy mandate of 10 U.S.C. 2305 and ASPR 1-1201, inclusion of patent and latent defects clause does not constitute admission that specifications are ambiguous. Rather, inclusion is merely acknowledgment that any specification may have defects even though checked by contracting agency technical personnel ---- 978

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)
Clarification. (*See* **CONTRACTS, Specifications, Ambiguous, Clarification**)
Conformability of equipment, etc., offered
Administrative determination
Basis of evaluation

Contention that IFB provision which limits court reporting only to electronic method improperly restricts competition, is not sustained since record shows that court's determination of its needs is supported by reasonable basis. In such technical areas as this, where there may well be differences of opinion, agency's evaluation of own needs should be given great weight because agency is in best position to assess its own requirements ---- 645

Negotiated procurement

Allegation that cancellation of RFP was arbitrary because air conditioners obtained from another agency's inventory were manufactured under different specifications and would not meet Govt.'s needs without modifications does not justify recovery of proposal preparation and

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment—Continued
Administrative determination—Continued
Negotiated procurement—Continued Page

related costs, since explicit judicial recognition of right to recover proposal expenses in such circumstances appears to be lacking, and in any event cancellation was not make in bad faith or arbitrarily or capriciously, since contracting officer found that modified inventory units would meet requirements and right to reject all offers on unneeded supplies is well established---- 215

Approximate requirements
Record does not support contention that specifications in negotiated procurement precluded consideration of design proposed by successful offeror because such design was not specifically called for, as specifications were performance type, leaving exact design and approach to meet performance parameters to inventiveness and ingenuity of offerors---- 363

Commercial model requirement
"Off the shelf" items
Where purchase description covers salient characteristics of "commercial, off the shelf" item and agency specifically informs all offerors that specifications are not sufficient to permit design and manufacture of item, commercial, off-the-shelf characteristic was IFB requirement---- 499

Based on detailed review of arguments propounded, invitation for bids and referenced purchase description, prior decision that IFB required successful bidder to provide "commercial, off-the-shelf" item at date set for delivery is affirmed. Contracting officer's affirmative determination of low bidder's responsibility based on erroneous interpretation of specification in face of strongly negative preaward survey was not reasonable exercise of procurement discretion---- 715

Drawings, samples, etc.
Acceptance
Effect
In future, requirements for bid samples should include (FPR 1–2.202–4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement---- 157

Literal reading of specifications
Bid is not nonresponsive where variable rates for contractor's representative are included, solicitation having requested "Per diem rates and full terms" to be submitted with bid, in view of other solicitation instruction that all costs for representative are to be included in bid price and inasmuch as solicitation did not envision other than a single bid price to cover all specification requirements including contractor's representative---- 237

Samples submitted prior to award
In future, requirements for bid samples should include (FPR 1–2.202–4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement---- 157

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies Page

Contrary to allegations that purchase description, drawings and sample are not sufficiently definite and complete to satisfy mandate of 10 U.S.C. 2305 and ASPR 1-1201, inclusion of patent and latent defects clause does not constitute admission that specifications are ambiguous. Rather, inclusion is merely acknowledgment that any specification may have defects even though checked by contracting agency technical personnel ---- 978

Contention that activity's failure to disclose known errors in solicitation invalidates IFB is not sustained when IFB included seven changes, deviations and waiver forms detailing patent defects discovered by procuring activity and activity states it possesses no further knowledge of any patent defects ---- 978

Negotiated procurement

Rejection of revised proposal is not improper since determination as to whether proposal is technically acceptable is primarily matter for administrative discretion and record does not show agency conclusion that protester's proposed approach contains deficiencies which present unacceptable risk that proposed system would not meet desired standards is unreasonable ---- 60

Lacking independent technical and cost analysis of relative merits of competing proposals in "band 8" approaches and operational effectiveness of system without band 8 requirement, GAO cannot question agency's decision to eliminate band 8 requirement in order to preserve design-to-production cost constraint or subsequent decision, based on possible future importance of requirement to partially restore band 8 coverage via option technique ---- 169

Upon further consideration, decision is affirmed that insufficient basis exists to conclude NASA failed to conduct written or oral discussions required by 10 U.S.C. 2304(g). Controverted areas of protester's proposals—low level of effort; planned demotions of technicians; and salary reductions of key personnel—were deficiencies, not strengths, ambiguities, or uncertainties, and agency could reasonably judge that deficiencies were not required to be discussed under circumstances present ---- 1009

Tests
Specification requirement

Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact ---- 39

Defective
Cancellation of invitation

Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt.'s needs ---- 1068

CONTRACTS—Continued
Specifications—Continued
Definiteness requirement Page
Contentions that technical data package fails to fall within standards of NAVMAT Notice for utilization of patent and latent defects clause and ASPR 1–108 or 1–109 was not followed for use of subject clause are not substantiated since use of patent and latent defects clause is authorized in two different situations, and this procurement comes within purview of one of these situations and use of clause is authorized by ASPR 1–108(a)(vii) ---- 978

Labor stipulations
Listing in IFB of specific equipment types to be repaired is preferable, since bid calculation is difficult where solicitation lists only general equipment types, requiring bids on flat labor hour rate for each type; also, applicable repair standard depends on equipment specified in purchase orders placed under contract. Since solicitation provided common basis for bidding, and submission of 20 bids is indication terms were reasonable, conclusion cannot be drawn that defects were so serious as to contravene requirement for full and free competition ---- 120

Deviations
Acceptance prejudicial to other bidders
When low bidder proposed post-bid opening change from brand name to "or equal" color in brand name or equal IFB, contracting officer acted imprudently in accepting, without verification, allegation that brand name was not available, since another bidder bid on basis of brand name color and if not available proper course would have been cancellation of IFB and readvertising to permit all bidders opportunity to submit bids on new basis ---- 593

Informal *v.* substantive
Alternate bids
Because it included nonrecurring costs in first program year, multiyear bid deviated from requirement that like items be priced same for each program year. Bid may nevertheless be accepted if otherwise proper under analogous rationale applicable to single year procurement with option provisions because no other bidder was prejudiced, since bid was low on all program years and low overall. B–161231, June 2, 1967, will no longer be followed to the extent it is inconsistent with rationale herein ---- 967

Bid bond principal and bidder variance
Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since IFB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid ---- 271

Option prices
Option provision should be corrected to: (1) warn bidders of consequences of failure to abide by its terms; (2) clarify whether requirement that option prices be no higher than initial quantity refers to first program year or each year; and (3) exclude contingency in option price that covers possibility that option may be exercised when costs exceed

CONTRACTS—Continued
Specifications—Continued
Deviations—Continued
Informal v. substantive—Continued
Option prices—Continued Page

bid price thereby avoiding payment of premium by Govt. in cost of firm quantity ---- 967

Prejudicial to other bidders

Bid submitted which contained price for base quantity and greater price for option quantity in derogation of IFB provision imposing ceiling limitation on option quantity (option price was not to exceed price bid on base quantity) may not be considered for award since deviation would be prejudicial to all bidders who submitted bids in conformance with option ceiling provision ---- 476

Erroneous
Test requirements
Not prejudicial

Inclusion in IFB of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item," when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases ---- 39

Failure to furnish something required
Information
Subcontractor listing

Where intent of bidder in listing alternate subcontractors is to protect itself in the event the Government exercises its option to select an alternate listed on the bid schedule, such intent must be noted on "List of Subcontractors" attached to bid form prior to bid opening so as to be considered in the agency's determination of bid responsiveness ---- 159

Federal specifications
Deviation justification

Navy did not unreasonably deviate from Federal Specification W-R-175C/GEN because no manufacturer had qualified thereunder the type of product which in the Navy's judgment was required to satisfy its minimum needs ---- 488

Failure to use

Without GSA approval, the Navy lacked authority to procure reels of instrumentation recording tape valued in excess of $5,000 and of a type not covered by a Federal Supply Schedule (FSS) contract, because the Federal Property Management Regulations require procurements in those circumstances to be approved by GSA ---- 488

Master agreement
Use of list

Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms ---- 606

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CONTRACTS—Continued
Specifications—Continued
Minimum needs requirement
Review recommended Page
Prohibition in IFB of all-or-none bids to encourage competition in situation where contracting officer believes one supplier has a monopoly and is acting in restraint of competition through use of all-or-none bids is improper since net effect is simply to increase cost to Government of items on which competition exists. Competitive items should be readvertised. Sole-source items should be subject of separate negotiated procurement 395

Patent and latent defect clause
Use
Allegation that inclusion of patent and latent defect clause contravenes full and free competition requirement of 10 U.S.C. 2305 is without merit because clause lends itself to only one reasonable interpretation—to discover all patent defects and account for them in bid price—and this requirement does not preclude bidders from competing equally on basis of own reasoned judgment 978

Authorized
Contentions that technical data package fails to fall within standards of NAVMAT Notice for utilization of patent and latent defects clause and ASPR 1-108 or 1-109 was not followed for use of subject clause are not substantiated since use of patent and latent defects clause is authorized in two different situations and this procurement comes within purview of one of these situations and use of clause is authorized by ASPR 1-108(a)(vii) 978

Propriety data use. (*See* **CONTRACTS, Data, rights, etc.**)
Restrictive
Geographical location
Reasonable expectation that potential contractors located beyond certain distance from installation will not satisfactorily perform laundry contract provides basis for including in solicitation restriction requiring bidders have facilities located within certain radius of miles, and where protester has not presented evidence to overcome contracting officer's finding of marginal historical performance by contractors located beyond 90 miles from Camp Drum, New York, GAO cannot conclude that 90 mile restriction was without reasonable basis 29

Justification
Contention that IFB provision which limits court reporting only to electronic method improperly restricts competition, is not sustained since record shows that court's determination of its needs is supported by reasonable basis. In such technical areas as this, where there may well be differences of opinion, agency's evaluation of own needs should be given great weight because agency is in best position to assess its own requirements 645

Non-price listed parts clause
Parts procurement IFB clause which provides that, under cost-reimbursement segment of contract, contractor will not be able to furnish parts to Govt. at price which includes markup from affiliates is unduly restrictive and unreasonably derived, since provision would reduce

CONTRACTS—Continued
Specifications—Continued
Restrictive—Continued
Non-price listed parts clause—Continued Page
likelihood that contractor would buy from affiliates and ASPR guidelines recognize affiliates entitlement ro recover more than cost in comparable situations where there is price competition as clause contemplates---- 1050

Particular make
"Or equal" product rejected
Determination arbitrary and capricious
In brand name or equal solicitation where agency had no reasonable basis to determine that offered item was not "equal," determination to reject bid must be found to be arbitrary and capricious. Accordingly, bidder is entitled to bid preparation costs---- 1021

Samples
Place of submission
Bid sample requirement that one mockup of item be submitted with bid may not be interpreted so technically as to exclude low bidder from consideration for award because it submitted samples prior to bid opening to contracting activity's technical personnel---- 157

Time for submission
In future, requirements for bid samples should include (FPR 1-2.202-4) warning that bid may be rejected for failure to submit sample timely and should list reasons for sample requirement; however, failure to comply with FPR did not affect validity of instant procurement---- 157

Technical deficiencies. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies**)
Tests
Conformability of equipment offered to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests**)
Requirements
Administrative determination
Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact---- 39

Waiver
Invitation provision
Inclusion in IFB of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item," when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases---- 39

Status
Federal grants-in-aid
Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids

CONTRACTS—Continued
Status—Continued
Federal grants-in-aid—Continued Page
will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged ---- 6

Stenographic reporting
Method
Contention that 26 U.S.C. § 7458 (1970) precludes U.S. Tax Court from soliciting for electronic reporting method because provision authorizes "stenographic reporting" is without merit as Congress, in enacting provision in 1926, was not specifically concerned with limiting reporting to traditional written means but rather with accurate reporting of hearings and testimony. Therefore, Court can solicit for any method of reporting which effectuates said purpose ---- 645

Prices
Bid
Protester's allegation that prices quoted by low bidder were excessive and violate invitation provision, implementing P.L. 92–463, which requires that rates bid for a page copy of transcript be actual cost of duplication, based upon unsubstantiated inference in bidder's manner of bidding, is not supported by record since bidder has furnished satisfactory explanation as to its manner of bidding and its prices are consistent with those of other bidders on this and prior procurements for same service ---- 340

Subcontractors
Competitive system procedure application. (*See* **BIDS, Competitive system, Subcontractors**)
Limitations on use
In view of agency's past unsatisfactory experience with subcontractor attempts to provide court reporting services under prime contract, agency may impose reasonable limitations on prime contractor's right to subcontract all or part of such work ---- 645

Listing
Alternate subcontractors
Evaluation
Where successful offeror submitted qualifications of two alternatives subcontractors for evaluation with its proposal and contracting officer verified offeror's ability to commit highest evaluated of two subcontractors, even though offeror had made no firm commitment to either, merely having obtained firm quotes from both, unlike listing of subcontractor requirements in formally advertised invitations by certain Federal agencies, award was not improper since neither applicable procurement regulations nor RFP required firm subcontractor commitment or precluded proposal of alternate subcontractors and Govt. had right to approve subcontractors ---- 468

Bidder responsibility *v.* bid responsiveness
Where intent of bidder in listing alternate subcontractors is to protect itself in the event the Government exercises its option to select an alternate listed on the bid schedule, such intent must be noted on "List of Subcontractors" attached to bid form prior to bid opening so as to be considered in the agency's determination of bid responsiveness ---- 159

CONTRACTS—Continued
Subcontractors—Continued
Privity. (*See* **CONTRACTS, Privity, Subcontractors**)
Subcontracts
Administrative approval
Review by General Accounting Office Page
GAO will not consider on merits protest of award of automatic data processing subcontract by health insurance carrier administering Medicare Part "B" program pursuant to cost reimbursement type contract with Social Security Administration (SSA), since SSA's subcontract selection approval involved no fraud or bad faith; carrier is not SSA's purchasing agent; SSA's procurement procedure guidance, review of RFP, attendance at offerors' conference and negotiation sessions, and other involvement in subcontract procurement process did not have net effect of causing or controlling subcontractor selection; and procurement was not "for" Government 767
Award prejudicial
Even though subcontracting methods of Government prime contractor, who is not purchasing agent, are generally not subject to statutory and regulatory requirements governing Government's direct procurements, contracting agency should not approve subcontract award if, after thorough consideration of particular facts and circumstances, responsible Government contracting officials find that proposed award would be prejudicial to interests of Government. "Federal norm" is frame of reference guiding agency's determinations as to reasonableness of prime contractor's procurement process, although propriety and necessity of variation from details of "Federal norm" is recognized 767
Bid shopping
Listing of subcontractors
Alternates
Where formally advertised solicitation contained subcontractor listing requirement, low bid which listed alternate subcontractors for several of the categories of work listed on bid form was properly determined nonresponsive in that contractor would have been afforded opportunity to select, after opening of bids, the firm with which it would subcontract work in each category where an alternate was stated, contrary to design and purpose of requirement to preclude "bid shopping." 159
Cost-reimbursement. (*See* **CONTRACTS, Cost-type, Subcontracts**)
Generally
GAO will not consider on merits protest of award of automatic data processing subcontract by health insurance carrier administering Medicare Part "B" program pursuant to cost reimbursement type contract with Social Security Administration (SSA) by virtue of protester's allegations that contractual and regulatory requirements that carrier conduct proper cost analysis before awarding subcontract were not complied with, since enforcement of such requirements are contract administration matters appropriate for SSA's resolution and not proper for GAO's resolution absent evidence indicating fraud or bad faith 767
Privity between subcontractor and United States. (*See* **CONTRACTS, Privity, Subcontractors**)
Small Business authority, (*See* **SMALL BUSINESS ADMINISTRATION, Contracts, Subcontracting**)

CONTRACTS—Continued

Termination

Award to next low responsive and responsible bidder Page

In situation where it becomes evident in preaward survey that low responsive bidder does not have intention or ability to provide required "commercial, off the shelf" item by time set for delivery, there is no reasonable basis upon which bidder could properly have been found responsible. Accordingly, award to such bidder was improper and should be terminated, with award being made to next low responsive and responsible bidder willing to accept award at its bid price. Modified by 54 Comp. Gen. 715 499

Convenience of Government

Administrative determinations

Question of whether supplies under contract are still needed is matter for contracting agency to determine in accordance with its obligation to properly administer contract. Moreover, decision made in this regard as to whether or not any given contract should be terminated for convenience of Govt. rests with contracting agency 1031

"Best interest of the Government" basis

Prior decision concluding that termination for convenience is in best interest of Govt. is affirmed, taking into consideration (a) extent of contract performance; (b) estimated cost of termination for convenience (both at present and at date of prior decision); and (c) whether benefits to competitive procurement system require corrective action; and because it is not clear that all bidders would offer same items on resolicitation and thereby render reprocurement academic exercise. However, second part of original recommendation, i.e., award to next low bidder, is modified because agency states that requirements as interpreted exceed its minimum needs 715

Erroneous awards

Low bidder who inserted dashes rather than prices for some of the dining facilities to be priced for kitchen police services but who also bid a high per meal price for an estimated 10 million plus meals has submitted a responsive bid since the dashes were, in effect, "no charge" bids covering unpriced dining facilities where only the high per meal price would be payable by Government. Contract awarded to higher bidder should be terminated for convenience of Government 345

Partial

Agency's evaluation of transportation costs based on other than most economical method of shipment was contrary to terms of solicitation. GAO 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 901

Reporting to Congress

Recommendation for convenience termination which is contained in affirmation of prior decision presupposes that contractor is satisfactorily performing contract in accordance with its terms. Recommendation should not take precedence over any possible termination for default action should such action be appropriate and necessary 715

CONTRACTS—Continued
Termination—Continued
Convenience of Goverment—Continued
Unsubstantiated low offer Page
In Navy mess attendant solicitation, where successful offeror proposes to use 64.5 percent of Government estimate with no justification as to why job can be performed at that level and contracting officer admits that if there were more time available for negotiations Government estimate might have been in need of downward revision, under ASPR § 3-805.4(c) (DPC #110, May 30, 1973) failure to reopen negotiation on amended estimate coupled with award on basis of unsubstantiated low offer requires that contract be terminated for convenience of Government---- 586
Negotiation procedures propriety
Release of draft RFP for marine salvage and ship husbanding contract to incumbent contractor approximately 5 months before other competitors received official RFP, resulting in incumbent's sole knowledge of approximate weights of evaluation criteria in violation of ASPR 1-1004(b) and 3-501(a); and consideration of criteria not stated in RFP, which were unequally applied to favor incumbent results in appearance of partiality which calls for recommendation that contract be terminated---- 375
"No-cost"
Where party requests no-cost cancellation of fixed-price supply contract on basis of sovereign acts of Government (dollar devaluation and embargo) and general inflation, although contract does not contain either escalation or excuse by failure of presupposed condition clause, fact that contract did contain changes, Government delay of work and default clauses is sufficient to establish all rights and duties of parties without resort to Uniform Commercial Code---- 527
Service being performed under Blanket Purchase Agreement (BPA) awarded and extended to June 30, 1975, pending resolution of protests should be resolicited for period commencing July 1, 1975, notwithstanding agency desire to continue until Dec. 31, 1975, since BPA was interim measure which has served purpose for which intended and to extend agreement would penalize bidders who protested defective IFB by not allowing them to compete for requirement and there would be no termination costs if service was resolicited effective July 1, 1975---- 955
Recommendation
Contractor who was permitted after bid opening to substitute "or equal" color for brand name color bid should have awarded contract terminated, since substitution is beyond contemplation of IFB requirements and procurement law---- 593
Tests
Necessary amount of testing
Administrative determination
Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact---- 39

CONTRACTS—Continued

Warranties

Automatic data processing equipment

Reasonableness of warranty

Allegation of unreasonableness Page

Allegation that warranty used in IFB for automatic data processing equipment is unreasonable in general business practice is refuted by extent of competition that did not except to warranty requirements.... 835

COURTS

Administrative matters

Judiciary accommodations

Although Administrative Office Act of 1939 provides that Director, Administrative Office of U.S. Courts, shall "provide accommodations" for Judiciary, Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 271 *et seq.*) provides that GSA shall perform centralized property management function (including leasing) for agencies of Federal Govt. Therefore Judiciary, included by definition in provisions of Property Act of 1949, may not perform its own leasing functions 944

Purpose of Administrative Office of U.S. Courts

Legislative history of Administrative Office Act of 1939 indicates purpose of Administrative Office was twofold: to divorce Judiciary from administrative and financial control of Dept. of Justice and to provide centralized administration for the various circuits. Therefore, duty of Director, Administrative Office of U.S. Courts under 28 U.S.C. 604(a)(11) to "provide accommodations" was meant to confer administrative authority via coordination of needs and budget responsibility for the courts rather than responsibility for actually leasing the space for accommodations 944

Costs

Docket fees

Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with U.S 22

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 judicial interpretation of contract provisions in subsequent court case not involving this contractor, the court case not indicating that it would have retroactive effect on other cases 928

COURTS—Continued
Judgments, decrees, etc.
Court of Claims. (*See* **COURTS, Court of Claims, Decisions**)
Jurors
Fees
Grand jurors
Increases
Effective date Page

Fees of grand jurors sitting in the June 18, 1973 grand jury in the Eastern District of Louisiana and fees of the June 5, 1972 grand jury sitting in Washington, D.C., may be increased retroactively to the amount provided for in 28 U.S.C. 1871 at the discretion of and beginning with the dates determined by the presiding judge, in accordance with the limitations imposed by the statute ---- 472

Reporters
Additional compensation
Maximum limitation

Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum ---- 251

Contract services

Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustanied because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR § 1–1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government ---- 696

Limitation on electronic reporting

U.S. Tax Court invitation seeking electronic reporting services is not contrary to provisions of 28 U.S.C. § 753(b) (1970), which limits electronic reporting to augmenting role, as that provision concerns U.S. District Courts, and does not purport to include U.S. Tax Court within its purview ---- 645

Tax Court of United States
Court of record
Status of procurement

U.S. Tax Court, which prior to 1969 was independent agency in Executive Branch and therefore subject to Federal Procurement Regulations (FPR), is now court of record under Article I of Constitution and thus no longer subject to FPR. Nevertheless, in its relevant procurement practices, Court is still required to comply with 41 U.S.C. § 5 (1970) ---- 645

COURTS—Continued
Tax Court of United States—Continued
Reporting
Stenographic *v.* electronic Page
Contention that 26 U.S.C. § 7458 (1970) precludes U.S. Tax Court from soliciting for electronic reporting method because provision authorizes "stenographic reporting" is without merit as Congress, in enacting provision in 1926, was not specifically concerned with limiting reporting to traditional written means but rather with accurate reporting of hearings and testimony. Therefore, Court can solicit for any method of reporting which effectuates said purpose 645

DAMAGES
Private property. (*See* **PROPERTY, Private, Damage, loss, etc.**)
Public property. (*See* **PROPERTY, Public, Damages, loss, etc.**)

DEBT COLLECTIONS
Military personnel
Retired
Survivor Benefit Plan
Contribution indebtedness
Debts of a deceased member, not the responsibility of his widow, in view of 10 U.S.C. 1450(i) may not be offset against an annuity payable to such widow under 10 U.S.C. 1450, the Survivor Benefit Plan. However, such reasoning does not apply to reduction of annuities due to insufficient deductions having been made from member's retired pay to cover cost of such annuities 493

Waiver. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)
Set-off (*See* **SET-OFF**)
Waiver
Military personnel
Allotment
Class S
An erroneous repayment of a Uniformed Services Savings Deposit Program deposit plus interest which arose out of an erroneous allotment of pay resulting in the member's indebtedness may be considered a claim "arising out of an erroneous payment of any pay" within the meaning of 10 U.S.C. 2774(a) and may be considered for waiver 133

