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TABLE OF DECISION NUMBERS

	Page
B-154522, Dec. 29	178
B-177610, Dec. 15	130
B-178564, Dec. 28	163
B-185291, Dec. 28	170
B-187716, Dec. 29	185
B-187771, Dec. 29	192
B-188481, Dec. 29	194
B-188738, Dec. 21	140
B-188771, Dec. 8	125
B-189013, Dec. 28	172
B-189100, Dec. 27	155
B-189417, Dec. 21	147
B-189460, Dec. 27	157
B-189465, Dec. 16	132
B-189594, Dec. 29	198
B-189784, Dec. 21	151
B-189811, Dec. 8	127
B-189926, Dec. 27	159
B-190144, Dec. 28	176

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[B-188771]

Contracts—Protests—Upheld—Bidder's Option To Accept Award—Conditioned Acceptance—Effect

Invitation for bids (IFB) provided that performance period was from March 15, 1977, or 5 days after award, if later, until March 14, 1978. Bidder confirmed bid on August 15, 1977, after General Accounting Office (GAO) decision upholding its preaward bid protest and during GAO review of another firm's request for reconsideration of that decision, on condition that award be for performance period of 1 year from award. Bid was thereby rendered ineligible for acceptance, since award of contract pursuant to advertising statutes must be on same terms offered all bidders, and various IFB clauses cited by bidder concern post-award situations.

Bids—Discarding All Bids—Reinstatement—General Accounting Office Direction—Bidder's Option To Accept Award

Although bids under canceled IFB expired during GAO consideration of protest against cancellation, where GAO decision recommends reinstatement of IFB, successful bidder may still, at its option, accept award thereunder.

Bidders—Unsuccessful—Anticipated Profits

Claim for anticipated profits and for cost of pursuing bid protest is rejected.

In the matter of the Tennessee Valley Service Company, December 8, 1977:

Invitation for bids (IFB) No. DAHO3-77-B-0023 for moving services was issued on February 18, 1977, by the United States Army Missile Materiel Readiness Command. The period of performance was from March 15, 1977, "or five (5) days after award of contract, if later," through March 14, 1978. After bids were opened, the Army determined that the solicitation's evaluation clause was ambiguous. Under one interpretation of the clause perceived possible by the Army Tennessee Valley Service Company (TVS) would have been entitled to award, and under another, Maintenance, Inc., would have been. The Army therefore canceled the IFB and resolicited for the requirement.

TVS and Maintenance both protested the cancellation. In our decision in *Tennessee Valley Service Company*, B-188771, July 20, 1977, 77-2 CPD 40, we recommended that the canceled solicitation be reinstated and award made thereunder to TVS, if otherwise proper. That decision was subsequently affirmed in response to an August 12 request by Maintenance that we reconsider. See *Tennessee Valley Service Company—Reconsideration*, B-188771, September 29, 1977, 77-2 CPD 241.

Pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3) (1976 ed.), the Army withheld award under IFB -0023 during our consideration of the initial protests. We are now

advised that on August 4 the contracting officer asked TVS to confirm its bid, which TVS did by letter of August 15 "on the condition that the contract be awarded for a term of one year from the date of award." Maintenance had filed its request for reconsideration in the intervening period, and the Army determined to withhold award to TVS while we considered that request.

In accordance with our July 20 and September 29 decisions, the Army has attempted to award a contract to TVS under IFB–0023 for the period beginning 5 days after award until March 14, 1978. However, TVS has requested that our Office direct the Army to award a contract to TVS for a term of 1 year, which was the contract period contemplated under IFB–0023 as initially issued and was the basis upon which TVS conditioned the confirmation of its bid on August 15. TVS suggests that such award would be authorized by paragraph J–3 of the IFB, "Requirements" (see ASPR § 7–1102.2 (1976 ed.)); paragraph L–1 clause 2, "Changes" (see ASPR § 7–1902.2 (1976 ed.)); and paragraph L–1 clause 30, "Government Delay of Work" (see ASPR § 7–104.77 (1976 ed.)). In the alternative, TVS requests $10,000 in damages, on the following basis:

> This contract should have been awarded to Tennessee Valley Service Company on or about March 15, 1977. The fact that it was not awarded at that time was entirely the fault of the government and in no way the fault of Tennessee Valley Service Company. The continued delay and eventual refusal of the Contracting Officer to award this contract to Tennessee Valley Service Company coupled with the fact that it awarded the work to another bidder during the delay we believe shows bad faith on the part of the Contracting Officer. The Contracting Officer's unwarranted delay in awarding the contract, her eventual refusal to award the contract to Tennessee Valley Service Company, her award of the work to another bidder while Tennessee Valley Service Company's protest was pending, and her causing Tennessee Valley Service Company to protest her improper cancellation and award several times over a period of six (6) months have damaged Tennessee Valley Service Company in the amount of $7,000.00 (contract price minus cost of performance) and caused it to incur attorneys' fees of approximately $3,000.00.

The IFB, by providing that the contract awarded would run from March 15, 1977, "or five (5) days after award of contract, if later," clearly advised bidders that the performance period could be less than 1 year. In any case, since award of a contract pursuant to the advertising statutes must be made on the same terms offered to all bidders, see *The Manbeck Bread Company*, B–190043, October 5, 1977, 77–2 CPD 273, award under IFB–0023 could not properly include a performance period after March 14, 1978, as suggested by TVS. Moreover, by conditioning acceptance of the award on August 15 on a basis inconsistent with the terms of the solicitation, TVS rendered itself ineligible for award. See *Coronis Construction Company, et al.*, B–186733, August 19, 1976, 76–2 CPD 177. In this connection, the IFB provisions cited by TVS provide no basis to extend the effective period of the proposed contract. Paragraph J–3 merely sets out basic information concerning

the rights of the Government and a contractor during the performance period prescribed in a requirements contract. Clauses 2 and 30 of paragraph L–1 concern matters arising after contract award.

In view of the above, award should be made under IFB–0023 to the second low bidder, if otherwise proper and practical. In this connection, although other bids under IFB–0023 have presumably expired, we have held that in such situation a bidder may still at its option accept an award. See *Guy F. Atkinson Company, The Arundel Corporation, Gordon H. Ball, Inc., and H. D. Zachry Company (a joint venture)*, 55 Comp. Gen. 546, 550 (1975), 75–2 CPD 378.

In regard to the request for $7,000 in damages representing "contract price minus cost of performance," i.e., anticipated profits, such claims have continually been rejected. Concerning TVS's attorney's fees, the cost of pursuing a bid protest is also noncompensable. See *Bell & Howell*, 54 Comp. Gen. 937 (1975), 75–1 CPD 273.

[B–189811]

Bids—Late—Telegraphic Modifications—Delivered Subsequent to Bid Opening—Telephone Notification Received Prior to Bid Opening

Bid modification was untimely where telegram was received after bid opening, notwithstanding fact that agency had received telephone call from telegraph company prior to bid opening indicating that bidder was modifying its bid.

Bids—Late—Telegraphic Modifications—Delay Due to Western Union—Failure To Use Tie-In Line to Installation

Erroneous information provided by agency and agency's acceptance of telegraph company's delivery by telephone did not constitute Government mishandling solely responsible for or the paramount reason for untimely receipt of telegraphic bid modification where telegram was qualified on its face as official Government business and telegraph company should have been aware of existence of its own tie-in line to Government installation.

In the matter of the Sturm Craft Company, December 8, 1977:

The Sturm Craft Co. (Sturm Craft) contends that the modification to its bid submitted in response to invitation for bids (IFB) N62472–77–B–0144 for shore power improvements at the Naval Underwater Systems Center, New London, Connecticut (Navy), was improperly rejected as late. If the modification is considered, Sturm Craft would be the low bidder.

Bid opening was at 2:00 p.m. on July 7, 1977. The IFB contained the clause "Late Bids, Modifications of Bids or Withdrawal of Bids (1974 Sep)" (late bid clause). The record indicates that Western Union received Sturm Craft's telegram addressed to the Resident Offi-

cer in Charge of Construction (as required in the IFB), at 6:10 p.m. on July 6. The instructions specified delivery on "AM 07-07." At approximately 10:00 a.m. on July 7, Western Union called the Office of the Resident Officer in Charge of Construction (ROICC) and read the telegram, which referenced the IFB and reduced Sturm Craft's bid price by $38,000. The individual who received the telephone call responded affirmatively to Western Union's query as to whether a confirmatory copy of the telegram was necessary. He gave no indication that delivery by telephone was unacceptable. The copy was received by the ROICC at 11:34 a.m. on July 8, after bid opening.

At bid opening, the low bid was submitted by The Thames Electric Company, at $289,550. Sturm Craft's bid was $321,000. If the modification is considered, Sturm Craft's bid would have been low at $283,000.

The Navy states in its report that the late bid clause allows " * * * consideration of late bids only if sent by registered or certified mail not later than the 5th day before opening, or the mail '(or telegram if authorized)' was late due solely to mishandling at the Government installation. Modifications of bids are expressly subject to the same requirements, and telegraphic bids were not authorized." Further, "[T]elegraphic modifications could be considered only if received before bid opening or excusably late for the same reasons that would justify consideration of a late bid. The Modification was late and was not (i) sent registered or certified mail five days prior to opening or (ii) late due solely to Government mishandling at the Government installation. The Navy cites three cases for the proposition that bidders cannot modify bids on the basis of oral telephonic notifications. 52 Comp. Gen. 281 (1972); 40 Comp. Gen. 279 (1960); B-161595, August 17, 1967.

On the other hand, Sturm Craft finds nothing in the IFB or the authorities cited by the Navy that precludes consideration of the telephonic notice of a telegraphic bid modification. Therefore, Sturm Craft contends that if it is not precluded, telephonic modification is permitted.

The pertinent provisions of the IFB are:

LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL OF BIDS (1974 SEP)

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) It was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g., a bid submitted in response to a solicitation requiring receipt of bids by the 20th of the month must have been mailed by the 15th or earlier), or

(ii) It was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized. A bid may also be withdrawn in person by a bidder or his authorized representative, *provided* his identity is made known and he signs a receipt for the bid, but only if the withdrawal is made prior to the exact time set for receipt of bids.

* * * * * * *

(d) Modifications of bids already submitted will be considered if received at the office designated in the invitation for bids by the time set for opening of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid.

The initial controversy is whether the oral notice of the contents of the telegram received prior to bid opening and confirmed after bid opening may properly be considered as modifying the bid.

There is no provision in either the present regulation or the clause which permits the acceptance of a bid modification made by telephone prior to bid opening and confirmed by subsequent telegram received after opening. While prior to July 31, 1973, Armed Services Procurement Regulation (ASPR) § 2–304 (1973 ed.) permitted the consideration of bid modifications under these circumstances, Defense Procurement Circular No. 110, issued on May 30, 1973, effective July 31, deleted the provisions of ASPR allowing such modifications and stated:

Telephonic receipt of telegraphic bids/proposals, modifications or withdrawals no longer qualifies the telegram as being timely. The telegram itself must be received by the proper official at the Government installation by the time specified.

Since the telegram from Sturm Craft was not received until after the opening of the bids, the agency acted properly in determining that the telegraphic modification was untimely. *Cf. James Luterbach Construction Company*, B–190012, October 4, 1977, 77–2 CPD 265.

Sturm Craft argues alternatively that even if its modification is untimely, its late delivery was due solely to mishandling by the Government and that it should have been considered under subparagraph (a) (ii) of the late bid clause (ASPR § 7–2002.2 (1976 ed.)). Traditionally, we have construed this provision to authorize consideration of late bids or modifications where a bid or modification was mishandled after physical receipt at the Government installation but prior to delivery at the place designated in the IFB. *See* 46 Comp. Gen. 771 (1967); 43 *id.* 317 (1963); B–165474, January 8, 1969; B–163760, May 16, 1968; and B–148264, April 10, 1962.

However, in *Hydro Fitting Mfg. Corp.*, 54 Comp. Gen. 999 (1975), 75–1 CPD 331, we found that if Government mishandling is the paramount reason the Government installation fails to obtain actual control over the tangible bid or evidence of the time of its receipt, and there exists no possibility that the late bidder would gain an unfair advantage over other bidders and thereby undermine the integrity of the competitive bid system, his late telegraphic bid or modification should be considered.

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In *Record Electric, Inc.*, 56 Comp. Gen. 4 (1976), 76-2 CPD 315, we found the Navy properly refused to consider a telegraphic bid modification not received prior to bid opening where Western Union notified the procuring activity by telephone of the modification after being informed that the procuring activity was out of forms for receiving messages on its telex receiver and was therefore unable to transcribe the incoming telegram. Because Western Union had failed to respond to the Navy's timely order requesting a new supply of forms, and because the modification was not received after Western Union was advised that the modification could not be accepted by telephone and must be physically delivered prior to bid opening, we found the substantial cause for nonreceipt to have been Western Union rather than Government mishandling.

We believe that the facts in the present record are substantially similar to those involved in *Record Electric* and that the late delivery of Sturm Craft's modification cannot be said to have been due solely to Government mishandling or that Government mishandling was the paramount reason for the lateness. The record indicates that on the day prior to bid opening, Sturm Craft called the ROICC to ascertain whether there was a TWX machine on the installation to receive telegrams. The contract specialist erroneously advised that the machines on base were only for intragovernmental use. Sturm Craft contends that had it been properly advised that there was a tie-in line from Western Union to the Sub Base, the telegraphic modification would have been received the evening prior to bid opening. While the ROICC may be criticized for failing to indicate that telephonic delivery was unacceptable and that a tangible copy of the telegram must be received prior to bid opening, we believe Western Union should have been aware of the existence of its tie-in line to the base and, inasmuch as the telegram was clearly qualified on its face as "official Government business," should have made some attempt to transmit the message directly to the Government installation. Accordingly, we find no basis to conclude that Government mishandling was the paramount or sole cause of the modification's late receipt. Therefore, the award made to Thames Electric Company was proper and Sturm Craft's protest is denied.

[B-177610]

General Services Administration—Services for Other Agencies, etc.—Space Assignment—Rental—Liability of GSA for Damages to Agency Property

General Services Administration (GSA) is not required to reimburse tenant agencies for damage to agency property caused by building failures or to lower Stand-

ard Level User Charges by amount equal to liability insurance premium paid by commercial landlords. The general rule is that one Federal agency is not liable to another for property damages. There is no basis in Federal Property and Administrative Services Act or its legislative history to create an exception to this general rule where GSA serves as landlord.

In the matter of the liability of the General Services Administration for damage to agency property, December 15, 1977:

This decision is in response to a request by the Deputy Assistant Secretary of Defense (Administration) for our views concerning the liability of the General Services Administration (GSA) for damage to the property of Federal agencies which rent space in buildings owned or leased by GSA.

Specifically, the Department of Defense (DOD) wants to know whether GSA should reimburse agencies "for damage to or losses of furniture, furnishings, or equipment which result from building failures" where a commercial landlord would be liable "either by recovery from a lessor, where one is involved, or through a set-aside for that purpose in the Federal Buildings Fund." As an alternative to reimbursement for damages, DOD suggests that GSA "reduce its Standard Level User Charges to the Agencies by an amount equivalent to the premiums paid by the commercial landlords for liability coverage so that the agencies could then underwrite their position as self-insurers."

The landlord-tenant relationship between GSA and the various agencies is governed by the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471 *et seq.* (1970 and Supp. V, 1975). Section 490(j) of title 40 provides in pertinent part:

> * * * The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services * * *.

Since the damages to agency property referred to by DOD are those for which a commercial landlord would be liable, the question is whether GSA's status as a Federal agency would affect its liability to another Federal agency for damages. We think that it would.

The general rule governing claims for damages between Federal agencies was stated in B–137208, December 16, 1958:

> It has been a rule of long standing that funds of Government Departments and agencies subject to the control of the accounting officers of the Government are not available for the payment of claims for damages to property of other Government Departments and agencies. See 25 Comp. Gen. 49, 54 and cases cited therein. Such holdings have been based upon the premise that ownership of property is in the Government and not in a particular Department * * *.

Given the general rule which prohibits claims for damages between Federal agencies, recovery of damages from GSA would depend upon whether, in providing that rental rates "shall approximate commercial

charges for comparable space and services," rather than providing that such rates be based on cost alone, Congress intended to invest tenant agencies with all the rights that the agencies would have against a commercial landlord. On this issue, both the legislative history of section 490(j) and our comments on the draft bill are instructive.

The legislative history makes it clear that the purpose for providing that rental rates approximate commercial charges was two-fold. The first was to encourage the agencies to consolidate their space requirements by making them pay higher rental charges and the second was to generate extra funds to be used by GSA to finance construction of new buildings. See 118 Cong. Rec. 13500 (1972) (remarks of Rep. Gray). In B-95136, May 18, 1971, in comments on the draft bill, we said:

> The method of basing rental rates on cost recovery was rejected by GSA because it would not produce sufficient income to finance construction and major repairs. * * * It is more economical for the Government to occupy space in its own buildings than to lease commercial space, and, as indicated above, there is currently a backlog of $900 million of authorized but unfunded construction projects which apparently is not being significantly reduced at the present level of construction appropriations. Therefore if the proposed procedure is adopted, there would seem to be some merit in basing the rental rate on commercial charges rather than at rates designed to recover only GSA's actual cost.

In view of the above, it seems clear that Congress intended by the reference to "commercial" charges only to create extra revenue, not to invest tenant agencies with all rights they would have against a "commercial" landlord.

For the same reasons, it is also clear that GSA is not required to lower its rental charges by an amount equal to that which a commercial landlord would pay for liability insurance since the rental charges are not based on cost. There are many expenditures that go into a commercial rental charge for space that are not applicable to GSA. Among these are taxes, depreciation, interest on a long-term debt, and profit, as well as liability insurance. Since it was the intent of Congress that the funds representing the difference between rates based on cost and commercial rates be used to finance new buildings, the rental charges should not be lowered.

Of course, if GSA does not own the building, but is renting it from a commercial landlord, it should attempt to recover for damages caused by building defects. This would not be in violation of the rule against claims for damages between Federal agencies.

[B-189465]

Enlistments—Void—Pay and Allowances Entitlement

Decision by a military court that it does not have personal jurisdiction over an individual for purposes of military law because the Government has failed to

prove that the individual was validly enlisted does not automatically void the enlistment for purposes of determining the person's entitlement to pay and allowances.

Enlistments—Pay Rights, etc.—Validity Determination

Unless by court-martial authority, or by another method prescribed by law, an individual is deprived of his pay and allowances as a member of the armed forces, an administrative determination should be made, pursuant to the authority of the Secretary of the service concerned, to determine the validity of an enlistment for purposes of pay and allowances when a military court finds it lacks jurisdiction over the individual due to a defect in his enlistment.

Military Personnel—Induction Into Military Service—Void *v.* Voidable

When an enlistment contract is found to be voidable by either the Government or the individual because of a defect in the enlistment, either the Government or the individual may waive the defect and affirm the enlistment so as to confer upon the individual *de jure* member status for purposes of pay and allowances.

Enlistments—Validity—Administrative Determination Requirement—Pay and Allowances Until

Where an individual has been held by a military court to be outside the jurisdiction of the Uniform Code of Military Justice and the validity of the individual's enlistment has not been administratively determined to be invalid, the individual's military pay and allowances may be continued until the administrative determination is made. In such cases a prompt administrative determination should be made as to whether the enlistment is void, voidable, or valid.

Military Personnel—*De Jure* Status

Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a *de jure* enlisted status and entitled to pay and allowances.

Enlistments—Constructive

A constructive enlistment has been held to arise for purposes of pay and allowances when an individual who was originally ineligible to acquire the status of a member of the armed forces conceals his disability and enlists and after removal of the disability the individual remains in the service and voluntarily performs duties and such work is accepted by the Government without reservation.

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 537, December 16, 1977:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) dated June 27, 1977, which requests a decision on questions presented by Department of Defense Military Pay and Allowance Commitee Action No. 537 concerning the effect of decisions by the United States Court of Military Appeals (USCMA) in the cases of *United States* v. *Russo*, 50 C.M.R. 650 (1975), and *United States* v. *Catlow*, 48 C.M.R. 758 (1974), on the entitlement of persons to military pay and allowances.

The basic issue presented is whether a holding by a military court, that it has no jurisdiction over an individual because of the Government's failure to show a valid enlistment, must be considered as binding for administrative purposes, thus requiring termination of pay and allowances and release of the individual from service.

By way of background, in the *Catlow* case it was held that a person who enlists as an alternative to a jail sentence, which was to be imposed as a result of civilian charges, cannot acquire military status because such enlistments are involuntary in nature. The court concluded that without military status the person is not subject to the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* (1970), and cannot be court-martialed for an unauthorized absence. In so holding, the court stated that the Government was required to prove that a valid enlistment had been created and, absent a showing in the case otherwise, the enlistment was void at its inception for purposes of the pending criminal action requiring a dismissal of the charges against the defendant for lack of jurisdiction.

The court in the *Russo* case held that military courts do not have jurisdiction over an individual where a recruiter aids him in enlisting knowing the enlistee is not qualified to be a member of the military. In so holding, the court stated that common-law contract principles dictate that where a recruiter's misconduct amounts to a violation of the fraudulent enlistment statute (10 U.S.C. 884 (1970)), as it did there, the resulting enlistment is void as contrary to public policy unless the Government shows by controverting evidence the existence of a valid enlistment. Because such evidence was not produced by the Government in the *Russo* case, the Court of Military Appeals reasoned that the trial court was without jurisdiction to convict the defendant and, accordingly, the finding of guilty should be set aside.

Question One

The first question presented is: "1. Does a decision made in accordance with the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* (1970), and based on the holdings of the Court of Military Appeals in the cases of *United States* v. *Russo*, 23 USCMA 511, 50 CMR 650 (1975), and *United States* v. *Catlow*, 23 USCMA 142, 48 CMR 758 (1974), that an enlistment is 'void' and does not subject the enlistee to the jurisdiction of the UCMJ, *ipso facto* void the enlistment as a basis for entitling the enlistee to pay and allowances?"

We are of the opinion that a decision by the USCMA finding an individual's enlistment in the service void for the purpose of court-martial jurisdiction does not *ipso facto* void the enlistment for the

purposes of determining the individual's entitlement to pay and allowances.

Military courts do not function to decide administrative issues. *Herrod* v. *Convening Authority*, 42 C.M.R. 176 (1970). Military courts are courts of limited jurisdiction, their function is primarily to adjudicate criminal violations of military law, not to decide administrative questions such as whether a person should be discharged from the service, except as part of a sentence pursuant to a court-martial conviction.

Although the facts which would prove an individual's military status are the same for administrative purposes as they are for court-martial jurisdiction purposes, we do not find that in all instances where the Government fails to prove military status to the court it must be concluded that the individual does not, in fact, have military status. This would be the case if the Government in prosecuting the case before the court fails to bring into evidence otherwise available facts which would show that the individual was validly enlisted. *Parisi* v. *Davidson*, 405 U.S. 34, 42–44 (1972). Thus, while a military court's determination that it does not have jurisdiction over a person (such as in the *Russo* and *Catlow* cases) is conclusive for its jurisdictional purposes (10 U.S.C. 876 (1970)), such a determination of lack of jurisdiction is not conclusive as to a person's status in the service, for administrative purposes, such as whether he should be released from the service. Administrative matters such as determining under what conditions a member should be released are within the broad and comprehensive powers granted the service Secretaries. 39 Comp. Gen. 860, 868 (1960). Accordingly, a decision of a military court that it lacks jurisdiction over the individual because the Government has not shown a valid enlistment, while conclusive on the issue of court-martial jurisdiction, does not amount to a service review of the record of the individual to determine the status of that person for administrative purposes, and for entitlement to pay and allowances.

The answer to question number one, therefore, is in the negative.

Question Two

The second question presented is: "2. If the answer to question number 1. is in the negative, must, or may, an appropriate administrative authority decide the issue of the validity of such enlistment for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ independent of the prior decision?"

