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[B-180551]

Pay—Retired—Survivor Benefit Plan—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 an SBP annuity to the extent that the amount of the SBP plus the DIC payable would exceed the maximum annuity payable under SBP.

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—In Conjunction With SBP—Effect of Widow's Remarriage

Where widow losses 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 a result of coverage under 10 U.S.C. 1448(d) should be made in the same amount as the widow was receiving at the time loss of DIC payments occurred, since the legislative history of SBP indicates that widows of members dying on active duty are to receive no less than widows of other participants in the SBP and no indication is given that they are to receive any greater benefit than other widows with exception of cost-free coverage.

Pay—Retired—Survivor Benefit Plan—Dependency and Indemnity Compensation—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 the 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 appear that the benefit of only a temporary termination under these circumstances was intended.

Pay—Retired—Survivor Benefit Plan—Children—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 the lesiglative history of the SBP indicates such coverage was not intended.

Pay—Retired—Survivor Benefit Plan—Children—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 the widow loses eligibility because of death or remarriage, the dependent child or children are not entitled to an annuity unless dependent child coverage was elected by the member and the additional costs for such coverage were assessed.

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

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller), requesting a decision on several questions concerning the application of 10 U.S. Code 1448 (a) and (d) of the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455 (Supp. II, 1972), to widows and dependent children of members enrolled in the Plan and those members eligible for retirement who die on active duty. The questions and a discussion thereof are contained in Department of Defense Military Pay and Allowance Committee Action No. 500, enclosed with the letter.

The questions and discussion will be presented and answered separately for convenience. Question 1 is as follows:

1. If the widow is receiving the supplemental SBP annuity payment under 10 USC 1448(d) and then remarries after age 60, thereby losing her eligibility for DIC because of the remarriage, does her eligibility for the SBP annuity terminate simultaneously with the termination of DIC?

In the discussion contained in the Committee Action, it is pointed out that 10 U.S.C. 1450(b) and section 301b of the Department of Defense regulations for the SBP provide that annuity payments continue if remarriage occurs after age 60. However, these provisions also state that an annuity terminates on the first day of the month in which eligibility for an SBP annuity is lost. It is indicated in the discussion that if eligibility for an annuity under 10 U.S.C. 1448(d) is contingent on the widow's eligibility for Dependency and Indemnity Compensation (DIC), under 38 U.S.C. 411, it would appear that the legal entitlement to SBP terminates on the first day of the month in which eligibility in lost, rather than simultaneously with the termination of DIC. There is also noted in the Committee Action that 10 U.S.C. 1450(b) can be construed that the widow's eligibility for an annuity does not terminate upon remarriage, if the remarriage occurs after age 60.

Subsection 1448(d) of Title 10, U.S. Code, provides as follows:

(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died.

In our decision, 53 Comp. Gen. 847 (1974), we stated that it was our view that the language of the portion of subsection 1448(d) which refers to eligibility for compensation under section 411(a) must be construed as prohibiting payment of a survivor benefit annuity to a

spouse only where the amount of the benefit payable under 38 U.S.C. 411(a) would exceed the maximum annuity otherwise payable under subsection 1448(d).

Furthermore, as pointed out in the Committee Action, 10 U.S.C. 1450 (b) provides in effect that entitlement to an annuity would be terminated on remarriage of widow receiving such as annuity, only if the remarriage occurred before the widow reached 60 years of age. Thus, it is our view that the annuity payable under the above-outlined circumstances would not terminate when the widow remarries after reaching age 60. Question 1 is answered in the negative.

Question 2 is as follows:

2. If question 1 is answered in the negative, what is the amount of SBP annuity payable?

In S. Report No. 92-1089, Committee on Armed Services, United States Senate, September 6, 1972, at page 15, the following is set out in connection with what was later enacted as subsection 1448(d).

* * * the spouse of a service member, who is eligible to retire for longevity (after 20 years of service) but dies on active duty, will be paid 55 percent of the member's earned retired pay. The payment will recognize that DIC may be payable by the Veterans Administration (VA) by offsetting the DIC payment from the 55 percent of retired pay. * * *

Similar wording is contained on page 51 of the same report.

In view of the above, it appears clear that a guaranteed amount of 55 percent of the retired pay a member would have been entitled to receive, was intended to be paid to the surviving spouse under 10 U.S.C. 1448(d), although the amount could be composed of both annuity and DIC payments.

However, we must add that the legislative history of subsection 1448 (d) of Title 10, United States Code, indicates that the Congress intended that widows of members who are retirement eligible but die on active duty be given not less than the widows of those members who die in retirement (see 53 Comp. Gen. 470 (1974)), but there is no indication that there was any intent on the part of the Congress to grant these widows a greater level of benefits, other than cost free coverage, than that authorized to widows of members who participated in the SBP under 10 U.S.C. 1448(a).

Under the provisions of 10 U.S.C. 1450(c), a widow or widower who is entitled to DIC compensation may be paid an annuity under the SBP, but only in an amount that the annuity otherwise payable would exceed the DIC payments. Subsection 1450(e) of the same title provides in the second and third sentences thereof that if because of subsection (c) of section 1450, the annuity payable is less than the amount of annuity established under the Plan, the annuity payable will be recalculated and the amount of deductions from the member's

retired pay needed to provide that recalculated annuity will be determined and the difference between that amount and that actually paid by the member for coverage will be refunded to the widow.

Thus, if a member provided coverage for his spouse under the provisions of 10 U.S.C. 1448(a) and because of DIC payments she received an SBP annuity in an amount less than that elected and paid for by the member, such widow would receive a refund of part of the member's contribution to the Plan. If the widow then lost eligibility for DIC by reason of remarriage after age 60, she would only be entitled to an SBP annuity on the basis of the coverage paid for and not refunded.

It is our view that a similar interpretation must be applied in cases involving widows entitled to an SBP annuity under the provisions of 10 U.S.C. 1448(d), even though no deductions had been withheld or no premiums were paid for the coverage.

Thus, in the circumstances described in question 1, the widow would continue to receive an annuity under the SBP in the same amount as she was receiving prior to the loss of eligibility for DIC. Question 2 is answered accordingly.

Question 3 is as follows:

3. If no SBP annuity is payable under 10 USC 1448(d) because DIC is greater, is the widow's entitlement to an SBP annuity terminated permanently as in the case of retiree's widow?

The discussion in the Committee Action points out that under the Department of Defense regulations, no entitlement exists under the Plan, if the widow of a retiree is eligible for DIC in a greater amount than would have been paid under the Plan. It is stated that the regulations also provide that the entitlement to the annuity is terminated permanently under such circumstances. It is indicated that there appears to be no statutory provision directly addressing this issue, noting, however, that the first sentence of 10 U.S.C. 1450(e) provides that:

If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. * * *

It is further pointed out in the discussion in the Committee Action that the legislative history of the above-quoted provision indicates that Congress intended that all deductions from the member's retired pay be refunded when a potential beneficiary under SBP is entitled to receive DIC in an amount equal to or greater than the annuity payable under the SBP and that the eligibility of a widow whose husband contributed to the Plan, would be permanently terminated since provision is made for refund of the amounts deducted from the retired or retainer pay. The discussion goes on to say that it would seem that the eligibility of a widow to receive an annuity under 10 U.S.C.

1448(d) whose husband died on active duty and therefore never contributed to the Plan, would also terminate permanently when DIC payments equal to or exceeding the annuity which would have been paid under the SBP.

Subsection 1450(c) of Title 10, U.S. Code, provides as follows:

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

Thus, if DIC compensation exceeds the annuity no annuity payment may be made under the SBP.

As previously indicated, the legislative history of 10 U.S.C. 1448(d) indicates that the Congress intended that the widow or widower of a member who dies on active duty and who is eligible for retirement will receive the same annuity on the same basis as the spouse of a member who had already retired and was participating in the Plan. Therefore, since subsection 1450(e) of 10 U.S.C. provides that when the DIC compensation exceeds the annuity and no annuity is payable, the amounts deducted from a member's retired pay in order to provide the coverage under the Plan will be refunded to the widow or widower, it is our view that Congress did not intend to provide any additional benefits, other than cost free coverage, to the spouses of members eligible to retire but who die on active duty. Accordingly, question 3 is answered in the affirmative.

Question 4 is as follows:

4. If there is no eligible spouse, is the dependent child or children, as defined in 10 USC 1447(5), eligible to receive an annuity under 10 USC 1448(d)?

In the discussion contained in the Committee Action it is indicated that the above question was raised because subsection 1448(d) provides an annuity only to the eligible spouse, but, subsection 1450(a)(2) refers to all of section 1448 and provides that an annuity to "the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible." It is also indicated in the Committee Action that the legislative history of subsection 1448(d) indicates that the Congress intended that the spouse of an active duty member should not receive fewer benefits than the spouse of a retired member. It is also pointed out that no mention is made of providing an annuity to surviving dependent children where the spouse dies or otherwise becomes ineligible, although providing this benefit would appear to be consistent with intent of Congress in enacting subsection 1448(d). The Committee Action states further, that since there are numerous references in the legislative history to only the spouse of an active duty member being entitled to an annuity

under section 1448(d), it would seem that Congress did not contemplate the need for providing an annuity to such dependent children.

In 53 Comp. Gen. 847, question 3, we stated that since no reference was made in subsection 1448(d) to a child or children, but only to the spouse of a member who is eligible for retirement and dies on active duty and since it was specifically stated on page 14 of S. Report No. 92–1089, *supra*, that coverage under subsection (d) was not intended for dependent children, we concluded therein that only the eligible spouse would be entitled to an annuity under subsection 1448(d). Accordingly, question 4 is answered in the negative.

Questions 5 and 6 will be stated and answered together since they are interrelated.

5. If an eligible widow with dependent children is receiving an annuity under 10 USC 1448(a) which is reduced under 10 USC 1450(c) because of DIC entitlement and the widow becomes ineligible (because of remarriage or death), are the eligible children entitled to receive an annuity under 10 USC 1448(a)?

Question 6 is as follows:

6. If question 5 is answered in the affirmative, are the eligible dependent children entitled to receive in equal shares the full amount of the annuity or the reduced annuity?

In the Committee Action it is noted that with respect to questions 5 and 6, there is some confusion as to whether dependent children in such a case are entitled to receive an annuity, notwithstanding the clear language of section 1450(a)(2). It is stated in the Committee Action that the legislative history of Public Law 92–425 indicates that the dependent children are entitled to an annuity under 10 U.S.C. 1448(a) only if the retired member had paid an additional charge for such coverage. It is also indicated in the discussion that current Department of Defense regulations provide that a retired member may elect to provide his dependent children with an annuity should the eligible spouse die or otherwise become ineligible to receive an annuity. In view of this, it is noted in the Committee Action that it appears that dependent children in question 5 would not be entitled to receive an annuity under 10 U.S.C. 1448(a) unless the retired member had elected to cover them and paid the additional charge for such coverage.

On the basis of the discussion in the Committee Action, it appears that question 5 is limited to those situations where specific coverage for a widow and dependent child was not made and the additional cost for the dependent child was not assessed. The answer to this question is limited to that extent.

Subsection 1452(a) of Title 10, U.S. Code, provides the basis for deductions from retired or retainer pay of a member in order to provide coverage for survivors. In the above-noted section a formula is provided for computation of the amount by which retired or retainer

pay is to be reduced in the case of a retired member who has an eligible spouse or who has an eligible spouse and dependent child or children. That section also provides, however, that the formula for computing cost of coverage will be increased by an amount prescribed in regulation by the Secretary of Defense so long as there is an eligible spouse and dependent child. Subsection 1452(b) of that title provides that, in cases where there is no eligible spouse but there is an eligible dependent child, the member's retired pay or retainer pay will be reduced by an amount prescribed under regulations of the Secretary of Defense.

In this connection, it should be noted that on page 25 of S. Report No. 92-1089, the comment is made that the bill as introduced provided coverage for dependent children in the same manner as for the spouse at the same monthly cost for the same benefit level. It was pointed out in that report that the member electing such coverage must contribute to the Plan for life, even though eligibility for benefits is limited, in most cases of dependent children, until they reach age 22. The Committee then recommended the following which was adopted and is now codified in subsections 1452(a) and (b) of Title 10:

> While the committee agrees that the legislation should provide a benefit to dependent children, it also believes that it should be accomplished on the basis of a self-financing plan. Specifically, the committee recommends that the basic plan in the bill apply to the spouse. For a slight additional charge (above the charge for spouse coverage). the member could cover the spouse and dependent plan in the bill apply to the spouse. For a slight additional charge (above the children. If there were no spouse, the member could cover dependent children. The cost of dependent children's coverage, in both cases, would be based on the actuarial cost of providing benefits and would terminate when the children no longer are eligible for benefits.

In view of the above-expressed intent of the Congress, it appears that the coverage for a dependent child or children would be possible only if specific coverage for a dependent child had been elected and the attendant costs assessed from the member's retired pay. Thus, if no coverage had been elected for dependent children, they would not be entitled to receive an annuity on the basis of the coverage provided for the spouse under 10 U.S.C. 1448(a) notwithstanding the provisions of 10 U.S.C. 1450(a)(2). Accordingly, question 5 is answered in the negative and question 6 requires no answer.

[B-181199]

Contracts—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 temporary restraining order (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.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Commercial Model Requirement—"Off the Shelf" Items

Based on detailed review of arguments propounded, invitation for bids (IFB) 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.

Contracts—Termination—Convenience of Government—"Best Interest of the Government" Basis

Prior decision concluding that termination for convenience is in best interest of Government 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.

General Accounting Office—Contracts—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.

In the matter of Data Test Corporation, March 7, 1975:

This matter involves a request for reconsideration of our decision of December 20, 1974, in the Matter of Data Test Corporation (54 Comp. Gen. 499), made by the Department of Transportation (Federal Aviation Administration) and the Systron-Donner Corporation.

At the outset, it is important to note the chronology of events relating to the Data Test protest and this subsequent request for reconsideration.

Friday, June 28, 1974 (9:33 a.m.).	Protest filed at GAO
Friday, June 28, 1974 (1:05 p.m.).	FAA made award to Systron
Monday, July 1, 1974___	GAO orally notified DOT of protest
July 2, 1974_____	GAO notified DOT of protest in writing
August 9, 1974_____	GAO followed up as to date report may be expected

August 26, 1974	GAO followed up as to date report may be expected
September 9, 1974	GAO followed up as to date report may be expected.
September 18, 1974	GAO followed up as to date report may be expected
October 2, 1974	GAO received FAA report
October 3, 1974	Systron and Data Test obtained report for review and comment
October 15, 1974	Data Test requested additional material from FAA
November 8, 1974	FAA released material
November 12, 1974	Protest conference held at GAO with all interested parties
December 20, 1974	GAO decision issued
December 27, 1974	Data Test protested second low bidder's responsibility
January 2, 1975	Systron filed request for reconsideration conditioned on FAA action on decision
January 31, 1975	FAA requested reconsideration of decision
February 18, 1975	Conference on reconsideration held at GAO attended by all interested parties

On February 27, 1975, Data Test instituted Civil Action No. 75–0264 in the United States District Court for the District of Columbia (*Data Test Corporation* v. *The Honorable John W. Bannum, The Honorable Alexander P. Butterfield*). The complaint requested the following relief:

(a) That Defendants be enjoined from accepting delivery of any printed circuit board testers from Systron-Donner Corporation under contract WA5M–4–7215;
(b) That Defendants be enjoined from making any payments to Systron-Donner Corporation under contract WA5M–4–7215;
(c) That Defendants be enjoined from extending the time for delivery or modifying price terms of the existing contract WA5–M–4–7215;
(d) That Defendants be required to find Systron-Donner in breach of its contractual obligations to the FAA;
(e) That Defendants be preliminarily and permanently enjoined as stated in paragraphs (a), (b), (c) and (d) above;
(f) That this Court enter a declaratory judgment establishing that Plaintiff is the next low responsive and responsible bidder for printed circuit board testers under contract WA5M–4–7215; and
(g) That this Court grant such other relief as it deems necessary and appropriate.

From an examination of the complaint and supporting papers, it appears that many of the issues involved in the protest, as well as the request for reconsideration, are now before the District Court.

It is the practice of our Office not to render a decision on the merits of a protest where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. 4 C.F.R. § 20.11 (1974). See *Matter of Nartron Corp. et al.*, 53 Comp. Gen. 730 (1974). Similarly, we have declined to render a decision on a pending request for reconsideration where the issues involved therein come before a court after our Office has already rendered a decision on the protest. See *Matter of Cincinnati Electronics Corporation et al.*, B–175633, January 25, 1974.

However, an exception to this general policy is that our Office will render a decision on the merits in circumstances where the court expresses an interest in receiving our decision. *See*, for example, 52 Comp. Gen. 706 (1973), and *Matter of Descomp, Inc.*, 53 Comp. Gen 522 (1974).

In the instant case, we understand that on February 28, 1975, Data Test's motion for a temporary restraining order was heard by the District Court. After discussing the situation with our Office and receiving our assurance that every effort would be made to expedite our decision on the request for reconsideration within the period of the contemplated restraining order, the parties, upon full presentation of these circumstances to the court, agreed to the issuance of the restraining order. The District Court assented and issued the restraining order effective until 10 a.m., March 10, 1975.

In view of the fact that all parties, including the court, were fully aware of both the pendency of the reconsideration at GAO and the fact that our Office would make every attempt to issue its decision on or before March 10, 1975, we are proceeding with our decision on the reconsideration.

The facts of the case, as stated in our December 20, 1974, decision, are as follows:

> Invitation for bids (IFB) WA5M–4–7215 was issued on April 4, 1974, by the Federal Aviation Administration (FAA), seeking bids on 20 automatic printed circuit board testers with peripheral equipment, spare parts and related material. The testers in question [item 1 of the IFB] were required to be furnished "* * * in accordance with Purchase Description FAA–P–2576 * * *." The IFB stated that the award would be made on the basis of the lowest aggregate bid for all items with the exception of items 7 and 10. Item 7 was an optional item regarding test programming while item 10 pertained to the contractor's training of FAA personnel and the price for which is was to be negotiated within 30 days of award.
>
> In response to the IFB, four bids were received. The pertinent portion of the abstract of bids was as follows:

	Total Price excluding Items 7 and 10
Systron-Donner Corporation	$435,785
Atec, Inc.	476,585
Data Test Corporation	789,317

* * * * * * *

* * * [P]urchase description FAA-P-2576 * * * in outlining its scope states that:

"This purchase description covers the salient characteristics of a commercial, off the shelf, digital, noncomputer operated, Printed Circuit Board (PCB) Tester. * * *"

The essential issue considered in our decision was whether the invitation for bids (IFB) required bidders to provide a "commercial, off-the-shelf" item and, if so, whether Systron was able to meet this requirement.

After a detailed examination of the record, as supplemented by the interested parties, our Office concluded that the IFB did, in fact, require the successful bidder to deliver a commercial, off-the-shelf item and that in the face of a strongly negative preaward survey, we did not believe that Systron had the ability to satisfy the IFB requirement.

We concluded that the award to Systron was improper and recommended that the Systron contract be terminated for the convenience of the Government, with award made to the next low responsive, responsible bidder willing to accept the award at its bid price.

The main issue presented to us in the reconsideration has to do with our interpretation of the "commercial, off-the-shelf" requirement.

In reaching our earlier conclusion, we relied heavily on a preaward memorandum from the Chief of the FAA Radar and Navaids Section, which was sent to all prospective bidders. The memorandum contained the following relevant information:

1. *Question:* Is the specification definitive enough to permit the construction of printed circuit boards?

Answer: FAA-P-2576 was not written as a specification. It is a purchase description for the type of tester the FAA has determined by evaluation that will satisfy the agency's needs. It describes an off-the-shelf item and was not intended to be a specification that a contractor could manufacture and design a printed circuit board tester from.

In arguing against our interpretation of the IFB requirements, both the contractor (Systron) and FAA make reference to the following sections of the purchase description which, they state, lead to an opposite view of what the IFB required.

Section 3.6

Section 3.6 initially provided:

3.6 Reliability.—The PCB Tester shall have a calculated Mean Up Time (MUT) of 1,000 hours. All *bidders* shall provide complete statistical data and predictions showing the calculations of MUT, including parts breakdown, by type and quantity, failure rates used and calculation of subsystem reliability *with their proposal.* [Italic supplied.]

Systron argues that this provision would have clearly required that a bidder have a completed tester, on the shelf, prior to award. How-

ever, the FAA amended the provision on April 30, 1974, before bid opening, to read as follows:

3.6 Reliability.—The PCB tester shall have a calculated Mean Up Time (MUT) of 1000 hours. The *Contractor* shall provide complete statistical data and prediction showing the calculations of MUT, including part breakdown, by type and quantity, failure rates used and calculation of subsystem reliability of the tester. MIL STD 781 Plan IV A shall be used to demonstrate the MUT. [Italic supplied.]

Systron points out that if the IFB contained, as our Office determined, a requirement for items which were off the shelf at the time of award, it would not have been necessary for the FAA to have amended the original version of section 3.6.

The Systron argument fails in several respects. First, the original language would have required all bidders, whether successful or not, to go to seemingly considerable expense in preparing data. To avoid such a result, the provision was amended, and properly so, to make data submission a contract requirement. Second, our decision did not hold that a bidder was required to have a "commercial, off-the-shelf" item at the time of award. Rather, we held that a bidder, for responsibility determination purposes, must demonstrate, before award, the capacity or ability to deliver at the date specified for delivery the end product called for by the specifications. Therefore, a bidder need not *have* a "commercial, off-the-shelf" item as of the date of award, but he must have the capacity or ability to provide such an item on the date set for delivery. *See* B–176896, January 19, 1973, which involved a "manufacturer's standard commercial product" and is thus analogous to the instant case.

In this light, the amendment of section 3.6 can be viewed as an attempt to liberalize the IFB's provision so as to allow technically competent firms not possessing a "commercial, off-the-shelf" item at the time of bidding the opportunity to furnish one by the time set for delivery.[1]

Section 3.4

Systron states that section 3.4 of the purchase description also supports the view that a "commercial, off-the-shelf" item was not required by the IFB. That section provides:

3.4 Equipment and Services To Be Furnished by the Contractor.—Each PCB tester shall be complete in accordance with all contract requirements, and shall include the items listed below, or equivalent. Any feature or item necessary for proper operation in accordance with the requirements of this purchase description shall be incorporated even though that feature or item may not be specifically described herein. Instruction books and other documentation shall be supplied in accordance with the terms of this purchase description and of the contract.

[1] See discussion on pp. 10 and 11, *infra*.

3.4.1 Deliverable Items.—PCB Tester, consisting of:

	Para. No.
1. Basic Components:	
(a) Operators Control Board	3.4.2.1
(b) Trouble shooting probe	3.4.2.2
(c) Tester electronics	3.4.2.3
(d) Test Mount & Adapter/Interconnection	3.4.2.4
(e) I/O Modules	3.4.2.5
(f) Power Supplies	3.4.2.6
(g) Operators Desk	3.4.2.7
(h) Programs: operating, test & maintenance	3.4.2.8
(i) Documentation	3.4.2.9
2. Optional Components:	
(a) Level Translator Boards	3.5.1
(b) Additional Power Supplies	3.5.2
(c) Performance Check Module	3.5.3
(d) Test Development Fixture	3.5.4
(e) Level Set Probe	3.5.5
(f) Digital Printer	3.5.6

Systron argues that this section permits the supply of a complete tester and/or components which may or may not have been available off the shelf. Moreover, it contends that when read with the "commercial, off-the-shelf" provision of the purchase description noted above, it becomes clear that the components listed in the purchase description are identical to items already incorporated into a commercial off-the-shelf item, while substitution of a functional equivalent for any component is permitted. Further, as noted by Systron, any feature not set out in section 3.4 but which is necessary for proper operation must be incorporated into the item to be delivered.

Systron maintains that if only an "off-the-shelf" item was required, the specifications would not have (1) permitted substitution of a listed item, or (2) required the use of any feature necessary for proper operation.

The purchase description, and section 3.4 in particular, sets forth a general statement regarding tester configuration and a more detailed statement of performance requirements. As we construe section 3.4, it allows the successful bidder to deliver an item incorporating the contractor's configuration, but it does not allow the contractor to provide a tester which has different performance capabilities from those set forth in the purchase description.

In short, we do not feel that the purchase description was limited to a particular commercial tester either as it existed at August 13, 1973, the date of the purchase description, or the issuance date of the IFB. The purchase description describes a tester which contains certain broadly defined types of components which need not be arranged in any particular configuration but which would function within certain parameters. This does not, however, mean that the tester does not have to be off the shelf.

Section 3.1

Section 3.1 states in pertinent part that: "The tester shall consist of commercially available and reliable elements and components." Both the FAA and Systron argue that this language reinforces their position that there was no requirement that the tester be available off the shelf either prior to or at the date of award. Rather, it is concluded that there was merely a requirement that the tester be *built* with parts which were commercially available.

First, as we have stated above, there was no requirement that the tester to be furnished be a "commercial, off-the-shelf" item as of the date of award but rather only that it be so as of the date set in the IFB for delivery. Second, as noted by counsel for Data Test, whether a tester is made from commercially available components or specially manufactured components is a question exclusive of whether the end item itself is off the shelf. The implication of this section is that components should be of a kind which have already met the test of the marketplace, thus assuring the Government of their reliability and also providing the Government some assurance of future replacement availability.

Section 3.1 also states that:

> A complete tester is required which includes the cabinet and working surfaces, the electronic and electrical equipment needed for operation, the adapters, cables and connectors to fit the [printed circuit boards] PCBs to be listed and the INPUT/OUTPUT (I/O) modules used with the tester * * *. In addition to the equipment * * * described above the contractor shall develop and provide the programs and program documentation necessary to test various types of PCBs.

Systron states the requirement for a developmental effort is inconsistent with our Office's interpretation of the IFB. We do not agree. The language of section 3.1, as we construe it, does allow for a development of software but does not call for a development effort related to the tester itself. In this regard, section 3.4.2.8.6 of the purchase description provides:

> *3.4.2.8.6 Test Programming.*—The contractor shall develop test programs and diagnostics for testing the types of PCBs listed in the contract. Information needed to perform the failure analysis and test programming, such as operational circuit card schematic and logic diagrams, will be provided to the contractor by the FAA.

More importantly, we note that item 5 of the IFB calls for an option price on the test programming as follows:

> The test programming shall be in accordance with paragraphs 3.4.2.8.6 and 3.4.2.8.6.1 of Purchase Description FAA–P–2576. The contractor, under this item, shall provide individual prepunched test program card(s) complete with identification and documentation data, as listed in paragraphs 3.4.2.8.6 and 3.4.2.8.6.1 for each of the IBM Printed Circuit Boards: * * *

The "commercial, off-the-shelf" requirement for the tester itself (item 1 of the IFB) was not eliminated by the option for contractor

development of programming (item 5 of the IFB). Therefore, it was not inconsistent for the IFB to require a "commercial, off-the-shelf" tester while only giving the Government the option of buying these test programs which, by the terms of section 3.4.2.8.6, were to be developed at some unspecified time subsequent to award.

It is also contended that the delivery schedule stated in the IFB was extremely long for the purchase of an off-the-shelf item. In this regard, the delivery schedule provided for delivery of the first tester within 120 calendar days of award (or by October 26, 1974) with the remaining units to be delivered at a rate of two every 30 calendar days thereafter.

In the absence of any indication in the record as to the considerations involved in fixing a 120-day delivery schedule, we fail to see how any party can attach any significance one way or the other to the length of the delivery schedule.

Systron argues that the issuance of the IFB to 68 potential bidders is consistent with an understanding that numerous bidders were expected to be able to furnish the contract item. We get the implication from Systron's argument that in view of our interpretation of the specifications, it believes that only one firm, Data Test, could have met the specifications. Thus, Systron apparently feels that if FAA sought a "commercial, off-the-shelf" item, it would have negotiated a sole-source contract with Data Test. We reiterate that a "commercial, off-the-shelf" item was not required until the date set for delivery and, in this regard, we have yet to be shown that only Data Test could supply the item by the required time. Therefore, the use of formal advertising was not improper and we see no merit to Systron's argument.

Systron also argues that the fourth question in the memorandum from the Chief of Radar & Navaids Section to prospective bidders indicates that item 3(e) of the IFB schedule calls for a nonstandard performance capability and, hence, nonstandard equipment.

Item 3 of the IFB requires the successful bidder to provide 20 external power level translator kits, in accordance with paragraph 3.5 of the purchase description, consisting in part of:

> e. Three each output level translator board capable of translating the test "PCB" output levels to TTL levels with trim-pot adjustment capability from plus (+) 22 VDC to minus (—) 22 VDC as follows:
> (1) One board compatible to IBM discrete (SMS) logic.
> (2) One board compatible to IBM solid logic technique (SLT) logic, and
> (3) One board compatible to FAA system maintenance monitor console (SMMC) TTL logic.

Section 3.5 of the purchase description deals with optional accessories. In particular, section 3.5.1 states with regard to logic translator boards:

3.5.1 Level Translator Boards.—Where logic to be tested requires input or output or both signal levels and voltages other than those normally supplied with the tester, pre-wired test cards shall be provided by the contractor for inserting into the tester to accomplish the testing. For example the IBM SLT logic cards require an interface that is not compatible with the standard DTL/TTL logic and therefore requires different test cards to be inserted into the tester before testing the SLT logic.