Dependents
Erroneous Survivor Benefit Plan payments
Overpayment resulting from erroneous annuity payments under Survivor Benefit Plan made to member's widow should be considered for waiver as authorized by 10 U.S.C. 1453 under rules similar to those contained in 35 Comp. Gen. 401 (1956), which applied to the Uniformed Services Contingency Option Act of 1953 (now Retired Serviceman's Family Protection Plan). Thus, waiver should be granted only where there is not only a showing of no fault by widow but also that recovery would result in a financial hardship to the widow or for some other reason would be contrary to purpose of Plan and therefore against equity and good conscience 249

DEBT COLLECTIONS—Continued
Waiver—Continued
Military personnel—Continued
Effect of member's fault Page
Although the Army administrative report recommended against waiver of the member's debt because he stated at the time of his separation from the service he believed he had received an overpayment, the Army does not refute the member's statement that he alerted the Army to a possible overpayment by so indicating on his "out-processing" financial papers, and since there is no evidence of fault on the part of the member, the claim is waived under 10 U.S.C. 2774 133

Prior consideration of debt effect
An application for waiver under 10 U.S.C. 2774, which was originally received within the 3-year statutory period and denied, may be given reconsideration based on new evidence, notwithstanding the request for reconsideration is received after expiration of the 3-year limitation period 644

Statutes of limitation
A "Pay and Allowance Inquiry" form (on which the date was altered) prepared by the Army Finance Center and sent to the member's disbursing officer inquiring as to the erroneous payment but upon which no action was taken by the Army for over three years to notify the member or collect the debt may not be considered evidence that as of the original date of such form it was definitely determined by an appropriate official that an erroneous payment had been made so as to preclude the member's request for waiver from consideration as not being timely filed within the three-year period provided by 10 U.S.C. 2774(b)(2) 133

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 858

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 858

Pay, etc., due military personnel
Beneficiary designations
Six months' death gratuity
When member and wife were separated and agreement was executed by them prior to time member entered Air Force whereby wife waived all rights and other benefits to which she may be entitled as result of mem-

DECEDENTS ESTATES—Continued
Pay, etc., due military personnel—Continued
Beneficiary designations—Continued
Six months' death gratuity—Continued Page
ber's possible future military service and member designated his mother to receive the 6-months' death gratuity in the event there was no surviving spouse, mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford legal basis for payment of gratuity due from the U.S. to someone other than the lawfully designated recipient 152

DEFENSE DEPARTMENT
Procurement
Without open and competitive bidding
Refusal of Air Force to consider proposal from protester for TACAN was not unduly restrictive of competition contrary to maximum competition mandate of 10 U.S.C. 2304(g) where development contracts provided that follow-on production would be limited to development contractor (dual prototype method of contracting), since Air Force has demonstrated that such restriction was reasonably necessary to assure that prototype selected would meet technical and cost objectives and because testing of protester's equipment could not be accomplished within time constraints of procurement 1107

DEPARTMENTS AND ESTABLISHMENTS
Commercial activities
Private *v.* Government procurement
Cost comparison
Federal Property Management Regulations (FPMR) provide that procurement of computer equipment with ADP Fund under control of GSA shall conform with applicable 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 872

Program implementation
Unemployment relief
Comprehensive Employment and Training Act
The legislative intent of the Comprehensive Employment and Training Act of 1973, P. L. 93–203 approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152 560

"Hosts"
Enrollees or trainees
Comprehensive Employment and Training Act
Agencies of the Federal Government are not precluded from serving as "host" to enrollees under the Comprehensive Employment and Training Act of 1973, Public Law No. 93–203, approved December 28, 1973, by 31 U.S.C. 665(b). Modifies 51 Comp. Gen. 152 560

DEPARTMENTS AND ESTABLISHMENTS—Continued
Promotion procedures. (*See* **REGULATIONS, Promotion procedures**)
Services between
Procurement of supplies and services
Aircraft services Page
No impropriety has been demonstrated in GSA's procurement of heavy equipment repair services for use of Air Force since solicitation was issued pursuant to GSA–Air Force agreement executed under Air Force authorizing regulations; moreover, provisions of ASPR 5–205 whereunder GSA sources are required to be used for repair services does not prohibit GSA from procuring subject repair services on behalf of Air Force 120

DISCRIMINATION. (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA
Colleges, schools, etc.
Federal City College. (*See* **DISTRICT OF COLUMBIA, Federal City College**)
Federal City College
Investments
For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

Leases, concessions, rental agreements, etc.
Short term conference facilities
Service contract *v.* rental contract
Federal agencies may now procure use of short-term conference and meeting facilities without regard to prohibition against rental contracts in District of Columbia in 40 U.S.C. 34, inasmuch as the GSA in its Federal Property Regs., contained in 41 CFR 101–17.101–4 has interpreted the procurement of use of short-term conference facilities as a service contract instead of a rental contract. OTA, which has legislative authority to contract for such services, may reimburse its panel member sponsors for expenses incurred in arranging OTA panel meetings at COSMOS Club in D.C., with appropriate reductions in each member's actual subsistence allowance for meals provided in this manner. 35 Comp. Gen. 314; 49 *id.* 305; and B–159633, May 20, 1974, insofar as they prohibited procurement of short-term conference facilities in D.C., will no longer be followed 1055

School teachers
Leaves of absence
Federal annual and sick leave provisions
Although substitute teachers in D.C. do not earn sick leave under D.C. Teachers' Leave Act of 1949 or Annual and Sick Leave Act of 1951, service as substitute in D.C. is service for purpose of leave regulations which provided during period in question that sick leave could be recredited after separation from service of less than 52 continuous calendar weeks. Former substitute reemployed by HEW is, therefore, entitled to recredit of sick leave earned prior to substitute teaching, but amount for recredit is limited by Sick Leave Act of 1936 which, until 1952, limited accrued sick leave to 90-day maximum 669

DONATIONS

Gifts

To educators Page

Voucher covering cost of decorative key chains given to educators attending Forest Service-sponsored seminars, with intent that Sawtooth National Recreation Area and FS symbols on key chains would generate future responses from participants and depict positive association between SNRA and FS, may not be certified for payment, since such items are in nature of personal gifts and, thus, expenditure therefor would not constitute necessary and proper use of appropriated funds 976

ENLISTMENTS

Fraudulent

Determination

Waiver of fraud *v.* avoidance of enlistment

The date of determination of the fraud and the date of the decision to either waive the fraud or avoid the enlistment and release the individual from military control should be contemporaneous or as close to contemporaneous as possible so as to avoid retaining control over an individual whose status as a military member is void. Regulations may be changed in line with 47 Comp. Gen. 671 (1968) to place the authority to waive fraud in enlistment on the same level as the authority to determine the fact of a fraudulent enlistment 291

Pay rights, etc.

Members who fraudulently enlist (voidable enlistments) are entitled to receive pay and allowances until the fact of the fraud is definitely determined at which time either the fraud should be waived and the member continued in the service with pay and allowances or, the enlistment should be avoided by the Government and the member released from military control with no entitlement to pay and allowances beyond the date of determination of the fraud 291

Minority

Discharge

Within 90 days of enlistment

Under 10 U.S.C. 1170 a member enlisted between the ages of 17 and 18 years and who is discharged upon application of parents or guardian made within 90 days of enlistment, is entitled to pay and allowances through the date of discharge 291

Pay rights, etc.

The enlistment of an individual below the minimum statutory age for enlistment is void, however, if such individual continues in a military status after reaching the minimum age he enters a voidable military status which enlistment may be avoided at the option of the Government 291

Pay rights, etc.

Contractual

An enlistment is more than a contract, it effects a change of status and once that status is achieved the member is entitled to his military pay and allowances and such pay and allowances are not dependent upon the duties he performs but, rather, upon the status he occupies 291

ENLISTMENTS—Continued
Pay rights, etc.—Continued
Discharge before expiration of enlistment
Medically unfit Page
Members who subsequent to enlistment are determined to have been medically unfit at the time of enlistment may be paid pay and allowances through the date of discharge since the determination of medical fitness is primarily a function of the service and no statute affirmatively prohibits their enlistment, such as in the case of insane persons (10 U.S.C. 504) ---- 291

Void
Medically unfit and minority
The enlistments of individuals enlisted below the minimum statutory age who are still below that age when that fact is discovered and the enlistments of individuals who are insane are void and upon a definite determination of such facts the individual's pay and allowances are to be stopped and he should be released from military control---- 291

ENVIRONMENTAL PROTECTION AGENCY
Appropriation
Availability
Television set. (*See* **APPROPRIATIONS, Availability, Television set, Environmental Protection Agency ship**)

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Agency contracts
Sole source procurements
Public education and information programs
Factors used to justify sole-source procurement of public education and information programs such as: nonprofit organization's makeup; fact that organization would utilize volunteers in performance; organition's rapport and understanding of State and local Government, key memberships, respected position, community support and coalition approach do not represent proper justification for noncompetitive procurements irrespective of fact that nonprofit organization could quote lower price since statutes require full and free competition consistent with what is being procured---- 58

Grants-in-aid
Waste treatment
Recovery of costs
Statutory requirement that grantees under Public Law 92–500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since potentially large number of users—i.e., tax exempt properties—will not pay for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues---- 1

Water pollution. (*See* **WATER, Pollution prevention**)

EQUAL EMPLOYMENT OPPORTUNITY

Compliance with regulations

Contractors Page

Allegation that contractor may not be responsible because it did not perform satisfactorily under prior contract and was not in compliance with Equal Employment Opportunity regulations will not be considered, since no fraud has been alleged or demonstrated 421

Contract provisions. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)

Grant programs

Contract awards

Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged 6

Information

Obtaining

Contract award

Although protester alleges that it was requested to furnish Equal Employment Opportunity (EEO) information indicative of award 2 weeks before proposed awardee in furtherance of allegation of improper manipulation of funding available for additive items and record contains conflicting information as to when EEO information was obtained from bidders, once additional funding became available, increasing amount of additive items to be included for award and displacing protester as low bidder, it was appropriate to secure EEO information from resulting low bidder 320

EQUIPMENT

Automatic Data Processing Systems

Lease payments

Assignments

Validity

Assignment of lease payments under Government leases for computer equipment to lease financing company which purchases title to equipment should be recognized since purchaser of equipment may be regarded as financing institution under Assignment of Claims Act 80

Lease-purchase agreements

Acquisition of equipment

Army's procurement of ADPE without renewed competition was contrary to FPMR Temporary Reg. E–25, because Army did not have required delegation of authority from General Services Administration for sole-source ADPE procurements, and to maximum order limitation in ADP Schedule contract. Therefore, Comptroller General recommends that equipment currently installed on rental basis, and additional ADPE proposed to be acquired, not be purchased except in accordance with Comptroller General views and all applicable regulations, including new FPMR Temporary Reg. E–32 promulgated at 39 Eed. Reg. 25421 ... 196

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Leases
Evaluation
Separate charges Page

Where cancellation of 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 an FPMR provision stating that "separate charges" will not be considered in evaluating offers—is of interest for future procurements. Therefore, question is referred to GSA so it can consider whether FPMR provision should be revised ---- 872

Private *v.* Government procurement
Cost comparison

Before canceling an RFP involving lease of computer equipment, Navy had ascertained that alternative source of supply within Govt. 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 ---- 872

Selection and purchase
Competitive basis

Protester objecting to alleged sole-source procurement is not without standing to have protest considered because of failure to participate in earlier, competitive phase of procurement for automatic data processing systems since it is current non-competitive procurement action which is basis of protest ---- 196

Federal Supply Schedule

Army's procurement by renting initially and then purchasing automatic data processing equipment (ADPE) from one vendor pursuant to delivery order issued against Federal Supply Schedule contract 6 years earlier was unauthorized, since delivery order, which Army regarded as long-term contractual arrangement, was effective only with respect to equipment actually ordered for delivery and not with respect to additional equipment listed for possible future acquisition, which could be acquired only through issuance of subsequent delivery orders or contract awards in accordance with then applicable regulations ---- 196

Procurement with ADP Fund
General Services Administration control

Federal Property Management Regulations (FPMR) provide that procurement of computer equipment with ADP Fund under control of GSA shall conform with applicable 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 ---- 872

Warranties and damages

Allegation that warranty used in IFB for automatic data processing equipment is unreasonable in general business practice is refuted by extent of competition that did not except to warranty requirements --- 835

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Supplies
Procurement
Limitation for prior GSA approval Page

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 835

Recreation
Purchase authority. (*See* **WELFARE AND RECREATION FACILITIES, Civilian personnel**)

EXPERTS AND CONSULTANTS
Travel expenses
To and from places other than home, etc.

Although Government consultant employed on when-actually-employed basis returned to his home in St. Louis, Missouri, instead of returning immediately to Las Vegas, Nevada, where he was transacting non-Government business at time he was called for Government meetings in Washington, D.C., he may be allowed the full cost of round-trip airfare between Las Vegas and Washington because the delay was occasioned by the Government assignment 430

FAIR LABOR STANDARDS ACT
Applicability
Employees of Canal Zone Government
Fair Labor Standards Amendments, Pub. L. 93–259

Civil Service Commission's interim instructions, requiring agencies to compute overtime benefits under both the Fair Labor Standards Amendments of 1974 and under various provisions of Title 5 of the U.S. Code, and to pay according to computation most beneficial to the employee are not illegal, as Canal Zone Acting Governor contends, but are in accord with statutory construction principle to harmonize statutes dealing with the same subject whenever possible, and is consistent with congressional intent 371

FAMILY ALLOWANCES
Evacuation
Member's duty station not ordered evacuated

Where there was an ordered evacuation of dependents of members of uniformed services serving in Cyprus, and dependents en route to other destinations in general area were delayed because of suspension of commercial air transportation to destinations east of Rome, Italy, evacuation allowances provided in ch. 12, 1 JTR, may not be authorized under current regulations, nor may such regulations be amended to permit evacuation allowances for dependents en route to station at which evacuation of dependents is not ordered, in absence of statutory authority 754

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT
Provisions
Property management functions
Performed by GSA Page

Although Administrative Office Act of 1939 provides that Director, Administrative Office of U.S. Courts, shall "provide accommodations" for Judiciary, Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 271 *et seq.*) provides that GSA shall perform centralized property management function (including leasing) for agencies of Federal Govt. Therefore Judiciary, included by definition in provisions of Property Act of 1949, may not perform its own leasing functions ---- 944

FEES
Attorneys
Generally. (*See* **ATTORNEYS, Fees**)
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Attorney fees**)
Docket
Government liability

Docket fee may be awarded as cost against Government as set forth in 28 U.S.C. 1923, since after balancing 28 U.S.C. 2412 prohibition against taxing of attorney fees and expenses (docket fee appearing to be attorney's compensation for docketing suit) against allowance of such fees in sections 1920 and 1923, it appears that allowance of such fee accords with congressional intent in 1966 amendment of section 2412, which appears to be remedial in nature, to bring parity to private litigant respecting costs in litigation with U.S. ---- 22

Jury. (*See* **COURTS, Jurors, Fees**)
Membership
Use
Operation cost of association
Status of association in regard to contract protests

Dept. of Labor Day Care Parents' Association is an "interested party" under 4 CFR 20.1 for purpose of protesting Dept. of Labor's award of contract for operation of day care center where fees paid by its members account for approximately 15 percent of total operating cost of center and nearly one-third of contract price ---- 1035

FOOD
Stamp programs
Appropriations
Impounding

Court order, entered prior to expiration of availability period for fiscal year 1973 Food Stamp Program appropriation, which required that the impounded balance of such appropriation be recorded as obligated under 31 U.S.C. 200(a)(6), as a liability which might result from pending litigation, was effective to obligate the impounded 1973 appropriation balance and thereby prevent its lapse. Therefore, 1973 balance so obligated may be used during fiscal year 1976 without further appropriation action ---- 962

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Territorial cost of living allowance
Inclusion for aggregate limitation purposes
Judicial staff members Page

Determination by Judicial Conference that limitation at 28 U.S.C. 753(e) on annual salary payable to court reporters precludes payment of cost-of-living allowance to reporters receiving maximum salary is reasonable exercise of pay-setting authority given the lack of any indication that Congress intended reporters to receive compensation, other than transcript fees, in excess of that maximum. Determination is in line with our holding in B–107827, November 9, 1973, that cost-of-living allowance payable to Judges' secretaries and clerks under 28 U.S.C. 604(a)(5) is subject to appropriations limitations on aggregate salary 251

FOREIGN GOVERNMENTS
Contracts with United States
Furtherance of foreign relations

Protest that proposal offering listed Canadian end product should have been evaluated pursuant to Buy American Act restrictions is denied because regulations implementing Act provide for waiver with respect to listed Canadian end products and GAO has previously upheld DOD's discretion in effecting waiver of restrictions and listing products; moreover, action of Canadian, Commercial Corporation in submitting offer for Canadian supplier was proper under regulation. In view of Congressional cognizance of Agreements between DOD and Canadian counterpart waiving Act's restrictions, and as Agreement covers matter concerning U.S.-Canadian relations, it is inappropriate for GAO to question regulation's propriety 44

Exhibits
Archaeological finds of People's Republic of China
Government liability

Where Congress has authorized the Dept. of State to agree to indemnify the People's Republic of China (PRC) for loss of or damage to an exhibition of archaeological finds, and where the Dept. has agreed to be responsible for the security of collection while it is in U.S., the Dept., if it determines it is to the advantage of the U.S. to do so, may give assurance to private art gallery showing exhibition pursuant to agreement with PRC that, if U.S. is required to indemnify the PRC as result of negligence by gallery, U.S. will not seek to recover from gallery. 807

FOREST SERVICE
Other than timber sales. (*See* **AGRICULTURE DEPARTMENT, Forest Service**).

FREEDOM OF INFORMATION ACT
Disclosure requests
Contract protester

In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release information on its requirements, protester should have pursued disclosure request under Freedom of Information Act 1100

FUNDS
Advance
Repairs on defaulted mortgage properties
Housing and Urban Development Department Page
Under provisions of 12 U.S.C. 1713(k) Secretary of HUD may advance moneys for purpose of making necessary repairs to multifamily projects covered by mortgages which have gone into default and been assigned to him, provided that either default is cured or title to property acquired within reasonable time. After mortgage has gone into default and been assigned to Secretary of HUD, he may, in accordance with broad authority contained in 42 U.S.C. 3535(i), restructure mortgage to defer portion of monthly principal and interest payment to end of mortgage term so as to cure default 1061

Travel expenses
Accountability
Special Agent of the Drug Enforcement Administration whose wallet containing $1,185 in cash travel advance funds was stolen from his locked motel room while he was sleeping may nevertheless not be relieved of liability for the loss of such funds since travel advancements are considered to be like loans, as distinguished from Government funds and hence money in the wallet was private property of the Special Agent and he remains indebted to the Government for the loan, and must show either that it was expended for travel or refund amount not expended 190

Appropriated. (*See* **APPROPRIATIONS**)
Federal aid, grants, etc. to States. (*See* **STATES, Federal aid, grants, etc.**)
Impounding. (*See* **APPROPRIATIONS, Impounding**)
Land-grant funds
Investments
"Other safe bonds"
What constitutes
For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent .. 37

GARNISHMENT
Military pay, etc.
Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts 424

GENERAL ACCOUNTING OFFICE
Comptroller General
Impoundment functions
GAO interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C.G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be

GENERAL ACCOUNTING OFFICE—Continued
Comptroller General—Continued
Impoundment functions—Continued Page
used in deciding whether to treat impoundment as rescission or deferral; the C.G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C.G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C.G. is to report to Congress when President has failed to transmit a required message; and the C.G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability ---- 453

Contracts
Contractor's responsibility
Contracting officer's affirmative determination accepted
Exceptions
GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud ---- 66

Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis ---- 499

Where IFB provides for offerors' furnishing information as to experience in designing and producing items comparable to item being procured, record will be examined to determine if bidder to whom award was made meets experience requirement and rule that affirmative determinations of responsibility will not be reviewed except where there are allegations that contracting officer's actions in finding bidder responsible are tantamount to fraud is distinguished ---- 509

Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith ---- 681

GAO will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case ---- 686

Issue concerning whether awardee is nonresponsible for allegedly failing to offer finished product which meets quality of product initially offered will not be considered by GAO, since practice of reviewing protests involving contracting officer's affirmative determination of responsibility has been discontinued absent showing of fraud in finding ---- 775

GENERAL ACCOUNTING OFFICE—Continued
Contracts—Continued
Protests. (*See* **CONTRACTS, Protests**)
Recommendation for agency review
Justification for award Page
Since substantial justification forcon clusions 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 ---- 896
Recommendation for corrective action
Recommendation for convenience termination which is contained in affirmation of prior decision presupposes that contractor is satisfactorily performing contract in accordance with its terms. Recommendation should not take precedence over any possible termination for default action should such action be appropriate and necessary ---- 715
Agency's evaluation of transportation costs based on other than most economical method of shipment was contrary to terms of solicitation. GAO 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 ---- 901
Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt.'s needs ---- 1068
Where in course of final discussion with sole offeror remaining in competitive range contract being negotiated has significantly changed from RFP under which competitive range was determined, in absence of compelling reason, contracting officer must take action to amend RFP and seek new offers ---- 1080
Recommendation to GSA is made that future solicitations requiring bidders to indicate percentage either as addition to, or deduction from, established rate schedules should provide bidders with bidding schedule compatible with *METHOD OF AWARD* clause ---- 1087
Satisfied
Where GAO previously judged probable cost evaluation to be doubtful in certain respects, actions taken by NASA source selection official—in considering certain cost data and reaching determination that neither cost reevaluation nor reconsideration of selection decision is warranted—are responsive to intent of GAO recommendation. Under circumstances, additional analysis in area of application of G&A cost rates does not appear to be required ---- 1009

GENERAL ACCOUNTING OFFICE—Continued

Decisions

Abeyance

Pending protester's appeal to agency

Exception Page

Notwithstanding protester's appeal to agency under Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, for further documentation relative to merits of its protest, GAO will not refrain from issuing decision pending appeal, where record shows that further delay in issuing decision could harm agency procurement process and protester already has received substantial portion of agency documents 783

Effect on entitlements prior to decision

Prospective effect

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 greater than one-half. Prior interpretation was made by the CSC 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 890

Reconsideration

Litigation pending

Where issues involved in request for reconsideration are before court of competent jurisdiction, decision on reconsideration generally will not be issued. However, since parties consented to issuance of TRO, after receiving assurance that decision on reconsideration would be issued expeditiously within period of contemplated restraining order, and court was fully aware of both pendency of reconsideration and commitment to issue decision before expiration of TRO, decision on reconsideration is issued 715

Objection to RFP evaluation factors made 10 months after receipt of initial proposals is untimely, but where issue is part of request for reconsideration which has become involved in litigation before U.S. District Court, and suspension of litigation proceedings indicates court's interest in receiving GAO decision, untimely issue is addressed on merits along with other issues raised by request 1009

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, agency can also file exception to arbitration award with Federal Labor Relations Council (FLRC) under regulations promulgated by that agency. Decisions by the Comptroller General are binding on agency, the FLRC and Assistant Secretary of Labor for Labor-Management Relations 921

Review basis

Under provisions of 31 U.S.C. 74 and 82d, agency heads and authorized certifying officers have statutory right to seek decision from this Office on propriety of payments. Hence, agency may legitimately delay imple-

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Requests—Continued
Review basis—Continued Page
mentation of a determination by Asst. Secretary of Labor for Labor-Management Relations involving expenditure of funds pending Comptroller General decision ---- 760

Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
GAO review discontinued
Exceptions
GAO has discontinued practice of reviewing bid protests of contracting officer's affirmative responsibility determination except for actions by procuring officials which are tantamount to fraud ---- 66
Question of responsive bidder's manifestation after bid opening of inability to comply with specification requirement for commercial, off-the-shelf item is situation where our Office will continue to review affirmative responsibility determination, even in absence of allegation or demonstration of fraud to determine if determination was founded on reasonable basis ---- 499
Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith ---- 681
GAO will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case ---- 686
Issue concerning whether awardee is nonresponsible for allegedly failing to offer finished product which meets quality of product initially offered will not be considered by GAO, since practice of reviewing protests involving contracting officer's affirmative determination of responsibility has been discontinued absent showing of fraud in finding ---- 775
Defaults and terminations
Recommendations for corrective action
Recommendation for convenience termination which is contained in affirmation of prior decision presupposes that contractor is satisfactorily performing contract in accordance with its terms. Recommendation should not take precedence over any possible termination for default action should such action be appropriate and necessary ---- 715
Equitable jurisdiction
Specific statute requirement
Holding in 28 Ops. Atty. Gen. 121 (1909) cannot be followed since it was based on concepts of equity and principles of morality. GAO equitable jurisdiction can be exercised only where specifically granted by statute. There is no authority applicable to considering request for no-cost cancellation on equitable basis ---- 527