We have long held that where questions arise as to the validity of an enlistment contract which could affect an individual's entitlement to pay and allowances, a review of the problem should be made by

the appropriate administrative authority in order to make a definitive determination in regard to the matter. See generally 54 Comp. Gen. 291 (1974) and 47 Comp. Gen. 671 (1968). Consistent with the answer to question 1, we see no reason to change that view. Thus, when a court-martial authority makes a determination that it lacks jurisdiction over an individual due to the status of his enlistment, the service concerned should make an administrative determination pursuant to the governing regulations of the service concerned as to the nature of the enlistment in order to determine whether the enlistment is void, voidable, or valid for purposes of determining the individual's military status and entitlement to pay and allowances. 54 Comp. Gen. 291, *supra.*

While a military court's determination of lack of jurisdiction over an individual for court-martial purposes is a limited determination, it would be appropriate to consider it in making the administrative determination. Thus, where the military court has in evidence all relevent facts and has had a full hearing on the validity of an enlistment in order to decide the jurisdictional issue, an administrative body upon review of the court's record in all likelihood would find it sufficient to support a similar determination for administrative purposes.

Therefore, the second question is answered in the affirmative.

Question Three

The third question presented is: "3. If the answer to question number 2. is in the affirmative, and the appropriate administrative authority properly determines that the defect in the enlistment contract renders the enlistment merely voidable for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ, may the Service or the enlistee, as appropriate, waive the defect which renders the enlistment voidable and affirm the enlistment so as to confer the enlistee with *de jure* 'member' status for the purposes of title 37, United States Code, from the beginning of the enlistment?"

Among the problems considered in 54 Comp. Gen. 291 was the pay and allowance consequences arising from required administrative determinations as to whether an enlistment contract was void or merely voidable at the option of the Government. We stated therein, that once an administrative determination is made as to a fraudulent enlistment, if the contract is found to be voidable, the fraud should be waived or the individual should be promptly released from military control. In consonance with the foregoing guidance, paragraph 10401 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) states that, for the purposes of pay and allowances, when an enlistment is determined to be merely voidable,

the Government may void the contract or waive the defect and allow it to stand.

Table 1–4–1 of the DODPM, Rule 2, states that once a decision to waive the fraud has been made then pay and allowances continue with no loss of wages for the period, the enlistment being as valid as that of any other member.

Accordingly, for purposes of pay and allowances under title 37 of the United States Code, when the Government becomes cognizant of a fraudulent enlistment and the appropriate administrative body decides to waive the fraud, the waiver acts as a ratification of the individual's enlistment which relates back to the original date of entry conferring upon the individual, for pay purposes, *de jure* member status for the duration of the enlistment.

A similar conclusion also appears warranted when the voidable character of the fraud places the option to waive the fraud upon the individual whose enlistment has been found to be fraudulent. In those cases where the fraud or defect in the enlistment results from erroneous Government actions upon which the individual justifiably relied, and a decision is made that the enlistment is voidable and not void, it would appear consistent with our discussion above to permit the enlistee to waive the defect in the enlistment so as to confer upon the individual *de jure* member status for purposes of pay and allowances, such status relating back to the date of the original enlistment. 33 Comp. Gen. 34 (1953) and 54 *id.* 291. *Cf.* Question 3 is, therefore, answered in the affirmative.

Question Four

The fourth question presented is: "4. Assuming the answer to question number 2. is in the affirmative, in the case where an enlistee has been held not to be subject to the UCMJ and there has been no administrative determination as to the validity of the enlistment for purposes other than subjecting the enlistee to the jurisdiction of the UCMJ, may the enlistee be presumed to be entitled to pay and allowances until the determination is made?"

Where an enlistee has been held not to be subject to the UCMJ and there has been no administrative determination in regard to the validity of the enlistment, the enlistee may still be presumed to be entitled to pay and allowances. It has long been the rules in the case of a fraudulent enlistment entered into by the member concealing or misrepresenting a material fact that a decision by the Government to discharge the person constitutes an avoidance of the contract, and the individual is not entitled to pay and allowances for any period served under the fruadulent enlistment. However, by analogy to a *de facto*

255-868 O - 78 - 3

officer he is permitted to retain the pay he received currently while serving. 31 Comp. Gen. 562 (1952).

In 47 Comp. Gen. 671 and 54 Comp. Gen. 291, we recognized the necessity for an administrative determination that a member's enlistment was actually fraudulent before his pay and allowances are stopped. However, once such a determination is made payments must be stopped even if the defect is one which may be waived. Upon waiver, of course, back pay and allowances would then be payable.

In consonance with the principles mentioned above, and our answer to the first question, it is our view that a similar procedure should be followed in cases in which a military court finds that it has no jurisdiction due to the Government's failure to prove a valid enlistment. That is, an administrative determination should be made promptly to decide whether the enlistment is void, voidable or valid. Pay and allowances may be continued until such determination is made. The question, therefore, is answered in the affirmative.

Question Five

The fifth question presented is: "5. If the answer to question number 1. is in the negative and it is determined pursuant to a procedure suggested by question number 2. that the enlistment is void for all purposes, may a constructive enlistment arise for purposes other than subjecting the enlistee to the Uniform Code of Military Justice? If so, under what circumstances and from what point in time?"

Our Office has recognized constructive enlistments for purposes of pay and allowances where persons "otherwise qualified" to enlist, enter upon and render military service and the Government accepts such services without reservation. Such constructive enlistments may be regarded as *de jure* enlistments. See 33 Comp. Gen. 34, *supra*, 45 *id.* 218 (1965), and compare 52 Comp. Gen. 542 (1973). However, a definite distinction must be drawn between persons "otherwise qualified" to enlist and those who enter military service by fradulent means and thus whose enlistments are void or voidable. We have stated that a person who enlists in the military while under a disqualification does not by remaining in the service ratify his purported contract of enlistment; however, it has been accepted that the act of remaining in the service and receiving pay and allowances after removal of the disqualification is the equivalent of an enlistment. *Ex parte Hubbard*, 182 F. 76 (5th Cir. 1910); 54 Comp. Gen 291 (1974); 24 *id.* 175 (1944).

The crucial consideration in determining whether or not a constructive enlistment is present in a given case for purposes of pay and allowances appears to be whether the person who is otherwise qualified to be a member of the armed forces, after removal of the disqualifying

factor (24 Comp. Gen. 175, *supra*), or, who is otherwise qualified to become a member of the armed forces but due to some irregularity in procedure is not technically a member (45 Comp. Gen. 218), voluntarily accepts the benefits and assumes the obligations of membership in the armed forces without objection from the Government. See *Miller* v. *Commanding Officer, Camp Bowie, Tex.*, 57 F. Supp. 884 (D.C. Tex. 1944); 33 Comp. Gen. 34 (1953); and compare *United States* v. *King*, 28 C.M.R. 243 (1959).

Application of the rules discussed above to the circumstances which most frequently arise in regard to void versus voidable enlistments yields the following results.

Enlistments which are administratively determined to be absolutely void because at the time the individual enlisted and at the time the defect is discovered the individual is under a legal disability which renders him without legal capacity to acquire military status, neither the Government nor the individual being capable of waiving the defect, could not become constructively enlisted since the individual who enlisted still suffers the disability which originally prevented him from acquiring the requisite status in the armed forces. See *In re Grimley*, 137 U.S. 147, 152–153 (1890); *Hoskins* v. *Pell*, 239 F. 279 (5th Cir. 1917), 54 Comp. Gen. 291 (1974). Thus, for example, in our view a constructive enlistment could not arise where an individual enlists below the minimum statutory age and that fact is discovered before he attains that age. 10 U.S.C. 505(a). See also 10 U.S.C. 504 regarding enlistment of insane persons. The above circumstance is to be distinguished from the case where the disability preventing an individual from acquiring the status of a member of the service is removed during his enlistment giving rise to a voidable enlistment situation. This, for example, is the circumstance where a minor enlists prior to attaining the minimum statutory age of enlistment but reaches the age of legal majority before the original fraud is discovered. Such an individual, who reaches the minimum age and who continues to voluntarily provide services to the Government and the Government accepts those services, for a significant period of time without taking any action to void the enlistment may be considered to be serving in a constructive enlistment.

We are unable to provide any more specific answers to the general questions presented concerning constructive enlistments, other than to say, as stated above, that we have recognized them under the facts in the cases cited. If a case arises in which the member's entitlement to pay and allowances is contingent upon a constructive enlistment, we suggest it be submitted here for consideration.

[B-188738]

Contracts—Modification—Beyond Scope of Contract—Subject to General Accounting Office Review

Contrary to usual view that protests against proposed contract modifications are not for review since they are within realm of contract administration, protest which alleges that proposed modification is beyond scope of contract is reviewable by General Accounting Office, if otherwise for consideration.

Contracts—Protests—Conflict in Statements of Contractor and Contracting Agency—Protest Before or After Award

It is concluded that protester was specifically informed on February 18, 1977, of Navy's intent to modify contract in ways which were later made subject of March 31 protest notwithstanding that, as of February 18, Navy contracting office had not received internal Navy document describing modification and that some details of intended modification—unrelated to basic grounds of protest—were later changed.

Contracts—Protests—Timeliness—Basis of Protest—Constructive Notice

Although protester hedges admission that it was aware—as of March 30—that "grounds of protest *would* exist" if Navy modified contract as it intended, fact that protester acually filed protest on March 31 goes against protester's argument that companies need not file "defensive protest." In any event, information conveyed by Navy on March 30 was no more than that which had been conveyed in February 18 conference about intended modification.

Contracts—Protests—"Defensive Protests"

Basic concepts evident from review of cases holding protesters need not file "defensive protests" are: (1) protesters need not file protests if interests are not being threatened under then-relevant factual scheme; and (2) unless agency conveys its intended action (or finally refuses to convey its intent) on position adverse to protester's interest, protester cannot be charged with knowledge of basis of protest.

Contracts—Protests—Timeliness—Basis of Protest—Date Made Known to Protester

If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 constituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met.

Contracts—Protests—Administrative Actions—Filing Protest—"Adverse Agency Action" Conclusion

Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed.

In the matter of Brandon Applied Systems, Inc., December 21, 1977:

On March 31, 1977, a protest was received from Brandon Applied Systems, Inc., against the refusal of the Department of the Navy to state that "actual conversion of programs [would not be done] on a cost-reimbursable (hourly-rates) basis" under a proposed modification of Computer Sciences Corporation (CSC) contract No. N66032–76–D–0012. Brandon also protested against the proposed modification of the contract to include "additional work" in the contract on the theory that the modification would result in an improper sole-source contract. Specifically, Brandon said:

* * * [O]n March 17, 1977, * * * the ADPESO [Navy Automatic Data Processing Selection Office] Contracting Officer who issued the contract [informed Brandon that he] ha[d] received a written request, originated by the Naval Data Automation Command (NAVDAC), to take certain actions with regard to Contract No. N66032–76–D–0012. Although Brandon's request for a copy of the written request was denied, it is understood to call for the following action: (a) Early termination of the contract; (b) Termination of line item 6 in Section E, consisting of conversion of programs at fixed-prices per unit; (c) Award of additional work on a cost–reimbursable (hourly-rates) basis.

Brandon further explained that it was an unsuccessful offeror for the original work involved in the contract (awarded on June 15, 1976) which was described in RFP No. N66032–76–D–0010. The contract—awarded for computer software conversion and related services at Navy data processing centers—provided, according to Brandon, that conversion was to be on a "fixed-price" per unit basis, while related services, such as requirements analysis and planning, were to be on a cost-reimbursable basis. Contrary to the express limits of the contract, Brandon explained (as detailed more fully in a subsequent letter) that in "various meetings in February and March, 1977, [it was] advised orally by Navy that Navy was considering eliminating the fixed-price portions [relating to actual conversion (translation) of programs] of [the contract] and increasing the cost-reimbursable (hourly-rates) portions of the contract." Brandon also said:

* * * At a meeting on March 8, 1977, representatives of Brandon and Navy discussed the issue of whether [actual] conversion should be fixed-price. By letter dated March 25, 1977, Navy ADPESO advised Brandon that such an approach would be considered (though not assured) for the Navy's conversion to be performed by contractors [on future contracts] * * *. At a meeting on March 30, 1977, with the Contracting Officer and his legal counsel, Brandon representatives were advised that (1) NAVDAC had made a written request of ADPESO, by letter dated February 18, 1977, that [the contract] be subject to the procurement action indicated above; (2) No *actual conversion* had been performed thus far under the contract; (3) The Contracting Officer would *not* give Brandon a copy of the NAVDAC letter, in response to Brandon's oral request at the March 30, 1977, meeting; (4) Although the NAVDAC letter had been received in ADPESO previously, it was delayed in reaching the Contracting Officer's hands; (5) There was no assurance that *actual conversion* (fixed price under the contract) would be excluded from the contemplated additional hourly-rates work; (6) For reasons which the Contracting Officer could not reveal, Navy would not

agree to incorporate means to preclude the performance of *actual conversion* on an hourly-rates basis.

Accordingly, it was not until the March 30, 1977, meeting that Brandon was made aware that Navy might take a procurement action having the effect of having a contractor perform *actual conversion* on an hourly-rates basis. This awareness gave Brandon additional concern relative to Navy's March 25, 1977, letter regarding the use of other than fixed-price procurement for future *actual conversion* needs.

NAVY POSITION ON RELEVANT FACTS

The Navy informs us that because "many problems" had arisen with the administration of the CSC contract "it was initially decided to renegotiate" CSC's contract to: (a) eliminate the "line-by-line program translation" feature; (b) "double the labor hour categories;" and (c) terminate CSC's contract by September 30, 1977. Navy later decided that its initial decision was "not workable in a practical sense" because the planned termination date would prevent the contractor from completing certain needed tasks. As a result the Navy has informed us that it has decided to: (1) limit the current contract to two sites--San Diego and Norfolk; (2) let the contract run to its current termination date (June 27, 1978); (3) remove the line-by-line feature; and (4) initiate a new procurement for the workload at the remaining sites.

Navy further says that a Brandon representative met with the contracting officer and counsel on February 18, 1977, for the purpose of "discussing a rumor regarding a possible modification to the contract." The Navy continues:

> * * * At that time the Contracting Officer advised Mr. O'Connell [of Brandon] he was intending to modify the Computer Sciences Corporation contract * * * to reflect the deletion of items 6A and 6B in the contract and increase the labor-hour portion of the contract * * * by approximately one-hundred percent. Mr. O'Connell indicated that the Navy was incorrect in its approach and that the requirement should be handled on the line-by-line conversion of the contract, namely items 6A and 6B.
>
> On 1 March 1977 Mr. O'Connell again visited the Contracting Officer and Counsel and the same area was reviewed, and the Contracting Officer again advised Mr. O'Connell of the Navy's intention to modify the existing contract. During the period of 18 February through 1 March 1977, Mr. O'Connell repeatedly called the Contracting Officer on the same subject.
>
> On 30 March 1977 Mr. O'Connell had another meeting with the Contracting Officer and Navy Counsel together with Mr. Doyle, counsel for the company. The discussion was the same as the 18 February and the 1 March meetings. It is pertinent to point out that in the 30 March 1977 meeting the Contracting Officer advised the company representatives that he personally did not have correspondence from COMNAVDAC requesting the modification. This point is correct only because the formal request for modification had not reached the Contracting Officer although it had been received within ADPESO. * * * A copy was given to company Counsel on 2 April 1977 pursuant to a Freedom of Information Request. * * *
>
> Independently of discussion with this office, Mr. O'Connell and the president of Brandon visited Mr. G. D. Penisten, Assistant Secretary of the Navy for Financial Management, to again reaffirm the company's posture that the labor hour approach of the Navy was incorrect. Mr. Penisten arranged for a meeting with Captain L. Maice, USN, Data Processing Service Center Project Manager for the Naval Data Automation Command. This meeting was held on 8 March 1977 and the company submitted [a letter] to Captain Maice confirming the

discussions. Captain Maice replied [by letter of March 25, 1977] indicating that although the meeting was held, the substance of the company's letter was incorrect.

THRESHOLD QUESTION

A threshold question is initially for consideration. Protests against proposed modifications of contracts involve contract administration which is primarily within the authority of the contracting agency and is not ordinarily for resolution under our bid protest function. *Symbolic Displays, Incorporated*, B-182847, May 6, 1975, 75-1 CPD 278. Where, however, as here, the protest alleges that the proposed modification constitutes, in effect, a "cardinal change" beyond the scope of the contract and that the proposed modification should be the subject of a new procurement, we will review the protest, if otherwise for consideration. 50 Comp. Gen. 540 (1971); see also *Symbolic Displays, Incorporated, supra.*

TIMELINESS ISSUE

Turning to the "timeliness" issued raised by Navy, it is the Department's view that Brandon had knowledge of the basis of its present protest as of February 18, 1977—the date of the first Brandon Navy conference. Consequently, under this view, Brandon's failure to file a formal protest with our Office until 41 days after February 18 should render its protest untimely. See 4 C.F.R. § 20.2(b)(2) (1977). Alternatively, the Navy argues that, if Brandon's February 18 oral objections to the contemplated modification were considered to be a protest, the Navy's February 18 contemporaneous oral rejection of that protest must be considered *initial* adverse agency action from which, under 4 C.F.R. § 20.2(a) (1977), Brandon had 10 working days to file a protest with our Office. Since the March 31 protest was filed more than 10 working days after the February 18 oral denial, the protest is also untimely under this view.

Brandon's view on the "untimeliness" issue is that Brandon did not have a basis of protest as of February 18 because the Navy merely told Brandon that it was "contemplating" [1] taking the proposed action but had not finally decided to do so let alone actually executed the modification. The allegedly "tentative" nature of the Navy position was further underscored in Brandon's view by the facts that as of February 18, 1977, the contracting officer had not received an internal Navy document requesting that the modification action be taken and that

[1] That Navy merely stated it was "contemplating" the action is allegedly confirmed by contemporaneous notes taken by Brandon's representative in attendance at the February 18 conference. Additionally, Brandon alleges that the contracting officer orally admitted (at a July 29 GAO protest conference) that the action was only "contemplated" prior to late March 1977.

the initial Navy position regarding the proposed modification was later changed (insofar as Navy permitted the outstanding contract to run until its stated expiration date and decided to initiate a new procurement for some work otherwise covered by the contract). Because of these views Brandon insists that to have required it to file a protest within 10 working days of the February 18 conference would have placed it in the position of having to file a "defensive protest," that is, a protest filed before a protester learns of the outcome of efforts to determine if grounds of protest exist. Brandon further says that our decisions have rejected the concept of "defensive protests."

ANALYSIS

The first issue for decision is what information was conveyed to Brandon at the February 18 and March 1 conferences. The Navy insists that it told Brandon that it was intending to modify the outstanding contract to eliminate the "line-by-line program translation" feature (which Brandon considers as consisting of, or including, "actual conversion") and to increase the "labor-hour portion" (which Brandon views as "cost reimbursable" in nature) of the contract. Brandon's view—at least with respect to the February 18 conference—was that the Navy said that it was only "contemplating" the modification.

There is an obvious conflict between the Navy's view of the February 18 conference and Brandon's view. The allegedly contemporaneous written notes which Brandon cites as confirming its view of the conference have not been submitted to our Office, nor do we think that they are determinative of the outcome even if submitted. First of all, we have no way of determining whether in fact they were "contemporaneous"; secondly, we do not agree that allegedly contemporaneous notes should carry any greater weight than the actual recollections of the agency employees who participated in the conference. Under these circumstances, we must agree with the Navy's view that Brandon was specifically informed of Navy's intent to modify the contract in ways which were later made the subject of the March 31 protest to our Office.[2] *Reliable Maintenance Service, Inc.—request for reconsideration*, B–185103, May 24, 1976, 76–1 CPD 337.

Brandon's assertions that it should not be held to have had knowledge of a basis of protest as of February 18 hinge on the facts that the contracting officer had not received (as of February 18) the inter-

[2] Although Brandon insists that its protest was not against the modification as such—for example, Brandon says it would not have protested if Navy employees had performed "actual conversion" under the changed scheme—it is clear that at the February 18 conference the company's representative understood that the Navy was not planning to use its own employees for "actual conversion" work. If the representative had understood that Navy employees were to be used, the representative would not have objected that the Navy approach to "actual conversion" was incorrect.

nal Navy document describing the intended modification and that some details of the intended modification were later changed. These facts do not alter our agreement with Navy's view that Brandon was informed of the bases of the March 31 protest as of February 18. The receipt of the internal Navy document merely gave technical approval to the substance of the intended modification later protested by Brandon.[3] The fact that some of the details of the intended modification were later changed is also not significant. These details did not go to the protested elimination of the "line-by-line program translation" feature and the transfer of "conversion" work from a fixed-price category to an alleged cost-reimbursement category.

Thus, it is our view that Brandon was specifically informed of the basis of its March 31 protest as of February 18. The only remaining question is whether the "intended" nature of the protested action should otherwise have permitted Brandon to defer the filing of its protest until the "intended" character of the modification had been reduced to an actual modification.

First of all, it is important to note that Brandon does not argue that is was permitted to wait for the actual modification of the contract before being charged with having notice of the basis of protest. Brandon admits that it was aware that "grounds of protest *would* exist" no later than March 30, 1977, when it was told by the "contracting officer and his legal counsel" that there could be no assurance the Navy would exclude "actual conversion" work under the modified contract. This information, in our view, contained nothing more than what was already known by Brandon on February 18 under Brandon's interpretation of the existing contract. In that conference, it is clear that Brandon felt that the deletion of fixed-price, "program translation" work and increase in "labor-hour" work could only mean that "conversion" work would be done on an allegedly improper cost-reimbursement basis by non-Navy employees as to which manifested concern the Navy rebuffed Brandon. Although Brandon hedges its analysis by stating that it was only aware of the possible bases of protest as of March 30, the fact that Brandon actually filed a protest rebuts its argument that it felt it only was aware of possible bases of protest as of that date. As stated by Brandon: "Navy's position [on the untimeliness issue] would be to place the burden upon offerors to file *defensive* protests, a practice specifically disapproved of by GAO." If Brandon was of the view that it was not obligated to file a *defensive*

[3] As to the alleged statement of the contracting officer at the GAO bid protest conference that the protested action was only contemplated until the Navy document was received, the GAO representative at the conference has no recollection of the alleged statement. Even if the statement was made, it is the implicit position of the Navy that the statement was in error in view of the contracting officer's contrary views in the written record.

255-883 O - 78 - 4

protest involving only possible grounds of protest there would have been no reason—under Brandon's view of the facts—for the company to have filed a protest with our Office on March 31.

The cases cited by Brandon for the proposition that "defensive" protests need not be filed involve situations where:

(1) The protester—the apparent low bidder eligible for award until our decision moved its bid from low to second low—challenged the responsiveness of the second low bid within 10 days from receipt of our decision rather than 10 days from bid opening. *Action Manufacturing Company—Reconsideration, MB Associates*, B–186195, November 17, 1976, 76–2 CPD 424;

(2) The protester—the second low bidder—challenged the propriety of a restrictive legend in the low bid within 10 days from the date the procuring agency gave up its attempts to have the legend removed rather than 10 days from the date of bid opening when the legend was of public notice in the low bid. *Carco Electronics*, B–186747, March 9, 1977, 77–1 CPD 172;

(3) The protester had no notice of the initial agency decision to make a sole-source award until sometime after initial discussions with the contracting agency; further, the protester reasonably interpreted the initial discussions as indicating that an award decision had not been made. *Tosco Corporation*, B–187776, May 10, 1977, 77–1 CPD 329;

(4) The protester did not file a protest about an unacceptable part of its technical proposal until 10 days from the date the agency refused to confirm or deny unacceptability rather than from the date the agency told the protester the problem of unacceptability was being considered. *Datapoint Corporation*, B–186979, May 18, 1977, 77–1 CPD 348.