The IFB requires that in addition to the tester to be provided in item 1 which might have the capability to already interface with at least one of the required PCB logics, the successful bidder will also provide additional interfaces under item 3. This would allow the tester to accommodate PCB's of the logic type for which the contractor's tester would normally have the capability and also would accommodate PCB's of less normal logic type. The requirement for these additional level translator boards to handle less than normal logic types is apart from the requirement to deliver the tester itself and does not indicate that the tester "could not have been wholly off the shelf." Item 3(e) of the IFB and the question and answer, noted above, indicate that additional interfaces would be required to allow the tester specified in item 1 to test a certain number of abnormal logic types as well as the normal logic already within the capability of the particular tester supplied.

Systron also points out that other bidders shared its view that the IFB did not require delivery of a "commercial, off-the-shelf" item. Specifically, Systron indicates that its view is shared by the Fluke Trendar Corporation, a firm which lodged a before-bid-opening protest on this IFB with our Office and then withdrew the protest prior to award. The Fluke protest did involve the alleged restrictiveness of the specifications with respect to the "commercial, off-the-shelf" requirement. Fluke, in effect, viewed the IFB requirements as we did in our decision. When asked by our Office at a conference held on February 18, 1975, why the protest was withdrawn, Fluke indicated that the only reason it withdrew its protest was that it noted after bid opening that four bids had been received; therefore, it felt assured that there was adequate competition.

Systron, lastly, implies that it was improper for our Office to make an exception to the rules which we cited in *Matter of Central Metal Products Incorporated*, 54 Comp. Gen. 66 (1974). There we held that this Office has discontinued its prior practice of reviewing bid protests involving a contracting officer's affirmative determination of responsibility of a prospective contractor except for actions by procuring officials which are tantamount to fraud.

However, since that decision, we have considered responsibility matters wherein specific criteria are prescribed in the IFB as a standard of responsibility. See *Matter of Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974).

In sum, we are not persuaded that our previous interpretation of what was required by item 1 and the purchase description was erroneous. We feel, as we did on December 20, 1974, that the IFB required a "commercial, off-the-shelf" item.

The agency argues that even if this is the case, our determination that there was no reasonable basis upon which Systron could have been found responsible is erroneous. It states that:

> It is clear from reading the pre-award survey that Systron-Donner had produced a more sophisticated version of the needed equipment and possessed therefore the necessary technology available to produce a printed circuit board tester in accordance with our stated requirement, although no such item was "in stock."

As stated in our decision, the preaward survey gave no positive indication that Systron could provide a "commercial, off-the-shelf" item within 120 days of award; nor does it indicate that Systron had made any preparations to include this item in its commercial line. The preaward survey does, however, indicate substantial doubt as to the Systron engineering department's knowledge of the task required of it. The preaward survey team concluded by reporting that:

> Based on the facts gathered during this survey, it is concluded that Systron-Donner Computer Systems Division does not have the necessary record of performance or ability to comply with the proposed contract delivery schedule requirements.

Nevertheless, FAA argues that the contracting officer's determination to find Systron responsible was reasonable even in the face of this strongly negative preaward survey. The basis of this position lies in the fact that:

> Since the Contracting Officer did not agree with the "pre-award" survey team's interpretation of the solicitation requirements [note: the preaward survey team felt that a "commercial, off-the-shelf" item was required], he held that Systron-Donner was responsible because it would be able to meet the IFB requirements, as he interpreted them.

As noted above, the contracting officer's interpretation of the IFB requirements was erroneous and thus his affirmative determination of Systron's responsibility in the face of this strongly negative preaward survey was not a reasonable exercise of procurement discretion.

GAO Recommendation

Our decision of December 20, 1974, recommended that the agency (1) terminate Systron's contract for convenience, and (2) make award to the next low responsive and responsible bidder willing to perform at its bid price. To date our recommendation has not been acted upon. In its January 31, 1975, letter FAA states that:

> In view of our beliefs in this matter we have taken no action to terminate the Systron-Donner contract, but are giving the matter further consideration while awaiting your ruling on this motion.

Systron states that if our Office upholds its previous view then the specifications are an overstatement of the Government's minimum needs, since FAA did not intend or actually seek an off-the-shelf item. Indeed, the agency on January 31, 1975, for the first time, stated that the requirement for a "commercial, off-the-shelf" item, which our Office has found was clearly set out in the IFB, was and is in excess of the agency's minimum needs. Counsel for Systron, by analogizing the present situation to one existing before award, contends that the agency should, as in the usual case, terminate and reprocure its actual needs. *See* Federal Procurement Regulations (FPR) § 1–2.404.1(b) (1964 ed.).

Based on these new facts, we agree and to this extent the second portion of our recommendation relating to an award to the next low responsive, responsible bidder is rescinded.

However, counsel also states that:

> Although the agency normally should resolicit for its actual needs in a solicitation designed to achieve effective competition, here the agency already has achieved effective competition for its needs. It has three bids based on its interpretation of the specifications. Clearly, it is not in the Government's best interests to resolicit with a more definite description of its needs when that solicitation would only ask for the same items which already have been bid. In these circumstances, the termination of the low-bidder's contract and a resolocitation would be a wasteful and fruitless formality and a costly one. The interests of the Government would be best served under all the circumstances by retaining the status quo—FAA would receive the equipment it wants and needs at a low competitive price.

As counsel notes, whether our Office would recommend that an agency take corrective action on a given contract depends on whether the corrective action recommended would be in the best interest of the Government. The rules regarding preaward cancellation of an IFB (FPR § 1–2.404.1), cited by Systron, do not *per se* apply to decisions to recommend for the termination of a contract for the convenience of the Government.

We would agree, however, that where termination and resolicitation would be a merely prefunctory exercise and the present contractor is providing the Government's actual minimum needs for which there has been adequate competition initially, it would be difficult to find that a termination procedure would be in the Government's best interest. *Matter of Mobilease*, 54 Comp. Gen. 242 (1974); see, generally, *Matter of Spickard Enterprises, Inc., Cottrell Engineering Corp.*, 54 Comp. Gen. 145 (1974); *Matter of GAF Corporation, Minnesota Mining & Manufacturing Company*, 53 Comp. Gen. 586 (1974); 52 *id.* 285 (1972). This is so even though not every potential bidder participated in the original procurement. *See* 52 Comp. Gen., *supra*, at 285.

However, we do not agree that a resolicitation of this procurement would be a mere academic exercise. Unlike the situation set out in *Matter of GAF et al.*, *supra*, and 52 Comp. Gen., *supra*, it is not clear to us that all bidders involved in this procurement would again offer the same items which they offered originally. Indeed, since (1) FAA states that it does not need a "commercial, off-the-shelf" tester, and (2) the purchase description was written with a view toward the configuration and performance aspects of the Data Test 4700, a "commercial, off-the-shelf" item which Data Test asserts it intended to provide the Government, it seems unlikely to us that Data Test would, on a resolicitation, again offer its model 4700 since that model apparently exceeds the Government's minimum needs. It is not unreasonable to assume that Data Test would bid a noncommercial item on any resolicitation. Thus, we do not feel that resolicitation would be meaningless.

Moreover, in view of the original protest from Fluke Trendar against the alleged restrictiveness of the specifications with respect to the commercial, off-the-shelf requirement, we feel that it is also reasonable to expect that Fluke as well as other similarly situated firms would participate in a resolicitation.

However, the question remains whether our Office should forego its recommendation to terminate the Systron contract for the convenience of the Government. In reexamining our recommendation, we have considered a number of factors, among them: the extent of contract performance; the estimated costs of termination (including the amount of money committed toward contract fulfillment, both to date and as of the date of our decision); and whether the benefits to the competitive procurement system require corrective action. After an analysis of these factors, we remain of the opinion that termination of Systron's contract for the convenience of the Government would be in the best interests of the Government. Therefore, we affirm our previous recommendation.

It should be noted, however, that this recommendation for a convenience termination presupposes that the contractor is satisfactorily performing the contract in accordance with its terms and conditions. Our recommendation should not take precedence over any possible termination for default action should such action be appropriate and necessary. (In this regard, we again note that the delivery schedule required delivery of the initial unit to have been made on October 26, 1974, with the remaining units to be delivered at a rate of two every 30 days thereafter. FAA has informed us that to date no units have been delivered but that Systron has advised that six production units will be delivered in May and that delivery of the remaining 14 units will be completed by September 1975.)

Since this decision both affirms and modifies our earlier recommendation for corrective action, a copy is being transmitted to each of the committees referenced in section 232 of the Legislative Reorganization Act of 1970, 31 U.S. Code 1172.

[B-181734]

Personal Services—Contracts—Liquidated Damages Provision—Enforceable

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.

In the matter of an appeal to settlement of indebtedness, March 7, 1975:

The appeal to settlement by Dr. Joseph L. Fermaglich concerns a claim for liquidated damages for breach of his employment contract with the Veterans Administration (VA). This contract, signed November 12, 1963, provided that in return for being accepted for specialty training in neurology as a resident of the VA Hospital, East Orange, New Jersey, and for employment in the Department of Medicine and Surgery of the VA as a full-time physician at the regular salary of a full-time physician, Dr. Fermaglich agreed to render a specified length of obligated service. The period of obligated service was determined in accordance with a formula set out in the contract. The contract also provided:

* * * In the event of my failure to perform such obligated service, because of the amount of damages on breach of this agreement would be difficult of ascertainment, it is now agreed that I shall be obligated to pay to the Veterans Administration, not as a penalty but as agreed liquidated damages, the sum of $407.00 FOR *EACH MONTH* OR PORTION OF A *MONTH* FOR WHICH I FAIL TO PERFORM THE OBLIGATED SERVICE ASSUMED UNDER THIS AGREEMENT.

Pursuant to the contract, Dr. Fermaglich performed services for the VA between November 12, 1963, and April 6, 1966, at which time he entered the Air Force. After completion of his military service, he did not return to the VA to perform his obligated service.

According to a letter of Mr. Reubin Cohen, Hospital Director to the Chief Medical Director, Department of Medicine and Surgery of the VA, dated May 20, 1966, Dr. Fermaglich would have completed 3 years of training on November 11, 1966, at which time he was subject to 2 years of obligated service.

The VA takes the position that Dr. Fermaglich breached his contract of employment because he voluntarily entered the military service and

failed to return to his position following his tour of active duty to complete his obligated service with the VA. The VA claims that Dr. Fermaglich had a continuing contractual obligation because he voluntairly enlisted in the Air Force. This conclusion is derived from its examination of the "ARRC Form 75, Extended Active Duty Orders, which indicates that Doctor Fermaglich precipitated the action that resulted in his induction in the Air Force; that is, it was a voluntary action on his part." (Letter of M. J. Musser, M.D., Deputy Chief Medical Director to the Hospital Director of the VA Hospital, East Orange, New Jersey, dated July 5, 1966.) On the basis of these circumstances, the VA seeks recovery of the liquidated damages in the amount of $9,084.35 ($9,768 liquidated damages less $683.65 accrued annual leave).

Dr. Fermaglich has consistently denied his liability. He asserts that he did not "voluntarily" enter military service because his draft board had already taken steps to induct him. He submitted a copy of an order to report for induction on February 14, 1966. Based on this, he maintains that his induction into the Air Force terminated his contractual obligation, and therefore the liquidated damages under the contract are inapplicable.

The evidence in the file fails to support the assertion of Dr. Fermaglich that he did not voluntarily resign from the VA to perform military duty. The order of induction submitted as evidence requires Dr. Fermaglich to report on February 14, 1966. However, he remained with the VA until April 6, 1966, at which time he joined the Air Force. This would suggest that although Dr. Fermaglich was subject to forced induction by the Selective Service, and this threat may have prompted his enlistment in the Air Force, his departure from the VA was not the actual result of an involuntary draft call of the Selective Service.

In a legal opinion to the Chief Medical Director by the General Counsel, concerning the career residency agreement, dated June 5, 1968, quoting an unpublished memorandum opinion of that office dated October 9, 1961, it is stated:

> "6. The decision of the President or of a Service Department to call up a reservist to extended active duty is obviously beyond the control of either the individual concerned or the Veterans Administration. We are of the opinion that when such a decision has been made the rights and duties under a career residency contract are not abrogated thereby. Rather, the contract is in a state of suspension pending the completion of the resident's military duty. * * *"

This would establish that in the opinion of the VA, the contract of employment is not breached by a physician who departs for military service until the physician is released from active military duty and fails to return to the VA to complete the terms of the contract of employment which had been suspended. It is noteworthy that the

VA does not make a distinction in this opinion between a voluntary and an involuntary induction into the Armed Forces.

The evidence indicates that Dr. Fermaglich was advised that the VA was not releasing him from the obligated service portion of the contract. Despite his statement in a letter of May 2, 1969, to the Chief Fiscal Officer that he had never been advised that his residency training and obligated service would be deferred until completion of military duty, the file contains a statement, entitled "Affidavit" signed by the Personnel Management Specialist and the Assistant Personnel Officer which establishes that Dr. Fermaglich stated an intention to return to the VA to complete his career residency and obligated service.

This evidence is supported by a letter from Dr. Fermaglich to the Chief Fiscal Officer at the VA Hospital in East Orange, New Jersey, dated September 3, 1969, wherein he states in part:

> The Veterans Administration, well aware of the implications of terminating my residency and employment status, unfairly made every effort to coerce me into committing myself to continued residency training and obligated service following the conclusion of my military service. In fact the personnel office prepared a document in my name to that effect, to which you have previously alluded—reference United States Government Memorandum dated April 5, 1966, a copy of which is attached. This instrument, however, was never executed by me.

One can only deduce from this evidence taken together, that the doctor was well aware that the VA was desirous of him completing his contractual obligation.

The admission in this letter of September 3, 1969, also discounts the doctor's position that he had a right to rely on his interpretation of the contract as conveyed in a memorandum to the Personnel Director dated February 7, 1966. In that memorandum, Dr. Fermaglich asked whether, while serving in the Armed Forces, he would be on military leave from the VA or his employment and/or training status would be terminated. He concluded the memorandum to the effect that unless he was advised otherwise, he would understand that his separation was a termination of the employment. Clearly, this memorandum establishes that there was doubt in Dr. Fermaglich's mind of his status with the VA during his military service as well as the obligation to perform services after the military duty. Although the file does not reflect whether this inquiry was answered, we do not find that this self-serving obligation placed on the VA in the memorandum is an adequate means in and of itself to alter the legal obligation.

Not to be overlooked is the further evidence that at the time of his departure from the VA, Dr. Fermaglich signed a memorandum dated April 5, 1966, stating he did not wish to receive the lump-sum payment for accrued annual leave. The statement includes: "It is requested that it remain in my account for use after my return from military

service." This further supports the view that Dr. Fermaglich was aware of the continuing contractual obligation subsequent to his military service.

Furthermore, under VA regulations, the officials dealing with Dr. Fermaglich were not authorized to rescind the contract. See VA Personnel Policy, MP–5, part II, ch. 9, para. 12, dated June 1, 1964, wherein it provides:

> Physicians and dentists engaged in training in a career residency program shall be required to assume a period of obligated service. If they voluntarily leave the VA before fulfilling their contract, they shall be required to pay liquidated damages as specified in the contract.

Dr. Fermaglich also points to the fact that he was separated from the VA under VA Form 5–4652–3. He apparently interprets the "separation" as a rescission of the contract. The evidence does not support this contention. In 5A, *Corbin on Contracts*, page 533, § 1236, 1964, rescission is defined:

> * * * As the term is used in this treatise, rescission means a mutual agreement by the parties to an existing contract to discharge and terminate their duties under it. Just as in the case of the formation of a contract, so also in the case of its rescission there are expressions of accent by both parties—usually in the form of an offer by one and an acceptance by the other. * * *

While it is evident that Dr. Fermaglich chooses to view the "separation" as an offer of rescission which he accepted, there is no indication that the VA intended this result in releasing the doctor to perform military duty. Since there fails to be mutual agreement on the effect of the "separation," we believe that the contract was not rescinded.

Dr. Fermaglich in this letter of March 22, 1973, to Mr. Whitehead of our Office, also raises the issue that under VA Form 10–1015, he was prohibited from performing outside medical services for remuneration, without exclusion for military service. By being ordered to military duty for which he received pay for his medical services, he apparently contends that this is further evidence that his contract with the VA was abrogated.

The VA Form 10–1015 is a certification that the person is aware and promises not to engage in extra-VA professional activities in contravention of Department of Medicine and Surgery policies. There is an acknowledgement that the person is employed 24 hours per day, 7 days per week.

We find nothing in the certification or instructions pertaining to a contingency of the physician serving in the Armed Forces during the course of contractual obligation to the VA. The form, however, refers to the one signing it as a "full-time physician, dentist, nurse, resident, or intern of the Department of Medicine and Surgery." In the case of Dr. Fermaglich while performing military duty, he was not a "full-time physician" and therefore the certification is inapplicable.

The certification is clearly designed for the benefit of the VA to assure that the individual will not practice medicine or otherwise work in derogation of the required services to the VA. If the terms of the employment contract are suspended pending the military duty of an individual, as we find in this case, there is nothing inconsistent with that and the certification concerning outside practice.

This type of employment contract between the VA and a physician has been judicially reviewed and found binding. See *United States* v. *Averick*, 249 F. Supp. 236 (N.D. Ill. 1965). Thus we find that the contract of employment was not terminated by the intervening military service of Dr. Fermaglich and that it is valid and enforceable. Therefore, the appeal is denied and collection of the claim should be pursued under the authority of the Federal Claims Collection Act, the act of July 19, 1966, Public Law 89–508, 80 Stat. 308, 31 U.S. Code 952.

[B–181856]

Pay—Retired—Survivor Benefit Plan—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).

Pay—Retired—Survivor Benefit Plan—Retired Prior to Effective Date of SBP—Divorce and Remarriage—Spouse's Annuity Eligibility

Widow of service member, retired prior to effective date of the Survivor Benefit Plan (SBP), who had divorced member prior to SBP effective date, but who had remarried member thereafter, but within time limit imposed under subsection 3(b) of Public Law 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 an eligible surviving spouse under SBP upon death of member if he elected to expand that dependent child coverage to include such spouse within the time limitation contained in the fourth sentence of 10 U.S.C. 1448(a).

In the matter of a Survivor Benefit Plan annuity, March 7, 1975:

This action is in response to a request for an advance decision from Colonel J. H. Cook, FC, Finance and Accounting Officer, United States Army Finance Support Agency, Indianapolis, Indiana, concerning the eligibility of a widow to receive an annuity under the provisions of the Survivor Benefit Plan (SBP), 10 U.S. Code 1447–1455, as added by Public Law 92–425, effective September 21, 1972, in the circumstances described. The request was forwarded by letter from the Office of the Comptroller of the Army, Department of the Army.

and assigned Control Number DO–A–1225 by the Department of Defense Military Pay and Allowance Committee.

The submission states that on May 18, 1959, Lieutenant Colonel Kenneth N. Holmberg, SSN 506–09–8447, while serving on active duty in the United States Army, elected Options 2 and 4, at one-half reduced retired pay for his children, under the Retired Serviceman's Family Protection Plan (RSFPP). On October 1, 1961, Colonel Holmberg retired.

At the time of the RSFPP election, Colonel Holmberg was married to Opal M. Holmberg; however, on August 17, 1967, the Holmbergs were divorced. On February 2, 1973, approximately four months after the SBP became effective, Colonel Holmberg elected SBP coverage for his son, David Holmberg, based on the full amount of retired pay and at the same time elected to cancel his RSFPP coverage.

Colonel Holmberg's SBP cost was established effective March 1, 1973, and the RSFPP cost was discontinued effective February 28, 1973. On March 27, 1973, the member and Opal Holmberg remarried, and on the next day, Colonel Holmberg executed DD Form 1882 to change his SBP coverage from children only, to spouse and children. The change in election was received March 31, 1973, and became effective April 1, 1973. Colonel Holmberg died on April 28, 1973.

The submission indicates that the requirement of the SBP, as to qualifying as a surviving spouse, is that she be married to the member on date of eligibility for retired pay and married to him on the date of death, married him after retirement and married for at least 2 years immediately before the member's death, or married him after retirement and at time of death is the mother of living issue by that marriage.

Doubt is expressed in the submission whether the divorce which occurred and the later remarriage after passage of the SBP places Mrs. Holmberg in the category of a first-time marriage (we presume that phrase to mean a first-time marriage which occurred after retirement and after the effective date of Public Law 92–425), thereby making her eligible to receive an annuity under the Plan or whether the annuity is payable to her on behalf of David Holmberg, as an otherwise qualified dependent child of the member.

Since Colonel Holmberg was retired prior to the effective date of the SBP, his participation therein was by virtue of subsection 3(b) of Public Law 92–425, 10 U.S.C. 1448 note. That subsection provides that any person who is entitled to retired or retainer pay on the effective date of the act may elect to participate in the Plan if such election is made within 1 year of the date of enactment. That 1-year period was subsequently extended to 18 months (March 21, 1974), by section 804 of Public Law 93–155.

Subsection 3(e) of Public Law 92–425 provides in pertinent part:

(e) An election made under subsection (a) or (b) of this section is effective on the date it is received by the Secretary concerned * * *.

The record shows that a subsection 3(b) election was made by the member, naming his dependent child, David, to be the recipient of an annuity and that it became effective February 2, 1973. Thus, it is clearly evident that the member was at that point participating in the SBP to the same degree that a member who retired after the effective date of the Plan would participate, with the exception that as a pre-effective date retiree he would not lose the beneficial aspects of his status as a subsection 3(b) participant insofar as the nonapplicability of the time limitation imposed by 10 U.S.C. 1447(3)(A) restricting the eligibility of a surviving spouse. *See* 53 Comp. Gen. 818 (1974) as extended by answer to question 2 of 54 *id.* 266 (1974).

As to retired members to whom the Plan applies and who are participating in the Plan, the fourth sentence of section 1448(a) provides in part:

* * * a person who is not married * * * but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. * * *

In S. Report No. 92–1089, Committee on Armed Services, United States Senate, dated September 6, 1972, to accompany S. 3905, portions of which became Public Law 92–425, it is stated on page 2 that:

The language is S. 3905 as introduced would not permit a member who was unmarried at the time of his retirement but who had dependent children to cover a spouse married after retirement. The committee version would permit such coverage.

And on page 27 that:

The committee revised the coverage for persons who are unmarried at retirement. It will permit an individual who is unmarried but had a dependent child at retirement to elect coverage for a spouse upon marriage after retirement. * * *

Based on the above it would appear that while Committee consideration of section 1448(a) provisions did not specifically address itself to the type of situation described in the submission, it is reasonable to conclude that it was congressionally intended to permit a member who was single at the time of his entry into the Plan and who elected coverage for a dependent child, to expand that coverage to include coverage for a later acquired spouse.

Accordingly, it is our view that Colonel Holmberg's SBP election of his wife as an additional annuitant made subsequent to his election of his dependent child at a time when he was unmarried and within the applicable time limit was effective; that Opal M. Holmberg qualified as the member's eligible surviving spouse without limitation; and that she became entitled to an SBP annuity effective April 29, 1973.

[B-182109]

Contracts—Research and Development—Statement of Work—Individual Tailoring

Provision in Armed Services Procurement Regulation 4-105(a) permitting individual tailoring of statements of work for Research and Development (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.

Contracts—Research and Development—Competition Sufficiency

Contention that individual tailoring by Air Force of statement of work in Research and Development 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.

Contracts—Negotiation—Requests for Proposals—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.

In the matter of Fiber Materials, Inc., March 10, 1975:

This protest by Fiber Materials, Inc. (FMI), against the award of a research and development (R&D) contract to TRW, Inc. (TRW), for carbon/carbon substrates for throat inserts of solid propellent rockets nozzles presents two basic questions: whether the issuance of different statements of work to offerors in the competitive range was permissible, and, if this is answered affirmatively, whether the reliance on Air Force Systems Command (AFSC) pamphlet 800-6, August 18, 1972, entitled "Statement of Work Preparation Guide," in lieu of the Armed Services Procurement Regulation (ASPR) was permissible.

Request for proposals (RFP) No. F33615-74-R-5084 was issued on October 31, 1973, to 25 prospective sources. The R&D effort contemplated a cost-plus-fixed-fee (CPFF) contract for the development of a carbon/carbon composite substrate that would be thermally and structurally compatible with pyrolytic graphite coatings for use as throat inserts of solid propellent rocket nozzles. In addition to cost and technical proposals, the statement of work (SOW) requested presentation of a separate optional cost and technical proposal with a recommendation covering the most promising areas for expansion above the anticipated 4 person-years of effort and should encompass approximately 5 person-years in fiscal year 1975.

Four proposals were received by the November 30, 1973, closing date for receipt of proposals. The technical evaluation requested on December 3, 1973, was completed on February 5, 1974. As a result, two of the proposers were determined to be technically unacceptable. The two remaining in the competitive range were TRW, ranked technically on a 100 point scale at 65, and FMI at 61. The total respective prices of their proposals with the optional program were $457,446 and $549,000. The proposals were evaluated in light of the criteria stated at section "D," "Evaluation for Award Factors," which, in turn, referenced section "C," paragraph C–26, "Additional Information for Offerors." The evaluation criteria were listed in paragraph C–26 in descending order of importance:

M.1 1. Special Technical Factors (Paramount Importance)
2. Soundness of Approach (Lesser but Critical Importance)
3. Understanding of Problem (Lesser but Great Importance)
4. Compliance with Requirements (Lesser but Significant Importance)
5. Cost Factors (Lesser but Important)

M.2 Special Technical Factors include the following:
a. Experience
b. Background
c. Facilities

It is reported that subsequent to this evaluation, the development plan, of which this procurement was one part, was reduced in scope. The contracting officer states:

> This AFML program is one of the three insert development programs being pursued as part of the AFRPL Advanced Nozzle Throat Program for the SAMSO MX upper stage motor. The original Statement of Work for this program reflected the then current needs of the AFRPL/SAMSO/MX program. However, following the submission of the technical evaluation on 4 Feb. 1974, the AFRPL/SAMSO/MX development plan was modified. The scope changes that were required as a result of the modified development plan were not substantial and would not require resolicitation of all initial offerors pursuant to ASPR 3–805.4(b). Revised Statements of Work were therefore prepared to accommodate the revisions and to allow purchase of equal selected portions of the optional programs proposed by TRW and FMI at the time of the original proposal submissions. * * *

Revised SOWs were sent to TRW and FMI on April 3, 1974. Among other things, the revised SOWs increased the size of the insert tests from 3.5 inches to 7 inches; added 5 test firings; gave the proposers design, fabrication and assembly responsibility of the 5 nozzle assemblies; gave responsibility to oversee the test firings and conduct post-test analysis; and extended performance from 18 to 24 months. Revised proposals were received on May 1, 1974, and forwarded to the Air Force Materials Laboratory (AFML) for evaluation. Both were again determined technically acceptable and the point ratings remained unchanged. However, prices in the cost proposals increased: TRW—$510,372; FMI—$793,272.

Technical discussions were conducted with each proposer on May 17, 1974. It is reported that these discussions were directed to the weak points of the technical proposals to obtain clarifications and possible

upgradings. The contracting officer states that FMI was questioned in depth in view of the increased scope offered in its revised proposal. This action is stated to have been occasioned by the Air Force's (AF's) expectation that the revised SOW would reduce the level of effort, and consequently, costs. In particular, FMI's proposed increase in engineering hours was questioned. The justification offered at that time by FMI was accepted by the Project Engineer as reasonable on the one hand, while at the same time, FMI was told that its proposed engineering hours were very high. All questions posed to both offerors during these discussions were answered to the satisfaction of the Project Engineer.

On May 23, 1974, additional discussions were pursued with both offerors. The contracting officer reports that the subjects of these discussions were reporting requirements, the SOW, and the special and general provisions that would be included in any subsequent contract. At the close of discussions, both FMI and TRW were informed that their best and final offers would be required by May 30, 1974. The best and final offers did not result in a change to the technical ratings of 65 and 61 for TRW and FMI, respectively. The prices were: TRW—$496,450 and FMI—$758,705. Since the technical proposals were considered substantially equal, award was made to TRW on June 18, 1974, in view of its potential cost savings of $262,255.

Notice that it had been unsuccessful was sent to FMI on June 20, 1974. A formal debriefing requested by FMI on June 27, 1974, was held on July 11, 1974. During this debriefing, FMI requested a copy of TRW's SOW, as contained in its RFP and resultant contract. FMI was informed that this data only could be obtained through a formal request to the procurement contracting officer. On July 15, 1974, an invoice for $7.40 was sent to FMI covering the cost of reproducing the documents. On July 24, 1974, FMI protested the award to the AF. The FMI check for the documents was received on July 30, 1974, and the documents forwarded the same day. On August 14, 1974, the contracting officer sent his denial of the protest, which was received by FMI on August 19, 1974. The August 21, 1974, FMI protest was received here August 26, 1974.

There is a question whether the FMI protest to our Office was timely filed under our Interim Bid Protest Procedures and Standards, 4 C.F.R. part 20. Even assuming the protest untimely, we will consider the merits of the protest under section 20.2(b) of our Standards as raising an issue significant to procurement practice or procedure. *See* 52 Comp. Gen. 20 (1972). *Matter of Willamette-Western Corporation; Pacific Towboat & Salvage Co.*, 54 Comp. Gen. 375 (1974).

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FMI contends that the differences in the revised SOWs resulted in its proposal being based on approximately twice the level of effort required by TRW. It is to this difference in the SOW that FMI attributes its substantially higher price. In this vein, the different SOW precluded FMI from competing on an equal plane with TRW. Under FMI's analysis of the differences in the SOWs, the level of effort permissible by TRW was approximately $350,000 lower. It is clear that the revised SOWs issued on April 3, 1974, were not identical. The differences occurred in tasks 1, 2 and 3 of the SOW: task 1 was an analysis/requirement definition; task 2 was materials development and fabrication; and task 3 was materials configuration.