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Contracts—Continued
Relief to facilitate national defense Page
Our Office cannot review agency's findings under Pub. L. 85–804 since we are not one of Govt. agencies authorized by statute or implementing Executive orders to modify contracts without consideration--- 1031

Subcontracts
As matter of policy, GAO generally will not consider protests against awards of subcontracts by prime contractors, even where prime contract is of cost-reimbursement type, whether or not subcontract has been awarded. However, GAO will consider subcontract protests where prime contractor is acting as Government's purchasing agent; Government's active or direct participation in subcontractor selection has net effect of causing or controlling potential subcontractors' rejection or selection, or of significantly limiting subcontractor sources; fraud or bad faith in Government's approval of subcontract award is shown; subcontract award is "for" Government; or agency requests advance decision. 51 Comp. Gen. 803, modified---------- 767

GAO will not consider on merits protest of award of automatic data processing subcontract by health insurance carrier administering Medicare Part "B" program pursuant to cost reimbursement type contract with Social Security Administration (SSA) by virtue of protester's allegations that contractual and regulatory requirements that carrier conduct proper cost analysis before awarding subcontract were not complied with, since enforcement of such requirements are contract administration matters appropriate for SSA's resolution and not proper for GAO's resolution absent evidence indicating fraud or bad faith----- 767

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---------- 896

Contracts
Invitation for bids
Method of award clause
Recommendation to GSA is made that future solicitations requiring bidders to indicate percentage either as addition to, or deduction from, established rate schedules should provide bidders with bidding schedule compatible with *METHOD OF AWARD* clause---------- 1087

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Reconsideration of decision effect Page
Prior decision concluding that termination for convenience is in best interest of Govt. is affirmed, taking into consideration (a) extent of contract performance; (b) estimated cost of termination for convenience (both at present and at date of prior decision); and (c) whether benefits to competitive procurement system require corrective action; and because it is not clear that all bidders would offer same items on resolicitation and thereby render reprocurement academic exercise. However, second part of original recommendation, i.e., award to next low bidder, is modified because agency states that requirements as interpreted exceed its minimum needs 715
Reporting to Congress
Contract matters
Invitation for emergency standby power systems contained specification concerned with horsepower rating of engine needed to drive generator which was subject to conflicting reasonable interpretations. Where invitation so inadequately expresses Govt.'s requirements as to ensnare bidder into submitting nonresponsive bid, invitation should be canceled and procurement resolicited under terms clearly expressing Govt.'s needs. 1068
Withdrawn
Because resolicitation cannot be effectively implemented before expiration of contract recommended for resolicitation in prior decision and normal procurement cycle on upgraded specification is about to begin, HEW is advised that prior recommendation need not be followed. 53 Comp. Gen. 895, modified 483
Recommendation in 54 Comp. Gen 16 that negotiations be reopened to either cure deviation in accepted proposal or to issue amendment to RFP deleting option price ceiling is withdrawn in light of contracting agency's position that to do so would not be in best interests of Government based upon significant termination costs 521
Reviews
Pro rata expense reimbursement
House purchase or sale
Relocation expenses
Where employee purchases or sells land in excess of that reasonably related to a residence site and there is doubt as to the propriety of the agency proration determination under Federal Travel Regulations (FPMR 101–7) para. 2–6.1f (May 1973) or the employee takes exception to the agency determination, the case should be forwarded to Comptroller General with supporting evidence for review and disposition. 597

GENERAL ACCOUNTING OFFICE—Continued

Settlements

Reopening, review, etc.

Transportation claims Page

Even though request for reversal of audit action is addressed to Transportation and Claims Division, settlement action, disallowing claims, is ripe for review by Comptroller General where record shows Division adequately responded to all of claimant's grounds for reversal..... 89

GENERAL SERVICES ADMINISTRATION

Authority

Space assignment

Leasing

Freeze

In performing its centralized leasing functions pursuant to Federal Property and Administrative Services Act of 1949, as amended, GSA's imposition of freeze on monies appropriated to Judiciary for fiscal year 1975 for new leases is consistent with Congressional intent of GSA's appropriation act for 1975 to limit monies expended for leasing for all of Federal Govt..... 944

Services for other agencies

Space assignment

Including leasing

Although Administrative Office Act of 1939 provides that Director, Administrative Office of U.S. Courts, shall "provide accommodations" for Judiciary, Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 271 *et seq.*) provides that GSA shall perform centralized property management function (including leasing) for agencies of Federal Govt. Therefore Judiciary, included by definition in provisions of Property Act of 1949, may not perform its own leasing functions..... 944

GRANTS

To States. (*See* **STATES, Federal aid, grants, etc.**)

GRATUITIES

Reenlistment bonus

Eligibility

Public Law 93–277

Members of military service who were discharged or separated prior to June 1, 1974, and who reenlisted within 3 months but were not on active duty on June 1, 1974, the effective date of Pub. L. 93–277, are not entitled to receive the regular reenlistment bonus under prior law, as saved by sec. 3 of Pub. L. 93–277 since the law as enacted specifically limits save-pay to those members who were on active duty on the effective date of the act and there is nothing in the legislative history of that act which would furnish a basis upon which that limitation could be disregarded..... 536

Six months' death

Conflicting claims

Wife *v.* parent

Effect of wife's separation agreement

When member and wife were separated and agreement was executed by them prior to time member entered Air Force whereby wife waived all rights and other benefits to which she may be entitled as result of

GRATUITIES—Continued
Six months' death—Continued
Conflicting claims—Continued
Wife *v.* parent—Continued
Effect of wife's separation agreement—Continued Page
member's possible future military service and member designated his mother to receive the 6-months' death gratuity in the event there was no surviving spouse, mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford legal basis for payment of gratuity due from the U.S. to someone other than the lawfully designated recipient 152

Inactive duty training
Injury within scope of duties
Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who suffered heart attack and died during early morning of Sept. 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits under 32 U.S.C. 321(a)(1) and 32 U.S.C. 320 523

GUAM
Employees
Court reporters
Court reporter who served in dual capacity as court reporter-secretary under authority of 28 U.S.C. 753(a) is not entitled to additional pay for performance of secretarial duties in excess of maximum established under 28 U.S.C. 753(e) as in effect prior to June 2, 1970. While language of 753(a) does not clearly so limit compensation for combined positions, the derivative language of Public Law 78–222 which was revised, codified and enacted without substantive change by Public Law 80–773, expressly provided that the salary for such a combined position was to be established subject to the statutorily prescribed maximum 251

Determination by Judicial Conference that limitation at 28 U.S.C. 753(e) on annual salary payable to court reporters precludes payment of cost-of-living allowance to reporters receiving maximum salary is reasonable exercise of pay-setting authority given the lack of any indication that Congress intended reporters to receive compensation, other than transcript fees, in excess of that maximum. Determination is in line with our holding in B–107827, November 9, 1973, that cost-of-living allowance payable to Judges' secretaries and clerks under 28 U.S.C. 604(a)(5) is subject to appropriations limitations on aggregate salary 251

HEALTH, EDUCATION, AND WELFARE DEPARTMENT
Contracts
Negotiated
Basic ordering type agreements
Approval
Dept. HEW's proposed use of basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may

HEALTH, EDUCATION, AND WELFARE DEPARTMENT—Continued
Contracts—Continued
Negotiated—Continued
Basic, ordering type agreements—Continued
Approval—Continued Page

actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved ---------- 1096

HOUSING
Displacement
Relocation costs
Displaced persons only

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. 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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act ---------- 841

Effective date of entitlement

Holding in 51 Comp. Gen. 660 (1972) that 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 ---- 819

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Repairs on defaulted mortgage properties
Authority to make advancements from insurance fund for reimbursement.

Under provisions of 12 U.S.C. 1713(k) Secretary of HUD may advance moneys for purpose of making necessary repairs to multifamily projects covered by mortgages which have gone into default and been assigned to him, provided that either default is cured or title to property acquired within reasonable time. After mortgage has gone into default and been assigned to Secretary of HUD, he may, in accordance with broad authority contained in 42 U.S.C. 3535(i), restructure mortgage to defer portion of monthly principal and interest payment to end of mortgage term so as to cure default ---------- 1061

HUSBAND AND WIFE
Annulments
Widow's entitlement to annuity elected by military member
Annulment of widow's remarriage. (*See* **PAY, Retired, Annuity elections for dependents, Annulment of widow's remarriage**)
Dual rights where both in military or Federal service
Travel 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

HUSBAND AND WIFE—Continued
Dual rights where both in military or Federal service—Continued
Travel expenses—Continued Page
was transferred at approximately same time to same place, employee's PCS entitlements may be paid if agency determines transfer was in Govt.'s interest; that transfer also serves employee's personal needs does not preclude such determination ---------- 892

Transportation agreements
Renewals
Overseas service
Single, non-U.S. citizen who was hired outside continental U.S. for service overseas was permitted to negotiate transportation agreement. Ten years later employee married another employee of U.S. Govt., and they elected, as required by regulation, to retain husband's transportation agreement, with wife travelling as spouse. Husband was separated in RIF, and wife was denied right to negotiate renewal agreement because of travel benefits received by husband from non-U.S. Govt. employer. Wife should be permitted to negotiate renewal agreement because she has met all statutory requirements. Rules for local hires do not apply nor should benefits from husband's employer be considered -- 814

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 Govt. 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 Govt.'s obligation is limited to the greater entitlement and with payment of constructive drayage plus shipment to Lincoln Park, that entitlement resulted in greater payment ---------- 847

INSURANCE
Contractors
Government
Self-insurer
Where amount of contractor's commercial work is insignificant when compared to amount of Govt. work and Govt. as practical matter is bearing entire risk of loss of contractor's property in that Govt. is, in essence, paying full insurance premium under its cost-type contract, no compelling reason is seen why Govt. may not, within appropriation limits, agree to assume such risk of loss. B–168106 dated July 3, 1974, modified ---------- 824

Life
Civilian employees. (*See* **OFFICERS AND EMPLOYEES, Life insurance**)

INTEREST
Back pay
Statutory authority required
Asst. Secretary of Labor for Labor-Management Relations may not order agency to pay interest on backpay awards in absence of specific statutory authority ---------- 760

INTERGOVERNMENTAL PERSONNEL ACT
Assignment of State employees
"Pay" reimbursement Page

When a State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating assignment agreement required under 5 CFR 334.105 nor for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference, according to legislative history, to salary of State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to meaning used in Federal personnel statutes, that is, that term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part 210

INVESTMENTS
Land grant colleges

For purposes of investing First Morrill Act landgrant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

JOINT VENTURES
Bid
Bid bond
Discrepancy between bid and bid bond
Bid nonresponsive

Bid of corporation, which submitted defective bid bond in name of joint venture consisting of corporation and two individuals, must be rejected as nonresponsive and defect cannot be waived by contracting officer, since IFB requirement for acceptable bid bond is material and GAO is unable to conclude on basis of information bidder submitted with bid that surety would be bound in event bidder failed to execute contract upon acceptance of its bid 271

Joint venturers
Improper discussions alleged
Negotiated contract

Unsuccessful offeror's statement that one of joint venturers and Navy were involved in improper discussions during negotiation process is unfounded, as is contention that one of joint venturers participated in formulation of RFP for design and construction of family housing units on a turnkey basis. Furthermore, there are no regulations which prohibit on-site contractor from competing for additional award at same location 775

LABOR DEPARTMENT
Training programs
Comprehensive Employment and Training Act

The legislative intent of the Comprehensive Employment and Training Act of 1973, P.L. 93-203 approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152 560

LABOR DEPARTMENT—Continued

Unfair labor practices

Authority Page

Unfair labor practices which involve personnel actions by agency directly affecting employees may be regarded as unjustified or unwarranted personnel actions under Back Pay Act, 5 U.S.C. 5596 (1970), and Asst. Secretary of Labor for Labor-Management Relations may order agency to pay such backpay allowances, differentials, and other substantial financial employee benefits as are authorized under 5 CFR, part 550, subpart H, provided it is established that, but for the unfair labor practice, the harm to the employee would not have occurred 760

The Back Pay Act of 1966, 5 U.S.C. 5596, is applicable only to Federal employees and does not apply to unsuccessful applicants for employment. Therefore, while Asst. Secretary of Labor for Labor-Management Relations is authorized to take affirmative action when he finds that an agency has engaged in an unfair labor practice in hiring, he has no authority to direct agency to make appointment under the Back Pay Act 760

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 leasehold interest in property by GSA are not entitled to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Govt. was not committed to acquire property, tenant moves were not result of Govt.'s acquisition, and Govt. did not take an active role in encouraging tenants to move .. 819

Building construction for lease to Government

Relocation expenses to "displaced persons"

Effective date of entitlement

Holding in 51 Comp. Gen. 660 (1972) that 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 816

Renewals

New *v.* option to renew

No corrective action recommended on contract awarded improperly where due to nature of item procured (lease of relocatable office building) and circumstances presently existing (principally fact that incumbent contractor has already received payment for transporting, setting up and taking down buildings) there appears to be little room for price competition on any reprocurement 242

Termination

Property leased to Government

Tenants vacating premises

Not "displaced persons"

No entitlement to relocation expenses

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. or to federally

LEASES—Continued
Termination—Continued
Property leased to Government—Continued
Tenants vacating premises—Continued
Not "displaced persons"—Continued
No entitlement to relocation expenses—Continued Page

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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act ---------- 841

LEAVES OF ABSENCE
Administrative leave
Fighting local fires
Outside Government installation

The denial of administrative leave to employee for time spent in fighting local fire outside of Govt. installation was proper exercise of administrative authority since CSC has not issued general regulations covering the granting of administrative leave, and therefore, each agency has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate ---------- 706

Annual
Accrual
Part-time, etc., employees

Court reporters paid annual salary to be on call as needed by the court and free otherwise to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day and/or hour which they are required to work during workweek and are "part-time" employees excluded from annual leave entitlement by 5 U.S.C. 6301(2)(ii). While court reporter-secretary may be entitled to annual leave for secretarial portion of duties performed during a regular tour of duty, record contains no certification of leave earnings and use upon which to base lump-sum leave payment ---------- 251

Agency-forced
Curtailment of agency operations

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agreements between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue ---------- 503

Forfeiture. (*See* **LEAVES OF ABSENCE, Forfeiture**)
Holidays
Charging precluded
Within regularly scheduled tour of duty
Employees receiving premium pay

Employees of VA hospital, charged annual leave on holidays they did not work because they were paid premium pay under 5 U.S.C.

LEAVES OF ABSENCE—Continued
Annual—Continued
Holidays—Continued
Charging precluded—Continued
Within regularly scheduled tour of duty—Continued
Employees receiving premium pay—Continued Page

5545(c)(1) should have leave restored since decision 35 Comp. Gen. 710 interpreting sec. 5545(c)(1) states that a charge against leave for absence on a holiday within the regularly scheduled tour of duty is required only where standby on such holiday was required of employees and was thus considered in arriving at percentage of premium pay and standby was not required of employees on holidays in question 662

Involuntary
Curtailment of agency operations. (*See* **LEAVES OF ABSENCE, Involuntary leave, Curtailment of agency operations**)
Civilians on military duty
Entitlement
Part time, intermittent and temporary employees

Temporary limited employees of the Federal Govt. are not eligible for military leave as authorized by 5 U.S.C. 6323 999

Court
Jury duty
Saturdays and Sundays
Inclusion of premium pay in compensation payable

Because it would be a hardship on Federal Aviation Administration (FAA) employees called for weekday jury duty whose tours of duty include work on Saturdays or Sundays, or both, to require them to work their regularly scheduled weekend days in addition to serving on juries on 5 weekdays, the FAA may establish a policy to permit those employees to be absent on weekends without charge to annual leave and with payment of premium pay normally received by them for work on Saturdays and Sundays 147

Court reporters
Leave accrual

Court reporters paid annual salary to be on call as needed by the court and free otherwise to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day and/or hour which they are required to work during workweek and are "part-time" employees excluded from annual leave entitlement by 5 U.S.C. 6301(2)(ii). While court reporter-secretary may be entitled to annual leave for secretarial portion of duties performed during a regular tour of duty, record contains no certification of leave earnings and use upon which to base lump-sum leave payment 251

Forfeiture
Administrative error
Restoration
Exceptions

Employee who was reinstated after determination by Civil Service Commission (CSC) that he had been improperly separated due to procedural defect is not entitled to be credited with forfeited annual leave under provisions of 5 U.S.C. 6304(d)(1)(A) providing for restoration of annual leave lost through administrative error after June 30, 1960,

LEAVES OF ABSENCE—Continued
Forfeiture—Continued
Administrative error—Continued
Restoration—Continued
Exceptions—Continued Page

since CSC regulations do not consider an "unjustified or unwarranted personnel action" under 5 U.S.C. 5596 as an administrative error and CSC held, in fact, that agency's wrongful action was one of substance in that agency's reason for refusing to permit withdrawal of resignation was unwarranted and adverse action procedures should have been followed---- 801

Retirement

Employee entitled to use sick leave specifically requested that such time be charged to annual leave. After annual leave is granted, employee may not thereafter have such leave charged to sick leave and be re-credited with the amount of annual leave previously charged for purposes of lump-sum payment upon separation for retirement---- 1086

Home leave

Accrual. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave, Accrual**).

Credit to annual leave. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave, Credit to annual leave**).

Involuntary leave

Curtailment of agency operations

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agreements between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue---- 503

Lump-sum payments

Rate at which payable

Increases

CSC seeks GAO concurrence in application of 47 Comp. Gen. 773 (1968) to prevailing rate employees. Retroactive adjustments to wages of prevailing rate employees are governed by 5 U.S.C. 5344 which places limitations on those categories of employees entitled to such adjustments. Employees separated prior to date wage increase is ordered into effect may have wages and/or lump-sum leave payments adjusted only if they died or retired between effective date of increase and date increase ordered into effect (and then only for services rendered during this period) or if they are in the service of the Govt. actively or on terminal leave status on date increase is ordered into effect---- 655

Military

Civilians. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)

Military personnel

Lost time periods

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 dis-

LEAVES OF ABSENCE—Continued
Military personnel—Continued
Lost time periods—Continued Page
charge, 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 DOD regulations---------- 862

Payments for unused leave on discharge, etc.
Reservists hospitalized, etc.
A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(i), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave---------- 33

Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel, Leaves of absence**)
Sick
Recredit of prior leave
Break in service
Although substitute teachers in D.C. do not earn sick leave under D.C. Teachers' Leave Act of 1949 or Annual and Sick Leave Act of 1951, service as substitute in D.C. is service for purpose of leave regulations which provided during period in question that sick leave could be recredited after separation from service of less than 52 continuous calendar weeks. Former substitute reemployed by HEW is, therefore, entitled to recredit of sick leave earned prior to substitute teaching, but amount for recredit is limited by Sick Leave Act of 1936 which, until 1952, limited accrued sick leave to 90-day maximum---------- 669

Substitution for annual leave
Employee entitled to use sick leave specifically requested that such time be charged to annual leave. After annual leave is granted, employee may not thereafter have such leave charged to sick leave and be recredited with the amount of annual leave previously charged for purposes of lump-sum payment upon separation for retirement---------- 1086

Status of employees
Intermittent employees
Court reporters paid annual salary to be on call as needed by the court and free otherwise to augment income with earnings from transcript fees do not have regular tours of duty consisting of a definite time, day and/or hour which they are required to work during workweek and are "part-time" employees excluded from annual leave entitlement by 5 U.S.C. 6301(2)(ii). While court reporter-secretary may be entitled to annual leave for secretarial portion of duties performed during a regular tour of duty, record contains no certification of leave earnings and use upon which to base lump-sum leave payment---------- 251

Travel time
Excess
Annual leave charge
An employee assigned to temporary duty who departs earlier than necessary in order to take authorized annual leave and consumes travel-

LEAVES OF ABSENCE—Continued
Travel time—Continued
Excess—Continued
Annual leave charge—Continued Page

time in excess of that which would be allowed for official travel alone on a constructive travel basis, by virtue of special routing and departure times, may not be allowed per diem for the excess traveltime pursuant to Federal Travel Regulations and should be charged annual leave for such excess traveltime consumed for personal convenience 234

Without pay
Administrative discretion

Where employee resigned prior to receipt of specific notice of involuntary separation or general notice of proposed transfer or abolition of all positions in his competitive area, as required in applicable regulations for entitlement to severance pay, neither failure of agency to grant him leave without pay status prior to resignation nor its action in granting such leave to other employees provides basis for his entitlement to severance pay if not otherwise eligible since granting of leave without pay if not matter of right but a matter for agency's discretion 154

LEGISLATION
Statutory construction. (*See* **STATUTORY CONSTRUCTION**)

LICENSES
Bidder qualifications. (*See* **BIDDERS, Qualifications**)
States and municipalities
Government contractors

Whether action of nonprofit, State-created institution affiliated with educational institution in bidding for other than research and development contract was ultra vires in violation of Massachusetts law enabling its establishment, like matter of general compliance with State and local licensing requirements, is for resolution between the bidder and State. Furthermore, bidder's authority to perform work in various States is matter for determination by those jurisdictions 480

MARITIME MATTERS
Vessels
Sales
Minimum acceptable bid price

Maritime Admin. 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 830

MEALS
Military personnel
Away from duty station

Member with permanent change of station from Jacksonville, N.C. area to overseas location with temporary duty en route at Cherry Point, N.C., who occupied residence in Jacksonville while on temporary duty and commuted daily to Cherry Point, is not entitled to per diem during period that ch. 246, Aug. 1, 1973, case 13, para. M4156, 1 JTR, was in effect, as per diem is prohibited whether the temporary duty location is within or without the area of permanent duty station. However, member may be paid for transportation between his residence and temporary duty station and for meals in accord with this provision 803

MEETINGS
Meals
Reduction in per diem. (*See* **SUBSISTENCE, Per deim, Reduction, Conference meals**)

Short term conference facilities
Service contract
Federal Property Management Regulations Page

Federal agencies may now procure use of short-term conference and meeting facilities without regard to prohibition against rental contracts in District of Columbia in 40 U.S.C. 34, inasmuch as the GSA in its Federal Property Regs., contained in 41 CFR 101–17.101–4 has interpreted the procurement of use of short-term conference facilities as a service contract instead of a rental contract. OTA, which has legislative authority to contract for such services, may reimburse its panel member sponsors for expenses incurred in arranging OTA panel meetings at COSMOS Club in D.C., with appropriate reductions in each member's actual subsistence allowance for meals provided in this manner. 35 Comp. Gen. 314; 49 *id.* 305; and B–159633, May 20, 1974, insofar as they prohibited procurement of short-term conference facilities in D.C., will no longer be followed 1055

MILEAGE
Military personnel
As being in lieu of all other expenses
Rates
Increase
Effective date

Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a) 280

Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to data of dependents' travel (case b) 280

Ports of embarkation and debarkation
Payment basis

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route to Travis Air Force Base, Calif., and by POV from there to Bainbridge, traveled circuitously for personal reasons to Miami, Fla., and from there to Bainbridge. While the JTR 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, member may be paid only for distance by direct travel from port of debarkation actually used to new station, not to exceed distance by normal route 850

MILEAGE—Continued
Military personnel—Continued
Rates
Increase
Effective date Page

Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c)---------- 280

Where member is directed to perform periods of temporary duty en route to new permanent station prior to July 1, 1974, date of increased mileage rates, and effective date of permanent change of station is on or after July 1, 1974, since all the travel is performed in accordance with the permanent change of station order, the effective date of such order determines the mileage allowance rate applicable to all travel performed in accordance with the order without regard to the date member is required to travel in connection with temporary duty en route (case d)-- 280

Retirement
To selected home
Effect of amended Joint Travel Regulations

Member who claims mileage incident to his retirement, representing distance from his place of separation to his home of record or place of entry on active duty less distance from his place of separation to his selected home and who has already selected home and received appropriate allowances thereto, may receive no additional mileage allowance because he has received all that the law allows---------- 1042

Travel by privately owned automobile
Recruiters
Automobile insurance coverage

Although under 37 U.S.C. 428 and 1 JTR paragraph M5600 a member of armed services whose primary assignment is to perform recruiting duty may be reimbursed for actual and necessary expenses incurred in connection with performance of those duties, recruiter is not entitled to reimbursement by Govt. for increased cost of extended insurance coverage incurred in connection with use of privately owned automobile in performance of duties where a mileage allowance is authorized incident to such duties since such allowance is a commutation of the expense of operating automobile including the cost of insurance---------- 620

Travel by privately owned automobile
Dependents
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 Govt.'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---------- 892

MILITARY PERSONNEL
Allowances
Family. (*See* **FAMILY ALLOWANCES**)
Quarters. (*See* **QUARTERS ALLOWANCE**)
Station. (*See* **STATION ALLOWANCES**)
Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)
Claims
Waiver. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)
Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)
Courts-martial
Pay. (*See* **PAY, Courts-martial sentences**)
Death or injury
National Guard. (*See* **NATIONAL GUARD, Death or injury**)
Dependents
Annuity election for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)
Certificates of dependency
Filing requirements Page
In view of proposed Joint Uniform Military Pay System—Army procedures for recertifying and verifying dependency for payment of basic allowance for quarters, the annual recertification of dependency certificates prescribed by 51 Comp. Gen. 231 (1971), as they relate to Army members' primary dependents, no longer will be required..... 92
Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Dislocation allowance
Members with dependents. (*See* **TRANSPORTATION, Dependents, Military personnel, Dislocation allowance**)
Dual benefits
Retired pay and civilian severance pay
National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service..... 212
Enlistments
Generally. (*See* **ENLISTMENTS**)
Gratuities. (*See* **GRATUITIES**)
Household effects
Storage. (*See* **STORAGE, Household effects, Military personnel**)
Transportation. (*See* **TRANSPORTATION, Household effects, Military personnel**)
Medical officers
Pay. (*See* **PAY, Medical and dental officers**)
Mileage. (*See* **MILEAGE, Military personnel**)
Pay. (*See* **PAY**)
Retired. (*See* **PAY, Retired**)
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Quarters allowance. (*See* **QUARTERS ALLOWANCE**)

MILITARY PERSONNEL—Continued

Record correction

Retired pay

Purpose Page

Person whose military record is corrected on date subsequent to September 20, 1972, to show entitlement to retired pay on date prior to September 20, 1972, is not automatically covered under Survivor Benefit Plan (SBP), since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP 116

Reenlistment bonus. (*See* **GRATUITIES, Reenlistment bonus**)

Reservists

Death or injury

Inactive duty training, etc.