Two basic concepts are evident from a review of these cases—all of which found the filed protests to be timely. First, protesters are not viewed as having knowledge of a basis of protest if their interests are not being directly threatened under a then-relevant factual scheme. For example, until the protester in *Action Manufacturing Company, supra*, was displaced from its status as low bidder it could not be held to be obligated to raise questions about the adequacy of the second low bid. Secondly, unless the agency conveys to the protester its intent (or finally refuses to convey its intent) on a position adverse to the protester's interest the protester cannot be charged with knowledge of a basis of protest. (See, in this connection, *Domar Industries*, 56 Comp. Gen. 924 (1977), 77–2 CPD 150, where we held timely a protest about the propriety of a proposed contract modification waiving the specifications when there had been a similar waiver by the agency under

another contract and the agency had not decided whether to modify the contract under protest.)

In the present case, we believe the Navy clearly conveyed its decided intent to act in a manner contrary to the protester's perceived interests at the February 18 conference. Thus, as of February 18, Brandon must be held to have been charged with the basis of protest. If Brandon's February 18 objections, subsequent telephone calls, conferences and the like are not to be considered the filing of a protest with the Navy then it is clear that Brandon's March 31 protest is untimely filed under GAO's Bid Protest Procedures since it was filed more than 10 days after the basis of protest was known about nonsolicitation irregularities. On the other hand, if Brandon's February 18 (or March 1) objections are considered to be a protest then it is clear that the Navy's simultaneous oral rejection of those protests on February 18 or March 1 constituted *initial adverse agency action* from which Brandon had 10 days within which to file a protest with our Office. See *National Flooring Company*, B–188019, February 24, 1977, 77–1 CPD 138. Under either of these dates, the March 31 protest is untimely. Although Brandon apparently considered the contracting officer's initial adverse action to be ill-founded or inadequately explained, leading Brandon to seek reconsideration or clarification at a higher agency level, it was nevertheless obligatory that the protest be filed within 10 days after *initial* adverse agency action. *Rowe Industries*, B–185520, January 8, 1976, 76–1 CPD 13. Since the protest was not so filed it is untimely.

Since Brandon's related objection to the intended Navy contract modification—that Navy has failed to obtain a proper delegation of procurement authority for the modification—was not raised within 10 working days from February 18 or March 1, it is also untimely and will not be considered.

Protest dismissed.

[B–189417]

Subsistence—Per Diem—Rates—Lodging Costs—Purchase of Residence At Temporary Duty Station

Employee purchased residence at temporary duty location after assignment there, relocated household and rented out residence at permanent duty station. He may be paid a per diem allowance in connection with occupancy of purchased residence while on temporary duty based on the meals and miscellaneous expenses allowance plus a proration of monthly interest, tax, and utility costs actually incurred. Case is distinguished from 56 Comp. Gen. 223 involving employee whose second residence, where he lodged while on temporary duty, was maintained as result of employee's desire to maintain second residence without regard to temporary duty assignment.

Subsistence—Per Diem—Headquarters—Permanent or Temporary—Administrative Determination—Reevaluation Recommended

Employee given temporary duty assignment for a 5-month period, which assignment was extended for 2 additional 6-month periods, may be paid per diem while at that location since circumstances do not demonstrate that agency's designation of assignment as for temporary duty rather than as a permanent change of station was improper. Circumstances should be reevaluated prospectively to determine whether employee's continued assignment to that location should now be made on the basis of a permanent change of station.

In the matter of Robert E. Larrabee—per diem, December 21, 1977:

This decision is rendered in response to a request submitted by the disbursing officer for the Naval Weapons Center, China Lake, California, for an advance decision concerning reimbursement of the travel expenses claimed by Mr. Robert E. Larrabee. The travel claims in question cover the period from Feberuary 9, 1976, through April 30, 1977, during which period Mr. Larrabee was assigned to temporary duty as the Navy's technical representative at a contractor's facility in Richardson, Texas. The disbursing officer's question concerning reimbursement of the amounts claimed as per diem arises from the fact that Mr. Larrabee purchased a residence in Plano, Texas, some 12 miles distance from the contractor's plant, and resided there throughout the period of the temporary assignment.

By travel orders dated January 9, 1976, Mr. Larrabee was initially assigned to duty at Richardson for the period from February 9 through June 30, 1976. That assignment was twice extended, the first time for the period from July 1 through December 31, 1976, and the second time for the additional period from July 1 through December 31, 1977. In connection with his initial assignment to Richardson in February of 1976, Mr. Larrabee rented the house in Plano which he purchased on February 28, 1976. During the month of February 1976 he moved his family, together with his household goods and personal effects, to Plano, Texas, and rented out his residence in the vicinity of his permanent duty station at China Lake, California.

For the period from February 9 through December 31, 1976, Mr. Larrabee submitted per diem claims based on lodging costs of $18.35 per night or less, without additional documentation. For the period commencing January 1, 1977, he claimed lodging costs varying between $15.84 and $19.64 per night. It was not until the period subsequent to January 1, 1977, when lodging receipts were required to be submitted in support of claims for per diem, that the disbursing office became aware of the fact that those claims, including claims paid for the preceding period, were based upon lodging costs attributable to the employee's occupancy of his own residence. The daily lodgings

amounts claimed by Mr. Larrabee for the period subsequent to January 1, 1977, are based on a monthly proration of his interest costs, property taxes, and utility costs.

Based on the provisions of 2 Joint Travel Regulations para. C4550–5, in effect for the period of the temporary duty assignment in question and our decision B–187129, January 4, 1977, published at 56 Comp. Gen. 223 (1977) the disbursing officer questions the propriety of reimbursing Mr. Larrabee for the amounts claimed, particularly in view of the fact that Mr. Larrabee has expressed an intention to compete for a permanent assignment in Dallas, Texas. He suggests that in lieu of the temporary duty costs claimed, the employee should be reimbursed for costs incurred on the basis of a permanent change of station.

The disbursing officer's suggestion that Mr. Larrabee's expenses be reimbursed on the basis of permanent change of station to Richardson assumes that the temporary duty assignment to that location was in fact a permanent assignment. While the location of an employee's permanent station presents a question of fact and is not limited by the administrative designation, and while the length of Mr. Larrabee's assignment to Richardson is of such duration as to raise a question concerning the validity of its designation as his temporary duty station, under the circumstances we take no exception to that designation for the purpose of claims which have heretofore accrued. In this regard, we find particularly persuasive the fact that the assignment was initially intended to cover only a 5-month period and that the assignment was extended for no more than 6 months at a time. At the time the initial orders were issued it appears that the assignment was intended to be of sufficiently short duration to constitute a legitimate temporary duty assignment. As a matter of hindsight, given the total duration of the assignment as twice extended, it would appear that Mr. Larrabee should have been given permanent change of station orders at the outset. However, assuming that the orders were twice extended on the legitimate expectation that the assignment would terminate at the end of each extension period, we find no basis to question the Navy's designation of Mr. Larrabee's assignment as for temporary duty insofar as that designation affects the claims submitted. See B–174662, May 3, 1972. *Cf. Matter of Stanley N. Hirsch*, B–187045, August 3, 1977.

We understand, however, that Mr. Larrabee continues to be assigned to duty in Richardson. Given the facts that he now owns a nearby residence and has relocated his family to Plano, and inasmuch as he would not be entitled to residence purchase expenses or to a significant portion of the expenses ordinarily associated with a permanent change

of station, a comparison should be made of the anticipated cost of retaining him in Richardson in a temporary duty status and transferring him there. Any further assignment to Richardson should be effected in accordance with that cost comparison, together with a consideration of the anticipated duration of the Texas assignment and prospects of reassignment to China Lake. In Mr. Larrabee's case, since there has been no determination that he will be selected for the position for which it is understood he intends to apply, any such intention on his part is an inappropriate basis, in and of itself, to order a permanent change of station.

In light of the fact that we find no basis to question the Navy's designation of Richardson, Texas, as Mr. Larrabee's temporary duty station, our consideration of his per diem claims will be based on the assumption that China Lake continued to be his permanent duty station throughout the claim period involved. Throughout the period of the claim involved, the JTR has provided at para. C4550–5 or otherwise as follows:

TEMPORARY DUTY PERFORMED AT PLACE OF FAMILY DOMICILE. An employee, who performs temporary duty at the place of his family domicile which is other than the place from which he commutes to work each day when on duty at his permanent duty station, may be authorized payment of per diem even though meals and lodging are taken at such domicile. Authority will be for only such per diem as is justified by the circumstances and will not exceed the amount required to meet necessary allowable expenses. The travel approving official will be responsible for determining an appropriate reduction.

On August 1, 1977, that provision was superseded by the following language of 2 JTR para. C4552–2m:

m. *Temporary Duty Performed at Place of Family Domicile.* When an employee performs temporary duty at the place of his family domicile, which is other than the place from which he commutes to work each day while on duty at his permanent duty station, per diem will be computed in accordance with the provisions of subpar. a, except that no cost for lodging will be allowed for any day that the employee occupies lodgings at the family domicile (B-187129, 4 January 1977).

The above-noted change in the JTR, though inapplicable to the period covered by Mr. Larrabee's claim, reflects this Office's decision. There we held that an employee who stays at a family residence while performing temporary duty may not be reimbursed lodging expenses based on mortgage, utility, and maintenance expenses. The employee involved in that case maintained a residence in the vicinity of his permanent duty station in Washington, D.C., as well as in Atlanta, where his family resided. His claim for lodging costs of $19 per day while on temporary duty residing at his Atlanta residence, based on his monthly mortgage, utility, and maintenance costs were denied. The following excerpt is from the holding of that case.

* * * Here, the claimant maintained a second residence in Atlanta for family reasons. The cost of purchasing and maintaining the residence were incurred by

reason of his desire to maintain a second residence, and not by virtue of his travel. The claimant obligated himself to pay these costs independently of and without reference to his travel. In short, his mortgage, and maintenance payments would have been made irrespective of the travel. As such, they are not properly for reimbursement.

To the same effect, see *Matter of Fred Frishman*, B–186643, May 9, 1977.

The circumstances involved in the above-cited cases are to be distinguished from Mr. Larrabee's situation in that the resident in connection with which he claims lodgings costs was purchased after his need for lodgings at the temporary duty site because apparent. Compare *Matter of Dr. Curtis W. Tarr*, B–181294, March 16, 1976, and *Matter of Fred Frishman*, B–186643, October 28, 1976. In Mr. Larrabee's case it would be unreasonable to conclude that the costs of maintaining his Plano, Texas, residence were incurred merely by reason of his desire to maintain a second residence when the circumstances clearly demonstrate that that residence was purchased because of the temporary duty assignment. Under these circumstances, the fact that he rented out his California residence during the period of the temporary duty assignment and relocated his household to the temporary duty site does not defeat his entitlement to lodging costs in connection with his occupancy of the Texas residence for the period of the temporary duty assignment. See *Matter of Nicholas G. Economy*, B–188515, August 18, 1977.

In view of the fact that Mr. Larrabee's Plano, Texas, residence was purchased and maintained in connection with his temporary duty assignment, he may be paid a per diem allowance in connection with his occupancy of that residence while on temporary duty in Richardson, Texas, based on the standard meals and miscellaneous expenses allowance of $16 per day, plus lodging costs determined as a proration of monthly interest, property tax, and utility costs actually incurred. In determining his daily lodging costs, these monthly costs should be divided by the number of days in the month and not by the number of days the employee actually occupied the residence. See *Economy*, *supra*, and *Tarr*, *supra*. His transportation expenses are reimbursable to the same extent as if he occupied rented quarters at the temporary duty location.

[B–189784]

Contracts—Negotiation—Cost-Type—Technical/Cost Justification

Where instructions to offerors contained in request for proposals advises that "major consideration shall be given to technical proposals, as well as price," there is no basis to conclude that award of cost-type contract would be based solely on technical criteria.

Contracts—Negotiation—Cost Accounting Standards Requirements—Standard 402—Not Applicable to Negotiated Contracts Under $100,000

Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000.

Contracts—Negotiation—Awards—Notice—To Unsuccessful Offerors

Postaward notice to unsuccessful offerors is a procedural requirement which does not affect the validity of an award and the failure of an agency to notify protester until the 11th working day after award is not an "unlawful concealment of the contract award."

Contracts—Negotiation—Offers or Proposals—Preparation—Costs

Where record shows that there is no basis to conclude that agency actions deprived unsuccessful offeror from receiving an award to which it was otherwise entitled, offeror would not be entitled to proposal preparation costs.

In the matter of United States Management, Inc., December 21, 1977:

United States Management, Incorporated (USM) protests the award of a cost-plus-fixed-fee (CPFF) contract by the Department of Labor under request for proposals (RFP) No. 4A–77–29 to Science Management Incorporated (SMI). The RFP calls for a program to provide training in project management for key personnel in the Bureau of Labor Statistics. The contract, for an estimated cost and fixed-fee of $19,902, was awarded to SMI on July 1, 1977.

Protester asserts that the "evaluation of the offers was unlawful" because it failed to comply with the evaluation criteria set forth in the RFP. Protester reads the RFP as providing that the evaluation would be made solely on technical criteria, and that on that basis it was entitled to award because its proposal was technically superior.

The "Instructions to Offerors" set forth in the RFP stated in pertinent part that:

> Offerors are advised that major consideration shall be given to the evaluation of technical proposals, as well as price, in the award of a contract hereunder.

Offerors were thereafter advised to furnish separate Technical and Business Management Proposals. Within the "Technical Proposal Instruction" section of the RFP, offerors were advised of the technical evaluation criteria which were to be used for determining "technical merit." Set forth within the "Business Management Proposal Instruction" section of the RFP were instructions for the submission of cost and pricing data. Other than the above quoted portion of instructions to offerors, no further mention of the relative weights to be accorded to technical and cost considerations was made in the RFP.

As the protester notes, contracting agencies should advise offerors of the relative importance of cost to technical factors, because offerors are entitled to know whether a procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 386. In this regard, where the solicitation stated that "major consideration shall be given to the evaluation of technical proposals, as well as price," it is reasonable to conclude from this that both factors were to be accorded essentially equal importance. Moreover, if USM entertained any doubts as to the meaning of the instructions, it should have sought clarification prior to the date set for receipt of initial proposals. 4 C.F.R. 20.2(b)(1) (1976). There is certainly no reason to conclude that only technical factors were to be considered in the award evaluation.

Protester also claims that the "cost evaluation was unlawful in that the contracting officer gave consideration to 'Project Manager' (in the direct labor category) whose 136 hours were bid at zero cost, but may be charged to G&A, thus constituting double counting or a violation of Cost Accounting Standard 402." In addition, protester claims the contracting officer "gave consideration to 400 clerical hours in derogation of the technical evaluation."

We note that Cost Accounting Standard 402 calls for "consistency in allocating costs incurred for the same purpose," so that "[a]ll costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to a final cost objective." 4 C.F.R. 402.40 (1977).

> The purpose of this standard is to require that each type of cost is allocated only once and on only one basis to any contract or other cost objective. The criteria for determining the allocation of costs to a product, contract, or other cost objective should be the same for all similar objectives. Adherence to these cost accounting concepts is necessary to guard against the overcharging of some cost objectives and to prevent double counting. Double counting occurs most commonly when cost items are allocated directly to a cost objective without eliminating like cost items from indirect cost pools which are allocated to that cost objective. 4 C.F.R. 402.20 (1977).

A review of the record shows that of the professional hours considered in the evaluation, 136 were proposed at no cost, and, we assume, more than likely will be charged as an indirect cost. Standing alone, we do not believe such charge would violate Cost Accounting Standard 402, since the 136 hours are proposed to be performed by the president of the corporation whose salary may be allocated as an indirect cost. However, the president will also perform certain services for which a direct charge will be made. In that regard, depending on SMI's cost accounting procedures, this may or may not be a violation of the Standard. For example, if the class of employees involved accounts for its time on the basis of duties actually performed and, as

a result, the employees' costs are normally allocated to indirect costs except in the performance of specific duties for a particular contract which may require their specific services, such an accounting practice would not violate the Standard, because the employees are consistent in allocating costs incurred for the same purpose. In any event, Cost Accounting Standard 402 is not applicable to contracts under $100,000 and thus would not be applicable in this case.

Our examination of the record shows that protester's technical proposal was rated 15 percent higher than SMI's, but at an estimated cost and fee which was 32 percent higher than SMI's. In addition, when the 136 "professional hours" not directly charged to the contract are deleted from the proposal, SMI's proposed professional hours remain significantly higher and at a lower average hourly cost than those proposed by USM. Thus, while the 136 hours should not have been considered by the contracting officer in his technical evaluation, under the evaluation criteria of this proposal, where cost and technical considerations are of essentially equal importance, the protester was not prejudiced thereby. Moreover, the clerical hours proposed (substantially less than the 400 asserted by the protester) were not considered in the technical evaluation.

USM also complains that disclosure of the award was "unlawfully concealed until a July 19, 1977 letter notification was received" by it on July 22, 1977. The Department, on the other hand, believes that the 11 working days between the award and the dispatch of notice was "a normal and routine response time."

Federal Procurement Regulations 1–3.103(b) (1976) provides that:

> Promptly *after* making awards in any procurement in excess of $10,000, the contracting officer normally shall give written notice to the unsuccessful offerors that their proposals were not accepted * * *. [Italic supplied.]

While we cannot say that the 11 days taken by the agency to prepare and mail the notices to unsuccessful offerors comported with the requirement to "promptly" notify such offerors, we do not find that any offeror was prejudiced thereby. We have held that postaward notice to unsuccessful offerors is a procedural requirement and does not affect the validity of a contract award. *Systems Analysis and Research Corporation*, B–187817, April 12, 1977, 77–1 CPD 253. We therefore cannot conclude that notice of the award was "unlawfully concealed" from the protester.

Finally, since on the record before us, we do not conclude that the agency's actions deprived USM from receiving an award to which it was otherwise entitled, USM would not be entitled to proposal preparation costs as requested. *International Finance and Economics*, B–186939, October 25, 1977, 77–2 CPD 320.

The protest is denied.

[B-189100]

Transportation—Freight—Charges—Burden of Proof—Carrier

Carrier has burden of proving correctness of transportation charges originally collected on shipment.

Transportation—Bills of Lading—Description—Presumption of Correctness

Presumption that bill of lading correctly describes the article tendered for transportation is not conclusive; important fact is what moved, not what was billed.

Claims—Transportation—Settlement—Review—Carrier Allegations *v.* Record

In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case.

In the matter of Yellow Freight System, Inc., December 27, 1977:

Yellow Freight System, Inc. (Yellow Freight), in a letter dated May 11, 1977, requests the Comptroller General of the United States to review the General Services Administration's (GSA) action on its bill for transportation charges. See Section 201(3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b) (Supp. V, 1975). GSA, after auditing the bill, notified Yellow Freight of an overcharge of $2,634.38 which in the absence of refund was collected by deduction. 49 U.S.C. 66(a). Under regulations implementing Section 201(3) of the Act, a deduction action constitutes a reviewable settlement action [4 C.F.R. 53.1(b)(1) and 53.2 (1977)], Yellow Freight's letter complies with the criteria for requests for review of that action. 4 C.F.R. 53.3 (1977).

GSA reports that its action was taken on a shipment weighing 8,750 pounds, described on Government bill of lading (GBL) No. A-6018184 as 25 "CONTAINERS, SHIPPING, O/T CYL SU [other than cylindrical, set up] [at] 350 #" and transported by Yellow Freight in April 1974 from the Naval Air Station, Norfolk, Virginia, to the Naval Air Station, San Diego, California. The bill of lading also contained in parentheses the notation "NMFC-A 13-41050."

Yellow Freight collected freight charges of $3,567.18 on the shipment. It used a rate which apparently was based on the rating in item 41050 of the National Motor Freight Classification (NMFC) which is in accord with the notation on the GBL and which covers "Containers or Vans, shipping other than cylindrical. * * * capacity not less than 135 cubic feet." Because the applicability of this rating depended in part on the cubical capacity of the containers, GSA asked the shipper

for further information. The shipper replied: "CONTAINERS WERE STEEL USED, CORRECT NMFC ITEM NUMBER IS 41060, CONTAINERS STEEL 16 GAUGE OR THICKER, NOI, NOT LESS THAN 165 GALLONS OR 22 CUBIC FEET CAPACITY."

Based on this information, GSA issued to Yellow Freight a notice of overcharge for $2,634.38 and sent with it a copy of the information from the shipper.

Yellow Freight protested the overcharge. It stated in part:

> Please note item 41060 applies only when cylindrical and according to all information submitted these were not cylindrical and item 41050 should apply as rated.

GSA responded in part:

> Concerning questions of disputed fact between a claimant and the administrative officers of the Government, the unbroken rule of the accounting officers is to accept the statements of facts furnished by the administrative officers. See in this connection, 14 Comp. Gen. 927, 929 and 16 Comp. Gen. 325, 329.

GSA then collected the overcharge by deduction and Yellow Freight requests review of that action.

In its request for review Yellow Freight questions GSA's reliance on statements by Government administrative officers to resolve disputed questions of fact. The carrier points out that the Interstate Commerce Commission requires shipments to be rated as shown on the original bill of lading and believes that the administrative statement used here by GSA was a mere categorical statement which it states is not acceptable evidence to change a commodity description.

We remind Yellow Freight that it has the burden of proving the correctness of the freight charges it originally collected on the shipment transported under GBL No. A-6018184. *United States* v. *New York, New Haven & Hartford RR*, 355 U.S. 253 (1957); *Pacific Intermountain Express Co.* v. *United States*, 167 Ct. Cl. 266, 270 (1964). Here, as part of that proof, Yellow Freight relies on the description shown on the original bill of lading, which describes the containers as other than cylindrical. However, the presumption that a bill of lading correctly describes the article tendered for transportation is not conclusive; the important fact is what moved, not what was billed. *Penn Facing Mills Co.* v. *Ann Arbor RR*, 182 I.C.C. 614, 615 (1932); *Buch Express, Inc.* v. *United States*, 132 Ct. Cl 772 (1955). GSA, in reliance on this rule and in discharging its audit responsibilities under 49 U.S.C. 66(a), requested clarifying information from the shipper. GSA believed that the information supported its use of a freight rating applying to cylindrical containers.

We agree with Yellow Freight that the information furnished by the shipper and used by GSA to support its overcharge does not adequately

establish the fact that the containers were cylindrical; it is merely the shipper's opinion that the containers should be rated under NMFC item 41060 which applies to cylindrical containers. However, GSA now has obtained additional evidence consisting of a photograph and a further report from the shipper which establishes that the containers were, in fact, cylindrical. Copies of the photograph and report will be furnished to Yellow Freight. Based on this additional evidence we agree with GSA that NMFC item 41060 applies to the shipment transported under GBL No. A–6018184.

GSA also reports that NMFC item 41050, relied on by Yellow Freight, applies to shipments of containers with a capacity of not less than 135 cubic feet, whereas the containers shipped on GBL No. A–6018184 had a capacity of 52 cubic feet. We agree with GSA that in any event NMFC item 41050 would not apply to the shipment.

Yellow Freight's concern about GSA's reliance on statements of Government administrative officers to resolve disputed questions of fact is unfounded. We believe that GSA follows the "unbroken rule of the accounting officers" because in its audit of paid transportation bills and in its examination and settlement of claims [49 U.S.C. 66(a)] it relies solely on the written record with no opportunity, as in a court proceeding, to obtain sworn testimony, cross-examine witnesses, or to use more formal fact finding procedures. See 41 C.F.R. 101–41.604 (1976).

In the review of GSA claims settlements authorized by Section 201 (3) of the General Accounting Office Act of 1974, 49 U.S.C. 66(b), we also must rely on the written record, and, in the absence of clear and convincing contrary evidence, we will accept as correct the facts set forth in GSA's administrative report. The carrier seeking review, however, has the burden of affirmatively proving its case.

Based on the present record, GSA's settlement action on the shipment moving under GBL No. A–6018184 is correct and it is sustained.