The AF contends that the SOW differences were occasioned by its recognition of the relative strengths of the two competitors: TRW's strength in task 1 and FMI's strength in task 2. While acknowledging the differences, the AF maintains that the SOWs were identical in substance and did not require any extra effort on FMI's part vis-a-vis TRW. At the time, the AF expected that the revised SOW would reduce the scope of the FMI proposal from a technical, and, consequently, cost standpoint. Further, the revised SOWs afforded the AF the opportunity to incorporate the specific proposer's approach, along with the technical scope revisions, ostensibly to enable negotiations to proceed as soon as possible. The AF contends that, particularly in the R&D area, this approcah avoids any problem of technical leveling.

Paragraph 19 of the report from the Chief, Contract Management Division, Directorate, Procurement Policy, states:

> In conclusion, may we state that the two statements of work for the two technically acceptable sources (TRW and FMI) were individually revised to incorporate the original promises and technical approach taken by each offeror in response to the request for optional work items in the initial RFP. These promises and technical approaches did incorporate each contractor's prior knowledge, experience and abilities as they had proposed on the initial Request for Proposal. This did not result in a marked departure and contradictions to the previously specified technical criteria because both contractors original proposals were adjudged technically acceptable and responsive to the Request for Proposal. * * *

Support for this procedure is found by the AF at Armed Services Procurement Regulation (ASPR) § 4–105(a) (1973 ed.), which states:

> * * * In research, exploratory development and advanced development, statements of work must be individually tailored by technical and contracting personnel to attain the desired degree of flexibility for contractor creativity, both in submitting proposals and in contract performance. * * *

This procurement falls within the definition of exploratory development contained in ASPR § 4–101(a)(2) (1973 ed.).

The Supreme Court in *Paul* v. *Unitied States*, 371 U.S. 245 (1963), in commenting on the Federal procurement policy, quoted at page 254 from House Report No. 109, 80th Cong., 1st Sess., H.R. 1366, which

was enacted as the Armed Services Procurement Act of 1947 (now codified at Chapter 137 of 10 U.S.C.), as follows:

* * * the bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time it puts within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the Government of fair and reasonable prices for the supplies and services procured and affords an equal opportunity to all suppliers to compete for and share in the Government's business.

To assure that potential suppliers are afforded the opportunity to compete equally, each must be given the same description of the desired supplies or services. If the procurement description is not sufficiently complete or definite that a price competition can be entered immediately, with the assurance that all competitors are bidding on the same item, then it is permissible to negotiate with the competitors to make sure that they understand exactly what is expected of them. *Cf.* 10 U.S.C. § 2304 (a) (10) and (a) (11).

When procuring R&D efforts, ASPR § 4–106.3 (1973 ed.) covers the conduct of discussions. Beyond the requirements of ASPR § 3–805, generally governing the conduct of discussions, ASPR § 4–106.3 (1973 ed.) states:

The contracting officer should make certain that each prospective contractor fully understands the details of the various phases of the Government's requirement, especially the statement of work. This may be best accomplished by conferences between a prospective contractor, the contracting officer and appropriate technical personnel, particularly where there is doubt that a work statement is understood or will be interpreted correctly by prospective contractors.

Further, ASPR § 4–105(a) (1973 ed.), Statement of Work, provides:

(a) The preparation and use of a clear and complete statement of work is essential to sound contracting for research and development. In research, exploratory development and advanced development, statements of work must be individually tailored by technical and contracting personnel to attain the desired degree of flexibility for contractor creativity, both in submitting proposals and in contract performance. Careful distinction must be drawn between level-of-effort work statements, which essentially require the furnishing of technical effort and a report on the results thereof, and task completion type work statements which often require development of tangible end items designed to meet specific performance characteristics.

(b) In preparing statements of work, the following elements shall be considered:

(i) a general description of the required objectives and desired results;
(ii) background information helpful to a clear understanding of the requirements and how they evolved;
(iii) technical considerations, such as any known specific phenomena or techniques;
(iv) a detailed description of the technical requirements and subordinate tasks;
(v) a description of reporting requirements and any other deliverable items, such as data, experimental hardware, mock-ups, prototypes, etc., and
(vi) other special considerations.

It is clearly stressed in the regulation that, in procuring R&D, it is particularly important to assure that all competitors understand exactly the Government's requirements. A clear and complete statement of work is the primary vehicle to satisfy that responsibility. While ASPR § 4–105(a) (1973 ed.) does speak in terms of "individually tailoring" the SOW, we think this specialization was not meant to apply to each individual proposal submitted under an R&D solicitation. The direction in the subsection to individually tailor SOWs is, in our opinion, intended to impart the particularity of an individual R&D procurement and type of effort desired thereunder. Even recognizing that an R&D procurement has unusual problems in relation to the usual procurement of supplies and services, we can find no authority which countenances a departure from the basic principles of law and regulations governing the conduct of R&D procurements.

ASPR § 4–106 (1973 ed.) evidences the intent that discussions should be so conducted as to assure a commonality of interpretation of the Government's requirements. This instruction is made applicable particularly where doubt exists that the statement of work is being interpreted correctly. This is so even in light of the directions for the careful preparation and use of the SOW in ASPR § 4–105 (1973 ed.). Here, the recognition of speciality occurred before discussions, when the SOW was individually tailored to each proposal determined to be in the competitive range. However, it is only at the discussion stage of the procurement process that individual approaches reflecting different predilections of specialities should be recognized.

The AF maintains that its version of tailoring a SOW after a determination of competitive range has been made facilitates the negotiation process by recognizing the various strengths of proposers. We view this procedure as an imposition of subjective conclusions which might adversely affect one proposal while improving the competitive posture of another, notwithstanding that both have been determined to be within the competitive range.

To claim, as the AF does, that the SOWs are substantially the same is a conclusion that it is not borne out by the results. The AF has presented an analysis of the areas of cost difference between FMI and TRW, in an attempt to demonstrate that FMI did not accept any risks, thereby eliminating itself from the cost competition. We have reviewed the analysis and can see that FMI's proposed costs for in-house engineering hours, for example, were higher than envisioned by the AF and proposed by TRW. The AF traces the increase to expanded efforts in tasks 2 and 4 and concludes that this resulted without any contribution on the part of the AF. On the basis of the record before our Office, we are unable to translate the engineering and labor

effort into proposed costs that may have been occasioned by the differences in the SOWs. This is the thrust of the FMI protest. Nor can we establish from the record whether these matters were the subject of any discussions since no memorandum of price discussions with FMI was made as required by ASPR § 3–811 (1973 ed.). This, we understand, was because the AF received proposals with a significant cost spread in favor of TRW. In view of the substantial disparity in prices and the fact that award has been made and work commenced, we are not disposed to recommend corrective action since FMI failed to demonstrate how the differences in SOW wording caused its prices to increase over its initially proposed prices. However, we are recommending by separate letter of today to the Secretary of the Air Force that this practice of tailoring the SOW to individually suit particular proposals be terminated in future procurements.

To extrapolate, we believe that it would be equally inappropriate to initially tailor SOWs to reflect the individual respective strengths and weaknesses of prospective proposers.

While the AF may make every good faith effort to define the SOW for each proposer in terms substantially the same—but not identical—the use of different phraseology and/or sentence structure may shift an emphasis so as to change the interpretation by a proposer of the intended requirements. Again, as reflected in ASPR § 4–106.3 (1973 ed.), interpretation of the SOW in the correct manner, as intended by the Government, is the desired goal. This may be difficult enough when all competitors are basing their interpretation on the same document. When each firm is viewing a different SOW, it is far more speculative that they will have essentially the same understanding of the Government's requirements. Further, under the method employed here, each prospective contractor, viewing a statement of work tailored to its respective abilities and shortcomings could have a distorted view of what would be required of it to win the competition. This may fairly be said to work to a proposer's competitive disadvantage.

Concerning FMI's allegation that the AF's reliance on AFSC pamphlet 800–6 was misplaced and inappropriate, we have measured the conduct of the procurement against the standards of ASPR. Chapter 3 of the pamphlet, Research and Technology Statements of Work, is the part here in question. Initially, Chapter 1, section 1–2, Objectives, indicate that the pamphlet was intended to provide "* * * guidance in the establishment of statements of work which are: a. Tailored to meet program needs. b. Responsive to program planning and system definition requirements and constraints. c. Compatible with the standard DOD work breakdown structure. * * *" The preceding instruction makes it clear that the pamphlet was intended as an internal operating

document and an aid to AF procurement personnel. We have no objection to AF's reliance upon it in formulating a SOW, provided ASPR remains the governing standard.

The protest is denied.

[B–182216]

Set-Off—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.

Transportation—Motor Carrier Shipments—Payment—Set-Off

Setoff of monies due carrier against Government claims for loss and damage neither noted on delivery receipt because of misunderstanding as to nature of goods nor on Government bill of lading (GBL) when carrier received the 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.

In the matter of Gulf Pacific Agricultural Coop., Inc., March 10, 1975:

This decision is to Gulf Pacific Agricultural Coop., Inc., (Gulf Pacific) in response to its request of January 7, 1975, file G–9570–002, through its attorney Todd M. Sloan, of Hill, Farrer, and Burrill, for review of the action initiated by our Transportation and Claims Division (TCD) resulting in the collection by setoff of claims for $2,893.69 and $201.34 respectively, representing damages to shipments carried by Gulf Pacific. TCD's claim file numbers are TK–967251 and TK–967254.

We note that Gulf Pacific apparently transported these shipments as a so-called agriculture cooperative as defined in section 15 of the Agriculture Marketing Act, as amended, 12 U.S. Code 1141j (1970); under 49 U.S.C. 303(b)(5) (Supp. III, 1973), with exceptions not pertinent here, it thus is exempt from the provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, including the statutory provisions in 49 U.S.C. 20(11) and 319 (1970) relating to carrier liability for the loss of or damage to property transported by it. However, the Supreme Court has stated that 49 U.S.C. 20(11) codifies the common law rule making a carrier liable, without proof of negligence, for all damages to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, acts of God, the

public enemy, public authority or the inherent vice or nature of the commodity. *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 165, note 9 (1956); *Loss and Damage Claims*, 340 I.C.C. 515, 522 (1972). Thus, in an action to recover from Gulf Pacific for damages to a shipment, the shipper establishes a prima facie case when he shows receipt at origin in good condition, arrival at destination in a damaged condition and the amount of damages. Thereupon, the burden of proof is upon Gulf Pacific to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving it of liability. See *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 138 (1964).

Claim TK–967251 covers a shipment of 576 cartons of adjustable hospital folding field beds moving from Barron Industries, Sumner, Washington, to the Defense Depot, Mechanicsburg, Pennsylvania, under Government bill of lading (GBL) No. H–1879678. Gulf Pacific's trailer EK–2 (a closed van) was loaded to capacity by the shipper on April 20, 1973, with 517 cartons; 29 cartons were loaded in a rack beneath the trailer and 30 cartons were loaded on April 26, 1973, on a second trailer furnished at the carrier's convenience. Upon arrival at destination on May 4, 1973, trailer EK–2 was delivered with an exception showing that the 29 cartons loaded beneath the trailer had sustained water damage rendering the contents a total loss. A carrier representative waived inspection and authorized destruction of the 29 beds.

A claim for damages of $2,893.69 was filed against Gulf Pacific consisting of $2,813 for the beds plus unearned freight charges of $80.69. Gulf Pacific denies liability and claims that TCD's setoff action was improper, because the shipper loaded the trailer.

Gulf Pacific does not deny that the beds were in good condition when delivered to it. Further, the evidence establishes that the beds were damaged upon arrival and the amount of the damages. Therefore, a prima facie case of carrier liability has been established. Gulf Pacific asserts, however, that it is not liable and relies upon the act of the shipper in loading the trailer, one of the exceptions to carrier liability.

When the shipper assumes responsibility for loading he is liable for defects which are latent and concealed and which cannot be discerned by ordinary observation by the agents of the carrier. However, if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. *United States* v. *Savage Truck Line, Inc.*, 209 F. 2d 442, 445 (4th Cir. 1953), *cert. denied*, 347 U.S. 952 (1954).

It is unclear from the record whether Gulf Pacific's driver was present during the loading period; however, he was there to pick up the trailer and could have objected to the manner of loading, which was perfectly apparent, at that time. He did not object, however. The carrier, therefore, would appear to be liable.

It has never been our position that shipper loading constitutes an absolute defense. Rather, we assert that improper loading by the shipper can constitute a complete defense to damage claims only when the improper loading is not apparent on ordinary observation by the carrier. *Modern Tool Corporation* v. *Pennsylvania R.R.*, 100 F. Supp. 595 (D.N.J. 1951); *Minneapolis St. P. & S.S.M. R.R.* v. *Metal-Matic, Inc.*, 323 F. 2d 903 (8th Cir. 1963); *Lewis Machine Co.* v. *Aztec Lines, Inc.*, 172 F. 2d 746 (7th Cir. 1949).

In TCD's letter of October 31, 1974, to Gulf Pacific, it said:

> * * * your driver must have known of the use of the rack beneath the trailer. If use of that rack could potentially result in damage, it was the driver's duty to object to the manner of loading before moving the truck.

Gulf Pacific still does not deny that its driver knew or must have known of the use of the rack beneath the truck. Rather, it asserts that the cases TCD cites "* * * do not bear out your (its) assertion that our driver has a duty to object to the manner of loading before moving his vehicle." However, even the quotation that Gulf Pacific cites from *Modern Tool*, *supra* at 598, clearly supports our position. Therein it is stated that the carrier should not be held liable if the shipper's defective loading "* * * is not apparent to the ordinary observation of the carrier * * *." The carrier in *Modern Tool*, however, was not held liable because the shipper loaded and sealed a railroad car on its own private siding. The defective loading, therefore, was not apparent. The court in *Metal-Matic*, *supra* at 907 also agrees that the carrier can be liable if the act of the shipper in loading the car is patent and apparent by ordinary observation. Here, however, the loading of ordinary cardboard cartons with bedding inside on a rack beneath a trailer, where water, mud, and all manner of road grime could easily be splashed onto and through the cartons was apparent to the ordinary observation of the carrier's driver. Gulf Pacific can, therefore, be held liable.

South Carolina Asparagus Growers Ass'n. v. *Southern R. Co.*, 46 F. 2d 452 (4th Cir. 1931), cited by Gulf Pacific, does not help its position, because it involved a "Shipper's load and count" bill of lading, and the court refused even to allow testimony that the carrier saw the car before shipment.

Association of Maryland Pilots v. *Baltimore & O. R.R.*, 304 F. Supp. 548 (D. Md. 1969) is equally unpersuasive. In this case the court *holds*

the carrier liable despite the shipper's obvious negligence in loading a machine because the machine was in good condition when delivered to the carrier (and even after a derailment by the railroad), but arrived in damaged condition. Citing *Missouri Pacific*, *supra*, the court holds that a prima facie case against the carrier has been established and that the carrier, therefore, has the burden to prove its own absence of negligence, which it did not do. The carrier, therefore, was held liable.

We also have cited *Lewis Machine Co.* v. *Aztec Lines, Inc.*, *supra*. In this case a large machine crashed through the wall of the carrier's trailer when the driver went around a curve. The Circuit Court upheld the District Court's decision that even if the loading by the carrier was defective, "* * * the defects were patent to Aztec [the carrier] through the driver of the truck and the terminal personnel of Aztec in Chicago, who accepted the shipment * * *." Aztec, therefore, was held liable. *Lewis Machine Co.* v. *Aztec Lines, Inc.*, *supra* at 748. This case is precisely on point here. Although the beds were loaded defectively by the shipper, this was patent to Gulf Pacific through the driver of its truck. Following the *Lewis Machine* case, Gulf Pacific should be held liable for the damage to the folding beds. Accordingly, the administrative setoff action initiated by TCD would appear to have been proper and is sustained.

Claim TK–967254 covers a shipment of 27 chests of collapsible fabric tanks moving from Uniroyal, Inc., Warsaw, Indiana, to Tooele Army Depot, Utah, under GBL No. H–2807496, dated June 11, 1973. Shortly after the shipment had been delivered on June 20, 1973, without exception, and after Gulf Pacific's driver had left the terminal, damages were noted on seven of the chests. A damage report was prepared and the cost of repairs was estimated to be $201.34. The shipper claims that loading was accomplished without damage. Further, Gulf Pacific accepted the chests at origin without noting any exceptions on the GBL. Gulf Pacific denies liability, however, because of the clear delivery receipt given to it by the consignee.

It long has been held that a clear delivery receipt is not conclusive. A clear delivery receipt does not prevent establishing, by other evidence, that a shipment actually was received in a damaged condition. See *Rhoades, Inc.* v. *United Air Lines, Inc.*, 340 F. 2d 481, 486 (3rd Cir. 1965); *Mears* v. *New York, N.H. & H. R.R.*, 52 A. 610 (Conn. 1902). Gulf Pacific, however, claims that "the factual situation * * * is clearly within the parameters of the concealed loss problem." Quoting from *Miller's Law of Freight Loss and Damage Claims* (R. Sigmon Ed. 3d ed. 1967) at 143, Gulf Pacific asserts:

In the case of concealed loss or damage, however, the carrier's receipt indicates that the goods were delivered in good order so the essentials of a prima facie case of carrier liability are lacking.

Assuming without deciding that this is so, it does not denigrate our position because we have not treated this damage as a concealed loss problem. The damage in question was done to the 27 chest *containers* of the collapsible fabric tanks. The damage was not concealed inside any package. Rather it was readily observable. The discrepancy report by the Transportation Officer at the Tooele Army Depot indicates that the issuance of a clear delivery receipt resulted from the confusion of the inchecker as to the quality of the articles in the shipment. The receiving department at Tooele apparently was aware of the damages but mistakenly thought that the material being delivered was used rather than new and therefore no exception was noted on the delivery receipt.

As noted above, the absence of notations on a delivery receipt is only evidence that the goods were received in proper order, but does not conclude the issue and other evidence may be received. *Rhoades, Inc.* v. *United Air Lines, Inc., supra.*

The available evidence establishes here (1) that the goods were received by the consignee in damaged condition; (2) that the damage was not concealed but rather that it was not noted on the delivery receipt because of a misunderstanding on the part of the receiving department at Tooele; and (3) that at origin Gulf Pacific noted no exceptions on the GBL.

In concealed damage cases, lack of notation of exceptions on a GBL is not prima facie evidence that the goods were delivered to the carrier in good condition, because the bill of lading usually only says that the goods were received "in apparent good order and condition (contents and value unknown)." The carrier, therefore, only avers that the external parts of the shipment open to inspection and visible are in good condition.

This is precisely what is involved here. Only the containers of the fabric tanks were damaged, and these were readily open to inspection and were visible. The lack of exceptions on Gulf Pacific's GBL, therefore, is prime facie evidence that the 27 chests (although not their contents) were in good order when received by Gulf Pacific at origin. See *Monnier* v. *United States*, 16 F. 2d 812 (E.D. N.Y. 1925) *affirmed*, 16 F. 2d 815 (2nd Cir. 1926); *Hoover Motor Express Co.* v. *United States*, 262 F. 2d 832 (6th Cir. 1959).

Therefore, a prima facie case of carrier liability has been established. See *Missouri P. R.* v. *Elmore and Stahl, supra*, and cases cited therein. And because the carrier has presented no evidence, whatso-

ever, of its freedom from negligence and that the damage was caused solely by one of the exceptions to carrier liability, the setoff action initiated by TCD was proper and is sustained.

[B-182716]

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 susbsistence 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.

In the matter of reimbursement for relocation expenses, March 11, 1975:

This action involves a reconsideration of a settlement dated January 2, 1973, issued by the Transportation and Claims Division (TCD) of our Office denying the claim of Mr. M. Reza Fassihi, an employee of the Department of the Army, for reimbursement for real estate expenses incurred by him in connection with the sale and purchase of a residence.

While residing in Alexandria, Virginia, Mr. Fassihi was hired as an architect for assignment to Fort Sill, Oklahoma. In connection with this assignment, a travel order was issued on May 26, 1971, authorizing Mr. Fassihi to travel from Alexandria to his first duty station, Fort Sill. The travel order also authorized reimbursement for temporary quarters subsistence expenses, real estate expenses, and transportation expenses for Mr. Fassihi's wife and household goods.

Incident to his relocation, Mr. Fassihi states that he was reimbursed for the following expenses incurred by him:

Travel for employee and dependent	$230.05
Temporary quarters subsistence expenses	166.99
Tolls	8.60
Trailer rental	82.24
Purchase of residence	226.00

However, when Mr. Fassihi subsequently requested reimbursement in the amount of $1,937.50 for the real estate expenses incurred by him in connection with the sale of his former residence, his claim was administratively disallowed on the basis that new appointees assigned to their first duty station are not entitled to reimbursement for real

estate expenses. On the same basis, Mr. Fassihi was advised that a portion of the amount previously paid to him was improper and he was requested to refund to the Government $444.53. This amount represented $166.99 for temporary quarters subsistence expenses, $51.54 for per diem for his wife, and $226 for real estate expenses related to the purchase of his residence. The settlement of January 2, 1973, disallowed Mr. Fassihi's claim for reimbursement for the expense of selling his residence and held that he was indebted to the United States for the amount of $226 paid to him as reimbursement for the expense of purchasing a new residence on the basis that there is no authority to reimburse a new appointee for the real estate expenses incurred by him in connection with his appointment to his first duty station.

Mr. Fassihi states that he was unemployed at the time he was offered the position at Fort Sill and that in accepting this position he had relied on statements that he would be reimbursed by the Government for relocation expenses incurred by him. Furthermore, the record indicates that Mr. Fassihi was employed by the Washington Technical Institute from July 15, 1968 to June 30, 1970, and that he was given credit for such service when he was appointed to the position at Fort Sill. Since Mr. Fassihi had prior creditable service, his attorney contends that he was not a new employee. Accordingly, his attorney states that the travel orders were not erroneous and that Mr. Fassihi validly relied on those orders and urges our Office to grant him equity in this matter.

The authority to allow Government employees reimbursement for residence sale and purchase expenses, subsistence while occupying temporary quarters, and per diem for family is contained in 5 U.S. Code § 5724a (1970). However, section 5724a authorizes reimbursement for those expenses only for an employee transferred in the interest of the Government from one official station or agency to another for permanent duty or a former employee separated by reason of reduction in force or transfer of function who, within one year after separation is reemployed by a nontemporary appointment at a different geographical location. The decisions of our Office have held that the reference in section 5724a to a transfer from one official station to another for permanent duty requires a change in the permanent duty station of an employee without a break in service. B–164051, July 10, 1968.

In the present case Mr. Fassihi was appointed to the position at Fort Sill approximiately 1 year after his separation from the Washington Technical Institute. Thus there was a break in Mr. Fassihi's service. Moreover, his separation was not a result of a reduction in force or transfer of function. Accordingly, Mr. Fassihi is not entitled

to the travel and transportation expenses authorized under 5 U.S.C. § 5724a.

This conclusion, however, does not preclude him from entitlement to travel and transportation benefits authorized for new appointees and student trainees to manpower shortage positions under 5 U.S.C. § 5723 (1970). Section 5723 authorizes an agency to pay the travel expenses of a new appointee to a manpower shortage position and the transportation expenses of his immediate family and household goods. Since it appears that Mr. Fassihi's appointment was to a manpower shortage position he may be allowed reimbursement for such expenses. However, section 5723 does not authorize a new appointee reimbursement for residence sale and purchase expenses, subsistence while occupying temporary quarters, or per diem for family. Since new appointees are not entitled to reimbursement for such expenses and Mr. Fassihi was not transferred to Fort Sill without a break in service and his separation was not a result of a reduction in force or transfer of function, there is no authority to allow him reimbursement for residence sale and purchase expenses, subsistence while occupying temporary quarters, or per diem for family.

It is unfortunate that the travel order authorized allowances for Mr. Fassihi which were not properly allowable to him under applicable statutory authority. It is a well-settled rule of law, however, that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or by regulations, and this is so even though the agent may have been unaware of the limitations on his authority. See *German Bank* v. *United States*, 148 U.S. 573, 579 (1893); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); 53 Comp. Gen. 11, 15 (1973); and B–181080, May 21, 1974. Moreover, concerning amounts already reimbursed to Mr. Fassihi, the authority of 5 U.S.C. § 5584 to waive claims of the United States against a person arising out of an erroneous payment of pay or allowance to an employee does not include authority to waive erroneous payments of travel and transportation expenses and allowances, and relocation allowances payable under 5 U.S.C. § 5724a. 4 C.F.R. 91.2 (c) and (d) (1974).

In view of the above, our settlement of January 2, 1973, disallowing Mr. Fassihi's claim for $1,937.50 representing reimbursement for expenses incurred by him incident to the sale of his old residence and requiring repayment of $226 received by him as reimbursement for expenses incurred by him incident to the purchase of a new residence, is hereby sustained. Furthermore, Mr. Fassihi is required to refund to the Government any amounts received by him representing reimbursement for temporary quarters subsistence expenses and per diem for his family incident to his appointment to the position at Fort Sill.

[B–182838]

Bids—Acceptance Time Limitation—Bids Offering Different Acceptance Periods

Where invitation for bids for copper cathodes stated that bids offering less than 72-hour acceptance period will be considered 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.

In the matter of Miles Metal Corporation, March 11, 1975:

Miles Metal Corporation (Miles) protests the Bureau of the Mint's rejection of its bid under invitation for bids (IFB) No. BM–75–23 as nonresponsive.

Solicitation No. BM–75–23 for 40 million pounds of copper cathodes was issued November 21, 1974. Page 1 of the IFB stated in upper case letters as follows:

BID ACCEPTANCE PERIOD. BIDS OFFERING LESS THAN 72 HOURS FOR ACCEPTANCE BY THE GOVERNMENT FROM THE DATE AND HOUR SET FOR OPENING, WILL BE CONSIDERED NONRESPONSIVE AND WILL BE REJECTED.

The identical language appears again at page 8 of the invitation.

Opening of bids was set for 11:00 a.m. on December 10, 1974, at Mint Headquarters, Washington, D.C. Miles' bid was hand carried to the opening at which fourteen bids were received. The unit price offered by Miles for various quantities of copper cathodes would have qualified it among the low bidders. However, its bid was rejected as nonresponsive by the contracting officer because of Miles' offer of "2 calendar days" acceptance period rather than the 72 hours acceptance period required by the above–quoted language of the IFB.

At bid opening and after a number of bids had been opened and read, Miles became aware of the deviation of its bid from the invitation's requirements and requested to be permitted to extend its offered period of acceptance to conform with the Government's 72-hour requirement. The contracting officer rejected the offer, concluding that it would have been prejudicial to other bidders to permit Miles to change the terms of its bid.

In support of its protest to the Bureau of the Mint's determination of nonresponsiveness, Miles explains that its inclusion of a 48-hour acceptance period was a matter of inadvertence—that the Mint's previous solicitation for copper cathodes had used a 48-hour acceptance period and that Miles had merely failed to notice the change. In this connection, the protester cites various indicia of its good faith in attemping to comply with the terms of the invitation, including the facts

that its bid was hand carried from New York to the opening in Washington, D.C., and that its offer to extend the bid acceptance period was made at the opening prior to evaluation of the bids. Additionally, Miles asserts that the nonconformance of its bid to the 72-hour acceptance requirement was a technical deviation of a noncritical nature and that the Government's best interest would be served by acceptance of its low bid prices.

Contrary to Miles' view, we have consistently held that a provision in an invitation which requires that a bid remain available for acceptance by the Government for a prescribed period in order to be considered for award is a material requirement and that the failure to meet such a requirement renders a bid nonresponsive. 48 Comp. Gen. 19 (1968); 46 *id.* 418 (1966); B–177662(1), February 21, 1973. We feel that our consistent line of precedent in this regard is correct, since to hold otherwise affords the bidder who has limited its bid acceptance period an advantage over its competitors. As we pointed out in 48 Comp. Gen. 19, *supra*, when a bidder limits its bid acceptance period, it has the option to refuse award after that time in the event of unanticipated increases in cost, or by extending its acceptance period, to accept an award if desired. Bidders complying with the invitation's acceptance period limitation would not have that option but would be bound by the Government's acceptance. We think the rule is particularly applicable in this instance. We understand that even one day could have had a significant effect on bid prices here since copper cathodes are made by refiners who trade in the fluctuating copper market and that the price of the item is directly related to the price of copper listed on commodity exchanges.

Therefore, the fact of a bidder's good faith or that its failure to submit a bid specifying the correct acceptance period may have been due to oversight does not justify correction of the bid to remedy that defect. The rules under which corrections of certain mistakes in bid are permitted are applicable only when the bid as submitted is responsive to the terms of the invitation. 40 Comp. Gen. 432 (1961).

For the reasons expressed above, we are unable to agree with the protester's view that its failure to bid on the basis of a 72-hour acceptance period is immaterial. Accordingly, the protest of Miles Metal Corporation is denied.

[B–181901]

Officers and Employees—Transfers—Relocation Expenses—Distance Between Old and New Residence

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.

In the matter of a claim for reimbursement of real estate expenses, etc., March 17, 1975:

This responds to a request by Captain J. D. Tirey, FC, Finance and Accounting Officer, Department of the Army, in his memorandum of February 8, 1974, reference AMXNC-PF-P, forwarded here by 2nd endorsement on July 19, 1974, by the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 74-30, for an advance decision as to the reimbursement of real estate and other expenses to Mr. Gary A. Ward, a civilian employee of the Department of Defense, incident to a transfer of station.