Burial expenses

Claim for burial expenses by wife of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who died during early morning of Sept. 9, is returned for payment, since, at time of his death, member was in a pay status while on inactive duty training for the purpose of 10 U.S.C. 1481 523

Injured within scope of duties

Military member who during attendance at multiple unit training assembly two (MUTA–2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, distinguished 165

Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who suffered heart attack and died during early morning of Sept. 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits under 32 U.S.C. 321(a)(1) and 32 U.S.C. 320 523

Pay and allowance

A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(i), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave .. 33

Release from active duty

Selection of home

Vol. 1, JTR, may be amended to reflect that members of the uniformed services who qualify for travel and transportation allowances to home of selection under 37 U.S.C. 404(c) and 406(g) retain the right to travel and transportation allowances based on home of record or

MILITARY PERSONNEL—Continued
Reservists—Continued
Release from active duty—Continued
Selection of home—Continued Page
place of entry on active duty under 37 U.S.C. 404(a) and 406(a). 42 Comp. Gen. 370 and B–163248, March 19, 1968, overruled---------- 1042

Retirement
"Active duty" status requirement
Service as cadet-midshipman, Merchant Marine Reserve, United States Naval Reserve, at the United States Merchant Marine Cadet Basic School, Pass Christian, Mississippi, from March 1945 until December 1946, is Reserve service for purposes of 10 U.S.C. 1331(c) and, therefore, a person so attending must have performed "wartime service" as defined in that subsection in order to be eligible for retired pay based on non-Regular service under Chapter 67 of Title 10, United States Code---------- 603

Retired
Pay. (*See* **PAY, Retired**)
Retirement
Effective date
Mandatory retirement
Rear Admirals
Several rear admirals, both upper and lower half, are to be mandatorily retired under provisions of 10 U.S.C. 6394 on July 1, 1975, and as a result of retirement of rear admirals (upper half) on that date, some retiring rear admirals (lower half) would be entitled to basic pay as a rear admiral (upper half) in accordance with 37 U.S.C. 202, if considered to be serving on active list subsequent to the retirement of the rear admirals (upper half). These rear admirals are not entitled to compute retired pay on basis of rear admiral (upper half) since they also are to be mandatorily retired on July 1, 1975, and as a result will not be serving in that grade on the active list on that date---------- 1090

Mandatory
Effective date. (*See* **MILITARY PERSONNEL, Retirement, Effective date, Mandatory retirement**)
Reservists. (*See* **MILITARY PERSONNEL, Reservists, Retirement**)
Service credits. (*See* **PAY, Service credits**)
Travel and transportation entitlement
Actual travel performance requirement
A member upon retirement is entitled to travel at Govt. expense to his home of record or place of entry on active duty or to his home of selection if he qualifies. However, 37 U.S.C. 404(f) which permits travel payments upon separation or release of military members without regard to the performance of travel is not applicable to members upon retirement or placement on the temporary disability retired list. Such members may be paid only on basis of authorized travel actually performed---------- 1042

Joint Travel Regulations amended
In connection with retirement of military members, Vol. 1, JTR, may be amended to permit shipment of household goods within specified time limit to one or more places provided total cost does not exceed cost of shipment in one lot to home of selection, home of record, or place of entry on active duty, whichever provides greatest benefit----- 1042

MILITARY PERSONNEL—Continued
Retirement—Continued
Travel and transportation entitlement—Continued
Joint Travel Regulations amended—Continued
Effective date Page
Claims arising before June 14, 1974, date of 53 Comp. Gen. 963, for travel and transportation allowances to home of record or place of entry on active duty of members of uniformed services who were denied such allowances to selected homes may not be considered on basis of rule announced in that decision since it modifies or overrules prior decisions construing the same statutes. Effect of that decision is prospective except for its application to claimant in that decision. B–182904, February 4, 1975, overruled 1042
Travel expenses to selected home. (*See* **TRAVEL EXPENSES, Military personnel, Retirement, To selected home**)
Sea duty. (*See* **PAY, Additional, Sea duty**)
Service credits
Pay. (*See* **PAY, Service credits**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Telephone services
Private residences
Air Force member who incurs telephone relocation charges in connection with an ordered move from quarters is not entitled to reimbursement for such expense in view of the prohibition contained in 31 U.S.C 679 (1970) and so much of 52 Comp. Gen. 69 (1972) which allows payment for such telephone installation expenses is modified accordingly ... 661
Training
Advance
Nuclear-powered submarine
Submarine duty pay authorized in 37 U.S.C. 301(a)(2) may be paid to officers qualified in submarines as enlisted members while attending courses of instruction specifically preparing them for positions of increased responsibility in Navy's advanced submarine fleet, because legislative history demonstrates intent of act was to encourage volunteers from the Navy's conventional submarine fleet for duty in its nuclear submarine fleet by continuing submarine pay while in training to anyone qualified in submarines and already receiving such incentive pay 1103
Leading to commission
Legislative history of 37 U.S.C. 301(a)(2) demonstrates intent by Congress to encourage volunteers for Navy's nuclear submarine fleet and not to provide officers for entire submarine fleet including fleet of conventional submarines. Therefore, submarine duty pay authorized in act may be paid to officers previously qualified in submarines as enlisted members, while attending Submarine Officers' Basic Course or Submarine Officers' Indoctrination Course, only if being prepared as prospective crewmembers for Navy's advanced (nuclear powered) submarine fleet 1103
Transportation
Dependents. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)

MISSING PERSONS ACT
Civilian employees
Compensation. (*See* **COMPENSATION, Missing, captured, etc., employees**)

NATIONAL GUARD
Civilian employees
Technicians
Severance pay

Page

National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving serverance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service---------- 212

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---------- 905

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---------- 905

Training duty as guardsman
Injured in line of duty
Return to civilian occupation while disabled

A member of the National Guard who is also a National Guard technician under 32 U.S.C. 709 and who is injured in line of duty while performing training under 32 U.S.C. 502, is entitled in accordance with 37 U.S.C. 204(h)(2) to receive the pay and allowances of a regular member of the Army during the period of his disability for military duty even though he resumes his Government civilian occupation since he is not considered to be on active military service during period of receipt of pay and allowances under 37 U.S.C. 204(h)(2)---------- 431

Death or injury
Burial expenses

Claim for burial expenses by wife of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who died during early morning of Sept. 9, is returned for payment, since, at time of his death, member was

NATIONAL GUARD—Continued
Death or injury—Continued
Burial expenses—Continued Page
in a pay status while on inactive duty training for the purpose of 10 U.S.C. 1481 523

While on training duty
Under military control
Claims for death gratuity and medical expenses by beneficiaries of member who was to attend inactive duty training on Sept. 8–9, 1973, and then report for full-time training duty on Sept. 9–10, 1973, but who suffered heart attack and died during early morning of Sept. 9, may be allowed since member was under military control in his training area at time of heart attack and death and was, therefore, on inactive duty training at such time, which is basis for payment of such benefits under 32 U.S.C. 321(a)(1) and 32 U.S.C. 320 523

While traveling to and from inactive duty training
Return home for equipment
Military member who during attendance at multiple unit training assembly two (MUTA–2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, distinguished 165

Drill pay
Training assemblies. (*See* **PAY, Drill, Training assemblies**)

NATIONAL LABOR RELATIONS BOARD
Promotion procedures
Collective bargaining agreement
When agency agreed in a collective bargaining agreement that it would be policy of the agency to fill vacancies by promotion from within if qualifications of agency applicants are equal to those from outside agency, then at the time that the head of the agency approved the agreement under section 15 of Executive Order No. 11491, such policy, unless otherwise provided in the agreement, became a nondiscretionary agency policy and part of the agency's promotion procedures 312

NONDISCRIMINATION
Contracts. (*See* **CONTRACTS, Labor stipulations, Nondiscrimination**)
Discrimination alleged
Basis of sex
Agency determined applicant's nonselection was based on discrimination. Although applicant declined subsequent offer of position, she is entitled to backpay from date of nonselection to declination of offer. Applicable retirement deductions should be made against gross salary entitlement even though amount payable is reduced by interim earnings. 622

OFFICE OF ECONOMIC OPPORTUNITY
Employees
Arbitration awards
Arbitration award based on compromise settlement by union and Office of Economic Opportunity that grants employee retroactive promotion, but makes increased pay for higher level position prospective, is

OFFICE OF ECONOMIC OPPORTUNITY—Continued
Employees—Continued
Arbitration awards—Continued Page
improper to the extent that it does not provide for backpay since salary is part of position to which employee is appointed and may not be withheld. Thus, employee is entitled to backpay incident to retroactive promotion under provisions of 5 U.S.C. 5596 ---------- 538

OFFICERS AND EMPLOYEES
Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)
Appointments. (*See* **APPOINTMENTS**)
Back Pay Act
Applicability
Unsuccessful applicants for appointment excluded
The Back Pay Act of 1966, 5 U.S.C. 5596, is applicable only to Federal employees and does not apply to unsuccessful applicants for employment. Therefore, while Asst. Secretary of Labor for Labor-Management Relations is authorized to take affirmative action when he finds that an agency has engaged in an unfair labor practice in hiring, he has no authority to direct agency to make appointment under the Back Pay Act. 760
Canal Zone Government. (*See* **CANAL ZONE GOVERNMENT, Employees**)
Compensation. (*See* **COMPENSATION**)
Disputes
Arbitration
Arbitration award providing retroactive effective dates of promotions and compensation for 3 Office of Economic Opportunity employees may be implemented under Back Pay Act, 5 U.S.C. 5596, since arbitrator found that bargaining agreement had been breached which incorporated by reference agency regulation requiring promotion requests to be processed in 8 days ---------- 403
Naval Ordnance Station and employee's union ask whether it is legal to pay employee backpay because he was denied overtime assignment in violation of a labor-management agreement. Agency violations of labor-management agreements which directly result in loss of pay, allowances, or differentials are unjustified and unwarranted personnel actions as contemplated by the Back Pay Act. Backpay is payable even though the improper agency action is one of omission rather than commission. Therefore, an employee improperly denied overtime work may be awarded backpay. B–175867, June 19, 1972, applying the "no work, no pay" overtime rule to Back Pay Act cases will no longer be followed ---------- 1071
Dual compensation. (*See* **COMPENSATION, Double**)
Excusing from work
Volunteer firemen
Fighting local fires
The denial of administrative leave to employee for time spent in fighting local fire outside of Govt. installation was proper exercise of administrative authority since CSC has not issued general regulations covering the granting of administrative leave, and therefore, each agency has responsibility for determining situations in which excusing employees from work without charge to leave is appropriate ---------- 706

OFFICERS AND EMPLOYEES—Continued
Experts and consultants. (*See* **EXPERTS AND CONSULTANTS**)
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)
Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
Jury duty
Fees. (*See* **COURTS, Jurors, Fees**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)
Life insurance
Benefits
Children
Legitimate and illegitimate
Distinction abrogated Page

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..... 858

Military duty
Leave. (*See* **LEAVES OF ABSENCE, Civilians on military duty**)
Missing, interned, captured, etc.
Compensation. (*See* **COMPENSATION, Missing, interned, captured, etc., employees**)
Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Overseas
Hired locally
Transfers
Travel and transportation expenses

Single, non-U.S. citizen who was hired outside continental U.S. for service overseas was permitted to negotiate transportation agreement. Ten years later employee married another employee of U.S. Govt., and they elected, as required by regulation, to retain husband's transportation agreement, with wife travelling as spouse. Husband was separated in RIF, and wife was denied right to negotiate renewal agreement because of travel benefits received by husband from non-U.S. Govt. employer. Wife should be permitted to negotiate renewal agreement because she has met all statutory requirements. Rules for local hires do not apply nor should benefits from husband's employer be considered.... 814

Home leave
Accural

Disallowance of claim for reimbursement for accrued home leave or credit of such leave to annual leave account is affirmed since legal authority for home leave provides only for its use as such in discretion of agency; moreover, provisions of 5 U.S.C. 6304(d)(1)(A)—restoration of forfeited annual leave—are not applicable since no forfeiture is established on the record..... 349

OFFICERS AND EMPLOYEES—Continued

Overtime. (*See* **COMPENSATION, Overtime**)

Per diem. (*See* **SUBSISTENCE, Per diem**)

Premium pay

Leaves of absence

Holidays Page

Employees of VA hospital, charged annual leave on holidays they did not work because they were paid permium pay under 5 U.S.C. 5545 (c)(1) should have leave restored since decision 35 Comp. Gen. 710 interpreting sec. 5545(c)(1) states that a charge against leave for absence on a holiday within the regularly scheduled tour of duty is required only where standby on such holiday was required of employees and was thus considered in arriving at percentage of premium pay and standby was not required of employees on holidays in question 662

Promotions

Administrative determination

Federal Labor Relations Council review

Question of whether provision in collective bargaining agreement providing for temporary promotion for employees assigned to higher level positions for one pay period or more is valid in light of section 12(b)(2) of Executive Order 11491 which provides that management officials of an agency retain the right to promote employees within the agency is for determination by head of agency involved, subject to review by Federal Labor Relations Council. It is noted, however, that provision appears valid since agency has retained right to make determinations as to whether and whom to assign to higher level position, and 5 CFR 335.102(f) leaves to agency discretion the definition of "a reasonable time" in which to effect such promotions, thus making the time period amenable to negotiation 263

Compensation. (*See* **COMPENSATION, Promotions**)

Recreation, etc., facilities. (*See* **WELFARE AND RECREATION FACILITIES, Civilian personnel**)

Relocation expenses

Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Removals, suspensions, etc.

Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)

Retirement. (*See* **RETIREMENT, Civilian**)

Service agreements

Failure to fulfill contract

Service interrupted by military duty

Liquidated damage provision of employment contract between Veterans Administration and physician which required physician to perform period of obligated service in return for specialty training is found valid and enforceable. Military service of physician suspended contract of employment obligations and his induction into Air Force did not rescind contract. Certification of no extra-VA professional activities found inapplicable to issue of abrogation of contract 728

OFFICERS AND EMPLOYEES—Continued
Service agreements—Continued
Overseas employees
Reverting to original agreement Page

Single, non-U.S. citizen who was hired outside continental U.S. for service overseas was permitted to negotiate transportation agreement. Ten years later employee married another employee of U.S. Govt., and they elected, as required by regulation, to retain husband's transportation agreement, with wife travelling as spouse. Husband was separated in RIF, and wife was denied right to negotiate renewal agreement because of travel benefits received by husband from non-U.S. Govt. employer. Wife should be permitted to negotiate renewal agreement because she has met all statutory requirements. Rules for local hires do not apply nor should benefits from husband's employer be considered 814

Transfers. (*See* **OFFICERS AND EMPLOYEES, Transfers, Service agreements**)

Severance pay
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 905

Eligibility
National Guard technicians

National Guard technician prior to fulfilling requirement for immediate civil service annuity, although involuntarily removed from his civilian position due to loss of military membership, is precluded by 5 U.S.C. 5595(a)(2)(iv) from receiving severance pay when he is qualified for military retirement under the provisions of 10 U.S.C. 1331 by having attained age 60 with the requisite years of service 212

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 905

OFFICERS AND EMPLOYEES—Continued

Severance pay—Continued

"Reduction-in-force situation" Page

Although employee resigned after receipt of general *announcement* by agency of proposed reduction-in-force action and publication of general news items, he is not entitled to severance pay since notice failed to meet requirements for a general reduction-in-force *notice* under 5 CFR 351.804 and 550.706(a)(2), and his separation may not be regarded as involuntary within meaning of sec. 550.706 for purpose of entitlement to severance pay 154

Status

President's Commission on Personnel Interchange

Employees of the Federal Government selected to enter the business sector under the Executive Interchange Program established pursuant to Executive Order No. 11451, January 19, 1969, are entitled to travel and relocation expenses to the location where they are to enter private employment under the program on the same basis and in the same amount as any employee transferred from one official station to another in the interests of the Government 87

Transfers

Relocation expenses

Administrative determinations

Conflict with employees

Where employee purchases or sells land in excess of that reasonably related to a residence site and there is doubt as to the propriety of the agency proration determination under Federal Travel Regulations (FPMR 101–7) para. 2–6.1f (May 1973) or the employee takes exception to the agency determination, the case should be forwarded to Comptroller General with supporting evidence for review and disposition 597

Alaskan employee returned to U.S. for separation

No reimbursement for real estate expenses

Employee located in Alaska whose position was abolished was returned to continental U.S. for separation by retirement. His claim for reimbursement of real estate expenses in selling his Alaska residence is not allowable since pertinent statutes and regulations permit such reimbursement only when there is a permanent change of duty station. Return from Alaska for purpose other than assuming a new Govt. position does not constitute a permanent change of station. Returning employees in these circumstances are considered as in the same category as "new appointees" under 5 U.S.C. 5724(d), and new appointees are not eligible for real estate allowances 991

Attorney fees

House sale

Where an employee claimed reimbursement for a lump-sum attorney fee incident to the sale of his residence in connection with transfer, payment may not be made until he submits an itemized statement since only those legal fees may be paid which are listed in section 2–6.2e, FPMR 101–7, and the lump-sum fee may include unallowable items ... 67

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Distance between old and new residences Page
An employee transferred to a new official duty station who sells his home and relocates to a new residence located within the same area as his old residence may be reimbursed real estate expenses for the sale of the former home and other relocation expenses since the record shows the employee tried to relocate in the area of his new station, and commuted daily to the new station 751

Duty stations within United States requirement
Employee who was separated due to RIF while stationed in Okinawa, and was reemployed within 1 year in Washington, D.C., claims reimbursement of real estate expenses and additional temporary quarters allowance. Statute and regulations require that both old and new duty stations be in U.S., its territories or possessions, Canal Zone or Puerto Rico in order to receive this reimbursement. Okinawa was not territory or possession of U.S. before its reversion to Japan because Japan had retained residual or de jure sovereignty under Peace Treaty. Therefore, disallowance of claim is sustained 1006

Effective date of transfer
Date expenses were incurred
Employee who has incurred reimbursable relocation expenses in accordance with travel orders prior to effective date of transfer has sufficiently complied with statutory and regulatory requirements to permit payment of such expenses prior to actual transfer in certain circumstances. Since such payments may be recoverable if transfer is not effected, the Govt.'s interests are reasonably protected by recovery procedures 993

Mass transfer
Proper means for agency to provide lead time for employee to prepare for transfer is to issue travel order authorizing reimbursement for relocation expenses. Where agency advises employee of transfer but does not or cannot issue travel order at that time, agency should not encourage employee to incur relocation expenses in anticipation of transfer and has duty to advise employee that he cannot be assured that he will be reimbursed for such expenses unless or until a subsequent travel order is issued and that he cannot be reimbursed for particular relocation expenses at all if incurred in anticipation of transfer, but before travel orders are issued. 52 Comp. Gen. 8, modified 993

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 HUD 827

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
House purchase
Pro rata expense reimbursement Page

Employee purchased 43.003 acres of land on which she located mobile home. The administrative agency should determine how much of the land is "reasonably related to the residence site" as directed by Federal Travel Regulations (FPMR 101–7) para. 2–6.1f (May 1973) by taking into consideration zoning laws, valuation by local real estate experts on basis of location and use of land, percolation of soils, etc., and the manner in which real estate brokers, attorneys and surveyors charge their fees, i.e., whether they are percentage derivatives of the purchase/sale price or flat fees 597

Taxes
Transfer

Civilian employee of Army Corps of Engineers seeks reimbursement of New Mexico Gross Receipts and Compensating Tax levied in connection with his purchase of a newly constructed residence incident to transfer. Reimbursement may not be made since tax is a business privilege tax, and fact that employee may deduct tax on income tax return does not alter nature of tax. Tax is not assessed on casual sale of previously occupied home and, therefore, is not a transfer tax within meaning of sec. 2–6.2d of Federal Travel Regs., FPMR 101–7. Additionally, regulation prohibits reimbursement of expenses that are associated only with construction of a residence. B–174335, Dec. 8, 1971, overruled 93

House sale
Purchase completed after transfer

Where an employee entered into a contract for the purchase of a residence at his old duty station, but did not occupy the residence because of a transfer, he may be reimbursed the costs of selling the residence since he was prevented from occupying the residence, as required by the Federal Travel Regulations, by the act of the Government 67

House trailers, mobile homes, etc.
Miscellaneous expenses

When employee uses commercial carriers to transport two mobile homes incident to a permanent change of station and extra equipment is required for pickup and delivery of the trailer, employee would be entitled to reimbursement of such expenses since they do not appear to be expenses for preparing the trailer for movement nor do they appear to be otherwise prohibited by subsection 9.3a(3) of OMB Circular No. A–56 335

More than one mobile home

When employee changes permanent duty stations and it is necessary to transport two mobile homes by commercial carriers, resulting from eligibility status of mother-in-law prescribed by regulations, he may be reimbursed cost of applicable tariff as approved by ICC for transportation of both mobile homes in amount not to exceed maximum amount allowable for transportation and 60 days temporary storage of household goods. Regardless of method used in computing allowances he is entitled