[B–189460]

General Accounting Office—Reviews—Appellate Authority—To Review GSA Transportation Settlements—Time-Barred Requests

Transportation audit function was transferred from this Office to General Services Administration by Public Law 93–604, approved January 2, 1975; it was effective October 12, 1975, and included all transportation functions including settled claims but left General Accounting Office with appellate authority to review GSA settlements. Review requests must be received in GAO no later than 6 months from date of final dispositive action by GSA or 3 years from date of certain enumerated administrative actions, whichever is later. Carrier requesting review by GAO or GSA action after those dates is time-barred.

In the matter of Trans Country Van Lines, Inc., December 27, 1977:

Trans Country Van Lines, Inc. (Trans Country), in its letter of June 6, 1977, requests a review by the Comptroller General of the final settlement action of September 11, 1974, taken by the former Transportation and Claims Division (TCD) of the General Accounting Office.

The record shows that Trans Country billed for and was paid $3,820.60 on June 24, 1971, for transportation services rendered on a shipment from Petaluma, California, to Warrenton, Virginia, on Government bill of lading F–4243716, dated May 21, 1971. TCD determined in its audit of transportation charges that lower charges were available than those billed by Trans Country. Therefore, a Notice of Overcharge for $1,843.80 was stated against Trans Country. Trans Country protested the overcharge and received a reply from TCD. However, because of the time limitation imposed by 49 U.S.C. 66 (1970), the overcharge of $1,843.80 was collected by deduction from amounts otherwise due the carrier. Trans Country's claim for the amount deducted was disallowed by TCD on a settlement certificate dated May 2, 1974. On August 21, 1974, Trans Country protested as unwarranted the denial of its claim. TCD responded by letter of September 11, 1974, affirmed its disallowance, and suggested that Trans Country request a review by the Comptroller General of the United States of its final action on the claim. The letter of June 6, 1977, is the first correspondence received from Trans Country concerning the claim since August 24, 1974.

While Trans Country presents several reasons in support of its review request, we need not consider them, because, in our opinion, the claim is barred from our consideration by the time limitations on our review in the General Accounting Office Act of 1974, Public Law 93–604, approved January 2, 1975, 31 U.S. Code 52(c) note (Supp. V, 1975).

The transportaiton audit function was transferred from this Office to the General Services Administration (GSA) under the provisions of that Act. The entire transportation audit function, including the settlement of claims, was transferred to GSA, with the General Accounting Office retaining its oversight responsibilities as well as an appellate function enabling carriers to request the Comptroller General to review executive agency action on their claims. See Hearings on H.R. 12113 before a Subcom. of the House Comm. on Government Operations, 93d Cong., 2d Sess. 32 (1974). The transfer was effective October 12, 1975 (B–163758, August 27, 1975), and on that date TCD's final action of September 11, 1974, became in effect the action of GSA.

The authority for this Office to review an action taken by GSA on transportation claims is found at 49 U.S.C. 66(b) (Supp. V, 1975), which provides that:

Nothing in subsection (a) of this section hereof shall be deemed to prevent any carrier or forwarder from requesting the Comptroller General to review the action on his claim by the General Seervices Administration, or his designee. Such request shall be forever barred unless received in the General Accounting Office within six months (not including in time of war) from the date the action was taken or within the periods of limitation specified in the second proviso in subsection (a) of this section, whichever is later.

Pursuant to this statutory provision, we have promulgated regulations for the review of GSA transportation settlement actions. 4 C.F.R. 53 (1977). Specifically, 4 C.F.R. 53.2 (1977) provides that:

Actions taken by the General Services Administration on a claim by a carrier or freight forwarder entitled under 49 U.S.C. 66 to be paid for transportation services prior to audit that have dispositive effect and constitute a settlement action as defined in sec. 53.1 will be reviewed by the Comptroller General, provided request for review of such action is made within six months (not including time of war) from the date such action is taken or within the periods of limitation specified in 49 U.S.C. 66(a), whichever is later.

The periods of limitation referred to in both the statute and regulation, specified in 49 U.S.C. 66(a), are: (1) accrual of the cause of action, (2) payment of the transportation charges, (3) subsequent refund for overpayment and (4) deduction. The applicable dates for determining the statutory barring period in this case are the date the transfer was effective, October 12, 1975, and the date of deduction, March 15, 1974. Trans Country had six months from the date of the transfer, or April 13, 1976, or three years from the date of deduction, or March 16, 1977, to file its request for review of the final action taken on September 11, 1974, on its claim. Since Trans Country's request for a review of that action by this Office was not received here until June 27, 1977, we are barred by the provisions of the statute from considering it.

[B-189926]

Contracts—Mistakes—Correction—Bid Verification Requirement—Specificity of Verification

Request for modification of contract price due to alleged error in bid, claimed after award, is allowed because contracting officer, in discharging bid verification duty, failed to specifically point out discrepancy in contractor's bid.

In the matter of Williams and Company, Inc., December 27, 1977:

On the basis of a mistake in bid alleged after award, Williams and Company, Inc. (Williams) requests modification of contract No. DACW27-77-C-0021 awarded to Williams by the Army Corps of Engineers (Army) for varied quantities of stainless steel pipe (Items No. 1 and No. 2), stainless steel elbows (Items No. 3 and No. 4), and stainless steel flanges (Items No. 5 and No. 6). In bidding Items No. 3 and No. 4, Williams states, it mistakenly bid less expensive cast fittings in-

stead of the more expensive wrought fittings called for under the solicitation as amended.

The solicitation, as originally issued, required that:

> [a]ll stainless steel pipes, elbows and flanges * * * be ASTM Standard A 312 "seamless and welded austenitic SS pipe". Grade TP 304–Schedule 40.

Upon receipt of the solicitation Williams noticed that, with regard to Items No. 3 and No. 4, there was no indication in the solicitation as to whether they were to be 150-pound fittings or more heavily rated fittings. This discrepancy was reported to the Army. The Army subsequently issued an amendment to the solicitation which, among other things, addressed the issue which Williams had raised. The amendment as issued consisted of two pages and an attachment. The attachment was to be substituted for the above quoted specification and read as follows:

> *SPECIFICATIONS FOR STAINLESS STEEL PIPE, ELBOWS, FLANGES*
>
> *Stainless Steel Pipe* [Items No. 1 and No. 2]
>
> All stainless steel pipes to be ASTM standard A312 "Seamless & welded austenitic SS pipe". SS Pipe may be seamless or welded. Grade–TP304 Schedule 40.
>
> *Stainless Steel Elbow* [Items No. 3 and No. 4]
>
> All stainless steel elbows are to be ASTM standard A403 "Wrought austenitic SS pipe fittings". Elbows shall be threaded, short radius. Grade TP304.
>
> *Stainless Steel Flanges* [Items No. 5 and No. 6]
>
> All stainless steel flanges are to be ASTM standard A403 "Wrought austenitic SS pipe fittings". Flanges shall be raised face. Grade TP304.

The first page of the two page amendment contained the following pertinent provisions:

> Subject Solicitation for Stainless steel pipe, elbows, flanges, bolts, is hereby amended as follows:
>
> * * * * * * *
>
> 2. PART II—Section E: Page E–1, Items 3 and 4; the words Schedule 40 are deleted and the words Rated for 1000 lbs. minimum pressure are added. * * *.
> 3. Section F: Page F–1 is deleted, and the attached Page F–1 (revised) is substituted therefore.

Williams reports that because the second paragraph of the above quote answered the question which it had raised, Williams felt that the complete description of Items No. 3 and No. 4 consisted of the specification as originally issued plus paragraph 2, quoted above. Williams overlooked the additional statement with respect to Items No. 3 and No. 4 which was referenced in the revised Page F–1 previously quoted.

At bid opening the contracting officer was confronted with the following pattern of bids for Items No. 3 and No. 4, as well as total amounts bid for all items:

Bidder No.	Item No. 3	Item No. 4	Total bid for all Items
1[1]	[2]	[2]	13, 989. 50
2	340. 00	504. 00	31, 743. 00
3 (Williams)	34. 11	60. 00	23, 030. 86
4	30. 65	49. 83	24, 044. 06
5	276. 00	470. 00	28, 068. 60
6	53. 00	107. 00	45, 590. 00
7	37. 85	60. 00	25, 151. 90
8	24. 37	49. 22	25, 059. 62
9	24. 38	49. 22	24, 134. 16
10	25. 44	51. 36	26, 261. 84
11	248. 76	562. 84	28, 437. 10

[1] Bidder No. 1 was not eligible for award since it failed to bid on all items as required by the solicitation.
[2] No bid.

Of the ten bidders who bid Items No. 3 and No. 4, the three which we have underscored were extremely high while the other seven were considerably lower. However, this disparate pattern only occurred with respect to Items No. 3 and No. 4; all other items were bid without any significant deviation. The abstract of bids shows that 62 separate prices in all were bid by the eleven bidders for Items No. 1 through No. 6. Of the 62 prices, only the six prices underscored above varied significantly from the otherwise closely competitive pattern. The Government had estimated the cost of Item No. 3 at approximately $53 per unit while that of Item No. 4 was estimated at approximately $107 per unit. It is the Army's position that its examination of the bids revealed only a wide disparity in the bid prices and the fact that the Williams bid appeared to be inordinately low in comparison with the other bids received. Further, the Army asserts that the abstract of bids did not put the contracing officer on notice of Williams' error and that the error is not evident on the face of the bid.

When Williams discovered its error it requested that the Army modify the contract to provide for the supply of the wrought fittings at cost. This would increase the contract price by $3,012.90. The Army then questioned the next four low bidders regarding the basis of their respective bids and learned that all had committed the same error as Williams and had bid on the basis of a cast stainless steel requirement instead of a wrought stainless steel requirement. Moreover, three of the four bidders have no source for wrought fittings while the fourth bidder could only obtain it at a higher price. The Army concluded on this basis that if the relief sought by Williams were effected it would not displace any of the next four low bidders. However, the Army denied Williams' request on the ground that Williams had failed to establish, with clear and convincing evidence, that the contracting officer was, or should have been, on notice of the error prior to award

as is required by Armed Services Procurement Regulation § 2-406.4 (b) (ii) (1976 ed.). The Army points out that the contracting officer did seek verification of the Williams bid prior to award and that Williams furnished the same in writing.

We note that for Items No. 3 and No. 4, six bids were considerably lower than the Government estimate, while one was at the Government estimate and three were approximately six times higher than the Government estimate. We believe that this pattern, together with the fact that Items No. 3 and No. 4 were the subject of clarification in the only amendment issued, should have raised the issue of whether the amendment was being erroneously interpreted by the bidders with respect to Items No. 3 and No. 4. This being the case we are further of the opinion that the contracting officer should have specifically mentioned Items No. 3 and No. 4, when seeking verification of the Williams bid. We think that in these circumstances the rule of *United States* v. *Metro Novelty Mfg. Co.*, 125 F. Supp. 713 (S.D. N.Y. 1954), that a request for verification must be sufficiently explicit to put the bidder on notice that a mistake is actually suspected, is applicable. The Army's position that it was the overall discrepancy in prices bid, rather than the discrepancy among the prices bid for Items No. 3 and No. 4, and the possible erroneous interpretation of the specification applicable to these items, which prompted the request for verification, shows that Williams' verification of its bid was not based upon the information which should have caused the contracting officer to request verification in the first place. We therefore conclude that the contracting officer should have pointed out the discrepancy between the bids for both Items No. 3 and No. 4 in the course of seeking verification and that the failure to do so provides an adequate basis upon which to grant the relief sought by Williams. See *Atlas Builders, Inc.*, B-186959, August 30, 1976, 76-2 CPD 204.

In light of the fact that performance has been completed, relief should be granted by modifying Williams' contract so that the prices for Items No. 3 and No. 4 conform to the reasonable cost to Williams of the correct items which it has in fact supplied the Government. In this regard, we note that Williams' bid was $23,030.86, and that it has stated that the cost of the correct fittings would add $3,012.90 to its bid, for a total of $26,043.76. In cases such as this, we have limited the relief granted to the amount of the next high bid. Here, however, the second, third and fourth low bidders, whose respective prices were $24,044.06, $24,134.16 and $25,059.62, all have alleged that they made the same error as Williams. The relief requested by Williams would not bring its price above that of the fifth low bidder, whose price was $26,261.84.

[B–178564]

States—Federal Aid, Grants, etc.—Restrictions Imposed by Law—Grant Percentages

Decision B–178564, July 19, 1977, holding that section 13(k) of National School Lunch Act as amended by Public Law 94–105, which required payment in "amount equal to 2 percent" of funds distributed to each state, limits amount payable to States for costs incurred in administration of summer food program is reaffirmed. Section 7 of Child Nutrition Act cannot be construed as additional source of funds for such payments independent of 2 percent limitation. Holding in July 1977 decision is also consistent with most significant legislative history of recent statute amending these sections.

In the matter of the Summer Food Service Program—administrative cost limitations, December 28, 1977:

This decision is in response to a submission from Lewis B. Strauss, Administrator of the Food and Nutrition Service, United States Department of Agriculture, asking whether State administrative expense funds authorized by section 7 of the Child Nutrition Act of 1966 (CNA), as amended, 42 U.S.C. § 1776 (1970), might be used to supplement the 2 percent administrative expense payments to States for use in the summer food service program for children authorized by section 13 of the National School Lunch Act (NSLA), as amended, 42 U.S.C. § 1761. The submission in effect seeks modification of decision B–178564, July 19, 1977, which held that by virtue of section 13(k) of the NSLA, 42 U.S. Code 1761(k) (Supp. V, 1975), certain States which incurred administrative costs for prior program years exceeding the 2 percent allotments could not receive additional payments.

Before addressing the specific question raised, a review of the background to this matter is in order.

I

Prior to 1975, the summer and year-round phases of the special food service program had been carried out pursuant to authority set forth in section 13 of the NSLA. The Secretary was authorized to pay States for expenses incurred in administering these two programs and appropriations were authorized in such amounts as were necessary for this purpose by section 7 of the CNA, which provided:

The Secretary may utilize funds appropriated under this section for advances to each State educational agency for use for its administrative expenses or for the administrative expenses of any other designated state agency in supervising and giving technical assistance to the local school districts and service institutions in their conducting of programs under this Act and under sections 11 and 13 of the National School Lunch Act. Such funds shall be advanced only in amounts and to the extent determined necessary by the Secretary to assist such State agencies in the administration of additional activities undertaken by them under sections

11 and 13 of the National School Lunch Act, as amended, and sections 4 and 5 of this Act. There are hereby authorized to be appropriated such sums as may be necessary for the purpose of this section. See 42 U.S.C. § 1776 (1970).

Section 7 of the CNA did not establish any priority among the various programs for which it authorized payment of State administrative expenses.

In our report to the Congress entitled "An Appraisal of the Special SummerFood Service Program for Children," RED 75–336, February 14, 1975, at pages 14–15, we noted certain problems in the manner of paying States for their expenses incurred in connection with the summer food service program. Specifically, we pointed out that the allocation of administrative funds on a lump-sum basis for all child nutrition programs resulted in inadequate reimbursement for summer food program administrative costs and, therefore, less effective State administration.

At the time of the release of our report, the Congress had before it for consideration H.R. 4222, 94th Cong., 1st Sess., which was enacted as the National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975. Public Law 94–105, October 7, 1975, 89 Stat. 511, 42 U.S.C. 1751 note (Supp. V, 1975). Section 13 of H.R. 4222, as passed by the House of Representatives and reported by the Senate Committee on Agriculture and Forestry proposed to amend section 13 of the NSLA to cover only the summer food service program. Section 16 of H.R. 4222 proposed to add a new section 17 to the NSLA to authorize the year-round child care program, thus removing this program from the authority of section 13 of the NSLA. However, section 13 of H.R. 4222 as reported by the Senate Committee differed from the House-passed version in many ways, including a revision of subsection 13(k) of the NSLA which read as follows:

> The Secretary shall pay to each State for administrative costs incurred pursuant to this section an amount equal to 2 per centum of the funds distributed to that State pursuant to subsection (b) : *Provided*, That no State shall receive less than $10,000 each fiscal year for its administrative costs unless the funds distributed to that State pursuant to subsection (b) total less than $50,000 for such fiscal year.

The Committee explained this amendment as follows:

> The need for revision of the legislation governing the summer food program was clearly outlined in the report submitted to Congress by the General Accounting Office on February 14, 1975. The new provisions in the bill being reported by the Committee are based largely on that report.
>
> * * * * * * *
>
> The bill also authorizes administrative funds for States in administering the summer food program. The GAO report strongly recommended this amendment. The GAO found the States to have performed inadequately in seeking eligible sponsors, in training sponsors in monitoring program operations, and in providing assistance needed by sponsors to run the program well. Lack of administrative funds earmarked specifically for summer feeding has been a principal reason for this poor performance according to the GAO report. The funds provided under the new provision approved by the Committee could be used by States for administering only the summer feeding program, and not for other child nutrition programs. S. Rept. No. 94–259, 22–24 (1975).

As reported out by the Conference Committee and eventually enacted, this legislation contained the Senate's revision of subsection 13(k) of the NSLA.

Both before and after the enactment of Public Law 94–105, the Congress appropriated each year a specific lump-sum amount for the payment of State administrative expenses under the various NSLA and the CNA programs. For example title III of the Agriculture and Related Agencies Appropriations Act, 1978, Public Law 95–97 (August 12, 1977), 91 Stat. 810, 825, provides in pertinent part as follows:

> Food and Nutrition Service
>
> Child Nutrition Programs
>
> For necessary expenses to carry out the provisions of the National School Lunch Act, as amended (42 U.S.C. 1751–1761, and 1766), and the applicable provisions other than section 3 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1773–1785, and 1787); $2,422,901,000. * * * *Provided*, That of the foregoing total amount there shall be available * * * $13,675,000 for the State administrative expenses: * * *

See also Public Law 94–351 (July 12, 1976), 90 Stat. 851, 865; Public Law 94–122 (October 21, 1975), 89 Stat. 641, 662, 7 U.S.C. 2254 (Supp. V, 1975); Public Law 93–563 (December 31, 1974), 88 Stat. 1822, 1841; Public Law 93–135 (October 24, 1973), 88 Stat. 468, 489.

II

In the matter of *Summer Food Service Programs–Administrative Cost Limitation*, B–178564, July 19, 1977, we considered the legality of amending the Agriculture Department's regulations to relieve affected States of liability for administrative expenditures in excess of the statutory amount established by subsection 13(k) of the NSLA as added by Public Law 94–105, *supra*, and to reimburse them for administrative costs planned and incurred when such costs directly benefitted the program. In our decision to the Secretary of Agriculture we held that:

> Under the present statutory language * * * reimbursement of such costs is limited to 2 percent. The Department, therefore, may not amend its regulations to relieve States of liability for overexpenditures, or otherwise vary the percentage of the payment of administrative expenses, since the amount allowable for administrative expenses is expressly stated in the statute. There is no authority to issue regulations in contravention thereof.

Thus we interpreted subsection 13(k) of the NSLA, as amended by Public Law 94–105, as limiting the amount that might be paid to the States for administrative costs connected with the summer food service program to 2 percent of the amount of funds distributed to each State.

The recently enacted National School Lunch Act and Child Nutrition Amendments of 1977, Public Law 95–166, November 10, 1977, 91 Stat. 1325, generally amended section 13 of the NSLA and included a new formula for reimbursement of State administrative expenses under the summer food program. In lieu of the 2 percent formula con-

sidered in our July 1977 decision, the new section 13(k) formula provides in part:

(1) The Secretary shall pay to each State for its administrative costs incurred under this section in any fiscal year an amount equal to (A) 20 percent of the first $50,000 in funds distributed to that State for the program in the preceding fiscal year; (B) 10 percent of the next $50,000 in funds distributed to that State for the program in the preceding fiscal year; (C) 5 percent of the next $100,000 in funds distributed to that State for the program in the preceding fiscal year; and (D) 2 percent of any remaining funds distributed to that State for the program in the preceding fiscal year: *Provided*, That such amounts may be adjusted by the Secretary to reflect changes in the size of that State's program since the preceding fiscal year. * * * 91 Stat. 1329.

However, our July 1977 decision and the present request for modification of that decision address payment of State administrative costs for program years prior to fiscal year 1978. These payments remain subject to the 2 percent formula of section 13(k) existing before its amendment by Public Law 95–166 since the latter amendment is effective for program years commencing on or after October 1, 1977. *See e.g.*, H.R. Rept. No. 95–281, 1 (1977).

III

As noted previously, our July 1977 decision construed the language of section 13(k) of the NSLA as amended by Public Law 94–105—providing that the Secretary shall pay to each State for administrative costs "an amount equal to 2 percent of the funds distributed to that State" under the summer food program— to be a limitation upon the amount each State could receive for this purpose. In his request for modification of the July 1977 decision, the Administrator does not challenge our construction of this language as a limitation. Rather, he maintains that there is a separate source of payment for State administrative costs under the summer food service program—specifically section 7 of the Child Nutrition Act (CNA)—which is not subject to the 2 percent limitation in section 13(k) of the NSLA. In other words, the Administrator contends that the 2 percent figure limits only the use of section 13 funds for this purpose and not any additional funds available under section 7 of the CNA. The Administrator's submission elaborates upon this position as follows:

* * * The Comptroller General held (Decision B–178564, July 19, 1977) that there was no authority to reimburse States with funds from Section 13(k) in an amount exceeding two percent of their expenditures. However, the Department failed at that time to call attention to the possibility of using Section 7 funds.

We believe that the use of surplus Section 7 funds to augment the two percent administrative funds for the Summer Program is warranted by Public Law 94–105, which amended the National School Lunch Act, effective October 7, 1975. That Act separated the summer and year-round phases of the Special Food Service Program which had formerly both been included in Section 13. Section 13 of the new Act established the Summer Food Service Program for Children, and Section 17 established a distinct year-round Child Care Food Program for nonresidential Child Care institutions. Section 13(k) specifies that the Secre-

tary pay administrative costs equal to two percent of the summer food program funds distributed to the State; however, Section 17 contains no provision for administrative costs. The Act did not alter the language of Section 7 of the Child Nutrition Act. The Department has construed the reference in Section 7 to Section 13 as covering administrative costs under the new Section 17 since it appeared certain that Congress intended that administrative costs under that Section be covered. Since the reference to Section 13 continued unaltered, we believe that Section 7 also continues to provide authority to pay administrative costs incurred under the Summer Food Service Program.

* * * * * * *

Therefore, we propose to amend 7 CFR Part 235 to authorize payment of Section 7 funds for Summer Food Service Program administrative expenses when FNS determines that a State, through no fault of its own, requires funds in excess of those available under Section 13 in order to conduct the program well. Only Section 7 funds which are in excess of those needed for the other programs would be made available for Summer Food Service Program administrative expenses.

* * * * * * *

The U.S. Department of Agriculture Office of the General Counsel has recommended that we obtain your formal opinion on the legality of this proposal. The present situation requires an express determination of first, whether the reference to Section 13 in Section 7 allows funds appropriated under Section 7 to be used by States in their administration of the Summer Food Program; and second, whether the two percent limit in Section 13(k) applies specifically to funds appropriated under Section 13 or applies to all federal funds (including funds appropriated under Section 7) available for State expenditures incurred in the administration of the Summer Food Program. It appears to us that these two questions are simply different ways of posing a single question, and that accordingly they must both be answered the same way. If the reference to Section 13 in Section 7 means that SAE funds can be applied to Summer Food Program expenses, then in order for the two sections to be logically consistent the two percent limit must apply to only those funds appropriated under Section 13.

It is true that at the time here relevant section 7 of the CNA, quoted *supra*, did literally include the summer food program within its authorization of appropriations for payment of State administrative costs. However, for several reasons we cannot agree that section 7 affects the holding of our July 1977 decision.