The record accompanying Mr. Ward's claim shows that by Travel Order No. LO #10-58, dated October 10, 1972, he was authorized a change of official duty station from Fort Belvoir, Virginia, to New Cumberland Army Depot, New Cumberland, Pennsylvania. The travel orders provided for the payment to Mr. Ward of those real estate expenses for which reimbursement is authorized under the Joint Travel Regulations and various other relocation allowances. In this regard, the record further shows that, at the time of his receipt of the travel orders, Mr. Ward owned and was living in a residence located at 14729 N. Birchdale Avenue, Woodbridge, Virginia; that he entered into an agreement for the sale of the Woodbridge home; and that this agreement was consummated on November 8, 1972, when the sales transaction was completed. On or about this date, Mr. Ward leased a residence at 14774 Barksdale Street, Woodbridge, Virginia, and began commuting daily to his new duty station—a distance of about 123 miles.

Because Mr. Ward's old and new duty residences were about one mile apart and were both the same distance from his new duty station, a question has been raised with respect to his entitlement to the reimbursement of real estate expenses arising out of the sale of his former home.

In our view, essentially three questions have been presented: first, does the fact that Mr. Ward's old and new residence were approximately one mile apart preclude him receiving reimbursement of real estate expenses; second, to be eligible for receipt of such reimbursements must an employee's change of residence incident to a transfer result in his living in the vicinity of the new duty station; and third, in light of the facts presented, can it be said that the sale of Mr. Ward's home occurred incident to his transfer?

A. Distance between old and new residences

As to whether the sale of a residence and purchase of another in the same city constitute a change of residences incident to transfer, the

fact that both residences are within the same city would not be controlling as to eligibility for reimbursement. So long as the employee commutes daily to his new duty station from the new residence (as did Mr. Ward in the present case), the fact that the new residence is located near the former residence would not in itself preclude reimbursement of real estate expenses. *See* B–175822, June 14, 1972.

B. Distance between new residence and new official duty station

Review of the instant case evidences doubt by Mr. Ward's administrative agency as to his entitlement to real estate expense reimbursement because he did not move into a residence located within the vicinity of New Cumberland Army Depot. In cases involving somewhat similar circumstances this Office has taken the view that "* * * it does not follow that for a relocation to be incident to a transfer of duty station it must invariably result in less commuting time and distance." B–172705, May 28, 1971; *cf.* B–167171, August 8, 1969.

C. Whether the sale of the former home was incident to the change of official duty stations

Generally, in any case involving a transfer within the same local or metropolitan area where the agency finds that an employee's move was not related to his transfer, the costs of such move may not be borne by the Government. B–175822, *supra.* However, in the instant case, the only reason given by any agency official for concluding that the move was not related to the transfer was the fact that the old and new residences were approximately the same distance away from the new duty station. (Memorandum from Chief, Personnel Division, dated October 26, 1973.) As we stated in B., *supra*, this factor alone does not create such a presumption. We note that Mr. Ward signed a contract to sell his old residence on October 8, 1972, after receiving his notification of the pending transfer scheduled for October 22, 1972. On October 14, 1972, he spent some time hunting for a new residence in the area of his new station—apparently without success—since he and his family then occupied temporary quarters in the new area for 26 days while his children attended Pennsylvania public schools. There is no evidence that these expenses were not incurred in a good faith effort to relocate in the vicinity of the New Cumberland Army Depot incident to his permanent change of duty station. The fact that he ended by moving into a home only one mile away from his former residence—for whatever reason—does not change the purpose for which these expenses were incurred nor the Government's obligation to reimburse him. The transfer was apparently consummated as scheduled and Mr. Ward commuted to and reported daily to his new duty station as required.

577-439 O - 75 - 4

In light of the above, we would not object to an administrative determination that the sale of the Birchdale Avenue residence was made incident to his transfer. Consistent with such view, we would not interpose any objection to the reimbursement to Mr. Ward of real estate expenses incurred incident to the sale of his former home and payment of other relocation expenses claimed if they are otherwise proper.

[B-182932]

Family Allowances—Evacuation—Member's Duty Station Not Ordered Evacuated

Where there was an ordered evacuation of dependents of members of the uniformed services serving in Cyprus, and dependents en route to other destinations in the general area were delayed because of a suspension of commercial air transportation to destinations east of Rome, Italy, evacuation allowances provided in chapter 12, 1 Joint Travel Regulations, may not be authorized under current regulations, nor may such regulations be amended to permit evacuation allowances for dependents en route to a station at which an evacuation of dependents is not ordered, in the absence of statutory authority.

In the matter of evacuation allowance entitlements, March 18, 1975:

This action is in response to letter of December 16, 1974, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision regarding the payment of evacuation allowances in the circumstances described. The request which was forwarded by the Per Diem, Travel and Transportation Allowance Committee to this Office on December 24, 1974, has been assigned PDTATAC Control No. 74-46.

The Assistant Secretary of the Navy indicates that during the recent period of military action on Cyprus, an evacuation of dependents was ordered. At the same time, commercial air flights to destinations east of Rome, Italy, which involved travel in the general vicinity of Cyprus were canceled. As a result, the travel of dependents en route to overseas duty stations other than Cyprus, but in that general vicinity, was halted for periods of time awaiting resumption of air travel to their destinations. As a result some of the dependents involved were required to remain temporarily in Italy or other overseas points, travel of other dependents was halted before they commenced travel from points of origin in the United States after disestablishing their residences and shipping their household goods, while still other dependents were stopped in the United States at points en route or at aerial ports of embarkation.

It is explained that for members of the uniformed services who were stopped en route, payment of a per diem is authorized because they were in a delay-awaiting-transportation status. For dependents en

route to their sponsor's duty station on Cyprus evacuation allowances are authorized in accordance with chapter 12 of Volume 1 of the Joint Travel Regulations (1 JTR). However, for dependents whose travel was interrupted en route to duty stations other than Cyprus, there is no provision in 1 JTR for payment of a per diem.

In such circumstances, the Assistant Secretary asks if 1 JTR as presently written may be interpreted as permitting the payment of evacuation allowances to dependents destined for locations in the affected area, other than Cyprus. If the answer is in the affirmative a clarifying amendment to 1 JTR will be made. If the answer is in the negative, the Assistant Secretary wishes to know if 1 JTR may be amended to so provide in future cases.

Section 405a, Title 37, U.S. Code (1970) provides as follows:

> Under regulations prescribed by the Secretaries concerned, when dependents of members of the uniformed services are ordered evacuated by competent authority, they may be authorized such allowances as the Secretary concerned determines necessary to offset the expenses incident to the evacuation. Allowances authorized by this section are in addition to those authorized by any other section of this title. For the purposes of this section, a dependent "ordered evacuated by competent authority" includes—
>
> (1) a dependent who is present at or in the vicinity of the member's duty station when the evacuation of dependents is ordered by competent authority and who actually moves to an authorized safe haven designated by that authority, whether such safe haven is at or in the vicinity of the member's duty station or elsewhere;
>
> (2) a dependent who established a household at or in the vicinity of the member's duty station but who is temporarily absent therefrom for any reason when evacuation of dependents is ordered by competent authority; and
>
> (3) a dependent who was authorized to join the member and who departed from his former place of residence incident to joining the member but who, as a result of the evacuation of dependents, is diverted to a safe haven designated by competent authority or is authorized to travel to a place the dependent may designate, even though he was in the United States when the evacuation was ordered.

In accord with the foregoing statutory authority, chapter 12, 1 JTR, provides for evacuation allowances which include per diem allowances for command-sponsored dependents. Paragraph M12007–1 provides that the per diem allowance is provided to assist a member in meeting the excess costs involved in temporarily maintaining his command-sponsored dependents at places away from his duty station. Unless sooner terminated for other reasons, the allowance is to terminate on the date of detachment (relief from duty) of the member from the duty station from which the evacuation of dependents was ordered. (para. M12007–2).

Section 405a of Title 37, U.S.C., which was added by act of May 22, 1965, Public Law 89–26, 79 Stat. 116, specifically provides that when the dependents of members of the uniformed services are ordered evacuated by competent authority, they may be authorized such allowances as the Secretary concerned determines are necessary to offset the

expenses incident to the evacuation. It enumerates three instances in which a dependent will be considered as "ordered evacuated by competent authority," none of which refers to a situation in which the member's duty station is not ordered evacuated. Moreover, there is no indication in the legislative history of that provision of law of an intention to authorize evacuation allowances for dependents of a member whose duty station is, in fact, not ordered evacuated, or to consider such dependent as evacuated when the dependent is prevented from traveling to the member's duty station as a result of the suspension of commercial air travel.

It is recognized that the additional expenses incurred by dependents destined for locations in the area affected by the suspension of commercial air transportation were similar to expenses experienced by dependents delayed en route to Cyprus. However, in the absence of statutory authority, 1 JTR may not authorize the payment of evacuation allowances for dependents of members serving at a duty station from which an evacuation of dependents is not ordered, and both questions must be answered in the negative.

[B-158097]

Transportation—Automobiles—Military Personnel—Air Carriers—Not Included in "Privately Owned American Shipping Services"

The term "privately owned American shipping services" as used in 10 U.S.C. 2634 authorizing the overseas transportation at Government expense of a privately owned motor vehicle of a member of an armed force ordered to make a permanent change of station is limited to vessels and the Joint Travel Regulations may not be revised to include such transportation by air freight even if the use of air freight is limited to a not to exceed the cost of shipment by vessel basis.

In the matter of transportation of a privately owned vehicle overseas by air carrier, March 19, 1975:

This action is in response to a letter from the Assistant Secretary of the Navy (Manpower and Reserve Affairs), requesting the views of this Office as to whether the term "privately owned American shipping services" as used in 10 U.S. Code 2634 includes privately owned air carriers. Also the question is asked whether the Joint Travel Regulations may be revised to authorize shipment of a privately owned vehicle by air freight when overseas shipment of such a vehicle is authorized. We have been informed that the request has been considered by the Per Diem, Travel and Transportation Allowance Committee and assigned PDTATAC Control No. 72-64.

The Assistant Secretary states in his letter that because chapter 11, Volume 1 of the Joint Travel Regulations defines shipment of a pri-

vately owned motor vehicle as transportation by vessel, including port handling charges, to, from, and between overseas ports, and between United States ports when incident to changes in home yards and home ports, problems are being encountered in Alaska resulting in hardship to members and unnecessary expense to the Government. This is caused by the fact that shipping service by vessel to remote Alaskan ports is available only during the summer months and then is limited to three or four sailings per summer. Because of such limited availability, the Assistant Secretary states that members are often without their cars for many months after arrival at their new duty stations and that shipment may be required by circuitous routing costing the Government additional money.

The Assistant Secretary, therefore, asks whether the Joint Travel Regulations may be revised either to authorize such shipment by air freight, including the necessary controls recognizing the high cost nature of such transportation or to authorize the use of air freight for such transportation on a not to exceed the cost of shipment by vessel basis.

Section 2634 of Title 10, U.S. Code (1970), provides:

(a) When a member of an armed force is ordered to make a change of permanent station, one motor vehicle owned by him and for his personal use or the use of his dependents may, unless a motor vehicle owned by him was transported in advance of that change of permanent station under section 406(h) of title 37, be transported, at the expense of the United States, to his new station or such other place as the Secretary concerned may authorize—

(1) on a vessel owned, leased, or chartered by the United States;

(2) by privately owned American shipping services; or

(3) by foreign-flag shipping services if shipping services described in clauses (1) and (2) are not reasonably available.

When the Secretary concerned, or his designee, determines that a replacement for that motor vehicle is necessary for reasons beyond the control of the member and is in the interest of the United States, and he approves the transportation in advance, one additional motor vehicle of the member may be so transported.

Chapter 11 of Volume 1 of the Joint Travel Regulations entitled "Transportation of Privately Owned Motor Vehicles" implements the above statute of which paragraph M11000–2 provides:

* * * As used in this Chapter, the term "shipment" means transportation by vessel, including port handling charges, to, from, and between overseas ports, and between United States ports when incident to changes in home yards and home ports. The term does not include land transportation to or from such ports, except when transportation of privately owned motor vehicle is authorized by 37 U.S. Code 554 and is in accordance with related Service regulations. As customs and other fees and charges required to effect entry of a vehicle into a country are not part of shipment, such costs will be borne by the member.

Since at least 1937 there has been specific statutory authority for the transportation at Government expense of motor vehicles owned by members of the military. Originally, such authority was contained in the annual military appropriation acts (e.g., Military Appropriation Act, 1938, approved July 1, 1937, 50 Stat. 442, 451—authorizing the

transportation "on Army vessels" of "privately owned automobiles of Regular Army personnel upon change of station;" Naval Appropriation Act, 1946, approved May 29, 1945, 59 Stat. 201, 216—authorizing the "transportation on Government owned vessels of privately owned automobiles of Coast Guard personnel upon change of station;" Military Functions Appropriation Act, 1949, approved June 24, 1948, 62 Stat. 647, 656—authorizing the "transportation on Government vessels of privately owned automobiles of Army personnel upon change of station"). That authorization was enacted into substantive law by section 30 of the act of August 2, 1946, 60 Stat. 853, 857, 34 U.S.C. 898 (1952 ed.) and section 617 of the National Military Establishment Appropriation Act, 1950, approved October 29, 1949, 63 Stat. 987, 1020, 10 U.S.C. 825 (1952 ed.) and continued that limitation to transportation to a member's "new station" or a new post of duty, on a "vessel owned by the United States."

The above-cited provisions were repealed by section 53*b* of the act of August 10, 1956, ch. 1041, 70A Stat. 644, and were reenacted by that act as 10 U.S.C. 4748, 6157 and 9748 for the Army, Navy and Air Force, respectively, and 14 U.S.C. 471a, with respect to the Coast Guard. In this connection, section 49(a) of the same act provides that in enacting sections 1–48 of the act, "it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act."

At approximately the same time that Title 10, U.S. Code revisions were being considered, section 901 of the Merchant Marine Act of 1936, 49 Stat. 2015, as amended, 46 U.S.C. 1241, was further amended by the act of May 28, 1956, ch. 325, 70 Stat. 187, Public Law 538, by adding at the end thereof a new subsection reading as follows:

"(c) That notwithstanding any other provision of law, privately owned American shipping services may be utilized for the transportation of motor vehicles owned by Government personnel whenever transportation of such vehicles at Government expense is otherwise authorized by law."

The legislative history of S. 2286, which became Public Law 538, indicates that the term "privately owned American shipping services" as used therein was discussed solely in terms of ocean going vessels.

In S. Report No. 1163, 84th Cong., 1st Sess. 1, which accompanied S. 2286, it was stated that the bill would authorize the transportation of motor vehicles of members overseas at Government expense on commercial vessels as well as on Government vessels and in discussions on the floor of the House of Representatives during consideration of S. 2286, Congressman Bonner stated:

* * * The simple purpose of this bill would be to permit such shipments to be made on privately owned American-flag vessels.

Congressional Record, February 20, 1956, page 2527.

In B-95832, July 11, 1955, in a letter to the Honorable Warren G. Magnuson, Chairman, Committee on Interstate and Foreign Commerce, United States Senate, in which this Office furnished comments on S. 2286, this Office stated in part:

> The proposed legislation would authorize the ocean transportation, at Government expense, of motor vehicles owned by personnel of the Armed Forces and by civilian employees of the Department of Defense, on other than temporary duty orders, via (1) American commercial vessels at reasonable rates and conditions, or (2) Government-owned vessels on a space-available basis.
>
> This legislation would alter the present conditions governing the ocean transportation of such vehicles in two respects:
>
> 1. Authorize the overseas shipment of vehicles owned by military personnel on commercial vessels, whereas such shipments are now restricted to Government-owned vessels * * *
>
> * * * * * * *
>
> * * * it appears that the cost of shipping vehicles by commercial vessels is somewhat more than the recorded costs of MSTS. However, as noted previously, the shipment of vehicles on commercial vessels should enable more efficient utilization of Government-owned vessels and of cargo space therein, with resulting economies in MSTS operations. * * *

In B-133872, dated November 15, 1957, this Office stated in regard to Public Law 538:

> * * * Its effect is to authorize, in addition to Government-owned vessels, the use of American commercial vessels for overseas shipment of privately owned vehicles of military personnel * * *.

Further, in 39 Comp. Gen. 713 (1960), we stated:

> * * * the applicable provisions of the statutes and regulations provide for the transoceanic shipment of automobiles owned by Navy members ordered to duty overseas, when shipment is authorized, on Government-owned vessels or on commercial American vessels * * * The statutes [10 U.S.C. 6157 and the act of May 28, 1956, *supra*] and regulations appear to contemplate that the authorized shipments of automobiles to overseas areas for Navy members will be * * * at no expense to the member for ocean transportation. * * *

Section 111(b) of the act of September 7, 1962, Public Law 87-651, 76 Stat. 506, 511, added a new section 2634 to Title 10 of the Code, to repeal and combine sections 4748, 6157 and 9748 of that title and section 471a of Title 14 of the Code and reflect the act of May 28, 1956, *supra*. The legislative history of Public Law 87-651 reflects that its purpose was not to make any substantive changes in existing law, but rather to update Title 10 by codifying certain military laws enacted while the bill which became the act of August 10, 1956, *supra*, was under consideration by Congress and to transfer to Title 10 provisions which were then in other parts of the Code.

Based on the foregoing, it is our view that the only mode of transportation of motor vehicles authorized for military personnel by the various statutes and Code provisions cited is ocean transportation and that the phrase "privately owned American shipping services" as used in 10 U.S.C. 2634 does not include privately owned air carriers. We find no authority for the use of air freight to accomplish such trans-

portation. Accordingly, the Joint Travel Regulations may not be revised to authorize the use of air freight for transportation of privately owned vehicles of military personnel.

[B-180010]

Compensation—Removals, Suspensions, etc.—Back Pay—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. Code 5596 (1970), and Assistant 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 C.F.R., part 550, subpart H, provided it is established that, but for the unfair labor practice, the harm to the employee would not have occurred.

Interest—Back Pay—Statutory Authority Required

Assistant Secretary of Labor for Labor-Management Relations may not order agency to pay interest on backpay awards in absence of specific statutory authority.

Officers and Employees—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 the Assistant 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 an agency to make an appointment under the Back Pay Act.

General Accounting Office—Decisions—Requests—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 implementation of a determination by the Assistant Secretary of Labor for Labor-Management Relations involving expenditure of funds pending Comptroller General decision.

In the matter of unfair labor practice make-whole remedies, March 19, 1975:

This matter involves a request for an advance decision as to whether certain Federal employee make-whole remedies under the Back Pay Act of 1966, 5 U.S. Code 5596 (1970), and other relevant statutes are available to the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR), for use under his authority to remedy improper personnel actions caused by unfair labor practices (ULP).

The A/SLMR is authorized by Executive Order 11491, as amended, 3 C.F.R. 254 (1974), to decide ULP complaints and upon finding that a ULP has occurred is authorized to require agencies or labor

organizations to take remedial action. In this connection, sections 6(a)(4) and 6(b) provide:

> SEC. 6. *Assistant Secretary of Labor for Labor-Management Relations.*
> (a) The Assistant Secretary shall—
>
> * * * * * * *
>
> (4) decide unfair labor practice complaints and alleged violations of the standards of conduct for labor organizations; * * *
>
> * * * * * * *
>
> (b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

The unfair labor practices that may result in erroneous personnel actions to employees and thus require remedial measures are set forth in sections 19(a)(1), 19(a)(2), and 19(a)(4) of the Order and are as follows:

> SEC. 19. *Unfair labor practices.* (a) Agency management shall not—
> (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order:
> (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;
>
> * * * * * * *
>
> (4) discipline or otherwise discriminate against an employee because he has filed a complaint or given testimony under this Order;

Specifically, the A/SLMR has requested this Office to decide whether he has authority to employ make-whole measures under the Back Pay Act of 1966, 5 U.S.C. 5596, *supra*, or any other relevant statute when he finds violations of the Order involving the discriminatory failure to promote, to hire and/or to pay overtime. In addition the A/SLMR requests whether he has authority to order the payment of interest along with any backpay award.

The Back Pay Act of 1966, 5 U.S.C. 5596, *supra*, provides as follows:

> *§ 5596. Back pay due to unjustified personnel action*
> (a) For the purpose of this section, "agency" means—
> (1) an Executive agency;
> (2) the Administrative Office of the United States Courts;
> (3) the Library of Congress;
> (4) the Government Printing Office; and
> (5) the government of the District of Columbia.
> (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.

(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. [Italic supplied.]

The above-quoted statute requires that a finding be made by an appropriate authority that an employee has undergone an unjustified or unwarranted personnel action. Appropriate authority is defined in regulations implementing the Back Pay Statute contained in 5 C.F.R., part 550, subpart H. Section 550.803(c) reads as follows:

(c) The appropriate authority referred to in section 5596 of title 5, United States Code, and this subpart is (1) the agency or the office or official in an agency authorized under applicable law or regulation to correct, or to direct the correction of, the unjustified or unwarranted personnel action, or (2) a court having jurisdiction to make a determination that a personnel action is unjustified or unwarranted.

Thus, an appropriate authority may be an agency or an official authorized under applicable law or regulation to correct or direct the correction of an unjustified or unwarranted personnel action. We believe that under the provisions of section 6(b) of the Order, the A/SLMR satisfies the above-described criteria of an appropriate authority. In a number of recent decisions we have, in effect, held that a labor relations arbitrator is an appropriate authority within the meaning of the Back Pay Act and its implementing regulations. 53 Comp. Gen. 1054 (1974); 54 *id.* 435 (1974); 54 *id.* 538 (1974). Consequently, we now hold that the Assistant Secretary of Labor for Labor-Management Relations is also an appropriate authority under provisions of the Back Pay Statute and implementing regulations when exercising his authority under section 6(b) of the Order to direct an agency head to correct an unjustified or unwarranted personnel action caused by agency discrimination against an employee because of his union activity.

Therefore, the A/SLMR may order an agency head to take remedial measures available under the Back Pay Statute and other make-whole statutes (such as 5 U.S.C. 8909 (1970) which deals with reinstatement of health insurance and 5 U.S.C. 8706(f) (Supp. III, 1975) which similarly deals with reinstatement of life insurance) as set forth in implementing regulations, Civil Service Commission instructions and decisions from this Office. Such remedial measures include among other things backpay for retroactive promotions and backpay for periods of overtime of which the employee has been deprived. In this connection we point out that before any monetary payment may be made under the provisions of 5 U.S.C. 5596, there must be a determination not only that an employee has undergone an unjustified

or unwarranted personnel action, but that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable Civil Service regulations. Although every personnel action which directly affects an employee and which has been found to be an unfair labor practice may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless the A/SLMR can also establish that *but for* the wrongful action, the withdrawal of pay, allowances, and differentials would not have occurred. The following examples may be illustrative.

1. The A/SLMR finds that an employee was not included on a list of eligibles for promotion because he was known to be active in union affairs. Although the A/SLMR may find this to be an unfair labor practice and thus an unjustified or unwarranted personnel action, he may *not* order his retroactive promotion with accompanying backpay since it cannot be found that had he been included on the list of eligibles, he would definitely have received the promotion. *See* 54 Comp. Gen. 435 (1974); B–164815, August 22, 1968.

2. By the terms of a collective bargaining agreement, the agency agreed to consult with the union before selecting individual employees for overtime assignments. The agency failed to comply with the agreement to consult and instead selected the most senior members of a crew for the assignment. A junior member of the crew complains that an unfair labor practice has been committed because of the failure to consult and this is sustained by the A/SLMR. Nevertheless, the junior employee may not be awarded retroactive overtime pay since it cannot be shown that had the agency complied with the consultation requirement, he would have been selected for the assignment.

As a general rule, failure-to-consult actions, in the absence of a requirement that the agency carry out the advice received as a result of the consultation, are not likely to result in the necessary "but for" relationship between the wrongful act and the harm to the individual employee for which the Back Pay Act is the appropriate remedy. However, the Back Pay Act may be appropriately utilized for the class of unfair labor practices which involve discrimination in promotion, overtime pay, and other benefits because of the employee's participation or failure to participate in union activities.

Regarding agency discrimination in hiring we point out that the Back Pay Act, 5 U.S.C. 5596, *supra*, is apposite only to Federal employees and does not provide a remedy for unsuccessful applicants for Federal employment. Also, the authority to appoint is in the administrative agencies under regulations prescribed by the Civil Service Commission. In view of this and since there is nothing in any legis-

lation of which we are aware which authorizes the A/SLMR to make appointments to civil service positions, it is our opinion that he may not direct an applicant's appointment even though he is authorized to take affirmative action in cases involving discrimination in hiring as a result of an unfair labor practice.

With regard to the payment of interest on backpay awards, it is a general rule of law that in the absence of a contract or a statute evincing a contrary intention, interest does not run upon claims against the Government. *Seaboard Air Line Railway* v. *United States*, 261 U.S. 299, 304 (1923); *Smyth* v. *United States*, 302 U.S. 329, 353 (1937); 45 Comp. Gen. 169 (1965). Neither the Back Pay Act nor any other applicable statute specifically provides for the payment of interest on retroactive awards of backpay resulting from an unjustified or unwarranted personnel action. Therefore, interest may not be awarded by the A/SLMR on any backpay, allowances and differentials for which he has directed payment to an employee.

We also point out that although the A/SLMR may order an agency head to take remedial action with respect to an employee, including the payment of backpay, allowances and differentials and other substantial employment benefits, his order does not preclude the agency head or the authorized certifying officer of the agency from exercising their statutory rights under provisions of 31 U.S.C. 74 and 31 U.S.C. 82d in requesting an advance decision from this Office as to the propriety of such payments. Accordingly, an agency may properly delay the implementation of an order issued by the A/SLMR involving the expenditure of funds until it has obtained an advance decision from this Office.

[B-181067]

Transportation—Household Effects—Military Personnel—"Do It Yourself" Movement—Cash Advances

Volume 1, Joint Travel Regulations, may not be amended to allow advance payment for rental vehicles for transportation of personal property, and related expenses, as the advance payment provisions of section 303(a) of the Career Compensation Act of 1949, now appearing in 37 U.S.C. 404(b) (1970), limit such payments to the 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 the issuance of regulations which would authorize such advance payments.

In the matter of advance payments to military members for "Do It Yourself" personal property moving, March 19, 1975:

This action is in response to letter dated March 28, 1974, from the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs), requesting an advance decision as to whether Volume 1 of

the Joint Travel Regulations (1 JTR) may be amended to permit advance payment to members to cover the cost of operating a rented vehicle and related expenses, in connection with the movement of personal property. The request was forwarded here by letter dated April 2, 1974, from the Per Diem, Travel and Transportation Allowance Committee and has been assigned PDTATAC Control No. 74–13.

The Acting Assistant Secretary of the Air Force states that the current provisions of 1 JTR, paragraph M8500, provide that a military member who personally arranges for transportation of his personal property by means of a rental truck must procure the truck and packing aids himself and subsequently submit a claim for reimbursement.

It is further stated that since the use of a rental vehicle to move household goods is usually less costly to the Government than a Government procured shipment by a commercial household goods carrier, significant savings to the Government would be realized through widespread use of rental vehicles by military members. Consequently, the military services have undertaken a study of alternate methods of utilizing rental trucks for the movement of personal property of military members on a Department of Defense-wide basis.

As described by the Acting Assistant Secretary, the use of a rental truck to move household goods would be offered to military members on a strictly voluntary basis as a substitute for a move by commercial van line. The rental truck and packing aids would be procured by the military services under contractual arrangements with rental companies. In order to make such a method attractive, it would be necessary to provide service members with funds to defray the costs of fuel, oil, tolls, and special permits required to operate the vehicle.

It is stated that it has been concluded that the most appropriate method of providing such operating funds is for the military services to provide such funds to military members who move their household goods by rental truck. Such funds would be provided to military members in advance of the actual movement of the household goods and would be based on the operating costs of the type of vehicle utilized for the number of miles estimated for the move.

The Acting Assistant Secretary further states that question has arisen as to whether such an operating allowance may be provided by the Government within the current provisions of 37 U.S. Code § 406 (1970), in view of 39 Comp. Gen. 659 (1960) which related to advance payments of trailer allowances and which held that the authority for advance payments of travel and transportation allowances, which currently appears in § 406, is limited to the particular allowances specifically enumerated therein. Consequently, a decision is requested as

to whether the statute as written may be interpreted to permit amendment of 1 JTR to authorize cash advances to members to cover the cost of operating rental vehicles and for related expenses.

Section 404(a), Title 37, U.S. Code (1970), provides in pertinent part that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed upon a change of permanent station, or otherwise, or when away from his designated post of duty, or upon separation from the service or release from active duty. Section 404(b) states that "The Secretaries concerned may prescribe—(1) the conditions under which travel and transportation allowances are authorized, including advance payments thereof; and (2) the allowances for the kinds of travel, but not more than the amounts authorized in this section."

Section 406(a), Title 37, U.S. Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation in kind for his dependents, to reimbursement therefor, or to a monetary allowance in place of that transportation in kind at a rate to be prescribed, but not more than the rate authorized under § 404(a) of that title. In connection with a permanent or temporary change of station, § 406(b) provides that a member is entitled to transportation (including packing, drayage, crating, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned.

Paragraph M1100–3, 1 JTR, currently provides that advance payment for movement of household goods is not authorized.

Section 529, Title 31, U.S. Code (1970), provides in part:

> No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

In 39 Comp. Gen. 659, *supra*, it was held that the authority for advance payment of travel and transportation allowances for members of the uniformed services in § 303(a) of the Career Compensation Act of 1949, 37 U.S.C. § 253 (1958), was limited to the particular allowances specifically enumerated. Therefore, it was held that in the absence of specific authority for advance payments of trailer allowances, the advance payment prohibition of § 3648, Revised Statutes, 31 U.S.C. § 529 (1958), precluded the issuance of a regulation which would authorize advance payments of trailer allowances.