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
House trailers, mobile homes, etc.—Continued
More than one mobile home—Continued Page

to a flat $200 miscellaneous allowance or larger amount not to exceed 2 weeks basic salary of employee at time he reported for duty where claim is supported by acceptable documentation since there is involved only one change of station ---- 335

Leases
House lease at old duty station
Broker's fee

Employees of the Federal Government selected to enter the business sector under the Executive Interchange Program established pursuant to Executive Order No. 11451, January 19, 1969, are entitled to travel and relocation expenses to the location where they are to enter private employment under the program on the same basis and in the same amount as any employee transferred from one official station to another in the interests of the Government ---- 87

Loan processing

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 HUD ---- 827

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 "member without dependents" rate where employee has own PCS entitlements ---- 892

New appointees
Manpower category
Former employees

Former employee appointed to manpower shortage position who was authorized reimbursement for expenses of sale and purchase of residence, temporary quarters subsistence expenses, and per diem for family, is not entitled to reimbursement for such expenses and must refund any amounts already paid because appointees are not entitled to such reimbursement and he was not transferred without break in service or separated as result of reduction in force or transfer of function to entitle him to such reimbursement under 5 U.S.C. § 5724a and Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations ---- 747

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Nonreimbursable
Alaskan employees returned to U.S. for separation Page

Employee located in Alaska whose position was abolished was returned to continental U.S. for separation by retirement. His claim for reimbursement of real estate expenses in selling his Alaska residence is not allowable since pertinent statutes and regulations permit such reimbursement only when there is a permanent change of duty station. Return from Alaska for purpose other than assuming a new Govt. position does not constitute a permanent change of station. Returning employees in these circumstances are considered as in the same category as "new appointees" under 5 U.S.C. 5724(d), and new appointees are not eligible for real estate allowances 991

Pro rata expense reimbursement
House purchase or sale
Doubtful cases to GAO

Where employee purchases or sells land in excess of that reasonably related to a residence site and there is doubt as to the propriety of the agency proration determination under Federal Travel Regulations (FPMR 101–7) para. 2–6.1f (May 1973) or the employee takes exception to the agency determination, the case should be forwarded to Comptroller General with supporting evidence for review and disposition 597

Pursuant to travel orders
Prior to actual transfer

Employee who has incurred reimbursable relocation expenses in accordance with travel orders prior to effective date of transfer has sufficiently complied with statutory and regulatory requirements to permit payment of such expenses prior to actual transfer in certain circumstances. Since such payments may be recoverable if transfer is not effected, the Govt.'s interests are reasonably protected by recovery procedures 993

"Settlement date" limitation on property transactions
Extension

Employee who was transferred from Washington to San Francisco and had decided not to sell home in Fairfax, Virginia, since he had been advised that he would be rotated back to Washington within 2 years, but was given subsequently permanent assignment in Sacramento, may be granted extension to 1-year time limitation relating to completion of real estate transaction, even though his request was made after expiration of initial 1-year period but before expiration of 2-year period allowed by Section 2–6.1e of the Federal Travel Regulations 553

Military service

Civilian employee inducted into military service 5 weeks after transfer in June 1970 and discharged on March 30, 1972, may be reimbursed authorized real estate expenses incident to house purchase effected in November 1973 after his reemployment on July 3, 1972, provided agency grants time extension, commencing on February 24, 1973, when initial 1-year period (as extended by military service) expired 427

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
"Settlement date" limitation on property transactions—Continued
Time computation Page

Civilian employee transferred on June 16, 1970; separated July 21, 1970, for military duty; discharged therefrom on March 30, 1972; and reemployed on July 3, 1972, is entitled to have 1-year initial period for settlement of real estate transactions, as authorized in OMB Circular No. A–56, section 4.1e, extended to February 24, 1973 427

Spouse in armed services

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 transferred at approximately same time to same place, employee's PCS entitlements may be paid if agency determines transfer was in Govt.'s interest; that transfer also serves employee's personal needs does not preclude such determination 892

Taxes

Civilian employee of Army Corps of Engineers seeks reimbursement of New Mexico Gross Receipts and Compensating Tax levied in connection with his purchase of a newly constructed residence incident to transfer. Reimbursement may not be made since tax is a business privilege tax, and fact that employee may deduct tax on income tax return does not alter nature of tax. Tax is not assessed on casual sale of previously occupied home and, therefore, is not a transfer tax within meaning of sec. 2–6.2d of Federal Travel Regs., FPMR 101–7. Additionally, regulation prohibits reimbursement of expenses that are associated only with construction of a residence. B–174335, Dec. 8, 1971, overruled 93

Temporary quarters
Beginning of occupancy

Where an employee occupied temporary quarters beginning more than 30 days from the date he reported for duty at his new official station, but prior to the date his family vacated the residence at the old official station, he is entitled to temporary quarters subsistence expenses under Section 8.2e of the Office of Management and Budget Circular No. A–56, Revised, August 17, 1971 13

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 considered to be employee's "dependent" for PCS entitlement purposes 892

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Time limitation Page

Employee, who was transferred from California to Florida effective July 9, 1973, and who was unable to move into newly acquired home until September 11, 1973, because of delay in mortgage closing, may not be reimbursed for temporary lodging expenses beyond initial 30 days since FTR para. 2–5.2a (1973) provides for maximum 30-day time limitation when employee is transferred between areas in continental United States and, being a statutory regulation, its provisions may not be waived---- 638

Travel orders
Required for reimbursement

Proper means for agency to provide lead time for employee to prepare for transfer is to issue travel order authorizing reimbursement for relocation expenses. Where agency advises employee of transfer but does not or cannot issue travel order at that time, agency should not encourage employee to incur relocation expenses in anticipation of transfer and has duty to advise employee that he cannot be assured that he will be reimbursed for such expenses unless or until a subsequent travel order is issued and that he cannot be reimbursed for particular relocation expenses at all if incurred in anticipation of transfer, but before travel orders are issued. 52 Comp. Gen. 8, modified---------- 993

Truth in Lending Act effect
What constitutes a finance charge

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 HUD---------- 827

Service agreements
Failure to fulfill
Resignation

Department of the Treasury employee who was paid relocation expenses incurred in connection with a proposed transfer which was cancelled is legally obligated to refund relocation expenses paid when he separated from Government service prior to the expiration of 12 months from the date of cancellation, since cancelled transfer expenses are payable as though originally contemplated transfer occurred and employee was retransferred to original duty station. Entitlement to receive and retain transfer expenses is contingent upon satisfaction of agreement to remain in Government service 12 months after cancellation notification under the provisions of 5 U.S.C. 5724(i)---------- 71

Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Status for overtime compensation. (*See* **COMPENSATION, Overtime, Traveltime**)
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
OKINAWA. (*See* **RYUKYU ISLANDS, Okinawa**)

ORDERS
Amendment
Retroactive
Travel completed Page

Employee who, incident to transfer of station, was authorized and paid for transportation of household goods under commuted rate system claims reimbursement for actual expenses in excess of such reimbursement since he was required to have goods moved at higher rates than those of another carrier with lower rates because of a teamsters' strike. Employee is not entitled to such reimbursement since rights and liabilities regarding travel orders vest at time of transportation of goods and may not be revoked or modified retroactively to increase or decrease benefits in absence of evidence of administrative error in orders..... 638

Competent
Effect of subsequent orders

Army member who received orders as "Referral Recruiter" which did not specify temporary duty for the period of 171 days during which he was to perform recruiting duty at a location away from his permanent station is considered to have been on temporary duty during that period and is entitled to per diem for that period and temporary duty travel allowances for travel to the location where such duty was performed.... 368

Permissive *v.* mandatory
Travel orders

Member who receives permissive orders for temporary additional duty (temporary duty afloat) which are subsequently determined to be directed orders may not be reimbursed for nontemporary storage since nontemporary storage of household effects while on such duty is prohibited by para. M8200–1 and does not come within the exceptions specified in para. M8101–7, 1 JTR..... 387

PANAMA CANAL
Panama Canal Company
Employees
Overtime
Standby, etc., time
Home as duty station

Vessel employees of the Panama Canal Company are protected by the Fair Labor Standards Act, but under the act they need not be compensated for off-duty time spent at home awaiting telephone notification. 617

Quarters
Government

Naval officer occupying Panama Canal Company quarters is not entitled to housing allowance since Panama Canal Company quarters constitute Government quarters and therefore payment of housing allowance is prohibited by paragraph M4301–3c(2), JTR (change 246, August 1, 1973); however, member may be allowed temporary lodging allowance under paragraph M4303–3d, JTR (change 240, February 1, 1973), while occupying vacation quarters provided by the Panama Canal Company, as such quarters appear to be transient in nature and were occupied on a temporary basis..... 214

PAY

Absence without leave

Expiration of enlistment. (*See* **PAY, After expiration of enlistment**)

Return to military control

Periods of confinement, etc. Page

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 DOD regulations 862

Active duty

Absence without leave. (*See* **PAY, Absence without leave**)

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 statute 862

Duty performance part of month

Payment basis

A member of a uniformed service, who was obligated to serve on active duty for 30 days or more but who was released from the service before performing such active duty for at least 30 days, is entitled to receive pay and allowances on a day-to-day basis, including the 31st day of the month, computed in accordance with the provisions of 37 U.S.C. 1004 (1970) and not under the provisions of 5 U.S.C. 5505, since these latter provisions establish the general rule relative to the computation of pay for those individuals who performed such active duty for 30 days or more before being released 952

Reservists

Injured in line of duty

Ability to perform limited duty effect

Member of Marine Corps Reserve entitled to receive pay and allowances under 37 U.S.C. 204(i) for period subsequent to the termination of his initial active duty for training, who then returned to his Reserve unit where he performed military duties as a photographer, having agreed to extend his active duty for a period of about 6 months and/or until physically qualified for release from active duty, may be regarded under 10 U.S.C. 683(b) to be on active duty until discharged, and is entitled to active duty pay and allowances, and leave under 10 U.S.C. 701(a) 33

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 same MOS is not essential, decision to place member in that MOS or to assign him available duties consistent with his grade and service is question of personnel management best left to judgment of appropriate military commander 862

PAY—Continued
Additional
Sea duty
What constitutes vessel for sea duty pay Page
Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonselfpropelled service craft with berthing and messing available onboard, are not entitled to special pay for sea duty as the YRST–2 is not a "vessel" within the meaning of paragraph 10703 of the Department of Defense Pay and Allowances Entitlements Manual 442

Submarine duty. (*See* **PAY, Submarine duty**)
Training. (*See* **MILITARY PERSONNEL, Training**)
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 purpose of making good time lost during period covered by contract of enlistment 862

Civilian employees. (*See* **COMPENSATION**)
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 forfeiture of pay is entitled, in accordance with para. 10316b(4) of DODPM; to pay and allowances for period of confinement 862

Drill
Training assemblies
Pay and allowances for absence due to injury in line of duty
Return to civilian occupation during disability
A member of the National Guard who is also a National Guard technician under 32 U.S.C. 709 and who is injured in line of duty while performing training under 32 U.S.C. 502, is entitled in accordance with 37 U.S.C. 204(h)(2) to receive the pay and allowances of a regular member of the Army during the period of his disability for military duty even though he resumes his Government civilian occupation since he is not considered to be on active military service during period of receipt of pay and allowances under 37 U.S.C. 204(h)(2) 431

Status for benefits entitlement
Military member who during attendance at multiple unit training assembly two (MUTA–2) was instructed by his first sergeant to take the most direct route home to obtain his clothing records and return to the Armory, and who was injured on return trip when he lost control of his motorcycle, is entitled to disability pay and allowances since his return home was not due to an omission on his part with respect to the training schedule. 52 Comp. Gen. 28, distinguished 165

PAY—Continued
Medical and dental officers
Service credits
Constructive
Retired pay computation Page

Since 37 U.S.C. 205 only reduces constructive service credit for professional education of medical and dental officers by amount of service during period of member's professional education with which member is otherwise credited and since 10 U.S.C. 1405 restricts right of officers to count inactive service after May 1958 for retirement multiplier purposes, these provisions should be interpreted to permit such officer who was in the Reserves during professional training to receive the same amount of constructive service toward retirement he would be entitled to had he not been in the Reserves. However, any credit he might otherwise have accrued during same period by reason of Reserve membership would not be for use in determining multiplier for computation of retired pay..... 675

Reservists
Active duty
Injured in line of duty
Pay and leave entitlement

A member of the Marine Corps Reserve who while on his initial period of active duty for training sustains an injury determined to be in line of duty may receive pay and allowances in accordance with 37 U.S.C. 204(i), after expiration of the initial tour of duty while hospitalized and until he is fit for military duty but during such period reservist is not considered to be in active military service within the meaning of 10 U.S.C. 701(a) which would entitle the member to leave.. 33

Retired
Annuity elections for dependents
Annulment of widow's remarriage

Annuity payments to a widow of a deceased member under 10 U.S.C. 1434 of the Retired Serviceman's Family Protection Plan which were terminated because the widow remarried in Nevada, may be resumed from the date of termination since a California State court declared such marriage a nullity and since the effect of such decree under the California conflict of laws rule is that the marriage became void *ab initio* when the decree of annulment was entered..... 600

Computation
Retirement on effective date of active duty pay increase

Air Force warrant officer, retired under 10 U.S.C. 1293, effective July 1, 1968, which was first day of general increase in active duty pay rates, must compute retirement pay based on rates in effect on June 30, 1968, rather than July 1, 1968, since explicit statutory language contained in Formula 4 of 10 U.S.C. 1401, requires computation on basis of active duty pay rate in effect on day before retirement, absent any applicable formula more favorable to him..... 941

Effective date
Mandatory
Rear Admirals

Several rear admirals, both upper and lower half, are to be mandatorily retired under provisions of 10 U.S.C. 6394 on July 1, 1975, and as a result of retirement of rear admirals (upper half) on that date,

PAY—Continued
Retired—Continued
Effective date—Continued
Mandatory—Continued
Rear Admirals—Continued Page

some retiring rear admirals (lower half) would be entitled to basic pay as a rear admiral (upper half) in accordance with 37 U.S.C. 202, if considered to be serving on active list subsequent to the retirement of the rear admirals (upper half). These rear admirals are not entitled to compute retired pay on basis of rear admiral (upper half) since they also are to be mandatorily retired on July 1, 1975, and as a result will not be serving in that grade on the active list on that date---------- 1090

Survivor Benefit Plan
Annuity deductions

Debts of a deceased member, not the responsibility of his widow, in view of 10 U.S.C. 1450(i) may not be offset against an annuity payable to such widow under 10 U.S.C. 1450, the Survivor Benefit Plan. However, such reasoning does not apply to reduction of annuities due to insufficient deductions having been made from member's retired pay to cover cost of such annuities---------- 493

Beneficiary payments
Deceased beneficiary's estate

Amounts of annuity payments due a beneficiary under section 4, Public Law 92-425, but unpaid at the beneficiary's death either because annuity checks were not negotiated or because payments had not been established, may be paid to the estate of the deceased beneficiary------ 493

Children

Service member, retired prior to effective date of Survivor Benefit Plan (SBP), who as single person elects an SBP annuity for dependent child through subsection 3(b) of Public Law 92-425, is, by virtue of subsection 3(e) of that act, at that point participating in the Plan to the same degree as post-effective date retirees and is subject to the post-participation election restrictions contained in 10 U.S.C. 1448(a)------ 732

No eligible spouse

Where there is no eligible spouse, a dependent child or children are not entitled to an annuity under 10 U.S.C. 1448(d) since no mention is made to coverage for a child or children under that provision and legislative history of the SBP indicates such coverage was not intended---- 709

Status after death or remarriage of eligible spouse

When an eligible widow with dependent children is receiving an annuity under 10 U.S.C. 1448(a) which is reduced under 10 U.S.C. 1450(c) because of DIC entitlement and widow loses eligibility because of death or remarriage, dependent child or children are not entitled to annuity unless dependent child coverage was elected by member and additional costs for such coverage were assessed---------- 709

Dependency and indemnity compensation
In conjunction with SBP
Effect of widow's remarriage

Where widow loses eligibility for Dependency and Indemnity Compensation (DIC) paid under 38 U.S.C. 411 by reason of remarriage after age 60, Survivor Benefit Plan (SBP) annuity payable as result of coverage

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Dependency and indemnity compensation—Continued
In conjunction with SBP—Continued
Effect of widow's remarriage—Continued Page

under 10 U.S.C. 1448(d) should be made in same amount as widow was receiving at time loss of DIC payments occurred, since legislative history of SBP indicates that widows of members dying on active duty are to receive no less than widows of other participants in SBP and no indication is given that they are to receive any greater benefit than other widows with exception of cost-free coverage---------- 709

In lieu of SBP
Effect of widow's remarriage

Where no Survivor Benefit Plan (SBP) annuity is payable under 10 U.S.C. 1448(d) because Dependency and Indemnity Compensation (DIC) is greater, widow's entitlement terminates permanently, since a widow covered under 10 U.S.C. 1448(a) in same circumstances is entitled to refund of deductions from member's retired pay and Congress while providing that widows of members eligible to retire who die while on active duty should not receive a survivor annuity less than that of widows of members who did retire, it does not appesr that the benefit of only a temporary termination under these circumstances was intended--- 709

Effective date

The effective date of entitlement to an annuity under section 4, Public Law 92-425, is the date on which the requirements of the law are met or the effective date of the law, whichever is later. Regulations to the contrary are inconsistent with the law and invalid---------- 493

Erroneous payments
Waived

Overpayment resulting from erroneous annuity payments under Survivor Benefit Plan made to member's widow should be considered for waiver as authorized by 10 U.S.C. 1453 under rules similar to those contained in 35 Comp. Gen. 401 (1956), which applied to the Uniformed Services Contingency Option Act of 1953 (now Retired Serviceman's Family Protection Plan). Thus, waiver should be granted only where there is not only a showing of no fault by widow but also that recovery would result in a financial hardship to the widow or for some other reason would be contrary to purpose of Plan and therefore against equity and good conscience---------- 249

Incompetents
Election by guardian or committee

Where a court of competent jurisdiction determined that a member was mentally or physically incapable of managing his own affairs under State law which vests in a guardian or committee the power to act for and on behalf of the adjudged individual and such a guardian or committee was appointed to manage all his affairs, without limitation, an election made by the guardian or committee under the Survivor Benefit Plan on behalf of the member before his death was valid and became effective when received by the Secretary of the Department concerned---------- 285

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Record correction
Entitlement to retired pay prior to SBP
Election status Page

Members who become retroactively entitled to retired or retainer pay prior to effective date of Survivor Benefit Plan by virtue of record correction occurring after that date and statutory time limit for members entitled to retired or retainer pay on effective date of the act to elect to participate has expired, must be afforded the same opportunity as other prior retirees to elect into the Plan such period in their case being 18 months from the date of notification of records correction 116

Not automatic

Person whose military record is corrected on date subsequent to September 20, 1972, to show entitlement to retired pay on date prior to September 20, 1972, is not automatically covered under Survivor Benefit Plan (SBP), since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP 116

Entitlement to retired pay subsequent to SBP
SBP coverage
Automatic

Persons whose military records are corrected on date subsequent to September 20, 1972, to show entitlement to retired or retainer pay commencing subsequent to that date are automatically covered under Survivor Benefit Plan and may not be afforded a period of time to decline coverage or elect reduced coverage after award of retired pay, since their positions cannot be distinguished from a member becoming entitled to retired or retainer pay without correction of their record and do not receive opportunity to elect reduced coverage or decline coverage after they become entitled to that pay 116

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 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 purpose of acquiring increased SBP coverage when DIC is lost due to remarriage after age 60 is not authorized in absence of specific legislative authority 838

Retired prior to effective date of SBP
Divorce and remarriage
Spouse's annuity eligibility

Widow of service member, retired prior to effective date of Survivor Benefit Plan (SBP), who had divorced member prior to SBP effective date, but who had remarried member thereafter, but within time limit

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Retired prior to effective date of SBP—Continued
Divorce and remarriage—Continued
Spouse's annuity eligibility—Continued Page

imposed under subsection 3(b) of Pub. L. 92-425, as amended, and where retired member, as a single person, who had previously elected SBP coverage for dependent child, such widow immediately qualifies as eligible surviving spouse under SBP upon death of member if he elected to expand that dependent child coverage to include such spouse within time limitation contained in fourth sentence of 10 U.S.C. 1448(a) 732

Marriage prior to first anniversary date of SBP

A service member who was retired prior to the effective date of the Survivor Benefit Plan and who marries prior to the first anniversary of the effective date of the Plan may provide immediate coverage for his spouse regardless of the two-year limitation under 10 U.S.C. 1447(3)(A), provided such an election is made within the time limitation stated in subsection 3(b) of the act, as amended by section 804 of Public Law 93-135 266

Spouse
Remarriage after age 60

When widow who is receiving supplemental Survivor Benefit Plan (SBP) annuity payment under 10 U.S.C. 1448(d) and then remarries after age 60, thereby losing eligibility for Dependency and Indemnity Compensation (DIC) paid under 38 U.S.C. 411, annuity under SBP may still be paid since restrictions in 10 U.S.C. 1448(d) applying to eligibility for DIC have been construed only as prohibiting payment of SBP annuity to extent that amount of SBP plus DIC payable would exceed maximum annuity payable under SBP 709

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 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 838

Subsequent election changes
Post-participation election restrictions

Service member, retired prior to effective date of Survivor Benefit Plan (SBP), who as single person elects an SBP annuity for dependent child through subsection 3(b) of Public Law 92-425, is, by virtue of subsection 3(e) of that act, at that point participating in the Plan to the same degree as post-effective date retirees and is subject to the post-participation election restrictions contained in 10 U.S.C. 1448(a) 732

PAY—Continued

Sea duty. (*See* **PAY, Additional, Sea duty**)

Service credits

Cadet, midshipman, etc.