First, it is highly questionable that the Congress intended to create two separate appropriation authorizations for summer food program administrative costs. Since section 13 of the NSLA as amended by Public Law 94–105, *supra*, contained a specific authorization for this purpose, the reference to it in section 7 of the CNA had become redundant. On the other hand as the Administrator points out, the year-round program established in section 17 of the NSLA as added by Public Law 94–105 did not specifically authorize payment of administrative costs. Thus there was an apparent oversight in failing to amend section 7 of the CNA to refer to section 17 of the NSLA instead of section 13. This interpretation is supported by the most recent amendment to section 7 of the CNA by Public Law 95–166, 91 Stat. 1338–39, which deleted the reference to section 13 and added a reference to section 17 of the NSLA. The Agriculture Department had in effect been operating on the basis of such an interpretation and we do

not object to this approach (which, in any event, has been rendered moot by virtue of Public Law 95–166). However, the Department cannot have it both ways by taking the reference to section 13 to mean the section 17 year-round program and now asserting that this reference also retained effect as an additional and separate authorization for the reconstituted section 13 summer food program.

Second, even accepting the premise that there are two separate appropriation authorizations for payment of State administrative costs under the section 13 program, the actual appropriations for payment of administrative costs have been enacted in single lump-sum amounts covering all NSLA and CNA programs for which such payments are made. Thus we cannot agree with the Administrator that there existed in any real sense two separate "funds" available for summer food program administrative costs. We might add that even if two "funds" were arguably available, the very least to be said is that the specific section 13 "fund," with its 2 percent formula, would take precedence over any more general source of funding:

> * * * it is a rule of long standing that an appropriation made available for a specific object is available for that object to the exclusion of an appropriation which might otherwise be applicable in the absence of the specific appropriation, and that when the specific appropriation to which an expense is chargeable is exhausted, the general appropriation cannot be used for that purpose. 4 Comp. Gen. 476; 5 *id.* 399; 7 *id.* 400; 10 *id.* 440; 19 *id.* 633; *id.* 892. Also, we have held that the inclusion of the words "not to exceed" or similar language is not necessary to establish a limitation when an appropriation includes a specific amount for a particular object. 19 Comp. Gen. 892; A–99732, January 13, 1939; B–5526, September 14, 1939. 36 Comp. Gen. 526, 528 (1957). Compare 54 Comp. Gen. 799 (1975); 53 Comp. Gen. 695 (1974); 38 Comp. Gen. 588 (1959); and 38 Comp. Gen. 758 (1959).

Finally, it has been suggested that certain statements made during congressional debate on the legislation (H.R. 1139, 95th Congress) enacted as Public Law 95–166 support the view that section 7 of the CNA in effect at the time of our July 1977 decision did constitute a separate source of funds for summer food program administrative costs. During consideration of the Conference Report on H.R. 1139, Representatives Holtzman and Perkins engaged in a colloquy consisting of 2 questions. The first question and answer are relevant here and read as follows:

> MS. HOLTZMAN. * * * Mr. Speaker, I would like to ask the chairman of the committee and the chairman of the conference committee two questions regarding State administrative expenses.
>
> The first question has to do with interpreting the present law's provisions regarding the expenditure of unused State administrative funds appropriated under section 7 of the Child Nutrition Act for the purpose of administration in the summer feeding program. If I understand it correctly, the Department of Agriculture now has on hand approximately $630,000 in funds returned to it in fiscal year 1977 by States which could not use these funds for the administration of the school lunch program, the school breakfast program, and the child care feeding program. The Department would like to reallocate the unused funds from these programs to the States for the purpose of paying for the ad-

ministration of last summer's summer food service program for children. I would like to know whether the Chairman of the Committee would interpret this action as permissible under the present law.

* * * * * * *

Mr. PERKINS. * * * I do believe that it would be permissible under the present law, namely section 7 of the Child Nutrition Act, for the Department to use funds returned to it by the States for reallocation to States to pay for the administration of their summer feeding program during fiscal year 1977. Cong. Rec., October 27, 1977 (daily ed.), H11670–71.

Also Representative Quie made the following statement during consideration of the Conference Report:

* * * I understand that legal counsel in the Department of Agriculture has raised an issue of whether excess State administrative funds provided by other sections of these two acts could be used to bolster State administration of this program. I think Congress intended this to be possible and to continue to be possible under these amendments. The alternatives to adequate State administration are an uncontrolled program or abdication of State responsibility in favor of Federal administration. These alternatives are almost equally undesirable. *Id.* at H11674.*

The quoted statements do not relate to any provisions of the bill (H.R. 1139) then under consideration and do not proport to be more than opinions as to the meaning of the law then in effect. Thus they cannot be given substantial weight as legislative history. Moreover, these statements appear to be inconsistent with other explanations of the provisions in effect prior to Public Law 95–166 which relate directly to the changes made by that Act.

The report on H.R. 1139 by the House Committee on Education and Labor clearly viewed the 2 percent amount specified in the version of section 13(k) of the NSLA then in effect to be a limitation on administrative cost payments for the summer food program. Thus the report states: "The present law provides for payment of a flat 2 percent of the funds received last year." H.R. Rept. No. 95–281, at page 30 (1977). The report by the Senate Committee on Agriculture, Nutrition, and Forestry on its version of the legislation enacted as Public Law 95–166 also describes the section 13(k) formula then in effect as a "flat" 2 percent. S. Rept. No. 95–277, 23 (1977). These interpretations are more significant because they serve to explain the amendments to the law made by Public Law 95–166. The language of section 13(k) as amended by Public Law 95–166, quoted *supra*, reenforces the view that the formula specified was and is understood to have a limiting effect since the percentage amounts were increased and the Secretary was given authority to adjust such amounts. As discussed previously, the amendment to section 7 of the CNA by Public Law 95–166 (changing the reference from section 13 of the NSLA to section 17) likewise reenforces the view that section 7 was never intended

*During Senate debate on the Conference Report Senators Javits and Talmadge also discussed this issue, but no specific opinions were expressed concerning the effect of the present law. *Id.*, October 28, 1977, S. 18004.

to continue as a separate authorization for payment of summer food program administrative costs.

For the reasons stated above, we reaffirm our decision of July 19, 1977, as to the payment of administrative costs incurred for program years prior to fiscal year 1978. In our view all such payments are subject to, and limited by, the 2 percent formula of section 13(k) of the NSLA as amended by Public Law 94–105.

[B–185291]

Property—Public—Damage, Loss, etc.—Carrier's Liability—Burden of Proof

Prima facie case of liability of common carrier is established when shipper shows delivery to carrier at origin in good condition and delivery by carrier at destination in damaged condition. Once prima facie case is established, burden of proof shifts to the carrier and remains there. To escape liability, carrier must show that loss or damage was due to one of the excepted causes and that it was free of negligence.

Transportation—Delivery—Receipts—Effect on Liability for Damages

A delivery receipt signed by the consignee does not establish as a matter of law that property was in good condition when delivered to him. A delivery receipt is subject to explanation and correction.

In the matter of Trans Country Van Lines, Inc., December 28, 1977:

Trans Country Van Lines, Inc. (Trans Country) by letter dated June 17, 1977, requests review of the disallowance of its claim for $2,083.17. The claim represents the amount collected by the Government by setoff from monies otherwise due the carrier to satisfy the Government's claim for damage against Trans Country.

The Government's claim, No. Z–2625150, arises from the damages sustained to a shipment of magnetic tape drives while in transportation from Washington, D.C., to Kelly Air Force Base, Texas, under Government Bill of Lading (GBL) F–8775397, issued on September 13, 1972. The action costs to the Government for repairs were $2,789.07 but recovery is limited to the released valuation of 60 cents per pound per article.

Trans Country asserts that it did not receive notice of concealed damages and therefore did not have an opportunity to inspect all of the items damaged. Trans Country also contends that it has not been established that the carrier is responsible for all of the concealed damages and that the damages might have occurred after the shipment was delivered. The carrier also suggests that if the "delicate characteristics of this shipment" necessitated exclusive use of the vehicle service or

the need for air ride equipment, the Government should have ordered the equipment and paid for premium service.

Trans Country also invites attention to the provisions of Rule 29, Movers' & Warehousemen's Association of America Tariff 63, MF-ICC 90, which contains certain rules said to be applicable in connection with shipments rated under ICC Tender 150. Under those rules the carrier is not liable for any damages which occur subsequent to delivery at destination or for damages to the mechanical operation of the machines unless it can be established that such damage resulted from other physical damages to the articles shipped.

It is well established, however, that where a shipper shows that the goods were tendered to the carrier at origin in good order and condition, and received from the carrier at destination in a damaged condition, that a prima facie case of carrier liability has been established. The carrier, to relieve itself of liability, must show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes set forth in section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11). *Missouri Pacific RR* v. *Elmore & Stahl*, 377 U.S. 134 (1964); *Super Service Motor Freight Co.* v. *United States*, 350 F.2d 541 (6th Cir. 1965); *L. E. Whitlock Truck Service, Inc.* v. *Regal Drilling Co.*, 333 F. 2d 488 (10th Cir. 1964).

In *Mears* v. *New York, N.H. & H. RR*, 52 A. 610 (Conn. 1902), it was held that a clear delivery receipt is a mere piece of evidence and does not prevent a shipper from afterwards proving that the goods were in fact damaged when received from the carrier. In *Lyon* v. *Atlantic Coast Line RR*, 81 S.E. 1 (N.C. 1914), it was held that in a shipper's action for damages, it was the actual condition of the goods that determined the carrier's liability, and that the shipper's receipt of them in apparent good order and condition was not conclusive. Acceptance of a shipment does not waive a shipper's rights to recover for concealed damages. *M & S Tomato Repacking Co.* v. *Boston and Maine Corp.*, 310 F. Supp. 186 (D. Mass. 1970).

The record shows that the articles shipped were all tendered to the carrier at origin in good operating condition, and that the carrier loaded the shipment on a vehicle selected by Trans Country. Upon arrival at destination, three of the magnetic tape drives were visibly damaged. A Discrepancy in Shipment Notification (DD Form 1061) was thereupon issued on September 18, 1972, to the carrier in which the carrier was requested to make an immediate inspection. The record also shows that additional damages were discovered after delivery and photographs of the damaged articles were taken on September 20, 1972. Arrangements were then made to have all of the articles repaired.

Since the record establishes that the damages occurred during the transportation and not after delivery at destination, and since the

carrier has not shown that the damages resulted from a cause for which the carrier is not liable, the settlement action taken is proper and is hereby sustained.

[B-189013]

Aliens—Employment—Restrictions—South Vietnamese

Drug Enforcement Administration could employ South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1977 despite restriction against Federal employment of aliens in Public Law 94-419, which permitted employment only of South Vietnamese refugees paroled into United States. Appropriation act previously enacted for same fiscal year permitted employment of South Vietnamese aliens lawfully admitted into United States for permanent residence, and legislative history does not indicate second act was intended to repeal first.

Drugs—Drug Enforcement Administration—Employment of South Vietnamese

Under express terms of only statute now applicable, there is no basis for continued employment by Drug Enforcement Administration of South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1978, since restriction against Federal employment of aliens contained in Public Law 95-81 contains exception permitting employment only of South Vietnamese refugees paroled into United States and no additional exception to employment restriction provision has been enacted. However, it is doubtful that this result was intended. Therefore General Accounting Office recommends clarifying legislation and will defer action pending its consideration by Congress.

In the matter of employment restrictions—South Vietnamese aliens, December 28, 1977:

This decision to the Attorney General of the United States responds to a letter, with enclosures, from Kevin D. Rooney, Acting Assistant Attorney General for Administration, requesting our views concerning the continued employment of Hoang Ky Ly, a noncitizen employed by the Drug Enforcement Administration (DEA).

The submission indicates that Mr. Ly entered the United States on March 8, 1975, as a student with nonimmigrant status. He was lawfully admitted for permanent residence on August 27, 1976. Mr. Ly was first employed by DEA as a temporary translator, pursuant to 31 U.S.C. § 699b which permits the temporary employment of noncitizens as translators.* In May 1976, however, Mr. Ly was apparently converted to an excepted appointment as a criminal investigator with DEA. 31 U.S.C. § 699b provides in part (as it did with minor differences not here pertinent at the time of Mr. Ly's original excepted appointment):

* As discussed later herein, this section is derived from a restriction regularly carried in at least one appropriation act each year. At all times pertinent to this decision, the applicable appropriation acts contained an exception permitting the temporary employment of noncitizens as translators.

Unless otherwise specified and during the current fiscal year, no part of any appropriation shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States September 22, 1976, who, being eligible for citizenship, has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, (4) is an alien from Cuba, Poland, or the Baltic countries lawfully admitted to the United States for permanent residence, or (5) *South Vietnamese refugees paroled into the United States between January 1, 1975, and September 22, 1976* * * *. [Italic supplied.]

As noted above, Mr. Ly came into the United States from South Vietnam as a student, and later obtained permanent residence status. He was, however, never "paroled" into the United States. See 8 U.S.C. § 1182(d)(5) (1970). It would appear, therefore, that pursuant to the strict terms of section 699b he would not be eligible for employment by the United States. We are of the view, however, that independent authority existed for his continued employment through fiscal year 1977.

Restrictions against the Federal employment of noncitizens are routinely carried in at least one appropriation act each year. Section 669b of title 31 of the United States Code is derived from these appropriation act restrictions. The fourth exception contained in section 699b, permitting employment of aliens from specified countries who are "lawfully admitted to the United States for permanent residence," has been carried routinely since the Supplemental Appropriation Act, 1954, ch. 340, § 1302, 67 Stat. 418, 435–436, August 7, 1953. The reference to aliens from South Vietnam was added to the employment restriction provision for the first time at the suggestion of the Department of State by section 602 of the Treasury, Postal Service, and General Government Appropriations Act, 1976, Public Law 94–91, 89 Stat. 441, 458, August 9, 1975, which amended the fourth exception to permit the employment of aliens from South Vietnam who were lawfully admitted to the United States for permanent residence.

In view of the above, at the time of enactment of Public Law 94–91, Mr. Ly would have been entitled to be employed by the United States Government. Prior to his original excepted appointment, the restriction against Federal employment of noncitizens was enacted again at section 753 of the Department of Defense Appropriation Act, 1976, Public Law 94–212, 90 Stat. 153, 177, February 9, 1976. This section, however, deleted South Vietnam from the fourth exception and added a fifth to provide as follows:

Unless otherwise specified and during the current fiscal year, and the period *July 1, 1976, through September 30, 1976, no part of* any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States * * * unless such person (1) is a citizen of the United States, * * * (4) is an alien from Cuba, Poland, or the

Baltic countries lawfully admitted to the United States for permanent residence, or (5) *South Vietnamese refugees paroled into the United States between January 1, 1975, and the date of the enactment of this Act* * * *. [Italic supplied.]

This restriction was subsequently reenacted for fiscal year 1977 in the Department of Defense Appropriation Act, 1977, Public Law 94–419, § 750, 90 Stat. 1279, 1299, September 22, 1976.

Intervening between the enactment of these two Defense Department appropriation acts, the language contained in Public Law 94–91 (permitting employment of South Vietnamese aliens lawfully admitted for permanent residence) was reenacted in the Treasury, Postal Service, and General Government Appropriation Act, 1977, Public Law 94–363, § 602, 90 Stat. 963, 977, July 14, 1976.

Accordingly, two separate acts making appropriations for fiscal year 1977 contain provisions restricting the employment of aliens. With regard to aliens from South Vietnam, however, one act permits only the employment of persons admitted for permanent residence, while the other permits only the employment of refugees paroled into the United States. Since the latter is the most recent enactment, it is currently codified at section 699b of title 31 of the United States Code (see 31 U.S.C.A., 1977 Pamphlet). However, since the statutes are *in pari materia* they should be construed together unless we determine that the Congress intended that the second enactment repeal the first. That statutes *in pari materia* should be construed together is a restatement of the presumption against the implied repeal of statutes. 2A Sutherland, *Statutory Construction* §§ 51.01 *et seq.*

The employment restriction in each act starts with the phrase "Unless otherwise specified * * *." There is statutory recognition, therefore, that other statutes might be enacted during the same fiscal year which might also contain additional exceptions to the general restriction against the employment of noncitizens by the United States. Thus it would appear that the exceptions contained in both statutes would have to be given effect for fiscal year 1977, unless it can be affirmatively demonstrated that the Congress intended to repeal all prior enactments of the employment restriction when it enacted Public Law 94–419. We are unaware of any legislative history specifically indicating that this was the Congress' intent.

Debate in the Senate on the bill ultimately enacted as Public Law 94–212 (which first permitted the employment of South Vietnamese refugees paroled into the United States) does not indicate any congressional desire to repeal the former exceptions. See, in this regard, the statement of Senator McClellan at 121 Cong. Rec. S20341–42 (daily ed. November 18, 1975). Senator McClellan pointed out that the exception language permitting the employment of South Vietnamese aliens lawfully admitted for permanent residence "was inade-

quate to accomplish its purpose" since it did not reach South Vietnamese refugees who had been admitted under the Attorney General's parole authority but were not yet eligible to seek "legal residence." Thus the basic intent of the "corrected" language, referring to South Vietnamese refugees paroled into the United States, was to expand the scope of the exception. We find no evidence that Congress intended at the same time to disqualify those South Vietnamese who were able to satisfy the permanent residence test.

Subsequent legislative history, concerning the restrictions contained in Public Laws 94–363 and 94–419, indicates that the Congress understood that it was reenacting the South Vietnamese exceptions as contained in the respective 1976 acts—*i.e.*, the restrictions contained in Public Laws 94–91 and 94–212. There is no indication that the employment restriction contained in Public Law 94–419 was intended to repeal the restriction as written in Public Law 94–363. See H.R. Rept. No. 94–1229, 48 (1976) and S. Rept. No. 94–953, 48 (1976) with regard to Public Law 94–363; see S. Rept. No. 94–1046, 267 (1976) with regard to Public Law 94–419.

In light of the above, we are of the view that Public Law 94–419 does not, by implication, repeal Public Law 94–363. Therefore, the provision in Public Law 94–363, permitting the employment of aliens from South Vietnam who were lawfully admitted to the United States for permanent residence, and the provision in Public Law 94–419, permitting the employment of South Vietnamese refugees paroled into the United States between certain specified dates, may both be given legal effect. Accordingly, the continued employment of Mr. Ly during fiscal year 1977 was proper.

The restriction against the employment of noncitizens has been reenacted for fiscal year 1978 in the Treasury, Postal Service, and General Government Appropriation Act, 1978, Public Law 95–81 (July 31, 1977), 91 Stat. 341, 354–355. This Act does not reenact the employment restriction as enacted in the Treasury, Postal Service, and General Government Appropriation Acts for the previous 2 years—*i.e.*, the restriction contained in Public Laws 94–91 and 94–363. Instead, with regard to the exception for aliens from South Vietnam, Public Law 95–81 permits the employment only of "* * * refugees paroled into the United States * * *." This is the same language used in the employment restriction as enacted in the prior year Defense Department Appropriation Acts discussed above. The Department of Defense Appropriation Act, 1978, Public Law 95–111 (September 21, 1977), 91 Stat. 886, does not contain the employment restriction provision in any form (although it does contain an exemption for Defense Department employees, *id.*, § 803, 91 Stat. 899). In this regard, H.R. Rept. No. 95–378, 44 (1977), on the bill ultimately enacted as Public Law

95–81, indicates that the employment restriction provision contained in Public Law 95–81 was intentionally revised to preclude the necessity of reenacting the provision twice for fiscal year 1978.

Since, as noted above, Public Law 95–81 only permits the employment of refugees from South Vietnam who have been paroled into the United States, we must conclude that, under the express terms of the only relevant statute now in effect, there is no basis to support Mr. Ly's continued employment by DEA in fiscal year 1978. However, since it seems doubtful that such a result was envisioned or intended by Congress, we recommend that the Department of Justice seek clarifying legislation.

If the Department agrees to follow this course, we will take no action with respect to Mr. Ly (or persons similarly situated) pending consideration of the matter by Congress. If the Department declines to seek clarifying legislation or if clarifying legislation is not enacted by the close of the next session of Congress, Mr. Ly (and persons similarly situated) will have to be terminated.

[B–190144]

Contracts—Default—Indebtedness of Contractor to Supplier—Government Liability

Even if Government negligently fails to insure that Miller Act bonds are filed with construction contract, unpaid supplier's remedy lies against prime contractor and not the Government.

Contracts—Default—Monies Owing Contractor—Disposition

Where Government completes contract work after default of prime contractor, unpaid supplier of defaulted contractor is not entitled to contract balance remaining in hands of Government for work which Government rather than defaulted contractor completed. However, unpaid supplier may have equitable claim to contract money earned by defaulted contractor but which has been retained by Government.

In the matter of the Naval Facilities Engineering Command, December 28, 1977:

The Department of the Navy has requested our opinion as to whether payment may be made to an unpaid supplier of a defaulted Government contractor for material supplied to the contractor where, because the performance and payment bonds furnished by the contractor to the Navy were invalid, there is no surety from which the supplier may recover.

The record shows that on September 9, 1975, Walker Cement and Ferguson Excavating (Walker & Ferguson), a joint venture, was awarded contract N62472–75–C–6395 for repair work at the Naval

Weapons Support Center, Crane, Indiana. Pursuant to the Miller Act, 40 U.S.C. § 270(a) (1970), bonds were submitted by Walker & Ferguson naming the Highlands Insurance Company (Highlands) as surety for Walker & Ferguson. By letter of May 26, 1976, Highlands advised the Navy that the bonds had been signed by an attorney-in-fact who had not been authorized to bind the surety. The Navy reports that subsequent investigation has validated that the bonds were not authorized.

On November 9, 1976, Walker & Ferguson notified the Navy that it was financially unable to complete the contract, and on December 30, 1976, the contract was terminated for default. The contract was then completed by Government forces stationed at Crane, Indiana. At the time of default, $133,624 of $160,010, the total contract price as amended, had been paid to the contractor. Of the remainder, $7,033 constitutes contract retainage and the rest is for work unperformed and unbilled.

Wilson Building Supply, Inc. (Wilson) has made a claim against the Navy for $17,675.93, which it asserts remains unpaid for concrete provided by Wilson and used by Walker & Ferguson in performance of the contract. Wilson alleges that the Navy was negligent in failing to detect the unauthorized Miller Act bonds and therefore should be required to pay for the concrete provided by Wilson.

Navy, on the other hand, states that there was no negligence on its part and that, in any event, the claim should be denied on the strength of *Kennedy Electric, Inc.* v. *United States Postal Service*, 367 F. Supp. 828, 833 (1973), *affirmed* 508 F. 2d 954 (10 Cir. 1975).

We agree with the Navy. Even a negligent failure by the Government to assure that Miller Act bonds are filed does not support a laborer's or materialman's claim for payment from the Government. In *Kennedy Electric, supra*, the Post Office Department permitted an unbonded construction contract to proceed until the bankruptcy of the prime contractor. The plaintiff, an unpaid subcontractor, claimed payment from the Government based on its negligence. The court agreed that the Post Office had been negligent by failing to insure filing of the Miller Act bonds but held that the claim could not be allowed for that reason because of the absence of privity of contract between the plaintiff and the Government. The unpaid laborer's or materialman's remedy lies against the prime contractor and not the Government. *H. Herfurth, Jr., Inc.* v. *United States*, 89 Ct. Cl. 122 (1939).

Wilson notes, however, that in this case some $18,400 of the $26,000 unpaid contract price is to be used for completion of the contract work by station forces at Crane. In Wilson's view, this amount, from "an equitable standpoint," should be paid to the unpaid supplier which

relied on the contract bonds rather than transferred "from one of [Navy's] pockets to another while utilizing the materials furnished by [Wilson] without payment for same." Otherwise, Wilson believes, the Navy will be unjustly enriched at the expense of the supplier.