Although the current provisions which were derived from § 303 (a) and related provisions of the 1949 act are worded in such a way

that a broader application of the advance payment authorization might seem to be possible, we have reviewed the original wording and the legislative history thereof and it is clear that advance payments as authorized therein were intended to cover personal travel expenses only. Therefore, since the pertinent provisions of 37 U.S.C. §§ 404 and 406 are codifications of the provisions of the Career Compensation Act of 1949 and as such were not intended to expand any rights given by that act we find that the conclusion in 39 Comp. Gen. 659 with regard to the limited nature of the advance payment authority was in keeping with the law. Thus, the rationale of that decision also is for application in the circumstances described by the Acting Assistant Secretary of the Air Force, since the authority for advance payments in § 303(a) of the Career Compensation Act of 1949, which now appears in 37 U.S.C. § 404(b) is limited to advances for a member's personal travel and does not extend to additional travel and transportation allowances provided in § 303 of the act.

Accordingly, in the absence of a specific statutory provision, there is no authority for the proposed amendment of 1 JTR to authorize advance payments to cover the cost of operating a rental vehicle and related expenses for transportation of personal property; consequently, the proposed amendment would be violative of the prohibition of advance payments contained in 31 U.S.C. § 529.

[B–183039]

Contracts—Protests—Abeyance Pending Court Action—Temporary Restraining Order

Even though many issues involved in subcontract protest are before court of competent jurisdiction, General Accounting Office (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.

Contracts—Subcontracts—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.

Contracts—Protests—Subcontractor Protests

As matter of policy, General Accounting Office (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.

Contracts—Cost-Type—Subcontracts—Social Security—Medicare Part "B" Program

General Accounting Office 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 request for proposals, 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.

General Accounting Office—Jurisdiction—Subcontracts

General Accounting Office (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.

In the matter of Optimum Systems, Inc., March 19, 1975:

By telegram dated January 14, 1975, Optimum Systems Incorporated (OSI) protested the proposed award of a subcontract to Electronic Data Systems Federal Incorporated (EDSF) pursuant to a request for proposals (RFP) issued by the California Physicians' Service d/b/a California Blue Shield (CBS) under its cost-reimbursement type contract with the Bureau of Health Insurance, Social Security Administration (SSA), Department of Health, Education, and Welfare (HEW), Baltimore, Maryland.

SSA's contract with CBS was entered into pursuant to section 1842 of the Social Security Amendments of 1965, Public Law 89-97, July 30, 1965, 79 Stat. 286, 42 U.S. Code 1395u (1970), which provides, *inter alia*, that the Secretary of HEW is authorized to enter into contracts with health insurance carriers to perform, or secure the performance of, various administrative functions in connection with the voluntary supplementary medical insurance program established by Public Law 89-97. This program is commonly referred to as the Medicare Part "B" program. Under its SSA contract, CBS is to administer

this program in all but nine counties of California and its proposed subcontract award to EDSF is for automatic data processing (ADP) of Medicare Part "B" claims. EDSF is the incumbent subcontractor.

CBS's proposed award to EDSF was submitted to SSA for its approval in accordance with Article XVII of the contract, which provides, *inter alia*, that CBS "shall not enter into any subcontract * * * unless such subcontract received the prior written approval * * *" of SSA. Although SSA has tentatively approved the selection of EDSF, OSI's protest was filed prior to actual award. Consequently, SSA withheld actual approval of the selection pending our disposition of the protest.

However, on or about March 4, 1975, SSA decided to approve the proposed award to EDSF. Upon learning of the impending award, OSI instituted Civil Action No. 75–C–320 in the United States District Court for the District of Columbia (*Optimum Systems, Inc.* v. *Caspar W. Weinberger*). OSI asked for the following relief:

(a) That a temporary restraining order and a preliminary injunction issue enjoining Defendant, and his representatives and subordinates, from permitting the award or the implementation of the data processing contract for the Medicare program in California to go forward until the Comptroller General has had the opportunity to render a decision on the merits of Plaintiff's protest;

(b) That the Defendant and his representatives and subordinates be permanently enjoined from awarding a contract for data processing services to EDSF based on the Request for Proposals described herein;

(c) That this Court declare and adjudge that the Defendant and his representatives and subordinates are required by law to reissue a Request for Proposals for the data processing services in question and to reevaluate, in accordance with law, proposals submitted pursuant to the new Request for Proposals; and

(d) That Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances.

On March 11, 1975, the court issued a temporary restraining order preventing SSA from directly or indirectly permitting the award of a subcontract to EDSF until "* * * the determination of Plaintiff's [OSI] application for a preliminary injunction, or until a determination by the Comptroller General of the United States of Plaintiff's protest * * *, whichever date is sooner." The hearing on the motion for a preliminary injunction is scheduled for March 21, 1975.

It is the practice of our Office not to render a decision on the merits of a protest where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. 4 CFR § 20.11 (1974); *Matter of Nartron Corp., et al.*, 53 Comp. Gen. 730 (1974). However, an exception to this general policy exists where the court expresses an interest in receiving our decision. 52 Comp. Gen. 706 (1973); *Matter of Descomp, Inc.*, 53 Comp. Gen. 522 (1974); *Matter of Data Test Corporation*, 54 Comp. Gen. 715 (1975). Consequently, even though from our examination of OSI's complaint and supporting

papers it appears that many of the issues involved in the protest are now before the United States District Court, it is clear that the temporary restraining order issued contemplates a decision by our Office in this matter.

Since OSI's protest concerns the award of a subcontract by a prime contractor of the Government, a question is raised as to whether our Office should, as a matter of policy, consider this protest. The court, as well as SSA and OSI (who was given the opportunity to comment on this question), was made fully cognizant, prior to the issuance of the temporary restraining order, that this question was the initial issue which our Office had to resolve before this case could be developed under our Interim Bid Protest Procedures and Standards (4 CFR § 20.1 *et seq.* (1974)), and a decision on the merits issued.

OSI protests that the RFP specifications are restrictive, inconsistent, conflicting, vague, and based upon a system previously proposed by EDSF. OSI also contends that there was bias in favor of EDSF in the negotiations conducted prior to selection, since although generalized data concerning the operation of the existing EDSF ADP facilities management system was made available to OSI by CBS, the specific detail was not available to OSI, even though EDSF, as the incumbent contractor, had access to this information on a daily basis. Also, OSI contends that CBS failed to clarify inconsistencies in the RFP when asked by OSI, yet made various clarifications after the stated cut-off date for questions and answers. This bias was also allegedly exhibited by CBS's failure to discuss with OSI the differences between OSI's and EDSF's approaches, despite the fact that OSI's 1700 page proposal was significantly different than EDSF's and the subject of this procurement was a complex technical ADP system. Furthermore, OSI claims that CBS's lack of technical expertise, in particular with regard to the implementation of a new subsystem in EDSF's ADP system, caused CBS to favor the incumbent's system. OSI further alleges that CBS did not conduct a proper cost analysis, as is required by the contract with SSA, since CBS accepted EDSF's estimated cost of the proposed ADP system to the Government at face value. OSI concludes that, as a consequence of these alleged defective procurement practices, CBS's selection of EDSF may not have been based on an objective evaluation of the proposals of OSI and EDSF and that an independent review should be conducted. OSI also notes the likelihood that this subcontract procurement process was a "sham," in view of the fact that EDSF processes about 90 percent of all Medicare Part "B" claims handled under ADP subcontracts awarded by health insurance carriers pursuant to their prime contracts with SSA.

As indicated above, a question is raised as to whether our Office should, as a matter of policy, consider this subcontract protest. In so doing, we will take this opportunity to clarify and redefine our policy concerning the circumstances under which we will consider such protests.

Except in the case where a prime contractor is a purchasing agent of the Government, the prime contractor is normally an independent contractor, whose method of subcontracting is subject only to the conditions contained in its contract with the Government. In view of this status, our Office has consistently recognized that the contracting practices and procedures employed by prime contractors in the award of subcontracts are generally not subject to the statutory and regulatory requirements governing direct procurements of the Federal Government. See B–118129, March 18, 1954; 37 Comp. Gen. 315 (1957); 41 *id.* 424 (1961); 49 *id.* 668 (1970).

However, many Government contracts, such as SSA's contract with CBS, contain a clause requiring Government approval prior to the prime contractor's award of subcontracts of a certain magnitude. *See* Armed Services Procurement Regulation §§ 7–104.23, 7–203.8, 23–201 (1974 ed.); Federal Procurement Regulations (FPR) § 1–7.202–8 (1964 ed. amend. 123). We have often expressed the view that a contracting agency of the Federal Government should not approve a subcontract award, where it has such a contractual right, if the award would be prejudicial to the interests of the Government, particularly in the case where the prime contract is of a cost-reimbursement type and the cost of the subcontract is ultimately borne by the Government. *See* 37 Comp. Gen., *supra;* 41 *id.*, *supra;* 49 *id.*, *supra.* We also have expressed the view that the question of whether subcontract approval would be prejudicial to the interests of the Government is one which must be resolved by responsible Government contracting officials after a *thorough* consideration of the particular facts and circumstances of each procurement. *See* 46 Comp. Gen. 142 (1966); 49 *id.*, *supra;* 51 *id.* 678 (1972). We also have found that the frame of reference guiding such determinations as to the reasonableness of the prime contractor's procurement process is generally the "Federal norm" embodied in the procurement statutes and implementing regulations, although we recognize the propriety and necessity of variations from all of the details of the "Federal norm" in the procurement practices of prime contractors. *See* B–168522, June 2, 1970; 49 Comp. Gen., *supra;* B–172496, July 6, 1971; 51 Comp. Gen., *supra.*

Prior to our decision in 51 Comp. Gen. 803 (1972), our Office applied the foregoing principles to insure that subcontract awards were not prejudicial to the interests of the Government, and considered protests

of the awards of subcontracts as a matter of course where the Government had approved the subcontract awards and the prime contracts were of a cost-reimbursement type. *See* e.g., 37 Comp. Gen. *supra;* B–138830, June 19, 1959; B–153884, August 3, 1964; B–172496, *supra.* However, we questioned the Government's approval only where illegal or it was demonstrated that the proposed award was definitely against the interests of the Government. *See* B–168550, February 16, 1970; 37 Comp. Gen., *supra;* 46 *id.*, *supra;* 49 *id.*, *supra.* We also, on occasion, entertained subcontract protests where the usual lines of distinction between the prime and subcontract tiers were considered relatively unimportant and/or where the Government was directly involved in the selection of the subcontractor. *See* 47 Comp Gen. 223 (1967); 49 *id.*, *supra.* Finally, we considered subcontract protests where the prime contractor was found to be acting as a purchasing agent of an agency of the Federal Government. *See* B–152946, May 14, 1964.

As indicated above, our decision in 51 Comp. Gen. 803 had the effect of limiting our consideration of these protests. In that case, we decided, as a matter of policy, not to entertain protests of the awards of subcontracts where the following three circumstances coexisted: the prime contractor was not acting as a purchasing agent for the Government, award had already been made, and neither fraud nor bad faith on the part of the contracting officer in approving the award was alleged. We changed the past policy of considering as a matter of course all subcontract protests, since it was found that the possibility of finding adequate justification to support cancellation or termination of a protested subcontract was so remote where these three circumstances coexisted that consideration of such protests under our bid protest procedures would be unwarranted. We went on to indicate that we would give appropriate attention in our audit functions involving the prime contract in such cases to any evidence indicating that the cost to the Government was unduly increased because of improper procurement actions by the prime contractor.

To clarify and redefine our policy regarding subcontract protests, we will not consider protests against the awards of subcontracts by prime contractors of the Government, unless one of the appropriate circumstances set out below exists. This includes those protests involving prime contracts of a cost-reimbursement type where the subcontracts could well have a significant effect on the contract costs to the Government and might be prejudicial to the Government's interests. Furthermore, we no longer believe any valid reason exists for making any distinction based on whether award has been made in determining whether or not we will consider a particular subcontract protest. Our decision in 51 Comp. Gen. 803 is modified in this regard. We believe the

possibility of finding adequate justification to recommend remedial action in the case of a protested subcontract is ordinarily remote. Moreover, many matters surrounding the review of awards of subcontracts are matters of contract administration, which we believe are primarily for resolution by the contractor or contracting agency and which are, therefore, inappropriate for our Office to consider.

We will continue to issue decisions on awards made by contractors acting as purchasing agents of the Government, since the legal effect of the transactions made by such contractors on behalf of the Government is to directly bind the Federal Government. *See* 21 Comp. Gen. 682 (1942).

We will also consider protests of the awards of subcontracts where it has been shown that the Federal Government has so directly or actively participated in the selection of the subcontractor that the net effect of the Government participation was to cause or control the rejection or selection of a potential subcontractor, or has imposed such conditions on the contractor as to significantly limit the sources to which subcontracts could have been awarded. Examples of decisions in which we found this degree of Government direct or active participation in subcontractor selection or limitation and the type of circumstance which we will continue to consider under our bid protest procedures are as follows:

The Government limited the subcontractor sources and exercised control over every aspect of procurements, such that the prime contractors were "mere conduits." 47 Comp. Gen., *supra.*

The Government required that the prime contractor procure certain ancillary equipment from a particular company. B–162437, August 6, 1968.

The Government "directly participated in the decision" to reject a subcontract proposal and exclude it from competition on resolicitation based on the Government's negative preaward survey performed at the prime contractor's request. 49 Comp. Gen., *supra.*

The agency severely limited the prime contractor's rights of selection of subcontractors and was instrumental in drafting the terms of the subcontract. B–170324, April 19, 1971.

The Government hindered the testing and qualification of a potential subcontractor's product to such an extent that the subcontractor could not receive various awards. B–174521, March 24, 1972.

The Government specifically recommended an award of a subcontract to a particular company. 51 Comp. Gen. 678.

The prime contractor rejected a potential subcontractor since the Government required in the sole-source prime contract that only the

product manufactured by another company could be used. *Matter of California Microwave, Inc.*, 54 Comp. Gen. 231 (1974).

However, where the only Government involvement in the subcontractor selection process is its approval of the subcontract award or proposed award (to be contrasted with the circumstances set out above where direct or active Government participation in or limitation of subcontractor selection existed), we will only review the agency's approval action if fraud or bad faith is shown. *See* 51 Comp. Gen. 803; *Matter of Aircraft Systems Corporation*, B–181676, August 7, 1974; *Matter of Litton Industrial Products, Inc.*, B–181676, November 26, 1974; *Matter of Probe Systems Incorporated*, B–182236, January 2, 1975. However, we still are of the view that the general principles set out above concerning the standards and scope of an agency's review and approval of its prime contractors' subcontractor selection and procedures are still valid and for application by the contracting agencies.

We will also consider, under appropriate circumstances, protests of awards made by prime contractors acting under those cost-type management contracts and such other cases where we find the contractor's award was made "for" an agency of the Federal Government. *See* 4 C.F.R. § 20.1(a) (1974). For example, we have always considered protests of awards made "for" the Atomic Energy Commission (AEC) (now the Energy Resources Development Administration) by prime management contractors who operated and managed AEC facilities. *See* B–152946, *supra;* B–169942, July 27, 1970; B–170202, September 1, 1970; B–172959(2), September 10, 1971; 51 Comp. Gen. 329 (1971); B–179462, November 12, 1973. Also, see 49 Comp. Gen., *supra*, and *Lombard Corporation* v. *Resor*, 321 F. Supp. 687 (D.D.C. 1970), where the Government prime contractor, who managed a Government-owned contractor-operated plant, purchased equipment for the plant.

Also, where appropriate, we will consider questions concerning the awards of subcontracts submitted to our Office by those officials of Federal agencies, who are entitled to advance decisions from our Office. *See* 31 U.S.C. 74 (1970); 36 Comp. Gen. 311 (1956).

Based on the above discussion and on the record before us, we do not believe OSI's protest of CBS's award of the ADP subcontract to EDSF is appropriate for consideration on the merits. In making this determination, we have considered the contentions and arguments made by OSI to our Office and to the United States District Court contained in OSI's memorandum, affidavit and motions for a temporary restraining order and preliminary injunction. In addition, we have reviewed SSA's contract with CBS and SSA's contracting and subcontracting guidelines furnished to CBS.

The record indicates that SSA gave CBS procedural guidance on how to structure the RFP to enhance competition, how to properly and completely set out ADP requirements and evaluation criteria, and how to conduct appropriate negotiations and evaluate the proposals it might receive. Moreover, in addition to SSA's right of approval of the EDSF selection, SSA representatives apparently also reviewed the RFP, attended the offerors' conference and the negotiation sessions with each offeror, and accompanied CBS during on-site visits to the offerors. SSA also evidently asked and answered questions during these contacts with the offerors. It is our view that, on the record, the nature of the SSA involvement in the subcontract procurement process is not sufficient cause for our Office to consider OSI's protest. There is no indication that the CBS selection of EDSF was not independently made or that SSA's involvement in this procurement had the net effect of causing or controlling EDSF's selection.

The CBS contract with SSA has a specific condition requiring that CBS conduct a proper cost analysis, which OSI contends was not done. This requirement is also imposed by FPR § 1–3.807–10 (1964 ed. amend. 124). However, the contention that this contractual and regulatory condition was violated in the award to EDSF should not, in and of itself, form a basis for our consideration of OSI's protest, since we believe that the enforcement of such requirements is the type of matter of contract administration which is appropriate for resolution by the agency concerned and is not proper for resolution by our Office in the absence of evidence indicating bad faith or fraud by the agency concerned.

Also, there is no evidence indicating that SSA's approval of the award to EDSF involved fraud or bad faith. Moreover, CBS is not a purchasing agent of SSA, nor is this ADP procurement "for" SSA.

Although we will not consider the protest on its merits, appropriate attention in our audit functions involving the award of these Medicare Part "B" ADP subcontracts will be given to any evidence indicating that the cost to the Government has been unduly increased because of improper procurement actions by the prime contractor.

[B–181287]

Contracts—Negotiation—Evaluation Factors—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.

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—General Accounting Office Review Discontinued—Exceptions—Fraud

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 General Accounting Office, since practice of reviewing protests involving contracting officer's affirmative determination of responsibility has been discontinued absent showing of fraud in finding.

Contracts—Negotiation—Evaluation Factors—Propriety of Evaluation

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 General Accounting Office 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.

Contractors—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 request for proposals 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.

Contracts—Protests—Timeliness—Solicitation Improprieties

Issues regarding failure to indicate relative weights of evaluated subcriteria in request for proposals (RFP) and failure of RFP to indicate relative weight of cost factor in relation to technical factors are untimely as section 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.

Contracts—Negotiation—Evaluation Factors—Criteria—Contrary to ASPR

Use of evaluation factor, dollars per quality point ratio, not indicated in request for proposals (RFP), treats cost in manner other than offerors were led to believe upon reading section 1C.14 "Evaluation Criteria," and therefore, is in contravention of Armed Services Procurement Regulation 3-501 which requires full disclosure in RFP of method of evaluation.

Contracts—Negotiation—Requests for Proposals—Deficient

Even though deficiencies exist in request for proposals, 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.

In the matter of TGI Construction Corporation; Gallegos Corporation; Venture Builders Corporation, March 20, 1975:

On January 17, 1974, request for proposals (RFP) N62474-74-R-3339 was issued by the Naval Facilities Engineering Command, Western Division. The RFP solicited proposals for the design and construction of 800 family housing units at the Marine Corps Base, Camp Pendleton, California, and 200 family housing units at the Marine Corps Base, Twentynine Palms, California, on a turnkey basis.

In response to the RFP, seven proposals were received, and on April 19, 1974, each offeror was advised of areas of nonconformity of its respective proposal and was offered an opportunity to correct same as well as to provide a best and final offer from both a price and technical standpoint. The areas of nonconformity indicated to each offeror included both areas which failed to meet the requirements of the RFP as well as those areas which exceeded the maximum limitations of the RFP. All offerors responded in a timely manner, indicating that all deficiencies would be remedied.

Upon receipt of all proposals, the technical portions of each were given to the Turnkey Evaluation Board (Board) in accordance with the provisions of the Standard Technical Evaluation Manual for Turnkey Family Housing Projects for quality point scoring. Although the Board was given all seven proposals to score, unknown to it, only two of the offerors, both of which were joint ventures, Kaiser-Aetna-Ecoscience, Inc. (K-A-E), and TGI Construction Corporation, Gallegos Corporation and Venture Builders Corporation (TGI), were eligible for the award. The other five offerors had submitted cost proposals in excess of the statutory cost limitation stated in § 1C.4 of the RFP.

The Board then assigned quality points to each of the seven proposals submitted. K-A-E, while not receiving the highest technical quality point score, outscored TGI. When quality point scores and cost proposals were compared between K-A-E and TGI, the Board "* * * unanimously agreed that the proposal submitted by K-A-E offered the best project from an engineering, architectural and cost/quality ratio viewpoint." Since K-A-E's proposal was within the funds available and within the statutory cost limitation, award was recommended by the Board to K-A-E in the amount of $24,710,000. Award in that amount was made to K-A-E on May 20, 1974.

By telegram of May 20, 1974, TGI protested the making of the award to K-A-E on the basis that it met all of the qualifications regarding design and that it was the "* * * low responsible bidder under the RFP." Through subsequent correspondence from counsel for TGI,

numerous other points of protest have been raised, which will be discussed, *infra.*

Initially, TGI contends that there were significant errors in K–A–E's proposal in the areas of dwelling unit design, site design and engineering. While the individual allegations are too numerous to mention, we must begin with the premise that all areas of K–A–E's proposal that were beyond the limits of the specifications were brought to K–A–E's attention through the review comments. As stated above, all of these deficiencies noted were rectified before submission of K–A–E's best and final offer. Given this background, our review of the individual quality points assigned for all of the areas in question shows that K–A–E was in fact downgraded in those areas where its proposal was less desirable than the other designs submitted. In addition, it is interesting to note that in none of the categories evaluated was K–A–E's proposal considered to be the best. It was, however, consistently thought to be among the better proposals in each area. Based upon the comments made by the evaluators and the respective scores assigned, we find no reason to believe that any significant errors existed in K–A–E's proposal or that any deviations did not result in a proportionate downgrading.

TGI next contends that K–A–E's elaborate proposal presentation resulted in extra quality points being assigned to it. However, no firm evidence has been presented to substantiate this allegation, nor has our Office's independent investigation uncovered such evidence that would lead us to accept the validity of this allegation. The RFP, at § 1C.11, warned offerors that

> Unnecessarily elaborate brochures or other presentations beyond that sufficient to present a complete and effective proposal are not desired and may be construed as an indication of the offeror's lack of cost consciousness. * * *

and none of the evaluation comments mention K–A–E's method of presentation. Accordingly, without further proof, our Office cannot conclude that K–A–E received bonus quality points based on its method of presentation.

Additionally, TGI contends that K–A–E has a reputation for failing to offer a final product that meets the quality of the product initially offered which, in effect, calls into question the responsibility of K–A–E. Our Office, however, has discontinued the practice of reviewing bid protests involving a contracting officer's affirmative determination of responsibility of a prospective contractor. The determination of responsibility is largely within the discretion of the procurement officials who must bear any difficulties experienced by reason of a contractor's nonresponsibility. If the contracting officer finds an offeror responsible, we do not believe the finding should be disturbed

absent fraud. *Matter of Eastern Home Builders and Developers, Inc.*, B–182218, November 29, 1974.

Next, TGI contends that there is no reasonable basis of support for the evaluator's criticisms of its proposal or for the evaluation process by which it was determined that a 12 percent quality point differential existed between its and K–A–E's proposal. Moreover, TGI, citing 52 Comp. Gen. 686 (1973), states that "* * * the mere fact that a quality point differential exists between TGI and K–A–E is no indication that K–A–E's proposal is superior to TGI's especially as regards satisfaction of the Navy's minimum needs. * * *"

Although the individual criticisms are too numerous to mention, the individual evaluator's scoring and review comments, obtained by our field operations division, Los Angeles, and incorporated into the record before us, presents evidence in rebuttal to this contention. Determination of the relative desirability of the respective proposals is properly a function of the procuring activity and our Office has not attempted to make an independent reevaluation in this respect. However, we have made a thorough review of the many volumes detailing the evaluations, findings, and scoring of these highly complex and detailed proposals. In essence, the individual scores given TGI's proposal reflect the evaluator's belief that its proposal ranged from most desirable in one facet to least desirable in another, with the remaining areas of evaluation falling into the middle range of desirability. What this indicates is that the Navy, in making its award decision, did not indicate that TGI's proposal was "undesirable," but only that other proposals were viewed as "more desirable" for the purpose of the instant procurement. From our review, we are satisfied that the evaluations were not arbitrary or capricious, as contended, but were comprehensive and objective and provided a reasonable basis for selecting the most advantageous proposal. *See* 51 Comp. Gen. 621 (1972); B–178295, October 18, 1973.

As concerns the evaluation process utilized, we will not substitute our judgment for that of the contracting officials' by making an independent determination as to what areas should be considered during evaluation and thereby influence which offeror should be rated first and receive award. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness or favoritism or upon a clear showing of a violation of the procurement statutes and regulations. *See* B–164552, February 24, 1969. The record before us shows that TGI's proposal was evaluated in accordance with the criteria set forth in the evaluation plan. All of the other firms were evaluated on these same criteria. Under this procedure, K–A–E was duly selected for award. We do not find that the award made was

contrary to existing law or regulation. *Matter of AEL Service Corporation*, 53 Comp. Gen. 800 (1974).

TGI's citation to 52 Comp. Gen., *supra*, is correct in establishing the position that the fact that there is a point spread between two proposals does not automatically establish that the higher rated proposal is materially superior. Reading further, however, that decision states:

> * * * We believe that technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. * * * [Citations omitted.]

In the instant situation, the record does not establish that the Navy relied solely on the quality point scores as the basis for award. To the contrary, the Navy compared the quality point scores of each offeror with the prices offered in each proposal. Only after it had been determined which offer represented the least cost per quality point was an award recommended. Therefore, a choice of this nature does not appear to have been an abuse of discretion on the part of the procuring activity nor can we say that this procurement was in contravention of our holding in 52 Comp. Gen., *supra*.

Further, TGI contends that this procurement was improper due to the alleged participation of K–A–E in the formulation of the instant RFP and discussions between K–A–E and the Navy subsequent to the time of the Navy's intermediary letters to all bidders of April 19, 1974. The Navy has responded to this point by stating that K–A–E in no manner participated in any aspect of the formulation of the RFP, and any contacts between K–A–E and the Navy were simply "normal contacts" between the parties which occurred under an ongoing contract.

It should be noted that neither evaluators nor members of the Selection Board were aware of the identity of the offerors until the selection process was completed. Moreover, TGI has not submitted any concrete evidence which indicates any impropriety on the Navy's part, or any specific instance of improper exchange of information. Finally, we can find no regulation which would prohibit a contractor that is presently performing under an award at a particular installation from competing for an additional award at that same location. Accordingly, we find this contention to be without merit. See *Matter of BDM Services Company*, B–180245, May 9, 1974.

TGI also contends that K–A–E received bonus quality points for its proposal in contravention of amendment 0002, issued January 4, 1974, in certain specific areas. The Navy, in turn, has responded that no bonus points were awarded for exceeding the basic requirements of

the RFP, that any violations of the RFP specifications (over or under the stated requirements) were brought to the attention of K–A–E during negotiations and subsequently remedied, and finally, the RFP, while offering no bonus quality points for exceeding the basic floor areas, does not prohibit an offeror from exceeding basic square footages up to the maximum square footages stated.

Our review of the administrative record convinces our Office that no bonus quality points were, in fact, awarded for exceeding the RFP requirements and that K–A–E did rectify any deficiencies (including extra floor space) that were brought to its attention during negotiations. Moreover, our interpretation of the specifications leads us to believe that an offeror may submit a proposal which exceeds certain "Basic Net" floor areas, as long as the requirements of § 2A.2.D are complied with. The RFP states a *range* of acceptable square footage, warning only that:

> * * * Designs which provide less than the minimum or greater than the maximum net square feet indicated are not acceptable.

Accordingly, we find no violation of the terms of amendment 0002.

Finally, TGI contends that the RFP is defective in two significant features. First, TGI contends that the Navy has failed to indicate anywhere within the RFP the relative importance of the individual design evaluation factors vis-a-vis each other and overall price, and that the RFP failed to disclose the relative weight of the cost factor. TGI, relying primarily upon *Matter of AEL Service Corporation*, *supra*, states that the RFP does not provide proposers with any guidance as to the manner in which the actual evaluation would be made by Navy personnel, fails to indicate the relative weights of the factors listed among the principal criteria, and fails to specify relative weights of the subcriteria.

However, under § 20.2(a) of our Interim Bid Protest Procedures and Standards, published at 4 Code of Federal Regulations, part 20, protests against alleged improprieties contained in a solicitation, apparent upon the face of the RFP, must be filed prior to the closing date for receipt of proposals. In the instant protest, TGI raises the above allegations against the propriety of certain portions of the RFP, but these allegations have first been raised after the closing date for receipt of proposals. Accordingly, these allegations are untimely and will not be considered on their merits.

Secondly, and more importantly, TGI contends that the RFP failed to disclose the fact that a dollars per quality point ($/q.p.) ratio would be established to eventually determine which proposal was, in actuality, most advantageous to the Government.

In the instant solicitation, § 1C.14 "*Evaluation Criteria*" stated only that:

a. Evaluation will be made on the basis of site design, site engineering, dwelling unit design, and dwelling unit engineering and specifications, and cost. * * *

And, § C1.7, "*Basis of Award*," stated that:

The Navy reserves the right * * * to award a contract to other than the proposer submitting the lowest price offer; and, to award a contract to the proposer submitting the proposals determined by the Navy to be the most advantageous to the Government. * * *

Nowhere in the RFP is the use of the $/q.p. ratio indicated.