Retired pay Page

Service as cadet-midshipman, Merchant Marine Reserve, United States Naval Reserve, at the United States Merchant Marine Cadet Basic School, Pass Christian, Mississippi, from March 1945 until December 1946, is Reserve service for purposes of 10 U.S.C. 1331(c) and, therefore, a person so attending must have performed "wartime service" as defined in that subsection in order to be eligible for retired pay based on non-Regular service under Chapter 67 of Title 10, United States Code 603

Computation

Reservists

Since 37 U.S.C. 205 only reduces constructive service credit for professional education of medical and dental officers by amount of service during period of member's professional education with which member is otherwise credited and since 10 U.S.C. 1405 restricts right of officers to count inactive service after May 1958 for retirement multiplier purposes, these provisions should be interpreted to permit such officer who was in the Reserves during professional training to receive the same amount of constructive service toward retirement he would be entitled to had he not been in the Reserves. However, any credit he might otherwise have accrued during same period by reason of Reserve membership would not be for use in determining multiplier for computation of retired pay 675

Constructive

Medical and dental officers

Retired pay computation

Since 37 U.S.C. 205 only reduces constructive service credit for professional education of medical and dental officers by amount of service during period of member's professional education with which member is otherwise credited and since 10 U.S.C. 1405 restricts right of officers to count inactive service after May 1958 for retirement multiplier purposes, these provisions should be interpreted to permit such officer who was in the Reserves during professional training to receive the same amount of constructive service toward retirement he would be entitled to had he not been in the Reserves. However, any credit he might otherwise have accrued during same period by reason of Reserve membership would not be for use in determining multiplier for computation of retired pay 675

Submarine duty

Absence periods

Training and rehabilitation

Legislative history of 37 U.S.C. 301(a)(2) demonstrates intent by Congress to encourage volunteers for Navy's nuclear submarine fleet and not to provide officers for entire submarine fleet including fleet of conventional submarines. Therefore, submarine duty pay authorized in act may be paid to officers previously qualified in submarines as enlisted members, while attending Submarine Officers' Basic Course or Submarine Officers' Indoctrination Course, only if being prepared as prospective crewmembers for Navy's advanced (nuclear powered) submarine fleet 1103

PAY—Continued
Submarine duty—Continued
Nuclear-powered submarine Page
Submarine duty pay authorized in 37 U.S.C. 301(a)(2) may be paid to officers qualified in submarines as enlisted members while attending courses of instruction specifically preparing them for positions of increased responsibility in Navy's advanced submarine fleet, because legislative history demonstrates intent of act was to encourage volunteers from the Navy's conventional submarine fleet for duty in its nuclear submarine fleet by continuing submarine pay while in training to anyone qualified in submarines and already receiving such incentive pay..... 1103

Thirty-first day of the month
Active duty for part of month
A member of a uniformed service, who was obligated to serve on active duty for 30 days or more but who was released from the service before performing such active duty for at least 30 days, is entitled to receive pay and allowances on a day-to-day basis, including the 31st day of the month, computed in accordance with the provisions of 37 U.S.C. 1004 (1970) and not under the provisions of 5 U.S.C. 5505, since these latter provisions establish the general rule relative to the computation of pay for those individuals who performed such active duty for 30 days or more before being released..... 952

Withholding
Debt liquidation
Retired pay
For benefit of surety
Where a surety has indemnified the Government for a portion of loss occasioned by employee's embezzlement of public funds and the employee is entitled to receive military retired pay, such pay cannot be withheld for the benefit of the surety on theory that the surety is subrogated to the Government's right of setoff, since such action would be contrary to the language of 32 C.F.R. 43a.3, the Government's policy against accounting to strangers for its transactions and against having the Government serve as agent for collection of private debts... 424

PAYMENTS
Advance
Transportation costs
"Do It Yourself" transportation
Vol. 1, JTR, may not be amended to allow advance payment for rental vehicles for transportation of personal property, and related expenses, as advance payment provisions of sec. 303(a) of Career Compensation Act of 1949, now appearing in 37 U.S.C. 404(b) (1970), limit such payments to member's personal travel, and in absence of specific authority for advance payment for transportation of personal property, 31 U.S.C. 529 (1970) precludes issuance of regulations which would authorize such advance payments..... 764

PERSONAL SERVICES
Contracts
Liquidated damages provision
Enforceable Page

Liquidated damage provision of employment contract between Veterans Administration and physician which required physician to perform period of obligated service in return for specialty training is found valid and enforceable. Military service of physician suspended contract of employment obligations and his induction into Air Force did not rescind contract. Certification of no extra-VA professional activities found inapplicable to issue of abrogation of contract..... 728

POWERS OF ATTORNEY
Revocation
Death

Special power of attorney in favor of responsible financial institution authorizing that institution to indorse and negotiate Government benefit checks on behalf of payee, may be executed without time limitation as to validity, since recent court cases, applying Treasury regulations which provide that death of grantor revokes power and that presenting bank guarantees all prior indorsements as to both genuineness and capacity, afford adequate protection to Government against risk of loss. Modifies 48 Comp. Gen. 706, 17 *id.* 245 and other similar decisions..... 75

Special
Acknowledgment

Although GAO is aware of no requirement under Federal law, other than Treasury regulations, that special power of attorney be acknowledged, and feels therefore that acknowledgment may be eliminated without prejudice to rights of United States, GAO nevertheless recommends retention of acknowledgment provision in power of attorney form as option due to potential consequences of lack of acknowledgment under local law to private parties in matters not directly involving rights of United States..... 75

PRESIDENT
Committees, commissions, etc.
President's Executive Interchange Program. (*See* **PRESIDENT'S EXECUTIVE INTERCHANGE PROGRAM**)
Impounding appropriations

GAO interpretation of Impoundment Control Act of 1974 is that amendment to Antideficiency Act eliminates that statute as a basis for fiscal policy impoundments; President must report to Congress and Comptroller General (C. G.) whenever budget authority is to be withheld; duration of, and not reason for, impoundment is criterion to be used in deciding whether to treat impoundment as rescission or deferral; the C. G. is to report to Congress as to facts surrounding proposed rescissions and, in the case of deferrals, also whether action is in accordance with law; the C. G. is authorized to initiate court action to enforce provisions of the act requiring release of impounded budget authority; the C. G. is to report to Congress when President has failed to transmit a required message; and the C. G. can reclassify deferral messages to rescission messages upon determination that withholding of budget authority precludes prudent obligation of funds within remaining period of availability..... 453

PRESIDENT'S EXECUTIVE INTERCHANGE PROGRAM

Interchange Executives

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Transportation and travel expenses Page

Employees of the Federal Government selected to enter the business sector under the Executive Interchange Program established pursuant to Executive Order No. 11451, January 19, 1969, are entitled to travel and relocation expenses to the location where they are to enter private employment under the program on the same basis and in the same amount as any employee transferred from one official station to another in the interests of the Government 87

PROPERTY

Private

Acquisition

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 GSA are not entitled to benefits of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Govt. was not committed to acquire property, tenant moves were not result of Govt.'s acquisition, and Govt. did not take an active role in encouraging tenants to move 819

No entitlement

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. 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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act 841

Damage, loss, etc.

Contractor's property

Government liability

Govt. agency may, within appropriation limits, assume risk of loss for contractor-owned property which is used solely in performance of Govt. contracts since reimbursement for loss of property arising during performance of Govt. contract is necessary and proper expense chargeable to appropriation supporting Govt. contract. B–168106 dated July 3, 1974, modified 824

Where amount of contractor's commercial work is insignificant when compared to amount of Govt. work and Govt. as practical matter is bearing entire risk of loss of contractor's property in that Govt. is, in essence, paying full insurance premium under its cost-type contract, no compelling reason is seen why Govt. may not, within appropriation limits, agree to assume such risk of loss. B–168106 dated July 3, 1974, modified 824

PROPERTY—Continued
Private—Continued
Damage, loss, etc—Continued
Contractor's property—Continued
Government liability—Continued Page

Because of statutory prohibitions against entering into obligations in excess of appropriations contract may not provide for Govt.'s assumption of risk of loss of Govt. contractor's equipment and facilities unless available appropriations are sufficient to cover Govt.'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 824

Loaned exhibits

Where Congress has authorized the Dept. of State to agree to indemnify the People's Republic of China (PRC) for loss of or damage to an exhibition of archaeological finds, and where the Dept. has agreed to be responsible for the security of collection while it is in U.S., the Dept., if it determines it is to the advantage of the U.S. to do so, may give assurance to private art gallery showing exhibition pursuant to agreement with PRC that, if U.S. is required to indemnify the PRC as result of negligence by gallery, U.S. will not seek to recover from gallery 807

Public
Damage, loss, etc.
Carrier's liability
Burden of proof

Setoff of monies due carrier against Government claims for loss and damage caused by improper loading by shipper of cartons of folding beds under carrier's trailer, which was readily apparent to carrier's driver, was proper because improper loading by shipper can constitute complete defense to damage claims only when shipper loading is not apparent on ordinary observation by carrier 742

Setoff of monies due carrier against Govt. claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on GBL when carrier received goods was proper because clear delivery receipt does not prevent establishing by other evidence receipt of goods in damaged condition, GBL with no exception is prima facie evidence that parts of shipment open to inspection and visible were received by carrier in good order, and damage done was to containers which were open to inspection and visible rather than to goods concealed inside containers 742

Prima facie case. (*See* **PROPERTY, Public, Damage, loss, etc., Carrier's liability, Burden of proof**)

International shipments
Warsaw Convention

Air carrier's claim for amount administratively deducted to reimburse Govt. for loss of personal effects is proper for allowance where action at law was not brought by the Dept. of the Air Force within 2 years as required by Article 29 of Warsaw Convention. The 6-year statute of limitation in 28 U.S.C. 2415 does not abrogate holding in *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422, 145 Ct. Cl. 1 (1959) 633

Set-off authority. (*See* **SET-OFF, Authority, Property loss and damage**)
Surplus
Disposition
Sale. (*See* **SALES**)

PURCHASES
Blanket purchase agreement
Pending resolution of protest Page
Service being performed under Blanket Purchase Agreement (BPA) awarded and extended to June 30, 1975, pending resolution of protests should be resolicited for period commencing July 1, 1975, notwithstanding agency desire to continue until Dec. 31, 1975, since BPA was interim measure which has served purpose for which intended and to extend agreement would penalize bidders who protested defective IFB by not allowing them to compete for requirement and there would be no termination costs if service was resolicited effective July 1, 1975.. 955

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
Certificates of dependency
Filing requirements
Annual recertification
In view of proposed Joint Uniform Military Pay System—Army procedures for recertifying and verifying dependency for payment of basic allowance for quarters, the annual recertification of dependency certificates prescribed by 51 Comp. Gen. 231 (1971), as they relate to Army members' primary dependents, no longer will be required..... 92

Husband and wife both members of armed services
Female service member married to and residing with male member who receives BAQ at the with dependent rate on account of children of previous marriage, is not entitled to BAQ at the with dependent rate for child of present marriage since, although this child is not claimed as a dependent by other member, child must be considered a dependent of spouse who is receiving BAQ at the with dependent rate by virtue of other dependents and may not provide a basis for allowing both spouses to receive BAQ at the with dependent rate.... 665

Civilian overseas employees
Locally hired employees
Eligibility
Determination erroneous
Army employee who was erroneously found entitled to living quarters allowance under subparagraph 031.12c, Standardized Regulations, when not recruited in U.S. for prior employment with U.S. Armed Forces Institute under conditions providing for return transportation may not have initial finding reinstated on basis of Army's policy in *Stringari* grievance determination. Determination in employee's case was clearly contrary to regulation whereas initial determination which was reinstated in *Stringari* grievance involved exercise of faulty judgment in area of discretion and *Stringari* policy is applicable prospectively from date of determination..... 149

RECORDS
"Public Information Law"
Agency records
Disclosure
Page
In general, burden is on protester to obtain such information it deems necessary to substantiate its case. While request for reconsideration alleges agency failed to fulfill promised opportunity for protester to participate in laundry system design and to submit competitive proposal, it is noted that initial protest did not specifically make such complaints. Assuming agency refused to release information on its requirements, protester should have pursued disclosure request under Freedom of Information Act ---- 1100

Application
Disclosure remedy
Withholding from protester of certain procurement information furnished by agency in connection with protest does not establish that protest procedure is unfair. Where protester does not avail itself of disclosure remedy under Freedom of Information Act, but relies instead on information made available through agency's protest reports, and agency indicates withholding of procurement sensitive information is appropriate, withholding by GAO of such information is proper under bid protest procedures ---- 1009

RECREATION AND WELFARE FACILITIES (*See* **WELFARE AND RECREATION FACILITIES**)

REGULATIONS
Amendment
Effect on prior rights
Claims arising before June 14, 1974, date of 53 Comp. Gen. 963, for travel and transportation allowances to home of record or place of entry on active duty of members of uniformed services who were denied such allowances to selected homes may not be considered on basis of rule announced in that decision since it modifies or overrules prior decisions construing the same statutes. Effect of that decision is prospective except for its application to claimant in that decision. B–182904, February 4, 1975, overruled ---- 1042

Effective date
Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a) ---- 280

Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b) ---- 280

Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized

REGULATIONS—Continued

Amendment—Continued

Effective date—Continued Page

where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c)---- 280

Where member is directed to perform periods of temporary duty en route to new permanent station prior to July 1, 1974, date of increased mileage rates, and effective date of permanent change of station is on or after July 1, 1974, since all the travel is performed in accordance with the permanent change of station order, the effective date of such order determines the mileage allowance rate applicable to all travel performed in accordance with the order without regard to the date member is required to travel in connection with temporary duty en route (case d)---- 280

Retroactive. (*See* **REGULATIONS, Retroactive**)

Armed Services Procurement Regulation

Additive or deductive items

While ASPR § 2-201(b)(xli) (1974 ed.) requires disclosure of order of selection priority of additive items, FPR has no similar provision and, therefore, IFB issued by civilian agency need not reveal priority of additive items, and failure to indicate priority, with resultant post bid opening discretionary selection of additive items, does not render award of additive items invalid---- 320

Compliance

Contracting officers. (*See* **CONTRACTING OFFICERS, Regulation compliance**)

Effective date

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 greater than one-half. Prior interpretation was made by the CSC 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---- 890

Promotion procedures

Collective bargaining agreement

When agency agreed in a collective bargaining agreement that it would be policy of the agency to fill vacancies by promotion from within if qualifications of agency applicants are equal to those from outside agency, then at the time that the head of the agency approved the agreement under section 15 of Executive Order No. 11491, such policy, unless otherwise provided in the agreement, became a nondiscretionary agency policy and part of the agency's promotion procedures---- 312

Following arbitrator's determination that agency had not given employee priority consideration for promotion in accordance with Federal Personnel Manual and collective bargaining agreement and that had such consideration been given, employee would have been promoted, agency accepted arbitrator's findings and appealed only that portion of award granting employee retroactive promotion and backpay. Since agency did not question arbitrator's finding that employee would have been promoted but for agency's unwarranted personnel action, GAO would have no objection to processing retroactive promotion and paying backpay under 5 U.S.C. 5596 in accordance with 54 Comp. Gen. 312---- 435

REGULATIONS—Continued

Promotion procedures—Continued

Collective bargaining agreement—Continued Page

Collective bargaining agreement provides that certain IRS 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, GAO 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. 888

Retroactive

Amended regulation

Member who claims mileage incident to his retirement, representing distance from his place of separation to his home of record or place of entry on active duty less distance from his place of separation to his selected home and who has already selected home and received appropriate allowances thereto, may receive no additional mileage allowance because he has received all that the law allows 1042

Travel

Joint

Military personnel

Amended

Claims arising before June 14, 1974, date of 53 Comp. Gen. 963, for travel and transportation allowances to home of record or place of entry on active duty of members of uniformed services who were denied such allowances to selected homes may not be considered on basis of rule announced in that decision since it modifies or overrules prior decisions construing the same statutes. Effect of that decision is prospective except for its application to claimant in that decision. B-182904, February 4, 1975, overruled 1042

RETIREMENT

Civilian

Reemployment annuitants

Annuities

Supplemental

Retroactive correction of an appointment date may be accomplished under provisions of Back Pay Statute, 5 U.S.C. 5596 and implementing regulations where agency committed a procedural error by failing to follow provisions of administrative regulations requiring that retirement and reappointment be included in same action to preclude a break in service which was not intended, and where the break in service was only 1 nonworkday 1028

Overtime

Aggregate limitation

Computation

In computing aggregate rate of pay for determining maximum limitation on premium pay under 5 U.S.C. 5547, amount of annuity for pay period received by reemployed annuitant is to be included. See 32 Comp. Gen. 146 (1952) 247

RETIREMENT—Continued

Refund

Overpayment to employee

Agency liability Page

Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health cannot obtain reimbursement from a Federal agency whose certifying officer certified erroneous information on Standard Form 2806 leading to overpayment to a former employee from the Civil Service Retirement Fund, 5 U.S.C. 8348. Reimbursement by agency would violate 31 U.S.C. 628 which prohibits expenditures of appropriated funds except solely for objects for which respectively made. 205

RIGHTS, VESTED *v.* DISCRETIONARY

Regulation changes

Where Navy member's dependents complete travel to new home port prior to July 1, 1974, and effective date of change of home port order is after July 1, 1974, increased monetary allowance in lieu of transportation rates effective July 1, 1974, may be authorized as effective date of order is controlling without regard to date of dependents' travel (case a). 280

Where member's dependents complete travel under normal permanent change of station order prior to July 1, 1974, date of increased monetary allowance in lieu of transportation rates, and effective date of order is after July 1, 1974, increased rates may be authorized as effective date of order is controlling without regard to date of dependents' travel (case b). 280

Where member detaches from former permanent station prior to July 1, 1974, date of increased mileage rates, and after utilization of authorized leave, travel and proceed time, reports to new permanent station on or after July 1, 1974, increased rates may be authorized where effective date of orders is on or after July 1, 1974, without regard to actual date of performance of travel (case c) ---------- 280

Where member is directed to perform periods of temporary duty en route to new permanent station prior to July 1, 1974, date of increased mileage rates, and effective date of permanent change of station is on or after July 1, 1974, since all the travel is performed in accordance with the permanent change of station order, the effective date of such order determines the mileage allowance rate applicable to all travel performed in accordance with the order without regard to the date member is required to travel in connection with temporary duty en route (case d). 280

RYUKYU ISLANDS

Okinawa

Status

Employee who was separated due to RIF while stationed in Okinawa, and was reemployed within 1 year in Washington, D.C., claims reimbursement of real estate expenses and additional temporary quarters allowance. Statute and regulations require that both old and new duty stations be in U.S., its territories or possessions, Canal Zone or Puerto Rico in order to receive this reimbursement. Okinawa was not territory or possession of U.S. before its reversion to Japan because Japan had retained residual or de jure sovereignty under Peace Treaty. Therefore, disallowance of claim is sustained---------- 1006

SALES

Auction

Group *v.* numbered items

Disputes

Conflict between auction records and protester's allegat ons Page

Contentions that protester was not advised of auctioneer's intent to sell generators in group and that auctioneer did not state that successful bidder on item 56 could choose among remaining items in group have no merit since contentions concern questions of fact and pursuant to subsection (e) of part 6 must be resolved by Govt. records of auction, and records evidence that auctioneer stated that items in question would be grouped and that items were offered with option, and use of term option coupled with earlier explanations of its meaning constitutes adequate notice to bidders 484

Procedure

Propriety

Protest of sale of generators as group, listed on IFB as items 56 through 72 and item 75, at auction of DOD surplus property on basis that word "count" as used in part 6A(b) of Sale by Reference pamphlet which provides that sale of all items cataloged by weight, count or measure will be sold in like units is ambiguous and that generators are not like units has no basis since word "count" includes any item described by number in IFB and would therefore include generators listed as one each and generators, while not identical, were sufficiently similar in nature to constitute like units; therefore it must be concluded sale was in accordance with provisions of part 6A(b) and not in contravention of part 6A(a) 484

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 830

Minimum acceptable price

Computation and reasonableness

While GAO will not question manner of computing minimum acceptable bid price nor reasonableness of such price for 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 830

Lot basis

Numbered items

While, as contended, bidders were denied opportunity to bid on each numbered item from 57 through 72, and 75, since bid on item 56 would not merely be bid on that item but would constitute bid on any items in group, sale of like items by group is both practical and expedient method of sale and does not preclude bidder from purchasing single item in group and is specifically authorized by part 6A(b) of the Sale by Reference pamphlet 484

SAMOA (*See* **AMERICAN SAMOA**)

SET-OFF

Authority

Property loss and damage Page

Setoff of monies due carrier against Govt. claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on GBL when carrier received goods was proper because clear delivery receipt does not prevent establishing by other evidence receipt of goods in damaged condition, GBL with no exception is prima facie evidence that parts of shipment open to inspection and visible were received by carrier in good order, and damage done was to containers which were open to inspection and visible rather than to goods concealed inside containers 742

Contract payments

Government's status

Where assignee bank, acting in its own capacity, makes loan to contractor and in return receives assignment of contractor's claim against Government on specific contract and pledge of future receivables but is not fully repaid the amount of its loan out of funds of contract and/or receivables of contractor, if further funds become due under contract, assignee is entitled to amount of such fund which will cause loan to be fully repaid without setoff by Government 137

Tax debts

Right of United States to collect tax indebtedness of contractor by offsetting obligation against retainages under Govt. contract is superior to claim of payment bond surety or contractor 823

Debt collections

Military personnel

Retired. (*See* **PAY, Withholding, Debt liquidation, Retired pay**)

Deposits

Indebtedness of depositor

Taxes, etc.

Depositary bank which credits Government checks to depositor's account and allows withdrawals of the amount of the deposit without notice of any defects is holder in due course, entitled to receive payment of checks in full from Treasury Dept. without setoff for tax or other debts owing by the payee, notwithstanding stop order placed on payment 397

Transportation

Property damage, etc.

Set-off common law right

Setoff of monies due carrier against Government claims for loss and damage caused by improper loading by shipper of cartons of folding beds under carrier's trailer, which was readily apparent to carrier's driver, was proper because improper loading by shipper can constitute complete defense to damage claims only when shipper loading is not apparent on ordinary observation by carrier 742

SMALL BUSINESS ADMINISTRATION

Contracts

Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Subcontracting

Administration of program

Page

Protest against award of section 8(a) subcontract in which it is alleged that SBA's 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 GAO. However, since the matters raised in the protest concern SBA's administration of sec. 8(a) program, they will be considered by GAO in its continuing audit review of SBA activities 913

Limitation

Percentage

Allegation that sec. 8(a) award of 50 percent of solicitation quantity of cargo nets violates SBA's policy of restricting sec. 8(a) awards to no more than 20 percent of Govt.'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 913

Sufficiency of evaluation

Procuring activity

Protest against award of contract to SBA under sec. 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 913

Loans

Guaranteed loan programs

Lenders' entitlement to reimbursement

SBA possesses authority to reimburse lender for amount of interim loan made on request of authorized SBA official and subsequent to issuance of formal loan authorization regardless of whether direct loan by SBA was not fully disbursed to borrower 219

Official approval

Authorization

Not issued

Loan guarantee approved in writing by SBA official properly authorized to approve loan guarantees constitutes official approval of guarantee despite fact that formal loan authorization was never issued and lending bank having relied on such guarantee is entitled to reimbursement by SBA since SBA's final decision to deny loan application does not vitiate its prior approval and bank was deprived of an opportunity to comply with requirements contained in blanket guaranty agreement. 219

SMALL BUSINESS ADMINISTRATION—Continued
Loans—Continued
Guaranteed loan programs—Continued
Official approval—Continued
Authorization—Continued
Subsequently issued Page

Loan guarantee approved in writing by SBA official properly authorized to approve such loan guarantees constitutes official approval of guarantee despite fact that formal loan authorization was not issued until later time. However, SBA has no authority to reimburse a bank for interim disbursements made to the borrower pursuant to such approval because of bank's failure to comply with conditions, such as payment of guaranty fee, contained in both formal loan authorization which was issued after informal approval and blanket loan guaranty agreement between bank and SBA 219

SOCIAL SECURITY ADMINISTRATION
Civilian employees
Home to work transportation
Temporary emergency measure
Public transportation strike

Although hiring of vehicles for home to work transportation for Govt. employees is generally prohibited by 31 U.S.C. 638a, prohibition does not preclude such action where, as a temporary emergency measure, it is in Govt. interest to transport certain SSA employees to work during public transportation strike 1066

STATE DEPARTMENT
Employees
Home to work transportation
Government vehicles

22 U.S.C. 1138a and 2678, which authorize designated State Dept. officials to permit use of Govt. vehicles for home to work transportation of Govt. employees, apply only to vehicles owned or leased by the State Department 855

Foreign exhibits
Government liability

Where Congress has authorized the Dept. of State to agree to indemnify the People's Republic of China (PRC) for loss of or damage to an exhibition of archaeological finds, and where the Dept. has agreed to be responsible for the security of collection while it is in U.S., the Dept., if it determines it is to the advantage of the U.S. to do so, may give assurance to private art gallery showing exhibition pursuant to agreement with PRC that, if U.S. is required to indemnify the PRC as result of negligence by gallery, U.S. will not seek to recover from gallery 807

STATE LAWS
California
Annulment of marriage

Annuity payments to a widow of a deceased member under 10 U.S.C. 1434 of the Retired Serviceman's Family Protection Plan (RSFPP) which were terminated because the widow remarried in Nevada, may be resumed from the date of termination since a California State court declared such marriage a nullity and since the effect of such decree under the California conflict of laws rule is that the marriage became void *ab initio* when the decree of annulment was entered 600

STATE LAWS—Continued

New York

Decedents' estates Page

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---------- 858

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-- 858

STATES

Employees

Detail to Federal Government

"Pay" reimbursement

When a State or local Govt. employee is detailed to executive agency of Federal Govt. under Intergovernmental Personnel Act, reimbursement under 5 U.S.C. 3374(c) for "pay" of employee may include fringe benefits, such as retirement, life and health insurance, but not costs for negotiating assignment agreement required under 5 CFR 334.105 nor for preparing payroll records and assignment report prescribed under 5 CFR 334.106. The word "pay" as used in act has reference, according to legislative history, to salary of State or local detailee which term as used in 3374(c), upon reconsideration, does need to be limited to meaning used in Federal personnel statutes, that is, that term refers only to wages, salary, overtime and holiday pay, periodic within-grade advancements and other pay granted directly to Federal employees. 53 Comp. Gen. 355, overruled in part---------- 210

Federal aid, grants, etc.