We do not agree with Wilson's reasoning. As Navy reports, the defaulted contractor has been paid $133,624 for the portion of the work which it completed. Of the remaining contract balance of $26,386 (contract price of $160,010 less $133,624 paid to contractor), only $7,033 is traceable to contract retainage, i.e., money earned by the contractor but retained by the Government to assure contract performance. Thus the defaulted contractor earned a total of $140,657 while the remaining contract work was completed by the Government (apparently at a cost of $18,400). We see no reason in law or equity why the Government should be obligated to pay the contractor's supplier for the portion of the work which was completed by the Government at its own expense. We do not think that the Government is unjustly enriched if it retains the contract amount which was not earned by the defaulted contractor.

We recognize, however, that Wilson may have an equitable claim to the contract retainage of $7,033. See *Pearlman* v. *Reliance Insurance*, 371 U.S. 132 (1962); *Kennedy Electric*, *supra*. In *Kennedy* the court held that the unpaid subcontractor had an equitable lien on the retainage held by the Postal Service. In this regard, the Navy indicates that there may be other unpaid suppliers and subcontractors under this contract in addition to Wilson. Therefore, we recommend that the Navy take steps to assure that the rights of all parties are adequately determined prior to any payment from the contract retainage.

[B-154522]

Station Allowances—Military Personnel—Temporary Lodgings—Change of Station—Government Quarters Not Assigned

Although station allowances authorized under the provisions of 37 U.S.C. 405 (1970) for members without dependents ordinarily are not payable to a member until he reports at his permanent station, the Joint Travel Regulations may be amended to provide that permanent change of station travel terminates when a member reports to the home port of two-crew nuclear submarine at which time he becomes entitled to allowances applicable to training and rehabilitation duty at the home port of such vessel even though he has not reported on board. At that time station allowances would be payable under current rates if he is not assigned to Government quarters, since he incurs expenses which these allowances were designed to defray. Contrary decisions are modified accordingly.

Military Personnel—Dislocation Allowance—Members Without Dependents—Unable To Occupy Assigned Quarters

Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters

of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it is our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly.

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Navy Members Assigned to Two-Crew Nuclear Submarines—Permanent Change of Station—Not Assigned Quarters

Regulations may be changed to provide that basic allowance for quarters authorized under 37 U.S.C. 403 (1970) may be paid to members in pay grades E–4 (with less than 4 years' service) and below, prior to reporting on board the two-crew nuclear submarine when attached thereto incident to a permanent change of station, when they arrive at the submarine's home port and are not assigned Government quarters and are not entitled to a per diem allowance by virtue of a proposed change in regulations terminating permanent change of station travel at the time the member reports to the home port of these vessels. Such allowance would then be based upon the member's entitlements in a training and rehabilitation status. Contrary decisions are modified accordingly.

In the matter of permanent station allowances—two-crew submarines, December 29, 1977:

This action is in response to letter dated March 8, 1977, from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requesting a decision on various questions concerning the allowance entitlements of Navy members assigned to two-crew nuclear submarines. The questions have been assigned PDTATAC Control Number 77–8, by the Per Diem, Travel and Transportation Allowance Committee and Control Number SS–N–1262, by the Department of Defense Military Pay and Allowance Committee.

The questions concern entitlement of members assigned to two-crew nuclear submarines to housing and cost-of-living allowances, temporary lodging allowance, and dislocation allowance, during the period between their arrival at the home port of the submarine and the date they report aboard the submarine itself. A question is also raised concerning the entitlement to basic allowance for quarters (BAQ) for members in pay grades E–4 (with less than 4 years' service) and below. The primary issue in the case involves establishing an appropriate status for members who are assigned to two-crew nuclear submarines (the submarine being defined as their permanent duty station) between the date they report to the home port of the submarine, where a large part of their duties are also to be performed, and the date they report to the submarine. A substantial period is often involved since these submarines are normally at sea and unavailable.

The submission points out that this Office has held that a member assigned to a ship is not considered to have reported to his permanent

station until he actually reports on board the vessel. Under that rule a member assigned to a two-crew nuclear submarine is considered to be in a travel or temporary duty status incident to the change of station until he actually reports on board the submarine. See 48 Comp. Gen. 480 (1969); 47 *id.* 527 (1968); 46 *id.* 161 (1966); and 45 *id.* 689 (1966).

During this period of temporary duty a member with or without dependents is entitled to per diem allowances until he moves into permanent quarters. If he secures permanent quarters his per diem allowances are terminated. See Volume 1, Joint Travel Regulations (1 JTR), paragraph M4156, case 13. However, this does not change the character of his duty and he is still considered to be in a temporary duty or travel status. As a result, a member is not entitled to station allowances (housing, cost-of-living and temporary lodging allowances) for himself, since he has not reported to his permanent station. Members in pay grades E–4 (with less than 4 years' service) and below are not entitled to BAQ during the period of temporary duty, since they are still considered to be in a travel status.

Further, a member without dependents who is assigned to a ship is provided with Government quarters on the vessel and, therefore, is not entitled to the dislocation allowance authorized under 37 U.S.C. 407 (1970). See 48 Comp. Gen. 480, *supra*.

A problem has arisen in these cases because, due to operational requirements, two-crew nuclear submarines seldom enter their home ports. The respective crews change over at a port other than the home port of the submarine every 90 days. The off-ship crew is airlifted from the home port to the port where the exchange occurs, and the on-ship crew which is relieved is airlifted back to the home port to commence its period of training and rehabilitation at that place. Since the submarine is inaccessible most of the time, a member assigned to a two-crew nuclear submarine is issued permanent change of station orders to report to the home port of the submarine, pending his reporting aboard the submarine, and his orders indicate to which of the two autonomous commands or crews he is assigned. On arriving at the home port the member is assigned to duty with the crew to which he was assigned by his orders if it is the off-ship crew undergoing training and rehabilitation, although for travel purposes he is still on temporary duty incident to his permanent change of station having not reported aboard the submarine. If the crew to which he is not assigned by his orders is at the home port, he is assigned to temporary duty with it until his own crew returns to the home port for training and rehabilitation, at which time he joins that crew in a temporary duty status since he has not yet reported to the ship itself.

Depending on the crew to which the member is assigned, the period of temporary duty can be as long as 180 days, since the crews rotate every 90 days.

It is noted in the submission that as a result of these situations inequities exist for members assigned to two-crew nuclear submarines. Assignment to one of these submarines places a member in a unique status. The quarters on the submarine itself are only available to a crew member 50 percent of the time. The remaining 50 percent of the time a member is in travel status incident to the crew change or ashore performing training and rehabilitation duty primarily at the home port of the submarine in circumstances where Government quarters may not be available and the member must secure non-Government quarters. Also during this period the member may take leave. It is also noted that while the member is ashore and not on leave the duties he performs are not unlike those performed on the submarines.

It is suggested that a resolution of the matters in question can be achieved within the current definition of "permanent station," provided it is determined by our Office that contemplated changes in the regulations are allowable, within the provisions of the law. However, it is said that a more proper solution of this long-standing issue would be to modify the definition of "permanent station" as it pertains specifically to two-crew nuclear submarine duty. If such a change were made, decisions on each individual allowance would not appear necessary. Further, Navy members assigned to duty aboard two-crew nuclear submarines would be given equitable entitlements.

Therefore, it is requested that consideration be given to modifying the previous decisions which have held that the vessel and the vessel only is the permanent duty station of members assigned to duty aboard two-crew nuclear submarines and that a decision be rendered as to whether the definition of permanent station contained in Appendix J, 1 JTR, may be amended under the authority granted to the Secretaries concerned by 37 U.S.C. 411(d) (1970).

An amendment to that regulation is suggested which would terminate the member's permanent change of station travel status at the time he reports to the commanding officer of the submarine who is at the home port at the time the member arrives. This would be the commander of the off-ship crew and would not necessarily be the commander of the crew to which the member will be assigned. The proposal does not appear to modify the definition of permanent station except to the extent that the member's reporting to the home port would be considered as a constructive reporting to his permanent duty station. At the time of reporting to the home port the member would terminate his permanent change of station travel status and enter

the duty status applicable to all crew members undergoing training and rehabilitation at the home port.

As noted paragraph M4156, case 13, 1 JTR, precludes the payment of travel allowances once a member occupies permanent type quarters at the home port of the vessel to which assigned. While not specifically modifying the definition of permanent station, this regulation has had the effect of terminating a member's travel status and the allowances resulting therefrom prior to his actual date of reporting at his permanent station, the vessel. Thus, while this regulation was not promulgated with a view toward the unique situations presented by the assignment of a member to a two-crew nuclear powered submarine, we believe the rationale behind its issuance to be pertinent to the instant case.

Obviously, this regulation was issued to preclude the payment of per diem allowance authorized for travel or temporary duty when the expenses of such travel were not being incurred. The effect of this regulation was to expand a member's permanent station to include the place where a member actually establishes a permanent type residence, without actually changing the definition contained in Appendix J.

Similarly, we believe an amendment to the JTR's terminating a member's travel status incident to permanent change of station travel when he arrives at the home port of the two-crew nuclear submarine would be appropriate in view of the particular situation involved. Our view in this regard is based on the fact that the member's normal duty in this assignment includes a substantial amount of time in a training and rehabilitation status at the vessel's home port.

As a technical matter, a member in the situations discussed in the submission has not arrived at his permanent station until he reports on board the submarine. However, if his travel status has been terminated and he commences his normal duties—training and rehabilitation at the home port of the submarine—it is our view that he should be entitled to the same allowances during this period that he would receive if he had already reported on board the submarine, his permanent station, and then performed the duty at the home port.

In the past decisions we have held that members assigned to a two-crew nuclear submarine while ashore for periods in excess of 15 days for temporary additional duty for training and rehabilitation are entitled to quarters allowance and housing and cost-of-living allowances when not assigned to Government quarters and furnished Government messing facilities. See 44 Comp. Gen. 105 (1964); 47 Comp. Gen. 527 (1968); and 53 Comp. Gen. 535 (1974). That conclusion was reached because, although technically, members attached to two-crew submarines are assigned quarters on the submarine, it was our view

that Congress intended that members either be furnished quarters which they are able to occupy or be paid an allowance for quarters. We also concluded that since members ashore in excess of 15 days for training and rehabilitation duty were not considered to be in a "sea duty" status, the limitation in 37 U.S.C. 403(c) on the payment of BAQ to a member in this status was no longer applicable. Further, we concluded that the housing and cost-of-living allowances could also be paid since these members were actually experiencing the costs which the allowances were intended to defray.

With regard to temporary lodging allowances authorized under 37 U.S.C. 405 (1970), we have concluded that since the vessel is the permanent station, a member is still in a travel or temporary duty status until he reports aboard the vessel, and therefore is not entitled to this allowance for himself, since the entitlement to such allowances exists only when a member has reported to his permanent station. This is the case even though payment may be made to him on account of his dependents at the home port when they occupy hotel or hotel-like accommodations and are required to use restaurants. 48 Comp. Gen. 716 (1969).

The logic of such a rule seems clear, since the member in such cases is entitled to a per diem allowance for himself while in a travel status prior to reporting aboard the submarine. However, if a regulation were promulgated which would have the effect of terminating his travel status, and the member was required to occupy hotel and hotel-like accommodations subsequently without entitlement to a per diem allowance authorized for his travel duty, it would follow that he should be entitled to a temporary lodging allowance for himself, since he would be incurring the additional expenses which such allowance was intended to defray.

Furthermore, if a member is not entitled to a per diem allowance because his travel status is terminated and is entitled to BAQ and subsistence at the home port, it would appear that he should be entitled to housing and cost-of-living allowances authorized under 37 U.S.C. 405 (1970) for the same reasons stated in 53 Comp. Gen. 535, *supra*.

Likewise, the limitation of 37 U.S.C. 403(f) which precludes entitlement to a BAQ for members in pay grade E–4 (with less than 4 years' service) or below when they are in a travel status would no longer be applicable if a regulation were promulgated terminating permanent change of station travel when a member arrives at the home port in connection with his assignment to a two-crew nuclear powered submarine.

Accordingly, if the JTRs are amended so that a member's travel status resulting from a permanent change of station incident to assign-

ment to a two-crew nuclear submarine, is terminated upon his reporting to the home port of the submarine, thereby precluding the payment of per diem allowances, further amendment to the regulations providing entitlement to station allowances authorized by Part G, Chapter 4, 1 JTR, would be appropriate for members incurring the expenses for which these allowances were intended to defray, is authorized.

The Department of Defense Military Pay and Allowances Entitlements Manual may also be amended to provide for entitlement to a BAQ for members in pay grades E–4 (with less than 4 years' service) and below, assuming appropriate regulations terminating travel status in the described circumstances are promulgated.

The views expressed in 48 Comp. Gen. 716, *supra*, and similar cases involving entitlement to station allowances for members assigned to two-crew nuclear powered submarines upon reporting to the home port of the submarine will no longer be followed if a member's change of station travel status is terminated so that he is no longer entitled to a per diem allowance in connection therewith.

Subsection 407(a)(3) of title 37, United States Code, prohibits the payment of a dislocation allowance to a member without dependents who is transferred to a permanent station where he is assigned to quarters of the United States. A member assigned to a two-crew nuclear powered submarine is assigned to quarters of the United States on the submarine.

As we noted in 47 Comp. Gen. 527, a member without dependents is ordinarily precluded from receiving BAQ when he is assigned to quarters of the United States or is on sea duty; however, we concluded that when the member is not on sea duty, although assigned to quarters of the United States on the vessel, it appeared that such assignment must be to quarters he is able to occupy in order to preclude the payment of BAQ. Similarly, while 37 U.S.C. 407(a)(3) authorizes payment of a dislocation allowance to a member when he is not assigned to quarters of the United States at his permanent station, it would seem that the Congress did not intend to preclude the payment of the allowance when a member is not able to occupy the assigned quarters, and is in fact incurring the expense of moving into non-Government quarters, since he has no alternative. Accordingly, the regulations may be amended to authorize payment of a dislocation allowance in these limited circumstances, and 48 Comp. Gen. 480 is modified accordingly.

It is our view that an amendment to the definition of "permanent station" set forth in Appendix J, 1 JTR, while possible, may not be appropriate. The apparent reason for suggesting the amendment re-

lates only to the period of duty performed prior to reporting on board the submarine. If the definition of "permanent station" as it applies to members assigned to two-crew nuclear powered submarines is changed, then it would either involve a change requiring the home port to be considered the permanent station for all purposes, not just for reporting purposes prior to actually reporting on board the submarine, or a change under which the vessel and the home port would both be considered the permanent station of members of crews of these vessels. The amendment suggested by the Navy in the submission does not accomplish either of those changes but rather creates a constructive reporting at the home port as constituting reporting at the permanent station, the submarine. We believe that any amendments to accomplish the purpose suggested, should be made in chapters 4 and 9, rather than in Appendix J, 1 JTR, to authorize entitlement to the various allowances.

If it is determined that an actual amendment to the definition of "permanent station" is desired, we believe the matter should be resubmitted to this Office for consideration after an in-depth study is conducted of the effects of changing the definition of "permanent duty station" as it relates to duty on two-crew nuclear powered submarines.

As we stated earlier, we have no objection to amendments to the pertinent chapters of 1 JTR authorizing station allowance and dislocation allowance and amendments to the Military Pay and Allowances Entitlements Manual with regard to BAQ in the described circumstances based upon a determination that members of crews of these vessels complete permanent change of station travel upon arrival at the home port and enter a training and rehabilitation status until they actually report aboard the submarine.

[B-187716]

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Fixed-Price *v.* Cost-Type Offers

Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award.

Contracts—Negotiation—Evaluation Factors—Evaluators—Allegations of Bias, Unfairness, etc.—Not Supported by Record

Cost estimate in cost-type proposal may be properly compared, for evaluation purposes, to fixed-price proposal so long as cost estimate is determined to be rea-

sonable and realistic. Protester's contention that evaluators disregarded advantages of fixed-price proposal in making the comparison is not supported by record.

Contracts—Negotiation—Competition—Adequacy—Cost Analysis Requirement

Protester's contention that agency violated regulations by not requiring prospective cost-type contractor to furnish certified cost or pricing data and by not performing cost analysis of such data is without merit since adequate price competition existed for procurement, and therefore requirements for submission of cost and pricing data and cost analysis of such data were not applicable.

Contracts—Negotiation—Evaluation Factors—Price Elements for Consideration—Cost Estimates

Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts.

Contracts—Negotiation—Awards—Allegation of Improper Predetermination—Not Supported by Record

Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester.

In the matter of U.S. Nuclear, Inc., December 29, 1977:

U.S. Nuclear, Inc. (USN) protests the award of a contract by Brookhaven National Laboratory (Brookhaven) to Texas Instruments (TI) under invitation for proposals (IFP) No. 374463 to furnish 420 fuel elements for a high flux beam reactor (HFBR) located at Brookhaven. Brookhaven is a federally owned facility operated for the Energy Research and Development Administration (ERDA), now the Department of Energy, by Associated Universities, Inc., under a cost-type management contract. This procurement was effected under Brookhaven's management contract and the selection of the awardee was subject to ERDA's approval. Accordingly, this matter is properly for our consideration as a protest of an award of a contract "for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office." 4 C.F.R. § 20.1(a) (1976); *see* B-179462, November 12, 1973; B-169492, July 17, 1970.

The IFP, issued on January 19, 1976, permitted proposals to be submitted on either a fixed-price or cost basis. Of the five firms solicited, three submitted proposals by the February 23, 1976 closing date.

TI submitted a cost-plus-fixed-fee proposal, while USN and Atomics International (AI) submitted fixed-price proposals.

Following discussions with the three offerors, Brookhaven's proposal evaluation committee determined that there were "no appreciable differences between the three proposals on the basis of the technical criteria listed in the solicitation." By Amendment 1 to the IFP dated May 10, 1976, which called for best and final offers, Brookhaven advised the offerors that award would "be made to that responsible bidder whose proposal is responsive and will result in the lowest projected annual fuel cycle cost for the reactor." By June 1, 1976, in response to the request for best and final offers, TI submitted a cost-plus-fixed-fee proposal, USN submitted a fixed-price proposal, and AI submitted a fixed-price proposal and a cost-plus-fixed-fee proposal. On September 1, 1976, Brookhaven awarded the contract to TI on a cost-plus-fixed-fee basis after determining that TI's proposal offered the lowest annual projected fuel cycle cost. The protest was filed when USN was notified of this award.

USN contends that TI's cost-type proposal was not properly evaluated and compared with its fixed-price proposal. It maintains that Brookhaven and ERDA improperly determined that TI's proposal would result in the lowest cost. USN also contends that in evaluating TI's cost proposal, Brookhaven/ERDA did not comply with applicable regulations requiring submission of cost or pricing data by the offeror and a cost or price analysis by the contracting agency. Moreover, USN questions whether a determination was made that a cost-type contract could be used in this case.

Initially, ERDA argues that USN's protest boils down to the single contention that it was not appropriate to solicit cost-type proposals along with fixed-price proposals. According to ERDA, the protester should have known long before the filing of its protest that a cost-type contract might be awarded under this solicitation and that cost comparisons might have to be made as part of the evaluation process. Citing 4 C.F.R. § 20.2(b) of our Bid Protest Procedures, ERDA argues that the protest should have been filed before the closing date for receipt of proposals, and that since the protest was filed long after that date it should be dismissed as untimely.

However, the crux of the USN protest, as outlined above, concerns the evaluation of proposals. While the protester should have been aware from the solicitation that a comparison between fixed-price and cost-type proposals might be made as a part of the evaluation process, it was not aware, until after the award, of how the evaluation

was made. Therefore we believe the protester's contentions concerning the propriety of the evaluation are timely raised, and they will be considered on the merits. *International Finance and Economics*, B-186939, January 27, 1977, 77-1 CPD 66, at p. 11.

In fact, USN cites *International Finance and Economics*, *supra*, as a case where our Office recognized the "inherent advantage" of fixed-price proposals over cost-type proposals and concluded that the agency disregarded these advantages in its evaluation. In USN's view, Brookhaven/ERDA likewise overlooked the inherent advantages of the fixed-price over the cost-type contract in evaluating the proposals. It lists a number of these advantages, most of which pertain to the inherent differences between the fixed-price and cost-type contract. As an example, USN notes that it would be responsible to repair or replace nonconforming items while TI is reimbursed for the cost of repair or replacement. Yet, USN states, in evaluating the proposals "the only advantage assessed to USN's fixed-price bid was the cost of added inspection under a cost-type arrangement."

ERDA, for its part, concedes that a comparison between the two types of proposals is "difficult and must be performed with great care." ERDA also points to *International Finance and Economics*, *supra*, as recognizing that comparisons between the two types of proposals are possible and proper (77-1 CPD 66, at p. 9). That a proper comparison was made in this case is, in ERDA's view, amply demonstrated by the record. ERDA cites the evaluation file to show that both AI's and TI's cost proposals were assessed costs of Brookhaven inspection which are not assessed to USN's proposal. This, is the evaluator's view, adequately compensated for the warranty which was included in USN's fixed-price proposal but not in the cost proposals.

Essentially, however, ERDA contends that the sole evaluation criterion identified in the solicitation, as amended, was "lowest projected annual fuel cycle cost to the reactor" and that Brookhaven's cost comparison was appropriate for making that determination. It states that *International Finance and Economics* dealt with a situation where the agency failed to evaluate proposals in accordance with the evaluation criteria expressed in the solicitation, and thus is not applicable to the instant situation.

We agree. In the prior case we found in part that, although fixed-price proposals were not excluded under the solicitation, the agency had downgraded a proposal because it offered a fixed-price and made it "impossible to guarantee how much effort will be delivered." We felt that the agency had "missed the point" since the fixed-price offer guaranteed an acceptable product at a stated price.

In this case, Brookhaven/ERDA did not downgrade USN because it offered a fixed-price proposal. Instead the record indicates that the evaluators were aware of the advantages of a fixed-price proposal. Thus, the evaluators noted that the prices set forth by TI were estimates while those by USN were binding commitments. Nevertheless, the evaluators concluded that TI's cost estimates were reasonable. They also recognized that escalation falls solely on the fixed-price contractor but found that TI's projected escalation rate was realistic. Other factors were considered as well, including changes in requirements and possible termination, and prior manufacturing experience. Therefore, based on the record, we cannot sustain USN's contention that the evaluators disregarded the "inherent advantages" of USN's fixed-price proposal in making their cost comparison.

USN next contends that the evaluation of TI's cost proposal was contrary to regulations because TI did not furnish cost or pricing data and did not certify any cost information. USN cites the Federal Procurement Regulations (FPR) and the ERDA regulations applicable to cost-type procurements which require the submission of certified cost or pricing data from a prospective contractor for a cost-type contract. Moreover, USN points out that the FPR also provides that "price or cost analysis should be made in connection with every negotiated contract," citing FPR § 1–3.807–2(a), and it contends that Brookhaven/ERDA failed to comply with this requirement in evaluating TI's cost proposal.

In reply, ERDA states that while USN submitted a "Proposal Pricing Sheet" which was included in the solicitation as a convenient form for setting forth quotations, TI included in its proposal all of the data which would have been included in the Proposal Pricing Sheet. ERDA cites its regulation (ERDA 9–59.003) and the FPR as providing that "the method and degree of [price or cost] analysis" to be made for a negotiated procurement "is dependent on the facts surrounding the particular procurement and pricing situation." FPR § 1–3.807–2.

ERDA insists that "intensive cost *and* price analyses" were performed in this case. It states that data submitted or made available by TI were examined, including costs incurred by TI on similar work. It states that the TI cost estimates were compared with the price quotations offered by the other offerors, and that audit services were utilized. Also, ERDA states that since "adequate price competition" existed for this procurement, the requirement for certification of cost or pricing data was not applicable.