Concerning the use of the $/q.p. ratio, the Navy advises:

* * * A cost quality ratio, easily determined by dividing the dollars proposed into the quality points assigned, is a simple and non-prejudicial method of determining which offeror within the statutory cost limitations, was offering the best combination of quality of housing and price. * * *

While we are not disturbed by the fact that the $/q.p. ratio was not specifically disclosed to the offerors, we do believe that offerors are entitled to be apprised in the RFP as to the manner in which cost will be compared to the other evaluation criteria in determining the eventual awardee. To this extent, § 1C.14 "Evaluation Criteria" only disclosed the fact that there were five principal evaluation factors without giving any indication of their relative order of importance. This, we believe, would lead offerors to the conclusion that each evaluation factor was relatively equal in value, or worth approximately 20 percent of the total evaluation points. Although attachment "G" revealed that the four technical criteria were in fact weighted in relation to one another, there was no indication to dispel the belief that the technical factors would be given four times the weight of the cost factor. The effect of the $/q.p. ratio is to make a direct comparison of cost to technical excellence which does not give cost any discernible evaluation weight. Therefore, we find that § 1C.14 was misleading to the offerors and that correct information either disclosing the specific $/q.p. ratio or informing offerors of the general manner in which cost would be evaluated should have been included in the RFP. A disclosure of this information was required by ASPR § 3-501 *et seq.*, and its absence was a deficiency relating to proposal evaluation and the results following therefrom.

Given this deficiency, we must now determine whether corrective action is warranted. There are no statements in the procurement file establishing K-A-E's proposal as being technically superior to TGI's. While there are statements in the record to the effect that TGI was not a strong contender for award on the basis of quality design, there are counterbalancing statements that TGI's proposal was stronger than K-A-E's in certain areas of engineering. The only other comparative statements are those which establish K-A-E as submitting a stronger overall proposal. We may not speculate as to the technical superiority

of either proposal. Since there was no actual determination of technical superiority in the record before us, we cannot unequivocally state whether the award to K–A–E was improper.

More importantly, we must recognize the nature of this procurement and its state of performance. The award being for design and construction of housing and the houses being partially completed, it would not be economically feasible to recommend termination for convenience of the Government at this time. We are, however, bringing the above-mentioned procurement deficiency to the attention of the Secretary of the Navy.

[B–182801]

Contracts—Protests—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, General Accounting Office 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.

Contracts—Negotiation—Evaluation Factors—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.

Contracts—Negotiation—Offers and Proposals—Best and Final—Additional Round

Protest that no award can be made under request for proposals (issued by NASA's Langley Research Center for support services on a cost-plus-award-fee basis) because all proposals expired 120 days after the 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.

Contracts—Negotiation—Evaluation Factors—Administrative Determination

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.

Contracts—Negotiation—Evaluation Factors—Point Rating—Propriety of Evaluation

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.

In the matter of Riggins & Williamson Machine Company, Inc.; ENSEC Service Corporation, March 21, 1975:

Request for proposals (RFP) 1–15–4557, involving support services necessary to maintain certain facilities at NASA's Langley Research Center (LaRC), on a cost-plus-award-fee basis, was issued June 10, 1974, by LaRC, Hampton, Virginia. The RFP, covering a 1 year period of performance with two 1-year priced options, envisions a contractor who will furnish the manpower, tools, equipment and administrative support necessary to manage and implement work tasks in the areas of refrigeration and air conditioning maintenance, electrical system maintenace, equipment maintenance, building trades maintenance, and engineering services. The subject RFP covers expanded services presently being partially accomplished under two separate contracts between NASA and Riggins & Williamson Machine Company, Inc. (R&W). It is reported that the scope of the work under the subject procurement will be greatly expanded over the prior contracts as the new contractor will assume from the Government the bulk of the planning, scheduling and estimating of tasks.

Following the receipt of 13 proposals on July 25, 1974, seven firms were determined not to be in the competitive range. On September 9 and 10, 1974, oral discussions were conducted with the six remaining firms. Following the discussions, NASA's Technical/Management, Cost and Other Factors Evaluation Committee (Technical/Management Committee) reevaluated the proposals and presented its findings to NASA's Source Evaluation Board (SEB), which following its own evaluation, presented their findings to the Source Selection Official. In a source selection statement dated November 8, 1974, the Source Selection Official announced that Metro Contract Services, Inc. (Metro) had been selected for purposes of contract negotiation.

Subsequently, R&W and ENSEC Service Corporation (ENSEC) protested the selection of Metro for a number of reasons. During the period of time between submission of R&W's initial letter of protest and its comments on the NASA administrative report, R&W has been seeking release of certain documents pursuant to the Freedom of Information Act, 5 U.S. Code 552 *et seq.* and NASA's implementing regulations, 14 C.F.R. 1206 *et seq.* (1974). While R&W has been successful in obtaining some of the desired documents, we are aware that

NASA does not intend to release the other desired documents (such as Metro's proposal). In addition to its request to NASA for further documents, R&W sought a Court injunction against any award by NASA while its cases were pending before this Office and the Small Business Administration (SBA). While a request for reconsideration of an adverse decision (over a matter not before this Office) was pending before the SBA, R&W and NASA, with Court approval, entered into a stipulation whereby the protester would withdraw its application for injunctive relief and NASA would refrain from any award prior to this Office rendering its decision.

By letter of February 21, 1975, counsel for R&W has filed its comments on the NASA administrative report and also requested that this Office refrain from issuing a decision prior to its appeal to NASA for further documents contained in the administrative report. In this connection, the protester contends it has been at a disadvantage without access to the entire administrative report. After a careful balancing of any possible disadvantages to the protester against a further delay to NASA's procurement plan, we decided to proceed with our decision process. Our considerations in this regard have taken into account the fact that R&W has twice requested and been denied the further information, and that all interested parties were furnished a substantial portion of the administrative report. We are of the opinion that a determination to delay our decision any longer would both unreasonably and unnecessarily harm and further delay NASA's procurement process.

As its basis for claiming that it should have been selected for award of the LaRC contract, R&W contends in essence that it proposed the lowest cost; that as the incumbent it should have received a better evaluation; that all offers expired on November 22, 1974, and therefore are not eligible for award; that its proposal was responsive and Metro's was not; that the Technical/Management Committee favored R&W; and that NASA failed to provide a fair competitive evaluation of its proposal and arbitrarily selected Metro for award. ENSEC's sole allegation is that it believes there is an inconsistency between the final technical point scores and the narrative portion of the selection statement. For reasons discussed below, the protests are denied.

The pertinent portions of the evaluation procedures and criteria contained in the RFP are set forth below:

PART I. GENERAL INFORMATION

* * * * * * *

D. Proposals received as the result of this Request for Proposal will be evaluated under NASA Source Evaluation Board Procedures in accordance with NASA Source Evaluation Board Manual NHB 5103.6. As a result, the Technical/

Management Proposal will be scored. The cost and Other Factors Proposal will be evaluated but not scored; however, these Cost and Other Factors may be important discriminators in the final selection, and the Source Selection Official, after extensive consultation with the Source Evaluation Board and other advisors, will select the Contractor (or Contractors) for final negotiation which he considers can perform the contract in a manner most advantageous to the Government, all factors considered.

* * * * * * *

PART III. TECHNICAL/MANAGEMENT PROPOSAL CONTENT

The evaluation factors and criteria to be considered for your proposal are presented herein. Each factor will be assigned numerical ratings and weights. Each factor will be assessed using the designated criteria to determine his understanding of the requirements as reflected therein and his approach to implementing the requirements. In this regard, the Management and Operations Plan and the Management Engineering personnel will be considered of approximately equal importance.

* * * * * * *

Factor 1.0 *Management and Operations Plan*

This plan should describe from an administrative and technical standpoint how you intend to bring the overall service to a competent, efficient operational status and the manner and means by which the overall service, once established, will be maintained in order to accomplish the overall effort in support of the various S.O.W. areas. The plan should contain the following (the first four (4) items are of approximately equal importance and as a group carry over 3/4 of the weight for Factor 1.0) :

* * * * * * *

Factor 2.0 *Management and Engineering Personnel*

A. The positions considered by the Government to be management and engineering personnel are outlined in Enclosure 2.

The qualification of the management and engineering personnel will be assessed relative to their proposed positions and duties as follow (the three (3) items are listed in order of decreasing importance with key personnel carrying approximately 2/3 of the total weight for Factor 2.0) :

* * * * * * *

PART IV. COST AND OTHER FACTORS PROPOSAL CONTENT AND FORMAT

A. *Cost proposal*

1. As stated in the letter of transmittal, Enclosure 5, *Contract Pricing Proposal, DD Form 633, (NASA Edition)* should be used to summarize your Cost Proposal with detail backup to explain the estimating basis for each cost element provided in a suitable format.

* * * * * * *

B. *Other Factors*

1. Other factors which will be evaluated and presented to the Source Selection Official for his consideration in making a selection are past performance, related experience, labor relations, financial capability, support by corporate management, contract terms and conditions, safety and health, and Equal Employment Opportunity Compliance.

The record indicates that Factor 1 (Management and Operations Plan) was assigned 550 points out of a possible 1000, while Factor 2 (Management and Engineering Personnel) was assigned the remaining 450 points. As indicated in the RFP, "cost and other factors" were

evaluated but not scored. The source selection statement noted that the SEB gave the offerors within the competitive range an order of preference with adjective ratings and points for the scored factors, as follows:

Offeror	Final score	Adjective rating
Metro	766	Good.
Klate Holt	708	Good.
ENSEC	689	Satisfactory.
Riggins and Williamson	674	Satisfactory.
Mercury	649	Satisfactory.
Ashe	612	Satisfactory.

Upon consideration of the SEB's evaluation, the Source Selection Official concluded on the basis of its technical superiority and its realistic cost proposal that Metro's proposal represented the greatest value to the Government.

As noted above, R&W's first contention is that based on its lowest proposed cost, it should have been selected for award of the subject contract. The SEB report depicted the following proposed and probable 3 year costs for R&W and Metro with dollars in millions:

	R&W	Metro
Proposed Estimated Cost	6.4	7.4
Government Probable Cost Estimate	7.8	8.4

The range of proposed costs for the other four offerors in the competitive range was $6.9 million to $7.4 million (with an average of $7.2 million), and the range of probable costs was from $8.2 to $8.7 million (with an average of $8.4 million). Moreover, it was determined that the major reason for the difference in score and cost between R&W and Metro was the protester's failure to provide a full-time contract manager and supporting administrative and management staff to assume the expanded contractor responsibility. While we note that R&W is correct in its assertion that it proposed a lower cost than Metro, NASA's Procurement Regulation 3.805–2 states:

> In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (i) the lowest proposed cost, (ii) the lowest proposed fee, or (iii) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within

the limits prescribed by law * * * and appropriate to the work to be performed * * *. Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government.

Although the Government's probable cost estimate for Metro was 8 percent higher than that for R&W, Metro was also 14 percent higher than R&W in the scored factors and, therefore, it was proper under the terms of the solicitation and above regulations to select Metro notwithstanding the higher cost estimate. See *Matter of Applied Systems Corporation*, B–181696, October 8, 1974.

R&W next contends that the fact of its incumbency and prior satisfactory performance should have been given more weight in the evaluation. A review of the pertinent evaluation documents indicates that NASA was fully cognizant of R&W's incumbency and carefully considered this factor in its evaluation process. The RFP clearly indicated to all offerors that past performance was to be considered as being an "Other Factor" and thus would not be scored. In this regard, we note R&W received the same "satisfactory" rating as all offerors within the competitive range. In addition, we note the following remarks contained in the selection statement.

While the incumbent contractor has performed satisfactorily in some areas, taken as a whole, his performance can be evaluated to be just marginally satisfactory because of lack of administrative control and support.

R&W also contends that all offers expired on November 22, 1974, and therefore are not eligible for award. NASA strongly disagrees with the protester's version of when initial offers expired. Both NASA and R&W agree that LaRC requested on January 9, 1975, and subsequently received from all offerors, an extension of proposal acceptance time. In brief, it is R&W's position that the original proposal acceptance period of 120 days commenced July 25, 1974, the date of submission of the original proposals. Therefore, R&W believes NASA's extension request of January 9, 1975, was long after all proposals expired. NASA on the other hand, believes that the 120-day proposal acceptance period began to run on September 23, 1974, the date for receipt of best and final offers.

In 42 Comp. Gen. 604 (1963), we stated that in the proper circumstances the Government may accept a bid, once expired, which has subsequently been revived by the bidder. In 53 Comp. Gen. 737 (1974), we recognized that the intention of a bidder to extend the life of its bid may be indicated by the bidder's course of action in dealing with the contracting officer even after expiration of the bid. Additionally, we have taken the position that a protest to this Office during a bidder's acceptance period could be viewed as tolling the bid acceptance period pending resolution of the protest. 50 Comp. Gen. 357 (1970). Although those decisions involved advertised procurements,

we believe the same rationale is applicable here. Also, in a negotiated procurement, we have held that an offeror's participation in the negotiating process operates to extend its offer. *Matter of Dynalectron Corporation*, 54 Comp. Gen. 562 (1975). Thus, in the present situation, we think that even if all proposals did expire on November 22, 1974, all offerors effectively revived their proposals by express letters to NASA following the LaRC request of January 9, 1975, and that R&W and Metro's offers were extended by active participation in the subject protest. Furthermore, since the only right conferred by expiration of the acceptance period is conferred upon the offeror, the latter may waive such right and accept an award. 46 Comp. Gen. 371 (1966).

R&W has also taken the position that its "proposal was responsive and that of Metro Contract Services, Inc., was not." Normally, as in the present case, in negotiated procurements proposals are not rejected for nonresponsiveness, as are bids in formally advertised procurements. See, e.g., *Matter of Home and Family Services, Inc.*, B–182290, December 20, 1974. Rather, proposals are initially evaluated and, except in circumstances permitting award on the basis of initial evaluation, discussions are held with those offerors who submitted proposals in a competitive range. Proposal rejection occurs when it is determined that a proposal is not within the competitive range or when, after discussions are held with all offerors in the competitive range and best and final offers are submitted and evaluated, the proposal is not selected for award. Therefore, neither Metro's proposal nor R&W's proposal was ever considered by NASA in terms of responsiveness. Rather, R&W's proposal was rejected after best and final offers were submitted, evaluated and Metro was selected for award.

Basically, it is R&W's position that NASA failed to provide a fair competitive evaluation of its proposal and improperly selected for award the proposal of Metro. In this connection, we also refer to R&W's assertions that the Technical/Management Committee favored R&W, but a contrived selection statement was introduced to justify the selection of Metro. In the source selection statement, the Source Selection Official summarized the SEB's discussions with R&W as follows:

> Riggins and Williamson (R&W) is the incumbent contractor. His proposed management and operations plan was rated satisfactory because it did include a good procurement plan and did provide for a supervisory review of a task before start. Despite this the Board was convinced that R&W had a major weakness by not providing sufficient administrative and management support personnel to permit the contract manager to give his full attention to assure efficient performance of required services. The failure of R&W to provide a full time contract manager and supporting administrative and management staff has a ripple effect on all aspects of contract performance. For example, in the operations of the work control center, the estimating is supposed to flow from the production

control center, but it required the cognizant foreman to assist with the estimating because of the level of personnel employed as production controllers. Thus in effect, the supervisory function of the foreman is diluted by assuming these various roles. With respect to the management and engineering personnel evaluation area, the Board recognized the fact that R&W has organized a fairly stable blue collar workforce over a period of about three years under previous contracts calling for lesser services. Other major strengths were the employment of four of five foremen with good experience at this Center, a proven engineering supervisor with extensive Center experience, in addition to engineering personnel who have worked with that supervisor. Nevertheless the incumbent failed to meet an important RFP requirement to provide a qualified contract manager. This together with the fact that the incumbent did not provide for essential administrative and management support personnel, hurt the incumbent most in his rating in the unanimous judgment of the Board.

Some of R&W's contentions regarding the improper selection of Metro are based on its erroneous conclusion that the Technical/Management Committee favored R&W's proposal over Metro's. Our review of the entire record indicates that both the Technical/Management Committee and the SEB preferred the Metro proposal over the proposal submitted by R&W.

While R&W has submitted to this Office numerous pages attempting to explain how NASA's technical evaluation of its proposal was erroneous, NASA has in turn submitted a rebuttal to each of the protester's allegations. At this juncture, it should be emphasized that it is not the function of our Office to evaluate proposals and we will not substitute our judgment for that of the contracting officials by making an independent determination as to which offeror in a negotiated procurement should be rated first and thereby receive an award. B–164552(1), February 24, 1969. The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency, and such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations. B–179603, April 4, 1974; B–176077(6), January 26, 1973.

Based on our review of all of the material, we are unable to conclude that there has been a clear showing that the NASA evaluation was arbitrary or unreasonable. Rather, it appears to us that the evaluation was conducted in good faith and in accordance with the solicitation evaluation criteria. As previously stated, in these matters the administrative judgment must be afforded great weight. On the basis of the record before us, we find no reason to question NASA's judgment.

R&W has quoted portions from three of our decisions as supportive of its contentions that NASA erred in its selection process. We find the three decisions are not analogous to the present situation. In 50 Comp. Gen. 246 (1970), we upheld an Air Force award to the offeror who proposed the lowest cost, notwithstanding an allegation by the second low offeror that its proposal was technically superior. The cited decision is distinguishable in that the Government, unlike the present case, was dealing with two offerors who were "* * * essentially equal as to technical ability and resources to successfully perform * * *." *id.* 249.

The second case cited by R&W (52 Comp. Gen. 686 (1973)), involved a situation where the Government awarded a contract to the offeror

proposing the lowest cost notwithstanding a lower technical score, because the selection official found that there were no technical considerations which outweighed the cost advantage of the lower proposal. In the cited case we stated at page 690, that "* * * whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends on the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency." In the present case NASA, within its discretion, clearly felt Metro's proposal was significantly superior and, therefore, its offer was most advantageous even though higher in estimated cost. See NASA Procurement Regulation 3.805.2, *supra.*

R&W also relies on a quoted portion of our decision found at 51 Comp. Gen. 153 (1971). In the cited case we noted the error of a Navy contract award, without a determination of technical superiority, to a higher priced and slightly higher scored offeror, rather than to a lower priced, lower scored proposal that would meet the needs of the Government. Like the other cases cited by R&W, the Navy case is not analogous to the protest before us because, as pointed out above, NASA reasonably determined that R&W's lower priced proposal was not sufficient to overcome the technically superior proposal by Metro.

Finally, regarding the allegation by ENSEC concerning the alleged existence of an inconsistency between the final technical point scores and the narrative portion of the selection statement with regard to its and Klate Holt's proposals, we believe that the selection statement is amply justified in light of the technical point ratings assigned the participants in the subject procurement. Furthermore, since we have concluded that selection of Metro was proper, any inconsistency in the point scores and selection statement narrative concerning the ENSEC and Klate Holt proposals would not be material.

Accordingly, the protests by R&W and ENSEC are denied.

[B-182688]

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.

Contracts—Negotiation—Offers or Proposals—Revisions—Evaluation

Rural electric cooperatives, acting pursuant to "Informal Competitive Bidding" procedures approved by Rural Electrification Administration, 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.

In the matter of General Electric Company, March 24, 1975:

This protest primarily concerns the proper application of the Buy American Act of March 3, 1933, as amended, 41 U.S. Code § 10a–10d, and various implementing directives, to a procurement conducted by private electrical power cooperative associations with funds furnished pursuant to a loan guarantee agreement of the Rural Electrification Administration (REA), U.S. Department of Agriculture (USDA), under the provisions of section 306 of the Rural Electrification Act of 1936, as amended, 7 U.S.C. 936 (1970), as added by Public Law 93–32, approved May 11, 1973, 87 Stat. 69.

Proposals to furnish and install equipment and materials for electrical facilities as part of a system known as the CU Project were solicited by the Cooperative Power Association and United Power Association (CPA/UPA), both private cooperative corporations organized under the laws of Minnesota. REA Form 200, "Construction Contract-Generating, Notice and Instructions to Bidders," was included in the solicitation and award of a contract was predicated on receipt of REA-guaranteed loans from the Federal Financing Bank and upon approval of the contract by the REA Administrator. Proposals were received from the General Electric Company (GE) and from ASEA, Inc., a Swedish company. The proposals were evaluated and ASEA was determined to be the low offeror. A letter of intent to award was then furnished to ASEA, and GE protested.

GE's main contention is that the Buy American Act, as implemented, is applicable to the procurement and that the implementing directives, Executive Order 10582 dated December 17, 1954, and FPR 1–6.104–4 (1964 ed.), require application of a 12 percent factor (6 percent because of the foreign bid, and an additional 6 percent because GE is a labor surplus area concern) to ASEA's price. GE claims that the addition of a 12 percent factor to ASEA's price would make GE the low offeror. USDA, on the other hand, asserts that this procurement is not subject to the Buy American Act, but only to the Rural Electrification Act of 1938, 52 Stat. 813, 818, 7 U.S.C. 903 note, and REA Bulletin 43–9, pursuant to which only a 6 percent factor was added to ASEA's price. Moreover, USDA asserts that even if a 12 percent factor is added, the GE price would still be higher.

At the outset, it should be noted that notwithstanding GE's contention to the contrary, the procurement in question is not a direct Federal procurement and therefore is not subject to the statutory and regulatory requirements applicable to such procurements. On the other hand, procurements which are effected with borrowed Federal funds or with federally guaranteed funds under REA programs are subject to certain statutory and regulatory provisions as well as the terms and conditions of the loan and/or guarantee agreements.

The Buy American Act provides that:

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States * * * shall be acquired for public use. * * * 41 U.S.C. 10a.

The Rural Electrification Act of 1938, *supra*, provides:

> In making loans pursuant to this title * * * the Administrator of the Rural Electrification Administration shall require that, to the extent practicable and the cost of which is not unreasonable, the borrower agree to use in connection with the expenditure of such funds * * * only such manufactured articles, materials, and supplies as have been manufactured in the United States * * *.

Executive Order 10582 provides that "the bid or offered price of materials of domestic origin shall be deemed to be unreasonable" if it exceeds by either 6 percent or 10 percent (the agency concerned selects the differential to apply) the offered price of foreign materials. The order further provides that, notwithstanding the above provision, an agency may reject a foreign bid if a domestic supplier will produce the materials in areas of substantial unemployment. FPR 1–6.104–4 states that foreign bids "shall be adjusted for purposes of evaluation by adding to the foreign bid * * * a factor of 6 percent of the bid, except that a 12 percent factor shall be used instead of the 6 percent factor if the firm submitting the low acceptable domestic bid is a small business concern or a labor surplus area concern * * *."

GE contends that Executive Order 10582 and FPR 1–6.104–4 are applicable to this procurement as an implementation of either the Buy American Act or REA's own 1938 Act. However, we think it is clear that neither the Buy American Act, the Executive order, nor the cited FPR section are relevant to this procurement.

The Buy American Act itself is applicable only to materials or supplies intended for "public use" and to a "public building" and "public work." Public use is defined by the Act as "use by * * * the United States," and public building and public work refer to a "public building of, and public work of, the United States." 41 U.S.C. 10c(b). *See* 46 Comp. Gen. 784 (1967). GE asserts that the Act is applicable here because the electrical cooperatives are instrumentalities of the United States, and cites *Alabama Power Co.* v. *Alabama Elec. Coop., Inc.*, 394 F. 2d 672 (5th Cir. 1968), *reh denied* 397 F. 2d 809, *cert. denied* 393 U.S. 1000, to support that proposition. In that case it was held that for purposes of the anti-trust laws (Sherman Anti-Trust Act, 15 U.S.C. 1, 2; Clayton Act, 15 U.S.C. 14), rural electric cooperatives were instrumentalities of the United States and therefore were not subject to anti-trust restraints. In so holding, the Court expressed its agreement with a Federal Power Commission (FPC)

decision in *Dairyland Power Cooperative*, 37 F.P.C. 12 (1967). However, we note that the FPC's position on the status of rural electric cooperatives was reversed in *City of Paris, Kentucky* v. *Federal Power Commission*, 399 F. 2d 983 (D.C. Cir. 1968). There the Court recognized that "while an entity may be considered a government instrumentality for certain purposes, it need not be so considered for all purposes." 399 F. 2d at 986. In holding that the cooperatives were not Government instrumentalities for purposes of section 210(f) of the Federal Power Act, 16 U.S.C. 824(f), the Court stated:

> The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in rural electrification is also served thereby is not enough to make cooperatives themselves instrumentalities. 399 F. 2d at 986.

While the cooperatives may be Federal instrumentalities for some purposes, it is our view that the cooperatives are not Federal instrumentalities for purposes of procurements conducted by them with funds borrowed from or guaranteed by REA. *See* B–163492, October 11, 1968. Therefore, we believe the provisions of the Buy American Act are not directly applicable to such procurements.

It is true that Executive Order 10582 is not limited to implementing the Buy American Act only. The introductory portion of the order refers to "the Buy-American Act, and other laws requiring the application of the Buy-American Act." However, it does not follow that the Executive order is applicable here. The Rural Electrification Act of 1938, *supra*, says nothing about the applicability of the Buy American Act to loans or loan guarantees furnished by REA. Instead, that Act contains its own specific language which is similar but not identical to the language of the Buy American Act. This is in contrast to another statute, the United States Housing Act of 1937, as amended, 42 U.S.C. 1401, 1406(c), which specifically makes the provisions of the Buy American Act applicable to low-rent housing projects receiving Federal financial assistance. *See* B–153408, March 16, 1964, and 48 Comp. Gen. 487 (1969). Since the Rural Electrification Act of 1938 does not require application of the Buy American Act, but instead imposes its own Buy American restriction, we do not regard the Executive order by its own terms as an implementation of the 1938 Act.

It follows that if neither the Buy American Act nor Executive Order 10582 is applicable to this procurement, the FPR provisions which implement the act and the order, see FPR 1–6.100, also are not applicable in the absence of some other provision making this procurement subject to the FPR requirements. GE contends that a USDA

procurement regulation, 41 C.F.R. § 4–1.050, which states in part that "Material published in the FPR having Government-wide applicability becomes effective throughout the Department of Agriculture upon the effective date of the particular FPR material," is such a provision. However, when read in context, it is clear that this provision means only that FPR provisions become applicable to USDA procurement actions on the effective date of the provisions without the need for issuance of USDA procurement regulations. It does not mean that procurements conducted by non-Federal entities, to which FPR requirements do not apply, see FPR 1–1.004, are to be subject to such requirements merely because a USDA program is involved.

GE further asserts the applicability of these regulations by virtue of a statement on REA Form 200 that the offeror "understands that the obligations of the parties hereunder are subject to the applicable regulations and orders of Governmental Agencies having jurisdiction in the premises." GE claims that a failure to treat FPR provisions and USDA regulations as applicable to procurements conducted by rural electric cooperatives with Federal funds would render this statement on REA Form 200 meaningless and would, contrary to the intent of Congress, leave "sizable expenditures and commitments of Government funds as are involved in this project * * * subject to no governmental regulation except for such regulations as the REA Administrator may elect to impose, and if he should elect, to no regulation whatsoever." We do not agree.

The statement on REA Form 200 does not purport to make any regulatory provision (FPR or USDA) applicable to the contract. It merely indicates that the contract is subject to any regulations which, by their terms, are applicable to the procurement. Furthermore, the fact that the FPRs or USDA procurement regulations are inapplicable here does not mean that there are no applicable regulations at all. In this regard, we note that REA has promulgated various bulletins and supplements thereto which set forth policies and procedures which are applicable to the type of procurement involved in this case. Since it is the REA Administrator who has the statutory responsibility for the rural electrification loan and guarantee programs, see 7 U.S.C. 901 *et seq.*, we do not agree with GE's assertion that Congress has envisioned regulatory requirements in this area other than those which might be imposed by the REA Administrator. In fact, we note that in imposing the Buy American type of requirement in the Rural Electrification Act of 1938, Congress specifically directed that borrowers of REA funds be required by the *REA Administrator* to comply with the requirement.

GE next contends that even if the Buy American Act and implementing directives are not applicable here, the requirements of the Rural Electrification Act of 1938 were not complied with in that the Administrator did not determine in this case whether acceptance of GE's proposal would result in an unreasonable cost. USDA, however, states that the statutory requirement was satisfied by adoption of the percentage differential in REA Bulletin 43–9, dated July 28, 1955.

Prior to issuance of that Bulletin, the REA Administrator apparently made individual determinations as to unreasonable cost in most cases, since borrowers were required to obtain special authorization from REA for purchasing foreign materials and supplies. However, the bulletin, which stated that it was applying Executive Order 10582 "as provided herein" to the Buy American provision of the Rural Electrification Act, adopted the 6 percent differential of the Executive order, stating that "purchases of such materials of foreign origin are deemed to be in compliance with the 'Buy American' requirement" when the cost of domestic materials exceeds by more than 6 percent the cost of the foreign materials. A notice accompanying the bulletin announced that REA borrowers no longer had to obtain special authorization to purchase foreign articles if the 6 percent differential existed.