Federal statutory restrictions

Competitive bidding procedure

Illinois Equal Employment Opportunity (EEO) requirements for publicly funded, federally assisted projects do not comply with Federal grant conditions requiring open and competitive bidding because requirements are not in accordance with basic principle of Federal procurement law, which goes to essence of competitive bidding system, that all bidders must be advised in advance as to basis upon which bids will be evaluated, because regulations, which provide for EEO conference after award but prior to performance, contain no definite minimum standards or criteria apprising bidders of basis upon which compliance with EEO requirements would be judged---------- 6

Unemployment relief

Work for Federal Government restriction

Exception

The legislative intent of the Comprehensive Employment and Training Act of 1973, P. L. 93-203 approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152- 560

STATION ALLOWANCES
Military personnel
Excess living costs outside United States, etc.
Fractional cost-of-living allowances
Members without dependents Page

Enlisted members without dependents assigned to ships homeported outside the United States, who are not in a travel status, but are required to be away from their station and where a determination has been made that subsistence in a Govt. mess is impractical, are entitled to a fractional cost-of-living allowance under par. M4301–5 of the Joint Travel Regs. for those meals which they must buy away from their station, since it appears that the prorated cost-of-living allowance was authorized for the purpose of defraying the excess costs incurred outside the U.S. for such meals whether a member is assigned to a ship or a shore-based unit 333

Temporary lodgings
Vacation quarters

Naval officer occupying Panama Canal Company quarters is not entitled to housing allowance since Panama Canal Company quarters constitute Government quarters and therefore payment of housing allowance is prohibited by paragraph M4301–3c(2), JTR (change 246, August 1, 1973); however, member may be allowed temporary lodging allowance under paragraph M4303–3d, JTR (change 240, February 1, 1973), while occupying vacation quarters provided by the Panama Canal Company, as such quarters appear to be transient in nature and were occupied on a temporary basis 214

STATUTES OF LIMITATION
Claims
Military matters and personnel
Waiver

An application for waiver under 10 U.S.C. 2774, which was originally received within the 3-year statutory period and denied, may be given reconsideration based on new evidence, notwithstanding the request for reconsideration is received after expiration of the 3-year limitation period 644

Transportation
Property damage, loss, etc.
Warsaw Convention

Air carrier's claim for amount administratively deducted to reimburse Govt. for loss of personal effects is proper for allowance where action at law was not brought by the Dept. of the Air Force within 2 years as required by Article 29 of Warsaw Convention. The 6-year statute of limitation in 28 U.S.C. 2415 does not abrogate holding in *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422, 145 Ct. Cl. 1 (1959) 633

STATUTORY CONSTRUCTION
Administrative construction weight
Prospective effect

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 greater than one-half. Prior interpretation was made by the CSC 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 890

STATUTORY CONSTRUCTION—Continued

Legislative history, title, etc.

Limiting money for leasing

Applicable to all of Federal Government

Including Judiciary Page

Since laws are presumed to be consistent and legislative history of Federal Property and Administrative Services Act of 1949 indicates GSA was to perform centralized property management functions for Govt. agencies generally while legislative intent of Administrative Office Act of 1939 was to have Director of AOC coordinate needs and budget for judicial branch, GSA's leasing function is consistent with Director's duty to provide accommodations for courts 944

STORAGE

Household effects

Military personnel

Nontemporary storage

Member's apartment

Where nontemporary storage of member's household goods otherwise is proper, reimbursement is not authorized for storage in member's apartment as para. M8101–1, 1 JTR, in accord with 37 U.S.C. 406(d) (1970) authorizes such storage only at Government or commerical facilities 387

Temporary duty

Member who receives permissive orders for temporary additional duty (temporary duty afloat) which are subsequently determined to be directed orders may not be reimbursed for nontemporary storage since nontemporary storage of household effects while on such duty is prohibited by para. M8200–1 and does not come within the exceptions specified in para. M8101–7, 1 JTR 387

STRIKES

Vehicle hire

Home to work transportation for Government employees. (*See* **VEHICLES, Hire, Home to work transportation, Government employees, Temporary emergency measure, Public transportation strike**)

SUBSISTENCE

Meals furnished civilian employees

Per diem reduced on pro rata basis

Federal agencies may now procure use of short-term conference and meeting facilities without regard to prohibition against rental contracts in District of Columbia in 40 U.S.C. 34, inasmuch as the GSA in its Federal Property Regs., contained in 41 CFR 101–17.101–4 has interpreted the procurement of use of short-term conference facilities as a service contract instead of a rental contract. OTA, which has legislative authority to contract for such services, may reimburse its panel member sponsors for expenses incurred in arranging OTA panel meetings at COSMOS Club in D.C., with appropriate reductions in each member's actual subsistence allowance for meals provided in this manner. 35 Comp. Gen. 314; 49 *id.* 305; and B–159633, May 20, 1974, insofar as they prohibited procurement of short-term conference facilities in D.C., will no longer be followed 1055

SUBSISTENCE—Continued

Per diem

Delays

Personal convenience Page

An employee assigned to temporary duty who departs earlier than necessary in order to take authorized annual leave and consumes travel-time in excess of that which would be allowed for official travel alone on a constructive travel basis, by virtue of special routing and departure times, may not be allowed per diem for the excess traveltime pursuant to Federal Travel Regulations and should be charged annual leave for such excess traveltime consumed for personal convenience 234

Rest stopover

Deduction of $37.50 from employee's claim for travel costs incurred due to overnight stop en route via air from Port Angeles, Wash., to Grand Canyon, Ariz., is correct. Federal Travel Regs. do not provide for rest stops, regardless of length of travel, when travel is within continental U.S., and this Office has never approved rest stops unless travel during normal periods of rest is involved 1059

Urgent need for services at former permanent duty station

Claim of AEC employee for per diem is allowable for temporary duty at former permanent duty station (Germantown, Md.) before reporting for duty at new permanent duty station (Las Vegas, Nev.) since employee did not accomplish PCS move to Las Vegas solely because of urgent need for services at former station and has vacated residence at former duty station, entered real estate purchase contract at new station and shipped household goods to new station in reliance on official notification of transfer 679

Fractional days

Excess of ten hours

Beginning or ending hours not for consideration

Although they did not begin travel before 6 a.m. or end travel after 8 p.m., employees who were in travel status for periods of 12 hours and 15 minutes to 13 hours and 15 minutes may be paid per diem allowances under FPMR 101–7, paragraph 1–7.6d(1), since that regulation requires the employees to begin or end the travel at the stated times only when travel of 6 to 10 hours is involved 284

Military personnel

Assignment to Harbor Clearance unit

Temporary additional duty

Aboard nonself-propelled service craft

Members who were ordered to Harbor Clearance Unit Two (HCU–2) but who performed temporary additional duty aboard the YRST–2, which is not a "vessel" for sea duty pay or for travel entitlement purposes may not receive sea duty pay but are not prohibited from receiving per diem by 1 JTR paragraph M4201–10 since while service in HCU–2 is considered sea duty, *i.e.*, onboard a vessel, the temporary additional duty was, in fact, not performed onboard a vessel 442

SUBSISTENCE—Continued
Per diem—Continued
Military personnel—Continued
Competent travel orders
Initial and subsequent orders Page

Army member who after a period of 171 days of duty as a "Referral Recruiter" which is considered to be temporary duty, received several temporary duty orders continuing the duty at same location for 5 additional months, in absence of approval for temporary duty in excess of 180 days, in accord with 1 JTR, paras. M3003–2c and d, and AR 310–10, para. 2–5b, is limited to per diem allowances not in excess of 180 days at that location 368

Delays
Personal convenience

Where member departed from his last duty station in a leave status pursuant to permissive rest and recuperation leave orders after receipt of permanent change of station (PCS) orders, but prior to effective date of PCS orders and not pursuant to them, and after arrival at his leave point he was granted emergency leave and subsequently was directed to proceed directly to new duty station, provisions of case 7(a), para. M4156, 1 JTR, are controlling and, therefore, member is not entitled to reimbursement of cost of transportation from his last duty station to his leave point or to per diem allowances for such travel 641

Temporary duty
Additional duty
Aboard nonself-propelled service craft

Members who were ordered to perform temporary additional duty aboard the YRST–2, a nonself-propelled service craft with berthing and messing available onboard, are not prohibited from receiving per diem by paragraph M4201–10, Volume 1, Joint Travel Regulations (1 JTR), as the YRST–2 is not a "vessel" for purposes of travel entitlements ... 442

En route to new duty station

Member with permanent change of station from Jacksonville, N.C. area to overseas location with temporary duty en route at Cherry Point, N.C., who occupied residence in Jacksonville while on temporary duty and commuted daily to Cherry Point, is entitled to per diem during period that ch. 243, May 1, 1973, case 13, para. M4156, 1 JTR, was in effect, as prohibition of per diem where temporary duty location was in area of former permanent duty station did not apply as Cherry Point is not in metropolitan area of Jacksonville, nor does it appear that personnel customarily commute between the two locations 803

"Referral Recruiter"

Army member who received orders as "Referral Recruiter" which did not specify temporary duty for the period of 171 days during which he was to perform recruiting duty at a location away from his permanent station is considered to have been on temporary duty during that period and is entitled to per diem for that period and temporary duty travel allowances for travel to the location where such duty was performed ... 368

SUBSISTENCE—Continued
Per diem—Continued
Military personnel—Continued
Temporary duty—Continued
Return daily to home Page

Member with permanent change of station from Jacksonville, N.C. area to overseas location with temporary duty en route at Cherry Point, N.C., who occupied residence in Jacksonville while on temporary duty and commuted daily to Cherry Point, is not entitled to per diem during period that ch. 246, Aug. 1, 1973, case 13, para M4156, 1 JTR, was in effect, as per diem is prohibited whether the temporary duty location is within or without the area of permanent duty station. However, member may be paid for transportation between his residence and temporary duty station and for meals in accord with this provision---------- 803

Permanent change of station

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 Govt.'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---------- 892

Rates
American Samoa
Establishment

Per diem entitlements of the employees in American Samoa classified as General Schedule employees are same as those of any Federal employee under Title 5 of the United States Code, regardless of whether expenses are paid out of appropriated funds or commingled grant and local moneys. However, restrictions in Title 5 would not apply to employees of the Samoan Government. Under Article II of the Samoan Constitution, the Samoan Legislature could establish per diem rates or vest the Governor with authority to do so---------- 260

Lodging costs
Application of "Lodging Plus" system

Civilian employee of Department of Army is entitled to a per diem allowance while on temporary duty under paragraph C8101–2.a of JTR, Volume 2, on the basis of the average amount the traveler pays for lodging plus an amount set forth in paragraph C8101–2.a for meals and incidental expenses not to exceed the maximum per diem of $25--- 299

Outside United States

Tachikawa and Yokota Air Bases in Japan, although not part of Tokyo City, are part of the Tokyo Metropolitan area and therefore are subject to the per diem rates applicable for Tokyo---------- 234

Reduction
Conference meals

Federal agencies may now procure use of short-term conference and meeting facilities without regard to prohibition against rental contracts in District of Columbia in 40 U.S.C. 34, inasmuch as the GSA in its Federal Property Regs., contained in 41 CFR 101–17.101–4 has inter-

SUBSISTENCE—Continued
Per diem—Continued
Reduction—Continued
Conference meals—Continued Page

preted the procurement of use of short-term conference facilities as a service contract instead of a rental contract. OTA, which has legislative authority to contract for such services, may reimburse its panel member sponsors for expenses incurred in arranging OTA panel meetings at COSMOS Club in D.C., with appropriate reductions in each member's actual subsistence allowance for meals provided in this manner. 35 Comp. Gen. 314; 49 *id.* 305; and B–159633, May 20, 1974, insofar as they prohibited procurement of short-term conference facilities in D.C., will no longer be followed 1055

Rest entitlement

Deduction of $37.50 from employee's claim for travel costs incurred due to overnight stop en route via air from Port Angeles, Wash. to Grand Canyon, Ariz., is correct. Federal Travel Regs. do not provide for rest stops, regardless of length of travel, when travel is within continental U.S., and this Office has never approved rest stops unless travel during normal periods of rest is involved 1059

Temporary duty
At former permanent duty station
Prior to reporting to new duty station

Claim of AEC employee for per diem is allowable for temporary duty at former permanent duty station (Germantown, Md.) before reporting for duty at new permanent duty station (Las Vegas, Nev.) since employee did not accomplish PCS move to Las Vegas solely because of urgent need for services at former station and has vacated residence at former duty station, entered real estate purchase contract at new station and shipped household goods to new station in reliance on official notification of transfer 679

Military personnel. (*See* **SUBSISTENCE, Per diem, Military personnel, Temporary duty**)

SURPLUS PROPERTY
Sales
Auction. (*See* **SALES, Auction**)

TAXES
Ad valorem
User charge
Waste treatment
Recovery of costs

Statutory requirement that grantees under Public Law 92–500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since potentially large number of users—i.e., tax exempt properties—will not pay for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues 1

TAXES—Continued
Relocation expenses
Transfers
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Taxes**)

TELEPHONES
Private residences
Prohibition
Military members Page

Air Force member who incurs telephone relocation charges in connection with an ordered move from quarters is not entitled to reimbursement for such expense in view of the prohibition contained in 31 U.S.C. 679 (1970) and so much of 52 Comp. Gen. 69 (1972) which allows payment for such telephone installation expenses is modified accordingly-- 661

TERRITORIES AND POSSESSIONS
Ryukyu Islands. (*See* **RYUKYU ISLANDS**)

TRAILER ALLOWANCES
Civilian personnel
Cost to dealer for transporting

Payment for transportation of newly purchased mobile home on commercial rate basis may be made not to exceed constructive cost of transporting employee's household goods where mobile home was transported by dealer, even though dealer was not listed by ICC as a commercial transporter since dealer was operating under color of State license or other State sanction permitting the towing and transportation of trailer---- 658

Costs to prepare trailer for shipment, etc.

When employee uses commercial carriers to transport two mobile homes incident to a permanent change of station and extra equipment is required for pickup and delivery of the trailer, employee would be entitled to reimbursement of such expenses since they do not appear to be expenses for preparing the trailer for movement nor do they appear to be otherwise prohibited by subsection 9.3a(3) of OMB Circular No. A–56---- 335

TRANSPORTATION
Accessorial charges
Tariff interpretation

A common carrier may by reference incorporate into a Government rate tender the transportation services and charges published in other tariffs---- 610

Air carriers
Foreign
American carrier availability

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route (Christchurch to Auckland, New Zealand, by foreign carrier, and by Category "Z" American air to Travis Air Force Base, Calif.), traveled circuitously for personal reasons using foreign air for overseas travel except from Lima, Peru, to Miami, Fla. 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---- 850

TRANSPORTATION—Continued
Air carriers—Continued
Foreign—Continued
American carrier availability—Continued Page

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route to Travis Air Force Base, Calif., and by POV from there to Bainbridge, traveled circuitously for personal reasons to Miami, Fla., and from there to Bainbridge. While the JTR 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, member may be paid only for distance by direct travel from port of debarkation actually used to new station, not to exceed distance by normal route---------- 850

Automobiles
Military personnel
Air carriers
Not included in "privately owned American shipping services"

Term "privately owned American shipping services" as used in 10 U.S.C. 2634 authorizing overseas transportation at Govt. expense of privately owned motor vehicle of member of armed force ordered to make permanent change of station is limited to vessels and Joint Travel Regs. may not be revised to include such transportation by air freight even if use of air freight is limited to a not to exceed the cost of shipment by vessel basis---------- 756

Within United States

Employee who ships automobile from old official duty station to new official duty station as part of his household goods even though still within the weight limitation is entitled only to reimbursement for shipment of his household goods on a commuted rate basis but not for shipment of his automobile since chapter 2, subsection 2–1.4h specifically precludes the shipment of an automobile as household goods-------- 301

Bills of lading
Notations
Effect

Application of commodity rates in carrier's tariff is determined solely by whether nature of articles transported is such that use of low-bed equipment is required; tariff requirement for bill of lading notation by shipper showing request for low-bed equipment construed as directory only and not as condition precedent to application of the rates-------- 27

Requirement
Failure to comply

Setoff of monies due carrier against Govt. claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on GBL when carrier received goods was proper because clear delivery receipt does not prevent establishing by other evidence receipt of goods in damaged condition, GBL with no exception is prima facie evidence that parts of shipment open to inspection and visible were received by carrier in good order, and damage done was to containers which were open to inspection and visible rather than to goods concealed inside containers---------- 742

TRANSPORTATION—Continued

Demurrage

Detention charges

Weekend and holiday travel Page

Weekend or holiday vehicle detention charges for overdimensional shipments are proper only when the carrier has a valid highway permit for the day preceding and the day following the Saturday, Sunday or holiday. Expenses incurred through the use of a transceiver to obtain State highway permits are properly reimbursable, but only where proven. 308

Dependents

Military personnel

Children

Mother and father members of uniformed services

Where child of marriage of female and male service members travels to new location incident to change of permanent station of both members to same location, since child is female member's dependent under item 3, para. M1150–9, 1 JTR, even though male member receives BAQ at the with dependent rate which includes such child (which precludes female member's BAQ at the with dependent rate for such child) she may receive travel allowance for child 665

Dislocation allowance

Husband and wife both members of uniformed services

Where female and male service members are married and reside in same household and incident to change of permanent station for each member the household is moved and members continue to reside in same household, only one dislocation allowance may be paid for such movement, and since male member already has received such allowance, female member's claim must be denied. However, upon repayment of dislocation allowance previously received by male (junior) member, dislocation allowance may be paid to the female (senior) member 665

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, S.C. Incident to transfer dependents traveled from Detroit, Michigan, to East Meadow, N.Y. 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 869

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, S.C. Incident to transfer dependents traveled from Detroit, Mich., to East Meadow, N.Y. Since the home yards are different, transfer is regarded as permanent change of station for purposes of dependent transportation and dislocation allowances 869

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, S.C. Incident to transfer de-

TRANSPORTATION—Continued
Dependents—Continued
Military personnel—Continued
Vessel and yard changes—Continued
Same port—Continued Page

pendents traveled from Detroit, Mich., to East Meadow, N.Y. 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 JTR. Accordingly, payment for dependent travel is authorized for the official distance from Detroit to N.Y., 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 869

Travel to attend award ceremonies for honor award recipients

There is no authority for CSC to issue regulations authorizing payment of travel and transportation expenses of members of the immediate family of honor award recipients to attend award ceremonies as such expenses are not considered "necessary expense" under 5 U.S.C. 4503 .. 1054

Detention charges. (*See* **TRANSPORTATION, Demurrage, Detention charges**)

Household effects
Actual expenses
In lieu of commuted rate
Teamsters' strike

Employee who, incident to transfer of station, was authorized and paid for transportation of household goods under commuted rate system claims reimbursement for actual expenses in excess of such reimbursement since he was required to have goods moved at higher rates than those of another carrier with lower rates because of a teamsters' strike. Employee is not entitled to such reimbursement since rights and liabilities regarding travel orders vest at time of transportation of goods and may not be revoked or modified retroactively to increase or decrease benefits in absence of evidence of administrative error in orders 638

Commutation
Shipment of automobiles precluded

Employee who ships automobile from old official duty station to new official duty station as part of his household goods even though still within the weight limitation is entitled only to reimbursement for shipment of his household goods on a commuted rate basis but not for shipment of his automobile since chapter 2, subsection 2–1.4h specifically precludes the shipment of an automobile as household goods 301

House trailer shipments
Commercial transportation
Transported by dealer

Payment for transportation of newly purchased mobile home on commercial rate basis may be made not to exceed constructive cost of transporting employee's household goods where mobile home was transported by dealer, even though dealer was not listed by ICC as a commercial transporter since dealer was operating under color of State license or other State sanction permitting the towing and transportation of trailer 658

TRANSPORTATION—Continued
Household effects—Continued
House trailer shipments—Continued
More than one trailer Page

When employee changes permanent duty stations and it is necessary to transport two mobile homes by commercial carriers, resulting from eligibility status of mother-in-law prescribed by regulations, he may be reimbursed cost of applicable tariff as approved by ICC for transportation of both mobile homes in amount not to exceed maximum amount allowable for transportation and 60 days temporary storage of household goods. Regardless of method used in computing allowances he is entitled to a flat $200 miscellaneous allowance or larger amount not to exceed 2 weeks basic salary of employee at time he reported for duty where claim is supported by acceptable documentation since there is involved only one change of station---------- 335

Special service fees

When employee uses commercial carriers to transport two mobile homes incident to a permanent change of station and extra equipment is required for pickup and delivery of the trailer, employee would be entitled to reimbursement of such expenses since they do not appear to be expenses for preparing the trailer for movement nor do they appear to be otherwise prohibited by subsection 9.3a(3) of OMB Circular No. A–56_ 335

Military personnel
"Do It Yourself" movement
Cash advances

Vol. 1, JTR, may not be amended to allow advance payment for rental vehicles for transportation of personal property, and related expenses, as advance payment provisions of sec. 303(a) of Career Compensation Act of 1949, now appearing in 37 U.S.C. 404(b) (1970), limit such payments to member's personal travel, and in absence of specific authority for advance payment for transportation of personal property, 31 U.S.C. 529 (1970) precludes issuance of regulations which would authorize such advance payments---------- 764

Release from active duty
Spouse in civilian service

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 Govt. 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 Govt.'s obligation is limited to the greater entitlement and with payment of constructive drayage plus shipment to Lincoln Park, that entitlement resulted in greater payment---------- 847

Total cost

In connection with retirement of military members, Vol. 1, JTR, may be amended to permit shipment of household goods within specified time limit to one or more places provided total cost does not exceed cost of shipment in one lot to home of selection, home of record, or place of entry on active duty, whichever provides greatest benefit---------- 1042

TRANSPORTATION—Continued

Motor carrier shipments

Claims settlement

National classification board ruling

Effect on GAO consideration Page

In exercise of statutory duty to settle claims of motor common carriers General Accounting Office is not bound by rulings of National Classification Board, since Board in effect is mere agent of claimant motor carrier. 89

Payment

Set-off

Setoff of monies due carrier against Government claims for loss and damage caused by improper loading by shipper of cartons of folding beds under carrier's trailer, which was readily apparent to carrier's driver, was proper because improper loading by shipper can constitute complete defense to damage claims only when shipper loading is not apparent on ordinary observation by carrier 742

Setoff of monies due carrier against Govt. claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on GBL when carrier received goods was proper because clear delivery receipt does not prevent establishing by other evidence receipt of goods in damaged condition, GBL with no exception is prima facie evidence that parts of shipment open to inspection and visible were received by carrier in good order, and damage done was to containers which were open to inspection and visible rather than to goods concealed inside containers 742

Overcharges

Disputed

Burden of proof

Carrier claiming that mechanical equipment was used in loading of shipments bears burden of proving that such equipment was actually used. Ramp used to drive fire truck on to carrier's vehicle is not mechanical equipment 167

Rates

Commodity

Basis for determination

Type of equipment required

Application of commodity rates in carrier's tariff is determined solely by whether nature of articles transported is such that use of low-bed equipment is required; tariff requirement for bill of lading notation by shipper showing request for low-bed equipment construed as directory only and not as condition precedent to application of the rates 27

Containers

Ammunition. (*See* **TRANSPORTATION, Rates, Classification, Ammunition, Containers**)

Increases

Assumption of cost

Fixed-price contracts

Where a contractor has entered into a fixed price contract with the Government and there is a subsequent increase in transportation expenses as a result of a freight rate increase, the contractor and not the Government must bear the increased expense 559

TRANSPORTATION—Continued
Rates—Continued
Light and bulky articles Page
Application of the light and bulky rule in carrier's published tariff is premised on each article transported and not on the size of the package or the shipment as a whole ---- 610

Tariffs
Construction
Against carrier
Contradiction in tariff language permits consideration of parol evidence in order to ascertain intended meaning. Ambiguities must be resolved against carrier ---- 167

Incorporation by reference
A common carrier may by reference incorporate into a Government rate tender the transportation services and charges published in other tariffs ---- 610

Routes
Applicable tariff rates
Longer *v.* shorter route
Where tariff provides that if transportation charges for longer route are less than charges for shorter route because of avoidance of bridge, ferry, or tunnel charges, then charges for longer route apply notwithstanding the fact that Government did not request longer route ---- 14
Tariffs. (*See* **TRANSPORTATION, Rates, Tariffs**)

Trailers
Trailer shipments
Civilian personnel. (*See* **TRANSPORTATION, Household effects, House trailer shipments**)
Weekend and holiday detention charges. (*See* **TRANSPORTATION, Demurrage, Detention charges**)

TRAVEL ALLOWANCE
Military personnel
Adjustment of allowance
Army member who received orders as "Referral Recruiter" which did not specify temporary duty for the period of 171 days during which he was to perform recruiting duty at a location away from his permanent station is considered to have been on temporary duty during that period and is entitled to per diem for that period and temporary duty travel allowances for travel to the location where such duty was performed ---- 368

Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel**)

TRAVEL EXPENSES
Advances
Accountability
Special Agent of the Drug Enforcement Administration whose wallet containing $1,185 in cash travel advance funds was stolen from his locked motel room while he was sleeping may nevertheless not be relieved of liability for the loss of such funds since travel advancements are considered to be like loans, as distinguished from Government funds and hence money in the wallet was private property of the Special

TRAVEL EXPENSES—Continued
Advances—Continued
Accountability—Continued Page

Agent and he remains indebted to the Government for the loan, and must show either that it was expended for travel or refund amount not expended ---------- 190

Air travel
Excursion rates
Circuitous routes
Personal convenience

When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package ---------- 268

Delays
Rest entitlement

Deduction of $37.50 from employee's claim for travel costs incurred due to overnight stop en route via air from Port Angeles, Wash., to Grand Canyon, Ariz., is correct. Federal Travel Regs. do not provide for rest stops, regardless of length of travel, when travel is within continental U.S., and this Office has never approved rest stops unless travel during normal periods of rest is involved ---------- 1059

Dependents. (*See* **TRANSPORTATION, Dependents**)
Experts and consultants. (*See* **EXPERTS AND CONSULTANTS, Travel expenses**)
First duty station
Manpower shortage
Relocation expenses

Former employee appointed to manpower shortage position who was authorized reimbursement for expenses of sale and purchase of residence, temporary quarters subsistence expenses, and per diem for family, is not entitled to reimbursement for such expenses and must refund any amounts already paid because appointees are not entitled to such reimbursement and he was not transferred without break in service or separated as result of reduction in force or transfer of function to entitle him to such reimbursement under 5 U.S.C. § 5724a and Government cannot be bound beyond actual authority conferred upon its agents by statute or regulations ---------- 747

Headquarters
Inadequacy of transportation
Public transportation strike

Although hiring of vehicles for home to work transportation for Govt. employees is generally prohibited by 31 U.S.C. 638a, prohibition does not preclude such action where, as a temporary emergency measure, it is in Govt. interest to transport certain SSA employees to work during public transportation strike ---------- 1066

TRAVEL EXPENSES—Continued

Interviews, qualifications, etc.