We find no basis to conclude that Brookhaven/ERDA's evaluation of TI's cost proposal was contrary to regulations. FPR § 1–3.807–3 (b)

and (f) provide that where there is adequate price competition cost or pricing data need not be requested. "Adequate price competition" may be said to exist where at least two responsible offerors who can satisfy the Government's requirements independently contend for the contract award. FPR § 1–3.807–1. Here there were three responsible offerors independently contending for the contracting award. Thus, a requirement for cost or pricing data was not applicable for this procurement. Rather, as provided by FPR § 1–3.807–2, the extent of cost or pricing analysis to be conducted was a matter left to the discretion of the procuring activity. 52 Comp. Gen. 346, 351 (1972). Hence, USN's contentions concerning the need to require submission of cost or pricing data and to perform a cost analysis of such data are not sustained.

As to the cost evaluation which was performed of TI's offer, the record shows that Brookhaven relied in part on an audit made in connection with a contract TI is currently performing for Oak Ridge National Laboratory for high flux isotope reactor (HFIR) fuel elements. The record shows that Brookhaven and ERDA "placed considerable reliance on the audited historical costs and estimating experience of TI in fabricating HFIR fuel elements," which TI has been doing on a cost-type basis for over 10 years, because of similarities between the HFIR fuel element and the HFBR fuel element.

It is USN's contention that these fuel elements are substantially different and cannot provide a basis for cost comparison. USN cites differences in the fabrication of the initial core, in the fuel plate fabrication, and in the fuel element assembly. (Both the HFBR and HFIR fuel elements consist of a number of aluminum plates containing enriched uranium, called fuel plates, which are joined to make an assembly called a fuel element.)

USN's contention concerning the core fabrication arises from an exception TI took in its initial proposal regarding tolerance on the thickness of the core. The protester suggests that this indicates TI might have problems in complying with the core thickness tolerance.

ERDA points out, however, that each of the offerors took exception to this aspect of the specification because they misunderstood the requirement. ERDA states that in the case of TI the exception was withdrawn in its final proposal and that, in fact, as a result of discussions with TI, Brookhaven clarified the specification on core thickness when it issued Amendment 1 on May 10, 1976.

As for fuel plate fabrication, USN points out a difference between the HFIR and the HFBR. The HFIR fuel plate is fabricated by an-

nealing the plates after substantial cold work and leaving them in a fully annealed condition. The HFBR fuel plate, however, is required to have 20 percent cold work so that the final anneal utilized in the HFIR plate fabrication cannot be done. This difference, according to USN, is significant and makes more difficult manufacture of the HFBR fuel plate.

ERDA, on the other hand, believes the similarity between HFIR and HFBR plate fabrication is obvious since both plates are fabricated using the same equipment and procedures. With regard to the 20 percent residual cold work in the HFBR fuel plates, ERDA believes this difference "is off-set by the fact that the HFBR fuel plate is bent to an easily controlled simple radius curvature while the HFIR plate is bent into a complicated involute curvature."

Finally, on the element assembly, USN notes that the HFBR fuel elements are assembled by mechanically swaging the fuel into grooved aluminum side plates, while the HFIR elements are assembled by a welding procedure. In the case of the HFIR, the fuel plates are inserted in a groove and a few circular welds are placed around the element, thereby tacking the fuel plates to the side plates of the circular aluminum channels. The roll swaging assembly procedure involved in the HFBR, in contrast, places stress on the fuel plates making it difficult to hold the tight water gap tolerances required for proper cooling of the fuel plates in the reactor. USN concludes from this that the difficulty in holding the HFIR water channels should be much less than in the assembly of the HFBR element. Also, because each HFIR element has 540 plates and each HFBR element only 18 plates, more than 30 HFBR elements must be assembled for each HFIR element to utilize the same number of plates.

In this connection, USN questions whether TI's current performance on the HFIR of more than 10 years experience manufacturing that type of fuel plate is relevant to a new start on the HFBR fuel plate. Thus, USN doubts that the 6 percent rejection rate, which was used in estimating TI's cost, is realistic.

In reply, ERDA explains that due to its concern over past assembly problems experienced by the incumbent HFBR contractor (not TI), Brookhaven had developed its own roll swaging machinery specifically for the HFBR plate; it thoroughly evaluated the assembly of HFBR elements, and, with the aid of its auditors, made assembly cost analyses. ERDA states that since these Brookhaven-developed machinery procedures and cost analyses were used by TI in its proposal, there was no need for a separate analysis on this portion of the work. (It notes, also, that USN was offered use of this same machinery but declined a signifi-

cant portion of it.) In addition, ERDA believes that the projected rejection rate of 5–6 percent for TI was conservative in view of TI's actually lower rejection rate over the past seven years.

In view of the foregoing, we cannot say that ERDA/Brookhaven's reliance on TI's cost experience in fabricating the HFIR fuel element was misplaced. In this connection, ERDA reports that in the time which has intervened since TI commenced HFBR work, TI's progress has served to confirm the validity of the evaluation in some notable areas. ERDA states that the TI qualifying plates have already been fabricated and tested in all important details and that the parameters which USN raised as possible points of difficulty, such as thickness control and cold work, "were all found to be comfortably within specifications."

Finally, USN has questioned whether a determination was made here that a cost-type contract could be used. It cites 41 U.S.C. § 254(b) and FPR § 1–3.405–1(c) as requiring such a determination. A copy of such a determination dated August 31, 1976, has been furnished to our Office by ERDA. Nevertheless, USN suggests that the Determination, in order to be valid, must be made prior to issuance of the solicitation. We do not agree. Where both fixed-price and cost-type proposals are solicited, a determination to award a cost-type contract should be made after proposals are evaluated and not before proposals are solicited.

Accordingly, the protest is denied.

[B–187771]

General Accounting Office—Decisions—Effective Date—Date of Decision

Applicant received travel expenses incident to preemployment interview. Travel occurred after issuance of a Comptroller General decision allowing such expenses, but prior to the issuance of a Civil Service Commission instruction on the matter. Since neither the decision nor the instruction has any contrary effective date, the authority to pay for preemployment interview travel expenses is the date of the decision, subject to such limitations as the Commission subsequently prescribed. Applicant's expenses were properly paid.

Travel Expenses—Interviews, Qualifications, etc.—Competitive Service Positions

Prospective employee who was reimbursed travel expenses for preemployment interview travel was properly reimbursed if such reimbursement was made in accordance with the authority described in subchapter 1–3d and e of Attachment 2 to Federal Personnel Manual Letter 571–66 (i.e., 5 U.S.C. 5703 and the Federal Travel Regulations).

In the matter of Dr. Robert W. Rigg—preemployment interview travel expenses, December 29, 1977:

Mr. Bert Z. Goodwin, Chief Counsel, Federal Aviation Administration (FAA), Department of Transportation, has requested a decision concerning the propriety of paying Dr. Robert W. Rigg, an FAA Medical Officer, the travel expenses he incurred incident to a preemployment interview. We shall treat the request as if made by the Secretary of the Department of Transportation inasmuch as it raises general questions needing clarification.

Mr. Goodwin states the facts in this case as follows:

> Travel expenses were paid for Dr. Robert W. Rigg from Steamboat Springs, Colorado to Anchorage, Alaska and return to Steamboat Springs. The amount of the travel voucher paid on an "actual expense basis" was in the amount of $668.62. The travel expenses were incurred during the period March 19–24, 1976. The travel expenses were incident to a preemployment interview conducted as a final measure to determine Dr. Rigg's ability to perform the duties of an FAA Medical Officer and to adapt to the Alaskan way of life. The position is that of Medical Officer (Preventive Medicine), GS–602–14 and is located in Anchorage. (Dr. Rigg was subsequently hired for the position.)
>
> The preemployment interview occurred between the time of your decision, 54 Comp. Gen. 554 (January 6, 1975), giving authority to pay preemployment-interview travel expenses, and the U.S. Civil Service Commission's (CSC) Federal Personnel Manual Letter (FPM) 571–66 (April 28, 1976), implementing your decision.
>
> The position for which Dr. Rigg was being interviewed meets the definition of "high-grade" positions in FPM Letter 571–66 since it is a professional position at grade GS–14.
>
> In accordance with Appendix C of the above FPM Letter, a copy of the position description and other postaudit material were forwarded to the Commission. As a result of its review, the Commission requested us to seek a decision from your office on the propriety of payment of the travel expenses which occurred before official implementation by the CSC of your decision, 54 Comp. Gen. 554.

In our decision 54 Comp. Gen. 554 (1975) we stated that under certain conditions an agency may pay the travel expenses of a prospective employee incurred in traveling to a place of interview for the purpose of permitting the agency to determine the prospective employee's qualifications for appointment to the competitive service. We limited this rule as follows:

> * * * Such positions contemplated in this respect are those which are of such high grade level or which have such unique or peculiar qualifications that the Commission finds that it cannot make a complete determination on the applicant's merits. In these situations it is necessary for the employing agency to conduct a preemployment interview so that the agency may obtain necessary information as to the employee's suitability to work in a given position. This information is peculiarly suited for the agency to determine but it may very well be outside of the Commission's competence in its review of an applicant's qualifications. Therefore, we hold that where the Commission rules that a position is of such nature that it could only be properly filled after the applicant has had a preemployment interview with the employing agency, we would have no objection to the agency's paying the travel expenses of an eligible to that position incident to an interview.

Subsequent to the issuance of 54 Comp. Gen. 554, *supra*, the Civil Service Commission issued an instruction on the matter through Federal Personnel Manual (FPM) Letter No. 571–66, April 28, 1976. Subchapter 1–2.a of Attachment 2 to FPM Letter 571–66 defines high-grade positions as grades GS–14 and above and subchapter 1–4.a states that preemployment interview expenses for prospective employees of those grades may be paid without prior Commission approval. The FAA has, as is required, forwarded to the Commission the necessary post audit information. Accordingly, Dr. Rigg's travel met the strict criteria in our decision and FPM Letter 571–66, and the only question remaining is whether the expenses may be reimbursed since they were incurred prior to the issuance of FPM Letter 571–66.

Since neither decision 54 Comp. Gen. 554, *supra*, nor FPM Letter 571–66 states any contrary effective date, it is our opinion that the authority to incur and pay for expenses pursuant to 54 Comp. Gen. 554 began on the date of that decision's issuance, subject to such criteria as the Commission subsequently established in FPM Letter 571–66. Accordingly, since Dr. Rigg incurred the expenses after January 6, 1975, the date of our decision in 54 Comp. Gen. 554, *supra*, and since there is no question that his preemployment interview travel was permissible within the parameters of our decision and the Commission guidelines, we have no objection to his being appropriately reimbursed for his travel expenses.

Assuming Dr. Rigg was paid his travel expenses in accordance with the authority described in subchapter 1–3. d and e of Attachment 2 to FPM Letter 571–66 (i.e., 5 U.S.C. § 5703 and the Federal Travel Regulations), the payments to Dr. Rigg were properly made.

[B–188481]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Assigned to Government Quarters—Nonoccupancy for Personal Reasons

When a member without dependents is offered an assignment to adequate Government quarters and chooses not to occupy such quarters for personal reasons, he is considered to have been assigned Government quarters within the meaning of 37 U.S.C. 403(b) and is not entitled to a basic allowance for quarters (BAQ) even if quarters are subsequently assigned to another member. Therefore, since the member is not entitled to BAQ because of 37 U.S.C. 403(b), partial BAQ may be paid under 37 U.S.C. 1009(d).

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Assigned to Government Quarters—Member on Sea Duty—Living With Family While in Port

A member assigned to sea duty who occupies Government family-type quarters assigned to his spouse when the vessel is in port is assigned to quarters on the vessel and is considered a member without dependents by virtue of 37 U.S.C. 420 (1970). Therefore he is not entitled to BAQ under 37 U.S.C. 403(c), and is entitled to partial BAQ authorized by 37 U.S.C. 1009(d).

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 535, Addenda A and B, December 29, 1977:

This action is in response to a request for advance decision from the Assistant Secretary of Defense (Comptroller) concerning entitlement to partial basic allowance for quarters (BAQ). Questions have arisen as a result of the enactment of section 303 of Public Law 94–361, July 14, 1976, 90 Stat. 923, 925, which added 37 U.S.C. 1009(c)–(f). Two questions together with discussions thereof are presented as addenda A and B to Department of Defense Military Pay and Allowance Committee Action No. 535. Decision B–188481, August 10, 1977, 56 Comp. Gen. 894, was issued in response to 4 other questions concerning partial BAQ previously presented in Committee Action No. 535.

The first question presented is as follows:

Is a member without dependents entitled to partial BAQ when, in accordance with applicable service regulations, he voluntarily declines to occupy Government quarters, acknowledges he has no entitlement to BAQ, and those quarters are subsequently assigned to someone else?

Sections 1009(a) and (b), title 37, United States Code, provide for upward adjustments in the basic pay, basic allowance for subsistence and BAQ of members of the uniformed services whenever there is an adjustment in the General Schedule of compensation for Federal classified employees. Such adjustments are to be of the same overall percentage as the increase in General Schedule rates. Under section 1009(c) the President may allocate the overall average percentage increase among the elements of compensation on an other than equal percentage basis. When the President chooses to allocate the increase on an other than equal percentage basis, section 1009(d), which provides as follows, authorizes payment of a "partial" BAQ to certain members without dependents:

(d) Under regulations prescribed by the President whenever the President exercises his authority under subsection (c) to allocate the elements of compensation specified in subsection (a) on a percentage basis other than an equal

percentage basis, he may pay to each member without dependents who, under section 403(b) or (c), is not entitled to receive a basic allowance for quarters, an amount equal to the difference between (1) the amount of such increase under subsection (c) in the amount of the basic allowance for quarters which, but for section 403(b) or (c), such member would be entitled to receive, and (2) the amount by which such basic allowance for quarters would have been increased under subsection (b)(3) if the President had not exercised such authority.

Subsection 403(a) of title 37, United States Code, authorizes the payment of BAQ, with the limitations of subsections 403(b) and (c) that entitlement does not exist when a member is assigned to quarters of the United States or when on field duty or sea duty. A member without dependents who is in a pay grade above 0–3 may elect not to occupy Government quarters and receive the BAQ instead.

It is stated in the Committee Action that Interim Change 206, dated October 27, 1976, to the Military Pay and Allowances Entitlements Manual provides in part that "Members without dependents, who are assigned to Government quarters but choose to reside in private quarters without receiving BAQ, are entitled to partial BAQ." The intent of this regulation was that members must *actually* be assigned to the Government quarters even if they chose to reside off base without BAQ before entitlement to the partial BAQ accrues.

In this regard it is noted in the Committee Action that Air Force Regulation 30–7, paragraph 3–14, "Bachelor Housing and Transient Quarters," requires a member to sign a statement which in effect provides that he acknowledges quarters are available for assignment to him and that he voluntarily declines the use of the quarters and will not be entitled to BAQ as a result. The regulation also provides that the member will not be required to maintain quarters on the base.

This policy, while not specifically approved, it is stated, appears to be supported by decisions of this Office and the courts. The phrase "assigned to quarters" as used in 37 U.S.C. 403(b) has been construed as not requiring actual assignment to Government quarters in order to preclude the payment of BAQ, but rather availability of quarters for assignment is the determinative factor. It is also stated that differences of opinion exist concerning whether 37 U.S.C. 403(b) should be construed to preclude the payment of BAQ to a member who voluntarily declines the assignment of Government quarters and those quarters are subsequently assigned to another member. If the statute is construed to preclude payment in such cases, Interim Change 206 referred to above would then have the effect of requiring a different interpretation of the phrase "assigned to quarters" for the purpose of entitlement to BAQ on one hand, and partial BAQ authorized by 37 U.S.C. 1009(d) on the other. In the absence of an expression of congressional

intent to the contrary, it is stated that this should not be the case even though these allowances are authorized by different provisions of law.

The facts in individual cases concerning entitlement to BAQ are determinative; however, as a general rule, when a member is informed that adequate Government quarters are available for assignment to him, and he chooses not to occupy those quarters for personal reasons, he has been "assigned" Government quarters within the meaning of 37 U.S.C. 403(b), and therefore is not entitled to BAQ. See 52 Comp. Gen. 64 (1972) and cases cited therein, and *McVane* v. *United States*, 118 Ct. Cl. 500 (1951).

Furthermore, the Government's obligation to a member is fulfilled when he is notified that adequate quarters are available for assignment to him. The subsequent assignment of the quarters to another member does not create a right to BAQ in the member who voluntarily chose not to occupy the quarters, since the Government is not required to maintain empty quarters for assignment to him in order to avoid liability for the payment of the BAQ. See B–187222, May 6, 1977, and B–155403, November 23, 1964.

Under 37 U.S.C. 1009(d) a member who is not entitled to BAQ under 37 U.S.C. 403(b) or (c) is entitled to partial BAQ, unless assigned to family-type Government quarters. 56 Comp. Gen. 894, *supra*. Accordingly, the first question is answered in the affirmative.

The second question presented relates to question 1 in Committee Action No. 535 which was:

1. Does the term "member without dependents", as used in 37 U.S.C. 1009(d), include a member married to a member when neither has a dependent other than his or her spouse?

The question now presented is:

If the answer to question 1 is affirmative, is such a member entitled to partial BAQ when assigned to sea duty and occupies family-type public quarters, which are assigned to his spouse, during periods the ship is in port?

In our response to question 1 in the decision of August 10, 1977, we concluded that while a spouse is defined as a dependent for the purpose of BAQ entitlement by 37 U.S.C. 401 (1970), the provisions of 37 U.S.C. 420 (1970) preclude the payment of increased allowances on the basis of a dependent who is entitled to basic pay. Thus, a member married to a member with no other dependents assigned to single-type Government quarters would be considered a member without dependents and would be entitled to the partial BAQ authorized by 37 U.S.C. 1009(d). Thus, the question was answered in the affirmative.

In considering other questions presented in Committee Action No. 535, we pointed out that the intent of the Congress in authorizing the

partial BAQ under 37 U.S.C. 1009(d) was that since the value of Government single quarters was substantially less than the value of Government family quarters, members assigned to Government single quarters should be entitled to additional compensation when a general reallocation of compensation was accomplished under the provisions of 37 U.S.C. 1009(c). Thus, we concluded that a single member assigned to Government family-type quarters would not be entitled to the partial BAQ since the member would be assigned to the higher value type housing. Similarly a member married to another member who is assigned Government family-type quarters would not be entitled to the partial BAQ authorized by 37 U.S.C. 1009(d).

In the situation presented in the second question, the member assigned to the Government family-type quarters is not entitled to the partial BAQ under 37 U.S.C. 1009(d) for the before-stated reasons. However, the member assigned to sea duty with quarters assigned on the vessel is still considered to be a member without dependents by virtue of 37 U.S.C. 420. Since the member is assigned to and by necessity occupies the quarters on the vessel and is not entitled to BAQ because of 37 U.S.C. 403(c), he is entitled to the partial BAQ authorized by 37 U.S.C. 1009(d) whether or not he occupies the Government family-type quarters with his spouse while the vessel is in port. The second question is answered in the affirmative.

[B-189594]

Travel Expenses—Military Personnel—Change of Station Status—Member Return to Old Station—To Complete Moving Arrangements

Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense.

In the matter of the Department of Defense Per Diem, Travel and Transportation Allowance Committee Control No. 77-19, December 29, 1977:

This action is in response to a letter from the Acting Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting

a decision as to whether Volume 1 of the Joint Travel Regulations (1 JTR) may be amended to authorize travel entitlements from a member's new permanent station to his former permanent station and return in the circumstances described. The request was forwarded to this Office by letter dated June 11, 1977, from the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control Number 77–19).

The submission cites our decisions B–169392, October 28, 1976, and B–167022, July 12, 1976, in which it was determined that an employee on temporary duty who received notice that his temporary duty station had been changed to become his new permanent station may be reimbursed for round-trip travel expenses from the new permanent station to the old permanent station for purposes of relocating his family to the new permanent duty station. In order to keep military and civilian travel allowances as nearly alike as possible, it is proposed to amend Volume 1 of the JTR to authorize travel entitlements to military members in circumstances similar to those set forth in those decisions.

In the July 12, 1976 decision we specifically departed from a long-standing rule set forth in B–167022, July 26, 1971, and B–167022, June 18, 1969, under which an employee was not entitled to be returned to his former permanent duty station at Government expense for the purpose of relocating his family or movement of a privately owned vehicle when, while on temporary duty, his temporary duty station was changed to become his new permanent duty station. Now employees are allowed round-trip travel between the new duty station and old duty station after such a transfer for the purpose of arranging the movement of family and household goods and assisting in other matters incident to the relocation.

The three cited decisions under file number B–167022 involve employees of the National Oceanic and Atmospheric Administration (NOAA) and its predecessor agency, the Environmental Science Services Administration, who were stationed aboard a sea-going vessel in circumstances not unlike members of the Navy or Coast Guard who serve aboard ship. We are informed that serving aboard the NOAA ship DISCOVERER at the time of our decision B–167022 of July 12, 1976, there were members of the NOAA commissioned corps who were members of the uniformed services and other crew members who were civilian employees apparently paid under the authority of 5 U.S.C. 5342. However, those decisions were concerned only with the civilian employee members of the vessel's crew and not with members of the

NOAA commissioned corps who are by statute members of the uniformed services. See 37 U.S.C. 101(3) (1970) and the act of December 31, 1970, Public Law 621, 84 Stat. 1863, 33 U.S.C. 857–1, *et seq.*

The question presented is whether a rule similar to that stated in B–167022, July 12, 1976, may be applied to members of the uniformed services.

The theory upon which that decision was based is stated as follows:

> * * * We do not believe it was intended that employees be so restricted in availing themselves of the relocation allowances granted them by Congress for the express purpose of alleviating the burdens that are involved in uprooting a family and relocating it to a different geographic area. * * *

While allowances for members of the uniformed services upon transfer do not cover the broad range of items allowable in the case of a civilian employee's transfer, it is considered that the Government nevertheless has an obligation to defray the cost of travel and transportation for members of the uniformed services, as well as civilians, where the travel is performed as a direct result of a change of the member's permanent duty station. Where a member is ordered on temporary duty away from his permanent station or is assigned to a vessel which is deployed away from the home port, such assignments are for the purpose of carrying out the Government's business and the member generally has no choice about the assignment or deployment of the vessel. Therefore, if while so assigned or so deployed, the member should receive orders for permanent duty at the temporary duty station or the vessel is assigned a new home port, the member may be reimbursed round-trip travel to the old permanent station or old home port for the purpose of arranging for relocation of his family and effects resulting from the permanent change of station. The rationale for the travel and transportation entitlements as authorized by the Congress was that members should not be required to expend personal funds for travel and transportation which results from a permanent change of station.

Accordingly, we would have no objection to amending 1 JTR to permit round-trip travel of a member with or without dependents to the old permanent station or home port at Government expense in such situations. This determination does not alter the long–established rule that when a member is directed to report for permanent duty at the temporary duty station, his right to per diem terminates beginning on the date of receipt of such permanent change-of-station orders because he is not traveling away from his designated post of duty. 38 Comp. Gen. 697 (1959). See also, 34 Comp. Gen. 427 (1955). Per diem may, however, be authorized for the period of his travel to and from the old permanent station or old home port.

INDEX

OCTOBER, NOVEMBER, AND DECEMBER 1975

LIST OF CLAIMANTS, ETC.