Notwithstanding this, GE claims that "Congress did not intend that a bulletin issued 20 years ago * * * would serve to be determinative as to the practicability and reasonableness of cost of a procurement * * * in these days of balance of payment deficits, chronic unemployment, and the countless other social and economic problems dealt with by Congress since 1955," and that what may have been considered reasonable in 1955 "could not conceivably have remained so during the entire intervening period of 20 years." In GE's view, the statutory requirement "cannot be delegated to or met by a bulletin issued by another administrator 20 years ago" and therefore each procurement "under this statute, particularly one of the magnitude of this project, should be determined expressly by the Administrator *at the time of the procurement.*" GE also asserts, by implication, that the provisions of REA Bulletin 43–9 do not represent a proper determination regarding the reasonableness of a domestic bid because no consideration is given to applying anything other than the 6 percent differential when bids are received from domestic labor surplus area concerns.

We have held that under the Buy American Act and Executive Order 10582, a determination as to the reasonableness of a domestic bid cannot be made in advance of soliciting bids, but must be made on the basis of comparison of the domestic bid with a bid offering foreign goods. 39 Comp. Gen. 309 (1959); 48 *id.* 487 (1969); B–165293, March

24, 1969. We also recognized, in those same cases, that the comparison is to be made in accordance with the differentials specified in the Executive order, and that determinations based on that comparison do not violate "the stated provisions or intent of the Buy American Act." 39 Comp. Gen. 309, *supra*, at 312. Similarly, we believe that, consistent with the differential specified in the Executive order and the current implementing regulations applicable to direct Federal procurements, see FPR 1-6.104-4 and ASPR 6-104.4 (1974 ed.), REA Bulletin 43-9 does represent a determination as to the reasonableness of a domestic bid and is a proper implementation of the Rural Electrification Act of 1938, so that a separate case by case determination is not required. Furthermore, with regard to REA's failure to require application of a higher differential when bids are received from labor surplus area concerns, it is clear that it is not required to do so by the Rural Electrification Act of 1938. That requirement is derived solely from Executive Order 10582 which, as pointed out above, is not specifically applicable to REA loan procurements. However, in this connection we note that REA had indicated its intention to review its Buy American policy to determine if "changes should be considered" with respect to labor surplus area concerns. Any such changes, of course, would not be applicable to this procurement.

In addition to its contentions regarding application of the Buy American Act and related provisions, GE challenges the refusal of the cooperatives to consider a second proposal submitted by GE. GE contends that had this second proposal been considered, GE's price would have been low even with only 6 percent differential added to ASEA's price. USDA disputes this contention, and claims that a proper evaluation of the second GE offer would have indicated that ASEA was still the low offeror regardless of whether a 6 or 12 percent differential was added to ASEA's price.

The procurement was conducted in accordance with a procedure known as "Informal Competitive Bidding," which is described in a May 23, 1973 supplement to REA Bulletin 40-6 as "a method whereby competitive sealed bids are obtained * * * which bids * * * are not publicly opened and read and which are subject to negotiation at the option of the borrower. * * * The negotiating procedure makes possible the clarification of the bids, the elimination of misunderstandings * * * and price negotiation where this appears to be in order." The bulletin further provides that when negotiation is conducted, each bidder is to be given "an equal opportunity to negotiate until any questions related to the bidder's proposal have been clarified and until a final price is reached. * * * Upon completion of negotiations, the negotiating Committee * * * shall determine the low responsive bid

* * *." Paragraph 1.25 of the General Provisions of the solicitation informed offerors that "subsequent to the bid opening [the cooperatives] may elect to conduct a round of discussions with each bidder to resolve any questions related to the substance of his proposal and to arrive at a final price."

Following receipt of proposals on March 18, 1974, negotiations were conducted with each offeror. According to the evaluation report prepared by CPA/UPA's engineering consulting firm, the cooperatives "held a number of meetings with each bidder to clarify each bid and to obtain prices on additions to each bid which would improve the proposed system operation and reliability, and also put the two bids on a more comparable basis." The record shows that during these negotiations GE was queried about the price impact of a one step reduction in its proposed basic insulation level (BIL). By letter of April 15, 1974, GE indicated that "costs will vary approximately 1% to 5% from one BIL level to the next." (GE's original basic proposed price was $62,310,915). By letter of April 18, 1974, GE stated that it did not have "any additional information at this time on price changes relative to possible BIL reductions * * * although we feel they are not significant. They will follow at a later date." This was followed by an April 25, 1974 letter from GE which stated that a "One step reduction in capacitor BIL for the filters and shunt banks will result in a price reduction of $6000," and by a May 2, 1974 letter in which GE responded to the query regarding "the dollar impact for a one step BIL reduction in the DC portion of the terminals." The letter stated that a one step reduction would result in "significant savings * * * while not impairing in any way the availability and performance of the station." GE then offered the equipment with a reduced BIL at a price approximately $5,600,000 lower than its initial price. It is this offer of May 2 that CPA/UPA refused to consider, on the grounds that the time of its submission "did not conform to the bidding procedure established for this project and with which all parties were in agreement." It is the cooperatives' position that the solicitation allowed for only one "round" of negotiation, that this round of negotiation was not for the purpose of allowing submission of a revised offer, but only to provide clarification and minor adjustments to the initial proposals, that in any event the "round" was completed during April, and that it would therefore be improper and unfair to ASEA to allow consideration of the May 2nd GE proposal. USDA concurs in this position.

It is clear that the procedures utilized in this procurement were not entirely consistent with Federal competitive bidding principles.

For example, the cooperatives considered proposed deviations from the solicitation's terms and conditions, and a definite, common cutoff date for receipt of final offers was not clearly established, even though negotiations were conducted in which revisions to proposals were made. However, as noted above, this is not a Federal procurement, the rules applicable to Federal procurement were not imposed upon the cooperatives by the loan guarantee agreement, and the informal procedures utilized here had the approval of REA. Although we think it would not have been unreasonable for the cooperatives to have considered GE's revised proposal, we cannot, under these circumstances, conclude that they were obligated to do so. In any event, in light of USDA's statement that an evaluation of the revised proposal would still show ASEA as the low offeror, it does not appear that the failure of CPA/UPA to evaluate GE's second proposal affected the ultimate selection of a contractor.

For the foregoing reasons, the protest is denied.

[B-182247]

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.

Appropriations—Limitations—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."

Appropriations—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.

In the matter of monies for land condemnation, March 25, 1975:

We have received a request for decision from an authorized certifying officer of the Forest Service, Department of Agriculture, as to

whether a voucher to pay a judgment obtained by Jacob and James Pete for land condemned by the United States for the Boundary Waters Canoe Area (BWCA) may be certified for payment.

Public Law 80–733, June 22, 1948, 62 Stat. 570, as amended, 16 U.S. Code § 577h (1970), authorized appropriations not to exceed $4.5 million for acquisition of land by purchase or condemnation in the BWCA. The certifying officer states that the full $4.5 million was appropriated by Congress for this purpose and that, as of July 11, 1974, this special appropriation for the BWCA has, except for $253.13, been exhausted, leaving $16,717.33 still owing the Petes on a $38,000 judgment rendered them by the U.S. District Court in Duluth, Minnesota.

The certifying officer suggests that funds appropriated pursuant to the Land and Water Conservation Fund Act of 1965 (L&WCFA), Public Law 88–578, September 3, 1964, 78 Stat. 897, as amended, 16 U.S.C. § 4601–4 *et seq.*, (1970), are probably also available to purchase land in the BWCA. He states that these funds are available for acquisitions of "inholdings within existing boundaries of wilderness, wild and canoe areas." Before certifying payment, however, he wishes a decision on the matter from this Office.

By letter dated October 4, 1974, B–182247, we requested the view of the Secretary of Agriculture in this matter. On January 24, 1975, the Assistant Secretary for Administration responded to our inquiry by simply stating:

> Funds appropriated under the Land and Water Conservation Fund Act of 1965 (78 Stat. 897 as amended; 16 USC 4601) are available for this type of purchase and funds were available at time of condemnation and could have been used.

No reasoning was supplied to give support to this statement.

Based on the facts presented by the certifying officer, it is our view that inasmuch as the Congress established a specific dollar limitation on the amount which could be appropriated for the purchase and condemnation of land in the BWCA, and since for that purpose it appropriated exactly that amount ($4.5 million), no funds other than those appropriated pursuant to the authority of 16 U.S.C. § 577h may be used to purchase or condemn land in the BWCA. *See*, for example, 36 Comp. Gen. 526 (1957), 38 *id.* 588 (1959), and 38 *id.* 758 (1959). Specifically, it is our position that the authorization limitation contained in 16 U.S.C. § 577h and the specific appropriations made pursuant thereto must take precedence over the more general funding authority conferred by the L&WCFA for land acquisitions, and hence, no more than $4.5 million may be obligated or expended to purchase or condemn land for the BWCA. Moreover, as we held in our decision of August 21, 1964, B–154988, copy enclosed, the permanent indefinite

appropriation for judgments, 31 U.S.C. § 724a (1970), is not available to pay condemnation judgments in situations such as this.

The creation of an obligation in excess of the amount available under an appropriation—a situation that pertains here—is a violation of the Antideficiency Act, 31 U.S.C. § 665 (1970).

Hence, based on the record before us, we are advising the Secretary of Agriculture by separate letter that a deficiency appropriation should be obtained to meet the outstanding balance on the court judgment.

[B-181790]

Leaves of Absence—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, 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.

In the matter of improper separation due to procedural defect—restoration of forfeited annual leave, March 26, 1975:

The United States Information Agency requested an advance decision as to whether an employee who has been reinstated after a separation which has been found to be improper because of a procedural defect is entitled to be credited annual leave under the provisions of 5 U.S. Code 6304(d) as amended by Public Law 93-181, approved December 14, 1973, 87 Stat. 706.

The agency in its request stated:

Mr. Donald W. Paxton was separated from the United States Information Agency on June 30, 1971 on the basis of a voluntary resignation dated April 29, 1971, submitted in Monrovia, Liberia. On May 20, 1971, he requested that his resignation be rescinded. The request was denied, the resignation accepted, and he was separated. Subsequently, Mr. Paxton sought legal redress through judicial and administrative proceedings.

On February 17 of this year, the Appeals Examining Office of the Civil Service Commission's Board of Appeals and Review held that Mr. Paxton had been improperly separated by resignation on June 30, 1971 and that his separation was fatally defective on a procedural basis. It was recommended that the Agency restore Mr. Paxton to his former position or to another position of like salary, grade, seniority, and tenure, retroactive to June 30, 1971, the effective date of his separation.

Had Mr. Paxton remained in service in Liberia, he would have been entitled to use or to accumulate and carry forward 45 days of annual leave each year. Because of his separation, the leave that could have been accumulated has not been forfeited.

We are uncertain whether the provisions of the Back Pay Act (5 USC 5596) must be read in conjunction with Section 3 of Public Law 93-181, which reads:

"Annual leave which is lost by operation of this section [5 USC 6304] because of—

"(A) Administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

* * * * * * *

shall be restored to the employee."

It is unclear whether the words "administrative error" must be read together with the terms "unjustified or unwarranted action" embodied in the Back Pay Act.

The Civil Service Commission in attachment to its Federal Personnel Manual Letter No. 630–22, dated January 11, 1974, setting forth guidelines and regulations implementing Public Law 93–181 stated, in pertinent part, at pages 2 and 3 the following:

Section three of law. Amends section 6304 in two respects.

a. *Explanation of first change in section 6304.* Temporarily suspends, under three conditions, the normal rule that requires that any annual leave in excess of maximum permissible carryover be automatically forfeited at the end of the leave year. The three conditions are:

(1) *Administrative error* when the error causes the loss of annual leave otherwise accruable after June 30, 1960.

(a) *Discussion.* This is a retroactive provision. It permits an agency to restore to a current employee any annual leave that may have been forfeited because of administrative error. There have been instances where an error was discovered and the employee's leave record adjusted to provide the proper leave credit. The normal maximum carryover rule (e.g., 30 days) remained in effect however, and sometimes resulted in forfeiture of some or most of the restored leave. This amendment permits all of the leave to be restored so long as the leave was accruable after June 30, 1960, even though the error may have occurred before June 30, 1960.

* * * * * * *

(3) Section 5596 of title 5 provides the basic guidelines for determining entitlement to pay, allowances, and benefits in the event an employee is found to have undergone an unjustified or unwarranted personnel action. This section provides that annual leave is to be restored up to the maximum amount permitted by the leave system under which the employee is covered. *For purposes of Public Law 93–181, unjustified or unwarranted personnel actions are not considered to be administrative errors.* Thus, an employee, under section 5596, is not entitled to exceed the normal maximum amount of annual leave permitted under the appropriate leave system. [Italic supplied.]

In this case the Civil Service Commission found that the agency's reason for refusing to permit Mr. Paxton to withdraw his resignation was unwarranted and thus his separation was an adverse action subject to the requirements of part 752–B of title 5, C.F.R., which, not being followed, made the separation "fatally procedurally defective."

Recently we have recognized in several decisions involving the "Back Pay Act" that administrative errors may be regarded as a form of unjustified or unwarranted personnel action which are compensable when they result directly in depriving an employee of pay, allowances, or differential, rather than a separate category of action. *Cf.* 54 Comp. Gen. 263 (1974); 54 *id.* 403 (1974); 54 *id.* 435 (1974). The statement of facts indicates that the Commission's Board of Appeals and

Review held that Mr. Paxton had been improperly separated and that his separation was defective on a procedural basis. Notwithstanding the use of the term "procedural," it appears to us that the CSC found the agency action to be substantively wrongful and therefore within the concept of unjustified or unwarranted personnel action under section 5596. Since the Commission, to whom authority to promulgate implementing regulations for Public Law 93–181 was delegated, has determined specifically that unjustified or unwarranted personnel actions as defined by section 5596 are not administrative errors under section 6304, the question raised by the agency is answered in the negative.

Accordingly, the leave may not be restored in accordance with the above discussion.

[B–180756]

Subsistence—Per Diem—Military Personnel—Temporary Duty—En Route to New Duty Station

Member with permanent change of station from Jacksonville, North Carolina, area to overseas location with temporary duty en route at Cherry Point, North Carolina, 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 Joint Travel Regulations, 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 Jacksonville, nor does it appear that personnel customarily commute between the two locations.

Travel Expenses—Military Personnel—Change of Station Status—Temporary Duty En Route

Member with permanent change of station from Jacksonville, North Carolina, area to overseas location with temporary duty en route at Cherry Point, North Carolina, 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, August 1, 1973, case 13, para. M4156, 1 Joint Travel Regulations, was in effect, as per diem is prohibited whether the temporary duty location is within or without the area of the permanent duty station. However, member may be paid for transportation between his residence and the temporary duty station and for meals in accord with this provision.

In the matter of per diem entitlement while on temporary duty but residing at permanent station, March 27, 1975:

This action is in response to letter dated November 28, 1973, from the Disbursing Officer, U.S. Marine Corps Air Station, FPO Seattle, Washington 98764, forwarded by Headquarters, United States Marine Corps, requesting an advance decision as to whether Gunnery Sergeant Thomas H. Bond, 214–42–7134, is entitled to per diem while performing temporary duty in the circumstances described. The request was

assigned Control No. 74–12 and forwarded to this Office by Per Diem, Travel and Transportation Allowance Committee endorsement dated February 27, 1974.

The record indicates that Gunnery Sergeant Bond was detached on July 28, 1973, from the Marine Corps Air Station, New River, Jacksonville, North Carolina, by Air Station (Helicopter) Special Order Number 036–73, dated July 3, 1973, which directed a permanent change of station to First Marine Aircraft Wing, Iwakuni, Japan. The order further directed a period of temporary duty for training under instruction en route at the Marine Corps Air Station, Cherry Point, North Coralina, with use of Government quarters and mess at such temporary station directed, if available. On July 26, 1973, prior to his detachment the member relocated his dependents from family housing at the Marine Corps Air Station, New River, Jacksonville, North Carolina, to 308 Ramsey Drive, Jacksonville, North Carolina, for the purpose of establishing a bona fide residence.

The member performed the temporary duty under instruction as ordered during the period from July 29, 1973, through September 10, 1973. During this time, he commuted on a daily basis between his residence in Jacksonville and the Marine Corps Air Station at Cherry Point, a distance of approximately 48 miles. According to the Official Table of Distances, NAVSO P–2471, the distance from the Marine Corps Air Station, Cherry Point, to the Marine Corps Air Station, New River, is 58 miles. While performing this duty, the member received an endorsement to his orders stating that Government quarters and messing were not available. Based upon the nonavailability endorsement, per diem totaling $950 was advanced to the member.

The view has been expressed by the Head, Disbursing Branch, Fiscal Division, U.S. Marine Corps, that since Gunnery Sergeant Bond's old permanent duty station was located at New River and he performed temporary duty at Cherry Point, there being a distance of 58 miles between those places, temporary duty was not performed at a location within the area of the old permanent station as required by case 13, para. M4156, Volume 1, Joint Travel Regulations (1 JTR).

It is the view of the Executive, Per Diem, Travel and Transportation Allowance Committee that the per diem allowance paid to the member is precluded by the provisions of 1 JTR para. M4156, case 13. It is indicated that it was the intention of case 13 to reduce and prohibit payment of per diem to members who commute between their permanent living facilities and temporary duty station and do not incur expenses normally associated with a temporary duty assignment. Additionally, it is stated as follows:

* * * The fact that the member commutes between residence-type quarters and his temporary duty station is clear indication that the temporary duty station is in the area of his old or new permanent duty station for the purposes of Case 13.

Therefore, it is concluded by the Executive, Per Diem, Travel and Transportation Allowance Committee that per diem allowances for this member are not authorized for the period of temporary duty but that the member may be paid a monetary allowance in lieu of transportation and reimbursement for noon meals, if actually procured.

Paragraph M4156, case 13, 1 JTR, ch. 243, May 1, 1973, provided in pertinent part as follows:

No per diem allowance is payable when a member is ordered permanent change of station with temporary duty en route in the area of his old or new permanent duty station and occupies residence-type quarters while performing temporary duty. * * * Transportation expenses incurred in traveling between residence-type quarters and the place of temporary duty may be considered under the provisions of Part K. An enlisted member on temporary duty under the provisions of this case who is required to procure meals at personal expense at the temporary station will be reimbursed at the rate of $3.10 per meal, not to exceed 2 meals per day. * * * The term "area" as used in this case is as defined in par. M4500-2.

Paragraph M4156, case 13, ch. 246, August 1, 1973, provides in pertinent part as follows:

No per diem allowance is payable when a member is ordered permanent change of station with temporary duty en route in the area of his old or new permanent duty station and occupies residence-type quarters while performing temporary duty. * * * Transportation expenses incurred in traveling between residence-type quarters and the place of temporary duty may be considered under the provisions of Part K when travel is within the area defined in par. M4500-2, or paid under the provisions of par. M4203 when travel is from outside that area. An enlisted member on temporary duty under the provisions of this case who is required to procure meals at personal expense at the temporary station will be reimbursed at the rate of $3.10 per meal, not to exceed 2 meals per day. * * *

Paragraph M4500-2, 1 JTR, ch. 228, February 1, 1972, stated as follows:

AREA. The area in which transportation expenses may be authorized or approved for conducting official business will be within the limits of permanent and temporary duty stations, and the metropolitan areas surrounding those stations which are ordinarily serviced by local common carriers of the cities or towns in which such stations are located, or in the comparable surrounding areas if the posts of duty are not located within recognized metropolitan areas. It will also include areas adjacent to a place at which the permanent and/or temporary duty station is located from which personnel customarily commute daily to that place.

Paragraph M4500-2 was changed effective August 1, 1973 (ch. 246) by omission of the last sentence of the foregoing provision.

Paragraph M4156, case 13, ch. 243, which was in effect during the period July 29-31, 1973, referred to the definition of "area" contained in para. M4500-2, ch. 228, to determine if the member's temporary duty station was in the area of his old permanent duty station, in which event no per diem allowance was payable. Since the record does not show that Marine Corps Air Station, Sherry Point, North Caro-

lina, is in the metropolitan area of Jacksonville, North Carolina, or, as provided in the last sentence of the definition, that personnel customarily commute between the two locations, it appears clear that Gunnery Sergeant Bond's temporary duty was not in the area of his old permanent station, and, therefore, per diem is not barred for the period during which ch. 243 was controlling.

Paragraph M4156, case 13, ch. 246, August 1, 1973, omits the statement that, "The term 'area' as used in this case is as defined in par. M4500–2." It appears that this was done because effective with ch. 246, the definition no longer refers to adjacent areas from which personnel customarily commute, thus narrowing the definition of "area" appearing in para. M4500–2.

Case 13, para. M4156, ch. 243, in addition to denying per diem where temporary duty was in the old permanent duty station area as defined by para. M4500–2 (ch. 228), provided for the payment of transportation expenses incurred in traveling between residence-type quarters and the place of temporary duty under part K, chapter 4 (reimbursement for travel within and adjacent to permanent duty stations and temporary duty stations). Case 13, para. M4156, ch. 246, which specifically denies per diem where the temporary duty is in the area of the old permanent duty station, such area not being defined, provides for the payment of transportation expenses under part K when travel is within the area defined in para. M4500–2 (ch. 246) and also provides that between residence-type quarters and the place of temporary duty transportation may be paid under para. M4203 (part E, chapter 4, temporary duty allowances in the United States) when the travel is from outside the area.

From the foregoing, it appears that effective August 1, 1973, case 13, while not entirely clear in its language, bars payment of a per diem allowance where a member ordered on a permanent change of station has temporary duty en route and occupies residence-type quarters at the former permanent duty station while performing temporary duty and commutes between his temporary duty station and his residence.

Consequently, for the period August 1–September 10, 1973, during which time ch. 246, case 13, para. M4156, 1 JTR, was in effect, Gunnery Sergeant Bond is not entitled to per diem allowances. However, he may be paid for transportation between his residence and his temporary duty station and for meals in accord with the foregoing provision. As previously indicated, the member is entitled to per diem allowances for the period July 29–31, 1973, when ch. 243, case 13, para. M4156, 1 JTR, was in effect.

The question submitted is answered accordingly.

[B-183401]

Property—Private—Damage, Loss, etc.—Loaned Exhibits

Where Congress has authorized the Department 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 Department has agreed to be responsible for the security of the collection while it is in the United States, the Department, if it determines that it is to the advantage of the United States to do so, may give assurance to the private art gallery showing the exhibition pursuant to the agreement with the PRC that, if the United States is required to indemnify the PRC as a result of negligence by the gallery, the United States will not seek to recover from the gallery.

In the matter of the assumption by United States of risk of loss or damage by private museum to exhibition of archaeological finds of the People's Republic of China, March 27, 1975:

This decision is in response to a request by the Deputy Legal Adviser, Department of State (Department), dated March 14, 1975, for our views on whether the Department can give—

* * * an assurance to the Nelson Art Gallery of Kansas City that the Department would not go against the Gallery or its representatives for any liability in case of loss or damage to the Exhibition of Archeological Finds of the People's Republic of China for which we had to indemnify the People's Republic.

According to information provided to us by the Department, it has arranged, as one of a series of cultural and scholarly exchanges agreed to with the People's Republic of China (PRC), the exhibition in the United States of a collection of archeological finds of the PRC. The exhibition is now at the National Gallery of Art, Washington, D.C., and, in accordance with the agreement with PRC, is shortly to be transferred to the Nelson Gallery-Atkins Museum (Gallery) in Kansas City, Missouri.

The exhibition has been valued at $51.3 million. The PRC has required, as a condition of its agreement to allow the exhibition to be shown in other countries, an agreement of the host country to indemnify the PRC for any loss or damage to objects in the Exhibition. Letter from the Department to the Chairman, Senate Committee on Foreign Relations, dated April 8, 1974, quoted in H.R. Report No. 93-1023, 2 (1974). The Congress has specifically authorized the Department to enter into such an agreement, to be in effect from the time the objects were handed over in Toronto, Canada, to a representative of the United States, to the time they are returned, in Peking, to a representative of the PRC. Public Law 93-287, 88 Stat. 143. The Department has accordingly concluded an indemnity agreement with the PRC.

The Director of the Gallery has now written to the Assistant Legal Advisor for Education, Culture and Public Affairs, Department of

State, concerning the possible liability of the Gallery if the United States is required to indemnify the PRC, under the agreement, for loss or damage resulting from negligence by Gallery employees. Specifically, the Director states:

> The security of the exhibition and the attendant curators is a matter of deep concern to us, and is being constantly co-ordinated with the appropriate officials of the Department of State.
>
> While the Congress has provided for indemnification with respect to the archeological materials entrusted to our care for the purpose of the exhibition, we at the Nelson Gallery-Atkins Museum have been advised that there still exists the possibility that the United States could go against the Gallery for any negligence on the part of its employees.
>
> It is our understanding that all risk insurance for the duration of the exhibition here would cost in the neighborhood of $42,000.00. We are in no way in a financial position to assume this obligation and would have to seek such payment from the National Endowment for the Humanities, a Federal agency. In consideration of the circumstances, the interest in the matter shown by Congress, and in the spirit of the legislation providing the indemnity, it would appear to be in the interest of the United States government to give adequate assurance to the Trustees of The Nelson Gallery Foundation that no claim will be made against it or its representatives so that by foregoing the payment of the insurance premium a substantial saving can be assured to a Federal agency.

The Department asks whether it can give assurance to the Trustees of the Nelson Gallery Foundation, as requested, that no claim will be made against the Gallery or its representatives. We conclude that, in the particular circumstances here presented, such assurance may be given if the Department determines it to be in the best interests of the United States to do so.

The Congress has, as already noted, authorized the agreement by the Department for indemnification of the PRC. The Department points out (in a proposed response to the Gallery's request) that, under its agreement with the PRC, the exhibition was given into the custody of a representative of the United States and is to be returned by a representative of the United States. Moreover, the United States has undertaken to "* * * adopt comprehensive measures to ensure the security of the objects after their entry into the territory of the United States * * *." October 28, 1974, agreement with the PRC. The security of the exhibition at the Gallery "* * * is being constantly co-ordinated with the appropriate officials of the Department of State." March 4, 1975, letter from the Director of the Gallery, quoted *supra*. The Department considers, therefore, that the Gallery will be acting in implementation of the custodial responsibility of the United States and, consequently, should not be held liable for any loss.

In this case, we note that, should the Gallery have to assume responsibility for its negligence, it intends to seek funds to pay for insurance protection from the National Endowment for the Humanities. There is thus a possibility, should a grant for this purpose be made, that the United States would, in effect, bear the cost of insuring the exhibit.

Alternatively, the PRC having agreed to the holding of the exhibition at the Gallery, it seems apparent that it would not be to the advantage of the United States, in terms of its relations with the PRC, for the Gallery to be unable to accept the exhibition because of inability to protect itself against liability.

In any event, the Department is entitled to make a determination whether it is to the advantage of the United States to give the Gallery the sought-for assurance. We consider it particularly significant in this respect that the United States has assumed responsibility for the security of the exhibition and, in carrying out that responsibility, is participating in the establishment of security arrangements by the Gallery. That is, the Gallery has in effect agreed to relinquish to the Department at least some of its responsibility for the security of the exhibition.

Under the circumstances, we conclude that it is within the discretion of the Department to determine that it is appropriate and in the overall interest of the United States to give the Gallery assurance that no claim will be made against it as a consequence of any indemnification which the United States may be required to make to the PRC for loss of or damage to items in the exhibition. While such action was apparently not specifically considered during deliberations on Public Law 93–287, it is not, in our view, inconsistent with the intent of that legislation.

[B–181663]

Contracts—Protests—Timeliness

Protest regarding negotiation rather than formal advertising of Navy mess attendant contracts filed after receipt of proposals is untimely under 4 Code of Federal Regulations (CFR) 20.1, *et seq.* (1974). However, due to widespread interest, matter will be considered significant issue under 4 CFR 20.2 (1974).

Contracts—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 Armed Services Procurement Regulation 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.

In the matter of Ira Gelber Food Services, Inc.; T and S Service Associates, Inc., March 28, 1975:

Request for proposals (RFP) N00612–74–R–0175 was issued on April 24, 1974, by the Naval Supply Center, Charleston, South Carolina. The RFP sought offers on the performance of mess attendant services at the Naval Air Station, Key West, Florida, from July 1,

1974, to June 30, 1975. The award of a contract to Military Base Management of New Jersey, Inc. (MBM), under the RFP resulted in this protest which essentially questions the negotiation procedures and procurement method utilized by the Navy.

By the closing date set for receipt of proposals, May 28, 1974, 15 offers were received, 11 of which proposed fewer hours than the Government's estimate of 161,987 man-hours. The report of the contracting officer states that:

> * * * The Contracting Officer, on 30 May 74, requested verification of the manhour requirements from the Food Services Officer, NAS, Key West * * * [who subsequently] verified that the estimates, as submitted and stated in the solicitation, were an accurate assessment of the manhour requirements for the services desired.

The Food Service Officer's memo to the contracting officer stated in pertinent part that.

> * * * a review of subject man-hour requirements was conducted. *The man-hour requirements originally submitted have been verified, in fact minimal additional man-hour requirements were discovered.* The Food Service Division, NAS Key West does not desire any further adjustment of these requirements to reflect the new requirements. It is therefore requested that prior man-hour requirements submitted be considered as a base for further contract negotiations. [Italic supplied.]

Our review shows that the estimate was not amended. We attribute this to the fact that the contracting officer felt, on the basis of advice from the Food Service Officer, that the estimate was reasonable, or perhaps understated, notwithstanding that most offerors proposed fewer hours than estimated by the Navy.