Competitive service positions Page

Civil Service Commission (CSC) request that we modify decisions, such as 31 Comp. Gen. 175, which do not allow Federal agencies to pay prospective employees' travel expenses incident to interviews for purpose of permitting agency to determine their qualifications for appointment to positions in competitive service is granted insofar as CSC concludes that positions are of such high level or have such peculiar characteristics that agency is better suited to determine through such interviews certain factors of appointees' suitability for positions which CSC itself cannot determine since such interviews are necessary to determine prospective employees' qualifications---------- 554

Reimbursement

Civil Service Commission (CSC) request that we modify decisions, such as 31 Comp. Gen. 175, which do not allow Federal agencies to pay prospective employees' travel expenses incurred in traveling to place of interview for purpose of permitting agency to determine prospective employees' qualifications for appointment to positions in competitive service is granted in part, even though Congress has refused to pass a law allowing such payments generally because it was concerned about wide abuses, since this decision limits payment to interview expenses incurred where CSC believes agency interview is necessary to properly determine prospective employees' qualifications---------- 554

Manpower shortage category personnel

First duty station. (*See* **TRAVEL EXPENSES, First duty station, Manpower shortage**)

Military personnel

Change of station status

Temporary duty en route

Member with permanent change of station from Jacksonville, N.C. area to overseas location with temporary duty en route at Cherry Point, N.C., who occupied residence in Jacksonville while on temporary duty and commuted daily to Cherry Point, is not entitled to per diem during period that ch. 246, Aug. 1, 1973, case 13, para. M4156, 1 JTR, was in effect, as per diem is prohibited whether the temporary duty location is within or without the area of permanent duty station. However, member may be paid for transportation between his residence and temporary duty station and for meals in accord with this provision---------- 803

Circuitous routes

Payment basis

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route (Christchurch to Auckland, New Zealand, by foreign carrier, and by Category "Z" American air to Travis Air Force Base, Calif.), traveled circuitously for personal reasons using foreign air for overseas travel except from Lima, Peru, to Miami, Fla. 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---------- 850

TRAVEL EXPENSES—Continued
Military personnel—Continued
Circuitous routes—Continued
Payment basis—Continued Page

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route to Travis Air Force Base, Calif., and by POV from there to Bainbridge, traveled circuitously for personal reasons to Miami, Fla., and from there to Bainbridge. While the JTR 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, member may be paid only for distance by direct travel from port of debarkation actually used to new station, not to exceed distance by normal route ---------- 850

Dependents
Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Headquarters
Metropolitan area

Member with permanent change of station from Jacksonville, N.C. area to overseas location with temporary duty en route at Cherry Point, N.C., who occupied residence in Jacksonville while on temporary duty and commuted daily to Cherry Point, is entitled to per diem during period that ch. 243, May 1, 1973, case 13, para. M4156, 1 JTR, was in effect, as prohibition of per diem where temporary duty location was in area of former permanent duty station did not apply as Cherry Point is not in metropolitan area of Jacksonville, nor does it appear that personnel customarily commute between the two locations ---------- 803

Leaves of absence
Station changes during leave

Where member departed from his last duty station in a leave status pursuant to permissive rest and recuperation leave orders after receipt of permanent change of station (PCS) orders, but prior to effective date of PCS orders and not pursuant to them, and after arrival at his leave point he was granted emergency leave and subsequently was directed to proceed directly to new duty station, provisions of case 7(a), para. M4156, 1 JTR, are controlling and, therefore, member is not entitled to reimbursement of cost of transportation from his last duty station to his leave point or to per diem allowances for such travel ---------- 641

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Recruiters
Automobile insurance coverage

Although under 37 U.S.C. 428 and 1 JTR paragraph M5600 a member of armed services whose primary assignment is to perform recruiting duty may be reimbursed for actual and necessary expenses incurred in connection with performance of those duties, recruiter is not entitled to reimbursement by Govt. for increased cost of extended insurance coverage incurred in connection with use of privately owned automobile in performance of duties where a mileage allowance is authorized incident to such duties since such allowance is a commutation of the expense of operating automobile including the cost of insurance ---------- 620

TRAVEL EXPENSES—Continued
Military personnel—Continued
Release from active duty
Rights Page

In connection with retirement of military members, Vol. 1, JTR, may be amended to permit shipment of household goods within specified time limit to one or more places provided total cost does not exceed cost of shipment in one lot to home of selection, home of record, or place of entry on active duty, whichever provides greatest benefit ---------- 1042

A member upon retirement is entitled to travel at Govt. expense to his home of record or place of entry on active duty or to his home of selection if he qualifies. However, 37 U.S.C. 404(f) which permits travel payments upon separation or release of military members without regard to the performance of travel is not applicable to members upon retirement or placement on the temporary disability retired list. Such members may be paid only on basis of authorized travel actually performed ------- 1042

Retirement
To selected home
Reimbursement entitlement
Joint Travel Regulations amended

Vol. 1, JTR, may be amended to reflect that members of the uniformed services who qualify for travel and transportation allowances to home of selection under 37 U.S.C. 404(c) and 406(g) retain the right to travel and transportation allowances based on home of record or place of entry on active duty under 37 U.S.C. 404(a) and 406(a). 42 Comp. Gen. 370 and B–163248, March 19, 1968, overruled ---------- 1042

Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Transfers
Reimbursement basis

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route (Christchurch to Auckland, New Zealand, by foreign carrier, and by Category "Z" American air to Travis Air Force Base, Calif.), traveled circuitously for personal reasons using foreign air for overseas travel except from Lima, Peru, to Miami, Fla. 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 ---------- 850

Modes of travel
Usually traveled route
Military personnel

Navy member on permanent change of station from Antarctica to Bainbridge, Md., instead of normal route to Travis Air Force Base, Calif., and by POV from there to Bainbridge, traveled circuitously for personal reasons to Miami, Fla., and from there to Bainbridge. While the JTR 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, member may be paid only for distance by direct travel from port of debarkation actually used to new station, not to exceed distance by normal route ---------- 850

TRAVEL EXPENSES—Continued

Overseas employees

Circuitous route Page

An employee assigned to temporary duty who departs earlier than necessary in order to take authorized annual leave and consumes traveltime in excess of that which would be allowed for official travel alone on a constructive travel basis, by virtue of special routing and departure times, may not be allowed per diem for the excess traveltime pursuant to Federal Travel Regulations and should be charged annual leave for such excess traveltime consumed for personal convenience 234

Permanent change of station

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Personal

Rule

Although hiring of vehicles for home to work transportation for Govt. employees is generally prohibited by 31 U.S.C. 638a, prohibition does not preclude such action where, as a temporary emergency measure, it is in Govt. interest to transport certain SSA employees to work during public transportation strike 1066

Personal convenience

Private and public business intermingled

Special fare *v.* regular rate

Reimbursement for "accommodations" in travel package

When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package 268

Private parties

Family members of honor award recipients

Travel to attend award ceremonies

There is no authority for CSC to issue regulations authorizing payment of travel and transportation expenses of members of the immediate family of honor award recipients to attend award ceremonies as such expenses are not considered "necessary expense" under 5 U.S.C. 4503 .. 1054

Temporary duty

Return to official station on nonworkdays

Under paragraph C10105 of JTR, Volume 2, an employee of the Department of the Army who is on temporary duty and voluntarily returns to his headquarters on nonworkdays is entitled to round-trip transportation by any mode and per diem en route not to exceed the per diem which would have been allowable had the employee remained at his temporary duty station 299

Transfers

Employee return to old station

To complete moving arrangements

An employee who has reported to new official duty station in Washington, D.C., and thereafter returns to his old duty station in Los Angeles,

TRAVEL EXPENSES—Continued
Transfers—Continued
Employee return to old station—Continued
To complete moving arrangements—Continued Page

California, to settle his rental agreement and to complete his moving arrangements is not entitled to additional travel expenses for this purpose even though erroneously advised otherwise---------- 301

When actually employed employees (WAE)
Travel to and from places other than home

Although Government consultant employed on when-actually-employed basis returned to his home in St. Louis, Missouri, instead of returning immediately to Las Vegas, Nevada, where he was transacting non-Government business at time he was called for Government meetings in Washington, D.C., he may be allowed the full cost of round-trip airfare between Las Vegas and Washington because the delay was occasioned by the Government assignment---------- 430

TREASURY DEPARTMENT
Secret Service agents
Protection for Secretary of Treasury
Reimbursable basis

Where it is administratively determined that the risk to a Government official would impair his ability to carry out his duties and hence affect adversely the efficient functioning of his agency, then agency funds if not otherwise restricted are available to protect him. However, without specific legislative authority in 18 U.S.C. § 3056(a)(1970) or elsewhere, funds appropriated to the Secret Service are not available for such protection. Secret Service protection may be provided to the Secretary of the Treasury or others for whom it is not specifically authorized only on a reimbursable basis pursuant to 31 U.S.C. § 686(a) (1970)---------- 624

UNEMPLOYMENT
Relief
Comprehensive Employment and Training Act

The legislative intent of the Comprehensive Employment and Training Act of 1973, P. L. 93–203 approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152-- 560

UNIONS
Federal service
Dues
Overpayment
Government's right to recovery

Abitration 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---- 921

Protest against agency-forced annual leave

American Federation of Government Employees requests ruling invalidating Air Force Logistics Command (AFLC) policy to reduce operations at its installations during 1974 Christmas holiday period and force employees to take annual leave on basis that AFLC is not authorized to promulgate policy that violates collective bargaining agree-

UNIONS—Continued
Protest against agency-forced annual leave—Continued Page
ments between installations and local unions. Since matter is presently before Assistant Secretary for Labor Management Relations as unfair labor practice complaint, Comptroller General declines to rule on issue-- 503

VEHICLES
Government
Home to work transportation
Government employees
Overseas
Although use of Govt. vehicles for home to work transportation of Govt. 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 Govt. interest, although specific legislative authority to use Govt. vehicles for this purpose should be sought and interim provision of vehicles to this end should be limited to most essential cases---------- 855

State Department
22 U.S.C. 1138a and 2678, which authorize designated State Dept. officials to permit use of Govt. vehicles for home to work transportation of Govt. employees, apply only to vehicles owned or leased by the State Department---------- 855

Hire
Home to work transportation
Government employees
Temporary emergency measure
Public transportation strike
Although hiring of vehicles for home to work transportation for Govt. employees is generally prohibited by 31 U.S.C. 638a, prohibition does not preclude such action where, as a temporary emergency measure, it is in Govt. interest to transport certain SSA employees to work during public transportation strike---------- 1066

Transportation. (*See* **TRANSPORTATION, Automobiles**)

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---------- 830

Price determination
While GAO will not question manner of computing minimum acceptable bid price nor reasonableness of such price for 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---------- 830

VETERANS ADMINISTRATION
Contracts
Obligated services for residency training, etc.
Service interrupted by military duty Page
Liquidated damage provision of employment contract between Veterans Administration and physician which required physician to perform period of obligated service in return for specialty training is found valid and enforceable. Military service of physician suspended contract of employment obligations and his induction into Air Force did not rescind contract. Certification of no extra-VA professional activities found inapplicable to issue of abrogation of contract..... 728

VOLUNTARY SERVICES
Enrollees or trainees
Comprehensive Employment and Training Act
The legislative intent of the Comprehensive Employment and Training Act of 1973, P.L. 93-203 approved December 28, 1973, is that facilities of agencies other than the Department of Labor are to be used for the purposes of fulfilling objectives of the Act. Modifies 51 Comp. Gen. 152..... 560

WAIVERS
Compensation
Claim of former Commissioner of Commission on Marihuana and Drug Abuse for compensation previously waived by him is for payment if otherwise proper since an employee may not be estopped from claiming and receiving such compensation when his right thereto is fixed by or pursuant to law. Should additional claims from other Commissioners be submitted, they may also be paid. However, should no balance remain in the applicable appropriation account, a deficiency appropriation would be necessary before payment could be made..... 393

Dept collections. (*See* **DEBT COLLECTIONS, Waiver**)
Rights and benefits
Military service
When member and wife were separated and agreement was executed by them prior to time member entered Air Force whereby wife waived all rights and other benefits to which she may be entitled as result of member's possible future military service and member designated his mother to receive the 6-months' death gratuity in the event there was no surviving spouse, mother's claim was properly disallowed because 10 U.S.C. 1447(a) provides that surviving spouse shall be paid the gratuity and a simple waiver of an unknown future right does not afford legal basis for payment of gratuity due from the U.S. to someone other than the lawfully designated recipient..... 152

WATER
Pollution prevention
Grants-in-aid
Recovery costs
User charge system
Ad valorem tax
Statutory requirement that grantees under Public Law 92-500 will adopt system of charges assuring that each recipient of waste treatment services shall pay its proportionate share of treatment works' operation and maintenance costs is not met by use of ad valorem tax since poten-

WATER—Continued
Pollution prevention—Continued
Grants-in-aid—Continued
Recovery costs—Continued
User charge system—Continued
Ad valorem tax—Continued Page

tially large number of users—i.e., tax exempt properties—will not pay for any services; ad valorem tax does not achieve sufficient degree of proportionality according to use and hence does not reward conservation of water; and Congress intended adoption of user charge and not tax to raise needed revenues 1

WELFARE AND RECREATION FACILITIES
Civilian personnel
Authority

In view of fact that crew and scientists aboard EPA ship, *Roger R. Simon*, are confined for extended periods without any common recreational facilities and that they are unable to personally provide their own portable televisions due to the ship's configuration, appropriated funds may be used to purchase television set and special antenna and rotor should responsible EPA official find it necessary for most efficient and economical performance of the ship's functions 1075

WORDS AND PHRASES
"Acquisition of such property"
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. 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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act 841

Area scheduling

Contention by bidder that it was aware of "area scheduling" requirement and would not have bid differently if included in IFB is not dispositive of issue of whether award should have been made under IFB, since to permit award on "area scheduling" would have resulted in contract which was not same offered to competition and more stringent requirement in IFB may have restricted competition 955

"Buy-in"

In cost reimbursement situation award to offeror submitting lowest cost cannot be considered "buy-in" (offering cost estimate less than anticipated cost with expectation of increasing costs during performance) because agency was aware of what realistic estimate cost of contractor's performance was before award and made award based on that knowledge. 352

"Commercial, off-the-shelf" items

Based on detailed review of arguments propounded, invitation for bids and referenced purchase description, prior decision that IFB required successful bidder to provide "commercial, off-the-shelf" item at date set for delivery is affirmed. Contracting officer's affirmative determina-

WORDS AND PHRASES—Continued

"Commercial, off-the-shelf" items—Continued Page

tion of low bidder's responsibility based on erroneous interpretation of specification in face of strongly negative preaward survey was not reasonable exercise of procurement discretion 715

Disclosure remedy

Withholding from protester of certain procurement information furnished by agency in connection with protest does not establish that protest procedure is unfair. Where protester does not avail itself of disclosure remedy under Freedom of Information Act, but relies instead on information made available through agency's protest reports, and agency indicates withholding of procurement sensitive information is appropriate, withholding by GAO of such information is proper under bid protest procedures 1009

Displaced persons

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. 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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act 841

"Federal norm"

Even though subcontracting methods of Government prime contractor, who is not purchasing agent, are generally not subject to statutory and regulatory requirements governing Government's direct procurements, contracting agency should not approve subcontract award if, after thorough consideration of particular facts and circumstances, responsible Government contracting officials find that proposed award would be prejudicial to interests of Government. "Federal norm" is frame of reference guiding agency's determinations as to reasonableness of prime contractor's procurement process, although propriety and necessity of variation from details of "Federal norm" is recognized 767

Full duty

"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 same MOS is not essential, decision to place member in that MOS or to assign him available duties consistent with his grade and service is question of personnel management best left to judgment of appropriate military commander 862

Home to work transportation

Although use of Govt. vehicles for home to work transportation of Govt. 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 Govt. interest, although specific legislative authority to use Govt. vehicles for this purpose should be sought and interim provision of vehicles to this end should be limited to most essential cases 855

WORDS AND PHRASES—Continued

"Hosts" Page

Agencies of the Federal Government are not precluded from serving as "hosts" to enrollees under the Comprehensive Employment and Training Act of 1973, Public Law No. 93-203, approved December 28, 1973, by 31 U.S.C. 665(b). Modifies 51 Comp. Gen. 152 560

"Informal Competitive Bidding"

Rural electric cooperatives, acting pursuant to "Informal Competitive Bidding" procedures approved by REA, were not obligated to evaluate revised proposal submitted by higher of two offerors after cooperatives inquired about possible reduction in price. Moreover, it appears that even had revised proposal been evaluated, selection of contractor would not have been affected 791

Leasehold interest

Tenants whose landlords exercise their legal right to gain possession of premises and then lease property to Federal Govt. 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. Govt.'s obtaining of leasehold interest in open market transaction is not "acquisition of such real property" causing tenants to vacate premises within meaning of section 101(6) of act 841

Level of effort

Where reading of evaluation factors statement in NASA RFP gives reasonably clear indication of relative importance of various factors, requirement that offerors be informed of importance of cost in relation to technical and other factors is satisfied. Description of statement of work as "level of effort" did not establish cost as overriding evaluation factor, because offerors were asked to exercise flexibility and discretion in proposing support services of greater scope and complexity than those performed under predecessor contract 1009

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 greater than one-half. Prior interpretation was made by the CSC 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 890

"Master agreement"

Dept. of Agriculture's proposed use of an annual Master Agreement prequalifying 10 consulting firms in each of 8 subject areas is unduly restrictive of competition. Unlike Qualified Products List/Qualified Manufacturers List-type procedures, which limit competition based on offeror's ability to provide product of required type or quality, proposed procedure would preclude competition of responsible firms which could provide satisfactory consulting services based only upon determination as to their qualifications compared to those of other interested firms 606

WORDS AND PHRASES—Continued

New appointees Page

Employee located in Alaska whose position was abolished was returned to continental U.S. for separation by retirement. His claim for reimbursement of real estate expenses in selling his Alaska residence is not allowable since pertinent statutes and regulations permit such reimbursement only when there is a permanent change of duty station. Return from Alaska for purpose other than assuming a new Govt. position does not constitute a permanent change of station. Returning employees in these circumstances are considered as in the same category as "new appointees" under 5 U.S.C. 5724(d), and new appointees are not eligible for real estate allowances 991

"Off-the-shelf" items

Based on detailed review of arguments propounded, invitation for bids and referenced purchase description, prior decision that IFB required successful bidder to provide "commercial, off-the-shelf" item at date set for delivery is affirmed. Contracting officer's affirmative determination of low bidder's responsibility based on erroneous interpretation of specification in face of strongly negative preaward survey was not reasonable exercise of procurement discretion 715

"Other safe bonds"

For purposes of investing First Morrill Act land-grant funds, bonds rated "A" or better by one of established and leading bond rating services may be considered by District of Columbia as constituting "other safe bonds" within meaning of that phrase as used in such act. 50 Comp. Gen. 712 (1971) modified 37

For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent ... 37

Pay

Full duty

"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 same MOS is not essential, decision to place member in that MOS or to assign him available duties consistent with his grade and service is question of personnel management best left to judgment of appropriate military commander 862

"Privately owned American shipping services"

Term "privately owned American shipping services" as used in 10 U.S.C. 2634 authorizing overseas transportation at Govt. expense of privately owned motor vehicle of member of armed force ordered to make permanent change of station is limited to vessels and Joint Travel Regs. may not be revised to include such transportation by air freight even if use of air freight is limited to a not to exceed the cost of shipment by vessel basis 756

WORDS AND PHRASES—Continued

"Prudent man rule" Page

For purposes of investing First Morrill Act land-grant funds, "prudent man rule" is too broad and subjective to be used as test for what constitutes "other safe bonds" within the meaning of that phrase as used in such act, since men may differ as to what is reasonable and prudent--- 37

"Travel package"

When an employee combines personal travel with official travel, thereby qualifying for a special fare, he is entitled to reimbursement of the lesser of the actual cost of the special fare, or the regular fare by direct route, notwithstanding the fact that the special fare may necessitate the purchase of accommodations or other items normally classified as subsistence or included in per diem which are not reimbursable while the employee is on leave, if such items are included as part of a travel package---------- 268

"Warsaw Convention"

Air carrier's claim for amount administratively deducted to reimburse Govt. for loss of personal effects is proper for allowance where action at law was not brought by the Dept. of the Air Force within 2 years as required by Article 29 of Warsaw Convention. The 6-year statute of limitation in 28 U.S.C. 2415 does not abrogate holding in *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422, 145 Ct. Cl. 1 (1959)-- 633

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