Discussions were held with all offerors. Those offerors whose proposals did not meet the evaluation and award criteria set out in section "D" of the RFP were advised and given the opportunity to adjust or revise their proposals. Additionally, by amendment No. 0004 all offerors were given the opportunity to submit best and final offers by June 20, 1974. Section "D" reads in pertinent part:

> Evaluation of Offeror's Manning and Prices
>
> (a) Manning levels offered must be sufficient to perform the required services. For the purpose of evaluating proposals the Government estimates that satisfactory performance during the contract period of 365 days will require a total of *161,987* manning hours (including management/supervision) for both Bldg. #1287 Item 0001 & Bldg. #515 Item 0002. This estimate is based upon approximately 227 hours on a representative weekday multiplied by 252 weekdays, and 173 hours on a representative weekend/holiday multiplied by 113 weekend/holidays for Bldg. 1287, Item 0001, & approximately 262 hours on a representative weekday multiplied by 252 weekdays, & 170 hours on a representative weekend/holiday multiplied by 113 weekend/holidays for Item 0002. *Submission of manning charts whose total hours fall below the total of 161,987 for the total of 365 days during the contract period as stated above may result in rejection of the offer unless the offeror clearly substantiates the manning difference with specific documentation demonstrating that the offeror can perform the required services satisfactorily with * * * fewer hours.* Such documentation should accompany the offer.

(b) Further evaluation of the offerors' proposals will be based on the following criteria:

(1) the manning distribution in space/job categories prior to, during and after meal hours and at peak periods must represent an effective, well planned management approach to the efficient utilization of manpower resources

(2) the total manhours offered must be supported by the price offered when compared as follows. The total of all hours offered for the total days during the contract period will be divided into the total offered price (less any evaluated prompt payment discount) to assure that this dollar/hour ratio is at least sufficient to cover the following basic labor expenses:

the basic wage rate
fringe benefits
health and welfare
vacation and holidays
FICA
unemployment insurance
workmen's compensation insurance

Failure of the price offered to thus support the offeror's manning charts may result in rejection of the proposal.

(c) Award will be made to the responsible offeror whose proposal, meeting the criteria set forth in (a) and (b) above, offers the lowest evaluated total price * * *. [Italic supplied.]

The lowest offer received was made by MBM. MBM proposed to use 129,924 man-hours or 80.2 percent of the Government's estimated number of man-hours at a price of $337,639.50. MBM submitted documentation as required by section "D" to demonstrate that satisfactory performance could be achieved with such fewer hours. The documentation consisted of actual MBM payroll records for the period January 1, 1973, through July 6, 1973. This material indicated that MBM had previously performed mess attendant services at the Naval Air Station in Key West and had used substantially fewer hours than the Government estimate stated in this RFP. Although the Navy recognized that since the earlier MBM contract, a number of changes had been made at Key West (i.e., the main feeding function had been transferred from building 1287 to building 515 and the total number of meals served had increased 15 percent), MBM emphasized in negotiations that the specifications for the present contract were unchanged from the previous contract, and that MBM's offered hours were 39 percent higher than what it had provided under the previous contract. The contracting officer accepted this justification.

Moreover, the contracting officer states that an evaluation of MBM's offer with respect to the dollar/hour ratio requirement of section D(b) of the RFP indicated that MBM's offer complied in that the evaluated price "was more than adequate to support the minimum price for the actual hours offered * * *."

The protesters argue that:

(1) MBM did not clearly substantiate its manning deficiency as required by section D(a) of the RFP;

(2) "* * * if the Government really believed that a drastic drop of 27,139 hours from its estimate was acceptable, this is an admission by the procuring office that its estimate was bad in the first place * * *;"

(3) that MBM's dollar/hour ratio does not comport with the requirements set out in section D(b) of the RFP; and

(4) the Navy has not acted to comply with the suggestion stated in *Matter of ABC Management Services, Inc.; Tidewater Management Services, Inc.; Chemical Technology, Inc.*, 53 Comp. Gen. 656, 664 (1974) that "* * * the Navy seriously consider formally advertising all future procurements for mess attendant services [as do the Army and Air Force]."

With regard to the latter point, the protester implies that the Navy acted improperly in ignoring our recommendation made in *Matter of ABC Management Services, Inc., et al., supra*, that it seriously consider formally advertising all future mess attendant procurements. As a basis of protest, this matter is apparently untimely under 4 C.F.R. § 20.2 (1974) since it was not raised prior to the date for receipt of proposals. However, since the overall question of the propriety of the Navy's method of procuring these services is of widespread interest, we regard the broad issue presented as a significant issue for consideration in accordance with 4 C.F.R. § 20.2(b) (1974). *See* 52 Comp. Gen. 20 (1972).

The instant procurement was negotiated under 10 U.S. Code § 2304 (a)(1) (1970) and Armed Services Procurement Regulation (ASPR) § 3-201.2(b)(ii) (1973 ed.) since it was totally set aside for small business. In this situation, ASPR § 1-706.5 (1973 ed.) gave the Navy the option of using either conventional negotiation techniques (as was done here) or a process known as Small Business Restricted Advertising which is conducted in the same manner as formal advertising with the exception that it is limited to small businesses. However, ASPR § 1-706.5(b) (1973 ed.) states that "The * * * latter method shall be used wherever possible."

Our Office made inquiry of the Navy as to the basis for using competitive negotiation rather than restricted advertising. The Acting Deputy Commander, Procurement Management, Naval Supply Systems Command, in a letter dated December 6, 1974, responded as follows:

> * * * the primary basis for negotiating the mess attendant services at the Naval Air Station, Key West, Florida, was due to a lack of confidence on behalf of the procuring activity regarding the Government's estimate of manhour requirements. This lack of confidence was in fact borne out in that the successful offeror (MBM) submitted documentation substantiating a proposed number of manhours of 20% less than the Government's estimate. This, of course, translated into significant dollar savings which inured to the Government's benefit. Moreover, the Navy has experienced in the past variations in its meal estimates ranging from 11% to as much as 56%. As I am sure you will agree, such inaccuracies in volume variation of meals does not lend itself to a formal advertised procurement. The problem, of course, is obtaining reliable meal estimates from our food service officers. Toward this end, a review is currently being conducted of FY 1974 solicitations for mess attendant services to determine, among other things, what corrective action can be taken in this regard. This review will include a scheduled conference with several of our major field purchasing activities throughout the

United States together with cognizant food service officers. Upon completion of this review, a decision will be made as to the feasibility of expanding our formal advertising pilot test program inaugurated in FY 1974. We shall advise you of the results of this study at the earliest possible date.

We do not agree with the above-noted position and do not feel that this has demonstrated to our satisfaction that the use of Small Business Restricted Advertising was not possible. However, since December 6, 1974, the Navy's position has changed as noted in its letter to our Office of February 21, 1975. That letter states:

This is in further reference to your office's decision (B–178955) dated March 11, 1974, wherein it was recommended that the Navy seriously consider formally advertising all future procurements for mess attendant services.

* * * * * * *

Although the format for negotiated solicitations for mess attendant services was revised prior to issuance of FY 1974 solicitations, twenty protests were filed with your office on the 29 negotiated solicitations by 13 different offerors. As set forth in greater detail below, a review of these negotiated procurements indicated that a significant contributing cause of the protests resulted from differing applications by the various contracting officers of the evaluation criteria for award. Specifically, we found ample evidence suggesting that contractors were unable to reasonably predict the application of the evaluation factors by the various contracting officers within the Command's field purchasing system. Furthermore, it is felt that these same criteria resulted in the Government not obtaining the full benefit of the competition available and consequently failing to obtain these services at the lowest realistic price.

The improvidence of not specifically defining or enumerating the satisfactory "specific documentation" required prior to submission of offers based on a lesser number of manhours than those estimated by the Government, has resulted in the same documentation being accepted by one contracting officer and rejected by another.

The application of the "dollar/hour ratio" factor has resulted in the rejection of many low proposals with consequent protests. This evaluation factor is contingent in nature and somewhat unrealistic as it presupposes the offeror will expend exactly the number of manhours on the manning chart when, in fact, the contractor usually utilizes a lesser number of hours in performing the contract. This factor ignores the fact that the Government is buying satisfactory service, *not* manhours, and that by efficient management the contractor can reduce direct labor hours wtih concomitant cost reductions.

The evaluation factor based on the offered per meal adjustments for volume variations admonishes offerors not to submit "unbalanced bids," but does not set forth any criteria or parameters for determining that a bid is unbalanced. Because the evaluation formula is based on a larger decrease than increase, offerors who propose a large adjustment for decreases may supplant the offeror who submits the lowest monthly price. If decreases in the actual number of meals served during a month do not exceed the allowable 15% variation from the estimated number of meals, the downward price adjustment does not materialize and the Government effectively awards a contract to other than the low offeror.

The inclusion of the Government's estimated number of manhours tends to inhibit offerors in many instances from submitting proposals on the basis of a lower number of hours because of concern of being declared initially unacceptable and outside the competitive range. *Since experience has shown that the Government's estimate is invariably overstated, the Government does not obtain the full benefits of unrestricted technical and price competition.*

Based on our experience with formal advertising this year, and the major problem areas noted above with the negotiation method, it has been determined that procurement of mess attendant services by formal advertising is the method that will result in a more uniform treatment of bidders, in addition to encouraging more realistic competition. Accordingly, all solicitations for these services issued after March 15, 1975, will be formally advertised. [Italic supplied.]

We commend the Navy for its change of position. Moreover, since both our Office and the Navy apparently now agree that there is and

was no reasonable basis not to use Small Business Restricted Advertising for these services, with regard to the instant procurement, we recommend that no option be exercised under the contract awarded to MBM. Further, we trust that this recommendation will be made applicable to all similar Navy mess attendant contracts at the earliest practicable date.

[B-181253]

Husband and Wife—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. Government, and they elected, as required by regulation, to retain husband's transportation agreement, with wife traveling as spouse. Husband was separated in reduction in force, and wife was denied right to negotiate renewal agreement because of travel benefits received by husband from non-U.S. Government 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.

In the matter of a transportation agreement, March 31, 1975:

This matter is before us based upon a request for an advance decision submitted by the Acting Assistant Secretary for Manpower and Reserve Affairs, Department of the Air Force, forwarded to our Office by the Executive Officer of the Per Diem, Travel and Transportation Allowance Committee, regarding the authority for permitting a civilian employee, Mrs. Albert Gilbert, to revert to her original transportation agreement in order to secure renewal agreement transportation.

On October 21, 1960, Mrs. Gilbert, a non-United States citizen who was then single, was hired in St. John's Newfoundland, for employment with the U.S. Air Force at Goose Bay Airport, Labrador. At that time she was permitted to execute a transportation agreement. She served under that agreement and subsequent renewal agreements until September 1971 when she married Albert Gilbert who was also employed by the U.S. Air Force at Goose Bay Airport. Since both of them had signed transportation agreements, under the regulations then applicable, Office of Management and Budget (OMB) Circular No. A-56, section 1.7 (now Federal Travel Regulations (FPMR 101-7) para. 2-1.5h(3) (May 1973)) and Volume 2 of the Joint Travel Regulations (JTR) para. C4003-2, they were required to either continue their separate agreements for their separate benefit or to elect that the transportation agreement signed by one spouse would remain in effect with the other spouse entitled to the benefits accruing to a dependent spouse. They elected to retain Mr. Gilbert's agreement with Mrs. Gilbert entitled to the benefits of a dependent spouse.

On May 28, 1973, Mr. Gilbert's employment was terminated due to a reduction in force. Subsequently he obtained term employment with the Canadian Ministry of Transport. As an incident of that employment, the Gilberts were entitled to one family trip per year, if they paid the first $80. When Mrs. Gilbert requested that she be allowed to revert to her original transportation agreement executed in 1960 in order to secure renewal agreement travel, her request was denied on the basis that she was eligible to travel as a dependent under her husband's transportation agreement with the Canadian Ministry of Transport.

Whether or not Mr. Gilbert receives or is entitled to any travel benefits under the terms of his employment with the Canadian Ministry of Transport is not a factor to be considered in deciding what benefits Mrs. Gilbert has earned because of her employment with the U.S. Air Force. The rationale behind the granting of benefits under initial and renewal transportation agreements is set forth in 2 JTR para. C4001 (change 98, December 1, 1973) which states in pertinent part that:

> 1. GENERAL. An agreement for transportation entitlement is an understanding between the department and the employee wherein the department agrees to furnish transportation and other related allowances * * * in consideration for which the employee agrees to remain in the Government service for a specified period or such part thereof as his services may be required. In addition, in the case of appointment or transfer to a position outside the continental United States, the employee agrees to complete the prescribed tour of duty at the overseas duty station in order to be eligible for return travel, transportation, and other related allowances. The completion of the period of service specified in the agreement establishes transportation eligibility and does not, in itself, terminate the employee's employment. * * *

It is clear that the benefits arising from a transportation agreement are part of the bargained-for consideration incident to employment, and that these rights may be divested or revoked only in the very limited circumsances set forth in the regulations. It should be noted in this context that Mrs. Gilbert was hired in St. John's for service at Goose Bay Airport, which was approximately 500 miles away. These two locations cannot be considered to be in the same geographical area. Therefore, the rules for people hired in one geographical area for service in another, 2 JTR para. C4002, rather than those relating to local hires, 2 JTR para. C4003–3b, apply.

When Mrs. Gilbert was initially recruited, she was granted transportation benefits and was permitted to sign a transportation agreement apparently under the authority of the Air Force Civilian Travel Manual, AFM 40–10, specifically chapter 4, sections 1(b) and 1(c) which are substantially in accord with the current regulations found in 2 JTR, para. C4002 (change 98, December 1, 1973). That paragraph generally describes those employees with whom transportation agreements must be negotiated. Subparagraph 2 deals specifically with employees recruited outside the continental United States for overseas duty, and provides, in pertinent part, that:

* * * The provisions in subpar. 1 also apply to an employee recruited outside the continental United States for assignment to an overseas official duty station in a different geographical locality from that in which the employee's place of actual residence is located (26 Comp. Gen. 679). This authority will be exercised in the best interest of the Department of Defense. The qualifications of the employee and conditions involved in his employment must justify the expenses incurred. * * *

When the Air Force initially hired Mrs. Gilbert, it had discretion, under this provision within certain limitations, to allow or not allow her to sign a transportation agreement. However, once this discretion was exercised, then all further actions were strictly limited by the terms of the regulations.

The specific questions presented in the submission will now be considered in the order in which they are raised.

(a) Has Mrs. Gilbert breached her entitlement to return transportation of household goods upon separation from Government employment because of her election, at the time of her marriage, to travel under her spouse's transportation agreement?

The conditions that must be met before an employee is entitled to separation travel and transportation are set out in 2 JTR para. C4200 (change 107, September 1, 1974). Except for the fact that Mrs. Gilbert is still employed, she has met those conditions. *See* 31 Comp. Gen. 683 (1952). The fact that she elected to travel as her husband's dependent when required, by regulation, to make an election, can in no way be considered a breach of any of her initial or renewal transportation agreements. The purpose of requiring this election is not to divest an employee of any earned benefits, but is intended to prevent the accumulation of double benefits from the same employer. Therefore, question (a) is answered in the negative.

(b) Has she breached her entitlement to Government-paid separation travel for herself and dependents because of the aforementioned election?

As in the answer to the previous question, Mrs. Gilbert has not breached the provisions of her initial travel agreement, and she and her immediate family (the applicable statutory provision, 5 U.S. Code 5722(a)(1), and the statutory regulation, Federal Travel Regulations (FPMR) para 2–1.5g(5)(a) (May 1973), both speak in terms of an employee's "immediate family" without requiring that they be "dependents") are entitled to separation travel. Question (b) is answered accordingly.

(c) If the answer to (a) or (b) is in the negative, is her entitlement based on her status at time of employment by the Air Force, or at the time separation travel is performed?

We assume that this question refers to the extent of Mrs. Gilbert's entitlement or benefits, rather than to her entitlement as such since as shown in the answers to questions a and b, the right to the entitlement itself is determined at the time of employment. However, the measure of that entitlement is determined by an employee's status at the time

the travel is performed. In B–151203, May 10, 1963, a similar change in status occurred. There in relation to employment leave travel, we held that the employee's status at the time the travel occurred was controlling with regard to travel of immediate family. We see no reason for a different result here in relation to separation travel. Therefore, Mrs. Gilbert's status at the time the separation travel is performed would determine the benefits to which she and her immediate family would be entitled.

Question (c) is answered accordingly.

(d) Is a married employee's election to perform renewal agreement travel as the spouse under her husband's transportation agreement revocable if there is a change in dependency status, or a loss or diminishment of travel entitlements under her husband's transportation agreement?

In a case such as this one, where an employee has earned an entitlement to certain benefits, independent of whatever that employee's spouse has done, that entitlement is not extinguished by the separation of the employee's spouse. In the question, the word "revocable" is used, but "reversion" would be more appropriate. Mr. and Mrs. Gilbert were required to make an election of benefits because they were both employed with the Federal Government. When Mr. Gilbert was involuntarily separated from the Federal service, the reason for the election no longer existed and Mrs. Gilbert as a Government employee should have been allowed to revert to her original agreement. This would not increase her entitlement, but would simply preserve those benefits to which she was already entitled. Therefore, in a situation as is presented here, where the spouses have independently earned their respective entitlements, and they are required to make an election of benefits in order to prevent a duplication of benefits, if one spouse ceases to be employed in the Federal service, thereby removing the basis for the election, the remaining spouse should be allowed to revert to the agreement held prior to the election.

Question (d) is answered in the affirmative.

(e) Notwithstanding that Mrs. Gilbert is not now under a transportation agreement, does she have a vested right to separation travel incident to the agreement executed in 1960 and upon completion of the prescribed period of service?

In accordance with the answers to questions a and b, nothing that Mrs. Gilbert has done jeopardizes her entitlement to separation travel. Mrs. Gilbert has already completed the required service. The only requirement that she has not met is the termination of her service. When she completed the service required under the original transportation agreement, her right to separation travel vested, subject to divestment only in accordance with 2 JTR paras. C4200–4206.

Question (e) is answered in the affirmative.

(f) Under the circumstances cited herein, would Mrs. Gilbert be eligible to enter into a transportation agreement so as to be entitled to perform renewal agreement travel?

The basic statutory authority for granting renewal agreement travel is 5 U.S.C. 5728(a) which provides that:

(a) Under such regulations as the President may prescribe, an agency shall pay from its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States under a new written agreement made before departing from the post of duty.

The language of this provision is mandatory, "an agency *shall* pay." The only conditions precedent are that the required service has been completed and that the employee has agreed to perform further service. This provision is implemented by 2 JTR para C4150, which provides that:

Round trip travel from overseas duty stations to places of actual residence and return to the same or a different overseas post of duty for the purpose of taking leave between overseas tours of duty will be encouraged and granted upon request of eligible employees. Authority will not be denied on the basis that the employee's position can be filled locally or that it is not desired to tender an eligible employee a renewal agreement. See par. C4003–1 for prohibitions regarding overseas local hires. Except as provided for teachers in par. C4156, authority may be denied under the following circumstances:

1. the employee is being processed for separation,
2. a reduction in force involving the employee is imminent,
3. a removal action is pending against the employee,
4. the employee's reassignment has been directed to a position in the United States,
5. the employee is to be reassigned to a position in the continental United States in connection with rotation on similar programs which will preclude completion of a required period of service under a renewal agreement.

Although the employee will not be denied renewal agreement travel at Government expense to which he has earned entitlement, except under the circumstances listed in items 1 through 5, the time at which the leave is granted in connection with such travel is subject to approval by the overseas command concerned. If the employee is engaged upon a project which will be completed within a reasonable time, there is a temporary shortage of personnel, or for other cogent reasons, the employee may be requested to postpone his renewal agreement travel for a reasonable period not in excess of 90 days.

This section clearly establishes a policy of encouraging renewal agreement travel. It also strictly limits any denial of such travel to cases listed. None of these factors have been shown to be present in Mrs. Gilbert's case. Therefore, she should be permitted to negotiate a transportation agreement granting renewal agreement travel. In computing the time limits for required service, the time should run from the return of Mrs. Gilbert from her last renewal agreement trip under either her own prior agreement or her husband's agreement with the Department of the Air Force, whichever is later.

Question (f) is answered accordingly.

In light of the answer to question f, no answer to question g is necessary.

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ABSENCES (*See* **LEAVES OF ABSENCE**)

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

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

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

Federal

Voluntary services

Enrollees or trainees. (*See* **VOLUNTARY SERVICES, Enrollees or trainees, Comprehensive Employment and Training Act**)

AGENTS Page

Government

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

Government liability for acts beyond authority

Civilian personnel matters

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

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

AGRICULTURE DEPARTMENT—Continued Page

Rural Electrification Administration

Loans to cooperatives

Federal law applicability

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

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

ALLOWANCES

Evacuation allowances

Military personnel. (*See* **FAMILY ALLOWANCES, Evacuation**)

ANNUAL LEAVE (*See* **LEAVES OF ABSENCE, Annual**)

APPOINTMENTS

Administrative function

Back Pay Act not applicable

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 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

APPOINTMENTS—Continued Page

Manpower shortage category

Travel expenses. (*See* **TRAVEL EXPENSES, First duty station, Manpower shortage**)

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

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

Limitations

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

ARBITRATION

Award

Consistent with law, regulations and GAO decisions

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

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

BIDDERS Page

Qualifications

Capacity, etc.

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

Experience

Propriety of evaluation

Since phrase "similar or related" as used in "Qualifications" evaluation standard of FPR 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

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

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

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

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 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

BIDS Page

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 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

Buy American Act

Price differential

Addition of 6% or 12% in evaluation

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

Competitive system

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

Discarding all bids

Readvertisement justification

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

Evaluation

Foreign product differential. (*See* **BIDS, Buy American Act, Price differential**)

Informal competitive bidding

Rural Electric 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

BIDS—Continued Page

Invitation for bids

Cancellation

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

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

Unit price error

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

Modification

After bid opening

Color substitution

"Or equal" for brand name

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

Negotiated procurement. (*See* **CONTRACTS, Negotiation**)

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

Signatures

Agents

Authority. (*See* **AGENTS, Of private parties, Authority, Contracts, Signatures**)

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Signatures—Continued

Agents—Continued

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, indicates certification execution was adequate and in conformance with bid and protester has not submitted evidence why this conclusion is unreasonable 686

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

Two-step procurement

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

BONDS

Bid

Surety

Underwriting limitation

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

BUY AMERICAN ACT Page

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**)

COMPENSATION

Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)

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

Removals, suspensions, etc.

Back pay

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

Wage board employees

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

CONTRACTORS Page

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

Fraud

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

CONTRACTS

Awards

Notice

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

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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
Mandatory referral to Small Business Administration
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
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
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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

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Medicare Part "B" program—Continued
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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

Negotiated. (*See* **CONTRACTS, Negotiation**)

Negotiation
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

Awards
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

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

CONTRACTS—Continued Page
Negotiation—Continued
Competition
Changes in price, specifications, etc.
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
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 562
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
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 Page

Negotiation—Continued

Competition—Continued

Propriety

Method of conducting negotiations

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

Cost, etc., data

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. 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, 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 ---------- 562

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 compensate for deficiencies in protester's approach. Also, no objection is found to downward treatment of proposed fee ---------- 562

Cut-off date

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

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors

Administrative determination

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

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---------- 562

Criteria

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

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

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

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Manning requirements—Continued
Government estimated basis—Continued
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 to 10 U.S.C. § 2304(g) requirement for "written or oral discussions," or that exception itself represented failure to comport with statute 562
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
Propriety of evaluation
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
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
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

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Propriety evaluation

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 562

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 562

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

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

CONTRACTS—Continued Page

Negotiation—Continued

Offers or proposals

Best and final

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

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

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

Qualifications of offerors

Experience

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

CONTRACTS—Continued Page

Negotiation—Continued

Offers or proposals—Continued

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

Prices

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

Requests for proposals

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

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

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

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Offer—Continued
Additional information—Continued
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
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
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
Two-step procurement
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
Price adjustment
Fixed-price contract
Rule
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

CONTRACTS—Continued Page

Privity

Subcontractors

Award "for" Government

As a 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. 893, 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

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 ---------- 783

CONTRACTS—Continued Page
Protests—Continued
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
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 contractor officer's findings in this case---- 686
Fraud
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
Subcontractor protests
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
Timeliness
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
Negotiated contract
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 Page
Protests—Continued
Timeliness—Continued
Solicitation improprieties
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
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
Research and development
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
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
Individual tailoring
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
Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Specifications
Conformability of equipment, etc., offered
Commercial model requirement
"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 "commerical, 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

CONTRACTS—Continued Page

Specifications—Continued

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

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

Restrictive

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

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

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

Privity. (*See* **CONTRACTS, Privity, Subcontractors**)

CONTRACTS—Continued Page

Subcontracts

Administrative approval

Review by General Accounting Office

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

Cost-reimbursement. (*See* **CONTRACTS, Cost-type, Subcontracts**)

Generally

GAO will not consider on merits protest of award of automotic 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

Termination

Convenience of Government

"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

CONTRACTS—Continued Page

Termination—Continued

Convenience of Government—Continued

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

Unsubstantiated low offer

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

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

COURTS

Reporters

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 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

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 Page
Tax Courts of United States—Continued
Reporting
Stenographic *v.* electronic
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.**)

DEBT COLLECTIONS
Waiver
Military personnel
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

DEPARTMENTS AND ESTABLISHMENTS
"Hosts"
Enrollees or trainees
Comprehensive Employment and Training Act
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
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

DISCRIMINATION (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA
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

FAMILY ALLOWANCES Page

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

FOREIGN GOVERNMENTS

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

GENERAL ACCOUNTING OFFICE

Contracts

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

Decisions

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 783

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

GENERAL ACCOUNTING OFFICE—Continued Page

Decisions—Continued

Requests

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 implementation 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 determination

General Accounting Office review discontinued

Exceptions

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

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

GENERAL ACCOUNTING OFFICE—Continued Page

Recommendations

Reconsideration of decision effect

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

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

HOLIDAYS

Annual leave charge. (*See* **LEAVES OF ABSENCE, Annual, Holidays**)

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**)

Dependents

Quarters allowance. (*See* **QUARTERS ALLOWANCE, Dependents**)

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

INSURANCE

Private property loaned to Government. (*See* **PROPERTY, Private, Loaned to Government, Insurance**)

INTEREST Page

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

JOINT VENTURES

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

Unfair labor practices

Authority

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

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

LEAVES OF ABSENCE—Continued Page

Annual

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. 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

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, 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

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 personnel

Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel, Leaves of absence**)

LEAVES OF ABSENCE—Continued Page

Sick

Recredit of prior leave

Reemployment

Break in service period

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 re-credited 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

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

MILEAGE

Military personnel

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

MILITARY PERSONNEL

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

Claims

Waiver. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

Medical officers

Pay. (*See* **PAY, Medical and dental officers**)

Retired

Service credits. (*See* **PAY, Retired, Medical and dental officers, Service credits**)

MILITARY PERSONNEL—Continued Page

Reservists

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

Reservists. (*See* **MILITARY PERSONNEL, Reservists, Retirement**)

Service credits. (*See* **PAY, Service credits**)

Service credits

Pay. (*See* **PAY, Service credits**)

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

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

OFFICERS AND EMPLOYEES

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

OFFICERS AND EMPLOYEES—Continued Page

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

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

Premium pay

Leaves of absence

Holidays

Employees of VA hospital, charged annual leave on holidays they did not work because they were paid premium 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

Removals, suspensions, etc.

Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)

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 speciality 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 Page

Transfers

Relocation expenses

Distance between old and new residences

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

House purchase

Pro rata expense reimbursement

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

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

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

"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

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Temporary quarters
Time limitation
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

ORDERS
Amendment
Retroactive
Travel completed
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

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

PAY
Medical and dental officers
Service credits
Constructive
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

PAY—Continued Page

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 (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

Survivor Benefit Plan

Children

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 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 appear that the benefit of only a temporary termination under these circumstances was intended 709

PAY—Continued Page
Retired—Continued
Survivor Benefit Plan—Continued
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 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
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
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
Service credits
Cadet, midshipman, etc.
Retired pay
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
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

PAY—Continued Page
Service credits—Continued
Constructive—Continued
Medical and dental officers—Continued
Retired pay computation—Continued
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

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
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

PROPERTY
Private
Damage, loss, etc.
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 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

PROPERTY—Continued Page
Public—Continued
Damage, loss, etc—Continued
Carrier's liability—Continued
Burden of proof—Continued
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

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Dependents
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

SET-OFF
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

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 California conflict of laws rule is that the marriage became void *ab initio* when the decree of annulment was entered ---- 600

STATES Page

Federal aid, grants, etc.

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

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

SUBSISTENCE

Per diem

Military personnel

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

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

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Temporary duty—Continued
Return daily to home
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
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

TELEPHONES
Private residences
Prohibition
Military members
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

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
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

TRANSPORTATION—Continued Page

Dependents—Continued

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

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

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

Military personnel

"Do It Yourself" movement

Cash advances

Vol. 1, JTR, may not be amended to allow advance payment for rental vehicles for transporation 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

TRANSPORTATION—Continued Page

Motor carrier shipments

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

Rates

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

Light and bulky articles

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

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

Tariffs. (*See* **TRANSPORTATION, Rates, Tariffs**)

Trailers

Trailer shipments

Civilian personnel. (*See* **TRANSPORTATION, Household effects, House trailer shipments**)

TRAVEL ALLOWANCE

Military personnel

Subsistence

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

Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel**)

TRAVEL EXPENSES Page

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

Interviews, qualifications, etc.

Competitive service positions

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 Jasksonville, 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

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
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
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

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

VETERANS' ADMINISTRATION Page

Contracts

Obligated services for residency training, etc.

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

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

WORDS AND PHRASES

"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 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

"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 particulr 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 determinatons as to reasonableness of prime contractor's procurement process, although propriety and necessity of variation from details of "Federal norm" is recognized ---------- 767

"Hosts"

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

WORDS AND PHRASES—Continued Page

"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

"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

"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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