	Page
Agriculture, Asst. Secretary of	102
Agriculture, Dept. of, Administrator	163
Air Force, Asst. Secretary of	198
Air Force, Dept. of	99
Attorney General	172
Babcock & Wilcox Co	85
Borg Warner Corp., York Div	104
Brandon Applied Systems, Inc	141
Burroughs Corp	110
Churchill, Gary B	1
Cubic Western Data, Inc	18
Customs Service, U.S	59
Defense, Asst. Secretary of	133, 195
Defense, Dept. of	35
Defense, Deputy Asst. Secretary of	131
Education Turnkey Systems, Inc	9
Environmental Protection Agency, Asst. Administrator	62
Federal Aviation Administration, Chief Counsel	193
Federal Procurement Policy, Office of, Administrator	35
General Telephone Co. of California	90
Goss, Donald K	99
Gull Airborne Instruments, Inc	67
Helms, The Honorable Jesse	52
Howard, Paul N. Co	73
Immigration and Naturalization Service	82
Justice Dept., Attorney General	172
Larrabee, Robert E	148
Ly, Hoang Ky	172
Medaugh, Billy M	97
Morgan, Gilbert C	32
Multi Electric Mfg. Inc	31
Nash, Kenneth L	82
National Aeronautics and Space Administration	1
National Commission on the Observance of International Women's Year	52
National Research Council	25
Navy, Asst. Secretary of	179
Navy, Dept. of	148, 176
Pan American Van Lines, Inc	15
Puerto Rico Aqueduct & Sewer Authority	73
Ragsdale, Nathaniel R	43
Rakous, Jr., George F	28
Rigg, Robert W	193
Scot, Inc	119
Senate, United States	52
Small Business Administration	35
State, Dept. of	43, 76
Sturm Craft Co	127
Sulak, Michael A	76
Systems Engineering Associates Corp	3
Tennessee Valley Service Co	125
Trans Country Van Lines, Inc	158, 170
Transportation, Dept. of	193
Treasury, Dept. of	59
U.S. Nuclear, Inc	186
United States Management, Inc	152
Veterans Administration	6
Williams and Company, Inc	159
Yellow Freight System, Inc	155

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page		Page
1951, Oct. 30, 65 Stat. 679	84	1976, July 12, 90 Stat. 851	
1953, Aug. 1, 67 Stat. 336	35	1976, July 14, 90 Stat. 963	
1953, Aug. 7, 67 Stat. 418		1976, Sept. 22, 90 Stat. 1279	
1974, Dec. 31, 88 Stat. 1822		1977, July 31, 91 Stat. 341	
1975, Dec. 23, 89 Stat. 1003	54	1977, Aug. 12, 91 Stat. 810	
1975, Dec. 23, 89 Stat. 1004	54	1977, Sept. 21, 91 Stat. 886	37
1975, Dec. 23, 89 Stat. 1005	54	1977, Sept. 21, 91 Stat. 903	37
1976, Feb. 9, 90 Stat. 153			

UNITED STATES CODE

See, also, U.S. Statutes at large

	Page		Page
5 U.S. Code Ch. 63	82	10 U.S. Code 876	145
5 U.S. Code 5333(b)	97	10 U.S. Code 884	134
5 U.S. Code 5342	199	10 U.S. Code 1447-1455	99
5 U.S. Code 5542	102	10 U.S. Code 1448 note	99
5 U.S. Code 5542(a)	102	10 U.S. Code 1448(a)	100
5 U.S. Code 5542(b)(2)	46	10 U.S. Code 2307	28
5 U.S. Code 5542(b)(2)(A)	47	10 U.S. Code 8911	99
5 U.S. Code 5542(b)(2)(B)	48	15 U.S. Code 631	35
5 U.S. Code 5542(b)(2)(B)(i)	49	15 U.S. Code 633	36
5 U.S. Code 5542(b)(2)(B)(ii)	49	15 U.S. Code 637	32
5 U.S. Code 5542(b)(2)(B)(iii)	49	15 U.S. Code 644	36
5 U.S. Code 5542(b)(2)(B)(iv)	49	15 U.S. Code 644(d)	42
5 U.S. Code 5544	102	15 U.S. Code 644(e)(1)	38
5 U.S. Code 5545(a)	50	15 U.S. Code 644(e)(2)	38
5 U.S. Code 5546(a)	50	15 U.S. Code 644(e)(3)	38
5 U.S. Code 5548	46	15 U.S. Code 644(e)(4)	38
5 U.S. Code 5596	97	21 U.S. Code 1180(a)	65
5 U.S. Code 5702(b)	3	22 U.S. Code 911	63
5 U.S. Code 5703	194	22 U.S. Code 1156—1158	63
5 U.S. Code 5724a(4)	29	31 U.S. Code 52c note	158
5 U.S. Code 6101	46	31 U.S. Code 71a	45
5 U.S. Code 6101(b)(2)	48	31 U.S. Code 529	26, 91
5 U.S. Code 6101(c)	46	31 U.S. Code 665	96
5 U.S. Code 6301(2)(B)(ii)	83	31 U.S. Code 699b	172
5 U.S. Code 7901	63	31 U.S. Code 712(a)	96
5 U.S. Code 7901(a)	64	31 U.S. Code 1172	76
5 U.S. Code 7901(c)	64	33 U.S. Code 857-1	200
5 U.S. Code App. I	52	33 U.S. Code 1281	73
5 U.S. Code App. I, sec. 3(2)	53	37 U.S. Code 101(3)	200
5 U.S. Code App. I, sec. 5(b)(2)	57	37 U.S. Code 401	197
7 U.S. Code 2254	165	37 U.S. Ccde 403(a)	196
8 U.S. Code 1182(d)(5)	173	37 U.S. Code 403(b)	196
10 U.S. Code 504	139	37 U.S. Code 403(c)	183, 196
10 U.S. Code 505(a)	139	37 U.S. Code 403(f)	183
10 U.S. Code 801	134	37 U.S. Code 405	183

UNITED STATES CODE—Continued

	Page
37 U.S. Code 407	180
37 U.S. Code 407(a)(3)	184
37 U.S. Code 411(d)	181
37 U.S. Code 420	197
37 U.S. Code 1009(a)	195
37 U.S. Code 1009(b)	195
37 U.S. Code 1009(c)	195
37 U.S. Code 1009(c)—(f)	195
37 U.S. Code 1009(d)	195
40 U.S. Code 270(a)	177
40 U.S. Code 270a	25
40 U.S. Code 270a–270d	25
40 U.S. Code 471	131
40 U.S. Code 481	97
40 U.S. Code 481(a)(3)	97
40 U.S. Code 490(j)	131
41 U.S. Code 10a-d	42, 89
41 U.S. Code 35	72
41 U.S. Code 252(c)(14)	87
41 U.S. Code 253(b)	95
41 U.S. Code 254(b)	192
41 U.S. Code 255	28, 91
42 U.S. Code 1751 note	164
42 U.S. Code 1761	163
42 U.S. Code 1761(k)	163
42 U.S. Code 1776	163
45 U.S. Code 4561	65
49 U.S. Code 20(11)	171
49 U.S. Code 66	158
49 U.S. Code 66(a)	155, 159
49 U.S. Code 66(b)	155, 158
49 U.S. Code 1517	79
49 U.S. Code 1601	18
49 U.S. Code 1602(f)	85
50 U.S. Code 2062	35

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
1 Comp. Gen. 143	92
9 Comp. Gen. 18	26
18 Comp. Gen. 839	93
19 Comp. Gen. 758	93
20 Comp. Gen. 917	93
24 Comp. Gen. 175	138
25 Comp. Gen. 834	93
28 Comp. Gen. 468	93
31 Comp. Gen. 215	84
31 Comp. Gen. 431	35
31 Comp. Gen. 562	138
31 Comp. Gen. 581	84
32 Comp. Gen. 191	102
32 Comp. Gen. 491	84
33 Comp. Gen. 34	137
33 Comp. Gen. 453	61
34 Comp. Gen. 150	123
34 Comp. Gen. 427	200
34 Comp. Gen. 659	93
36 Comp. Gen. 380	74, 95
37 Comp. Gen. 845	23
38 Comp. Gen. 697	200
39 Comp. Gen. 173	22
39 Comp. Gen. 860	135
40 Comp. Gen. 279	128
40 Comp. Gen. 432	20
40 Comp. Gen. 489	35
41 Comp. Gen. 8	49
41 Comp. Gen. 82	48
41 Comp. Gen. 306	35
42 Comp. Gen. 195	102
43 Comp. Gen. 317	129
43 Comp. Gen. 353	71
43 Comp. Gen. 544	22
44 Comp. Gen. 105	182
44 Comp. Gen. 529	22
45 Comp. Gen. 218	138
45 Comp. Gen. 689	180
46 Comp. Gen. 161	180
46 Comp. Gen. 434	20
46 Comp. Gen. 771	129
47 Comp. Gen. 54	63
47 Comp. Gen. 59	2
47 Comp. Gen. 527	180
47 Comp. Gen. 607	45
47 Comp. Gen 671	136
48 Comp. Gen. 158	20
48 Comp. Gen. 291	20
48 Comp. Gen. 480	180
48 Comp. Gen. 659	24
48 Comp. Gen. 716	183
49 Comp. Gen. 9	20
49 Comp. Gen. 98	119
50 Comp. Gen. 519	50
50 Comp. Gen. 540	143
50 Comp. Gen. 637	119
51 Comp. Gen. 69	123
51 Comp. Gen. 621	12
51 Comp. Gen. 727	49
52 Comp. Gen. 64	197
52 Comp. Gen. 87	22
52 Comp. Gen. 198	114
52 Comp. Gen. 265	20
52 Comp. Gen. 281	128
52 Comp. Gen. 346	190
52 Comp. Gen. 389	20
52 Comp. Gen. 425	11
52 Comp. Gen. 542	138
52 Comp. Gen. 640	22
52 Comp. Gen. 647	20
52 Comp. Gen. 702	48
53 Comp. Gen. 230	63
53 Comp. Gen. 258	12
53 Comp. Gen. 487	20
53 Comp. Gen. 496	70
53 Comp. Gen. 535	182
53 Comp. Gen. 670	6
53 Comp. Gen. 750	20

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL—Continued

	Page		Page
53 Comp. Gen. 895	95	55 Comp. Gen. 1012	95
54 Comp. Gen. 6	88	55 Comp. Gen. 1019	6
54 Comp. Gen. 66	89	55 Comp. Gen. 1204	72
54 Comp. Gen. 145	75	55 Comp. Gen. 1230	78
54 Comp. Gen. 231	6	55 Comp. Gen. 1323	33
54 Comp. Gen. 242	117	55 Comp. Gen. 1340	124
54 Comp. Gen. 251	85	55 Comp. Gen. 1358	61
54 Comp. Gen. 291	136	55 Comp. Gen. 1443	97
54 Comp. Gen. 304	121	56 Comp. Gen. 4	130
54 Comp. Gen. 395	116	56 Comp. Gen. 15	7
54 Comp. Gen. 445	88	56 Comp. Gen. 142	117
54 Comp. Gen. 530	153	56 Comp. Gen. 172	108
54 Comp. Gen. 553	30	56 Comp. Gen. 209	79
54 Comp. Gen. 554	193	56 Comp. Gen. 216	78
54 Comp. Gen. 580	70	56 Comp. Gen. 223	149
54 Comp. Gen. 732	100	56 Comp. Gen. 230	118
54 Comp. Gen. 937	127	56 Comp. Gen. 487	18
54 Comp. Gen. 999	129	56 Comp. Gen. 629	78
54 Comp. Gen. 1021	14	56 Comp. Gen. 894	195
55 Comp. Gen. 546	127	56 Comp. Gen. 924	146
55 Comp. Gen. 735	123	56 Comp. Gen. 976	32
55 Comp. Gen. 902	35	56 Comp. Gen. 1022	100

DECISIONS OVERRULED OR MODIFIED

	Page		Page
33 Comp. Gen. 453	59	54 Comp. Gen. 553	28
44 Comp. Gen. 105	178	55 Comp. Gen. 1323	32
47 Comp. Gen. 527	178	55 Comp. Gen. 1443	97
48 Comp. Gen. 480	178	B-187198, Apr. 18, 1977	1
53 Comp. Gen. 535	178		

DECISIONS OF THE COURTS

	Page		Page
Alabama *v.* King and Boozer, 314 U.S. 1	60	Hubbard, ex parte, 182 F. 76	138
Buch Express, Inc. *v.* United States, 132 Ct. Cl. 772	156	Keco Industries Inc. *v.* United States, 428 F. 2d 1233, 192 Ct. Cl. 773	14
Catlow, United States *v.*, 48 C.M.R. 758	133	Keco Industries, Inc. *v.* United States, 492 F. 2d 1200; 203 Ct. Cl. 566	14
Container Transport International, Inc. *v.* United States, 468 F. 2d 926; 199 Ct. Cl. 713	15	Kennedy Electric, Inc. *v.* United States Postal Service, 367 F. Supp. 828, affirmed 508 F. 2d 954	177
Diamond National Corp. *v.* State Board of Equalization, 425 U.S. 268	61	Kern-Limerick *v.* Scurlock, 347 U.S. 110	61
Dickerson, United States *v.* 310 U.S. 554	41	King, United States *v.* 28 C.M.R. 243	139
First Agricultural National Bank *v.* State Tax Commission, 392 U.S. 339	61	Lyon *v.* Atlantic Coast Line RR, 81 S.E. 1	171
Global Van Lines, Inc. *v.* United States, 456 F.2d 717; 197 Ct. Cl. 575	16	M & S Tomato Repacking Co. *v.* Boston and Maine Corp., 310 F. Supp. 186	171
Great Northern Ry. Co. *v.* United States, 312 F.2d 906; 160 Ct. Cl. 225	16	McVane *v.* United States, 118 Ct. Cl. 500	197
Grimley, In re, 137 U.S. 147 (1890)	139	Massman Construction Co. *v.* United States, 102 Ct. Cl. 699	75
Hall *v.* Siegel, No. 77-1028 (S.D. Ill., June 8, 1977)	52	Mears *v.* New York, N.H. & H. RR, 52 A. 610	171
Herfurth, H. Jr., Inc. *v.* United States, 89 Ct. Cl. 122	177	Metro Novelty Mfg. Co., United States *v.*, 125 F. Supp. 713	162
Herrod *v.* Convening Authority, 42 C.M.R. 176	135	Miller *v.* Commanding Officer, Camp Bowie, Texas, 57 F. Supp. 884	139
Heyer Products Co. *v.* United States, 140 F. Supp. 409, 135 Ct. Cl. 63	14	Missouri Pacific RR *v.* Elmore & Stahl, 377 U.S. 134	171
Hoskins *v.* Pell, 239 F. 279	139	New York, New Haven & Hartford RR, United States *v.*, 355 U.S.253	156

DECISIONS OF THE COURTS—Continued

	Page
Pacific Intermountain Express Co. *v.* United States, 167 Ct. Cl. 266	156
Parisi *v.* Davidson, 405 U.S. 34	135
Pearlman *v.* Reliance Insurance, 371 U.S. 132	178
Penn Facing Mills Co. *v.* Ann Arbor RR, 182 I.C.C. 614	156
Qonnar Corp. *v.* The Metropolitan Atlanta Rapid Transit Authority, Civ. Action No. 77-1218A	18
Russo, United States *v.*, 50 C.M.R. 650	133
Sea-Land Services, Inc. *v.* Gaudet, 414 U.S. 573	15
Shapiro *v.* United States, 335 U.S. 1	39
Super Service Motor Freight Co. *v.* United States, 350 F. 2d 541	171
Trans Ocean Van Service *v.* United States, 426 F. 2d 329; 192 Ct. Cl. 75	16
Trans Ocean Van Service *v.* United States, 470 F. 2d 604; 200 Ct. Cl. 122	16
Whitlock, L.E., Truck Service, Inc. *v.* Regal Drilling Co., 335 F. 2d 488	171

INDEX DIGEST

OCTOBER, NOVEMBER, AND DECEMBER 1977

ABSENCES

Leaves of absence. (*See* **LEAVES OF ABSENCE**)

ADMINISTRATIVE ERRORS

Correction

Promotions

Failure to carry our agency policy

Supervisor of wage board employees Page

Decision in *Billy M. Medaugh*, 55 Comp. Gen. 1443 (1976) held that pay adjustment for General Schedule supervisor of wage board employee must be eliminated or reduced when conditions prescribed in 5 U.S.C. 5333(b) are no longer met. That holding is not to be implemented while Civil Service Commission reviews regulations to determine what regulatory modifications may be needed to implement the decision..... 97

AGREEMENTS

Post-bid-opening

Bidders. (*See* **BIDDERS, Post-bid-opening agreements**)

AGRICULTURE DEPARTMENT

School lunch and milk programs

Administrative cost limitations

Decision B–178564, July 19, 1977, holding that section 13(k) of National School Lunch Act as amended by Public Law 94–105, which required payment in "amount equal to 2 percent" of funds distributed to each state, limits amount payable to States for costs incurred in administration of summer food program is reaffirmed. Section 7 of Child Nutrition Act cannot be construed as additional source of funds for such payments independent of 2 percent limitation. Holding in July 1977 decision is also consistent with most significant legislative history of recent statute amending these sections..... 163

AIRCRAFT

Carriers

Foreign

Use prohibited

Availability of American carriers

Dependents traveled by foreign air carrier from Accra, Ghana, to Frankfurt, Germany, and completed travel from Frankfurt to U.S. aboard U.S. air carriers. Employee is liable for 15 percent amount by which fare via Frankfurt exceeds fare by usually traveled route. Since travel via Frankfurt involved certificated U.S. air carrier service for 4,182 of 7,450 miles traveled, and proper routing via Dakar would have

AIRCRAFT
Carriers—Continued
Foreign—Continued
Use Prohibited—Continued
Availability of American carriers—Continued Page
involved travel of 4,143 of 5,610 air miles by U.S. air carriers, employee is liable for loss of U.S. carrier revenues computed in accordance with formula at 56 Comp. Gen. 209 76

ALIENS
Employment
Restrictions
South Vietnamese
Drug Enforcement Administration could employ South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1977 despite restriction against Federal employment of aliens in Public Law 94-419, which permitted employment only of South Vietnamese refugees paroled into United States. Appropriation act previously enacted for same fiscal year permitted employment of South Vietnamese aliens lawfully admitted into United States for permanent residence, and legislative history does not indicate second act was intended to repeal first 172

ALLOWANCES
Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)
Dislocation allowance
Military personnel. (*See* **MILITARY PERSONNEL, Dislocation allowance**)
Military personnel
Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)
Dislocation allowance. (*See* **MILITARY PERSONNEL, Dislocation allowance**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Quarters. (*See* **QUARTERS ALLOWANCE**)
Station. (*See* **STATION ALLOWANCES**)
Station allowances overseas. (*See* **STATION ALLOWANCES, Military personnel**)

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

APPROPRIATIONS
Availability
Capital cost of lessor
Long term lease
Agency's annual appropriation is not available for payment of equipmen lessor's entire capital cost at commencement of lease, and consequently low bid for lease of telephone equipment for 10 years which requires payment of bidder's capital costs at the outset of lease is properly rejected as requiring an advance payment contrary to law 89

APPRO PRIATIONS—Continued
Availability—Continued
Counseling for Government employees
Psychological Page

Under 5 U.S.C. 7901, Public Law 91-616 and Public Law 92-255, and implementing regulations, Environmental Protection Agency may expend appropriated funds for procurement of diagnostic and preventive psychological counseling services for employees at its Research Triangle Park, North Carolina, installation..... 62

Psychological counseling for Government employees. (*See* **APPROPRIATIONS, Availabiiity, Counseling for Government employees, Psychological)**

Defense Department
Restrictions
Price differential prohibition
Procurement in economic distressed, etc., areas

While order of preference for procurement set-asides set forth in Small Business Act does not control DOD procurement because of provision in DOD Appropriation Act, civilian agencies of Government are controlled by such order of preference since DOD Appropriation Act does not apply to them..... 34

Fiscal year
Contract
Date of award
Installation costs of telephone equipment

Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for that fiscal year; however, had bidder unbalanced its bid by including the capital cost of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. 529..... 89

Limitations
Procurement in economic distressed, etc., areas

Prohibition, contained in Department of Defense (DOD) Appropriation Act, of payment of contract price differential for relieving economic dislocations must be given effect notwithstanding earlier amendments to Small Business Act which allows such price differentials to be paid..... 34

ARMED SERVICES PROCUREMENT REGULATION
Progress payment clause
Inclusion of total performance or payment bond premiums in first payment

Reimbursement to Government contractors of the total amount of paid performance and payment bond premiums in the first progress payment can be authorized by amending the relevant Armed Services Procurement Regulation and Federal Procurement Regulations clauses to specifically so provide. Such reimbursements are not payments for future performance, but are reimbursements to the contractor for his costs in providing a surety satisfactory to the Government as required by law, and therefore, are not prohibited by 31 U.S.C. 529. Prior Comptroller General decisions, clarified..... 25

AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AWARDS
Contract awards. (*See* **CONTRACTS, Awards**)

BIDDERS
Anticipated profits
Unsuccessful bidders. (*See* **BIDDERS, Unsuccessful, Anticipated profits**)
Post-bid-opening agreements
Effect on bid Page
Mere fact that bidder enters into post-bid-opening agreement to obtain needed resources is not reason in itself to reject bid, unless effect of agreement is to cause bidding entity to "no longer exist" and to cause effective transfer of bid to nonbidding entity 67
Standards
Since bidding entity has no formal plans to dissolve and because entity may possibly do some business in its own name in the future so long as it does not compete with Bendix Corporation, infusion of resources from Bendix Corporation to bidding entity may be recognized in determining bidding entity's responsibility 67
Qualifications
Manufacturer or dealer
Administrative determination
Labor Department review
Ground of protest alleging that bidder is not "regular dealer or manufacturer" will not be considered since responsibility for deciding "regular dealer or manufacturer" status is vested in contracting officer and Department of Labor 67
Small business concerns
Responsibility
Conclusive determination
Vested in SBA
Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95-89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31
Responsibility *v.* **bid responsiveness**
Information
Essentiality
General Accounting Office finds that questioned bid contains unconditional commitment to furnish that which procuring agency requires contrary to assertion that bid is nonresponsive 67
Submission of test data
Purpose
Competency of bidder to perform
Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive 17
Responsiveness *v.* **responsibility.** (*See* **BIDDERS, Responsibility** *v.* **bid responsiveness**)

BIDDERS—Continued
Unsuccessful
Anticipated profits Page
Claim for anticipated profits and for cost of pursuing bid protest is rejected ---- 125

BIDS
Acceptance time limitation
Extension
After expiration
Reinstatement of canceled IFB
Bidder's option to accept award
Invitation for bids (IFB) provided that performance period was from March 15, 1977, or 5 days after award, if later, until March 14, 1978. Bidder confirmed bid on August 15, 1977, after General Accounting Office (GAO) decision upholding its preaward bid protest and during GAO review of another firm's request for reconsideration of that decision, on condition that award be for performance period of 1 year from award. Bid was thereby rendered ineligible for acceptance, since award of contract pursuant to advertising statutes must be on same terms offered all bidders, and various IFB clauses cited by bidder concern post-award situations ---- 125
Anticipated profits
Unsuccessful bidders. (*See* **BIDDERS, Unsuccessful, Anticipated profits**)
Bidders
Generally. (*See* **BIDDERS**)
Cancellation. (*See* **BIDS, Discarding all bids**)
Competitive system
Federal aid, grants, etc.
Bid responsiveness
Compatibility with State laws
Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74–7, attachment O and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs ---- 85
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Contracts
Generally. (*See* **CONTRACTS**)
Discarding all bids
Compelling reasons only
An invitation for bids which solicits bids on four alternate methods of performance, without indicating method of selecting among alternates, should not be resolicited where bid selected by grantee for award is low under any one of the four ---- 73
Reinstatement
General Accounting Office direction
Bidder's option to accept award
Although bids under canceled IFB expired during GAO consideration of protest against cancellation, where GAO decision recommends reinstatement of IFB, successful bidder may still, at its option, accept award thereunder ---- 125

BIDS—Continued
Evaluation
Costs
Storage-time related costs
Not for consideration
Not listed in IFB Page

Contrary to protester's insistence, storage-time related costs could not be considered as evaluation standards because they were not listed in IFB 103

Delivery provisions
Information
Failure to furnish

Failure of selected bidder to quote early delivery dates under "storage credits" pricing option is not significant since blanks provided for insertion of dates applied only to "non-storage credits" bidders and procuring agency did not need early delivery dates to evaluate bids. Further, I F B contained no indication of relative preference of bid depending on date of early delivery. Moreover, in absence of dates bidder is obligated to deliver at an indefinite date prior to required delivery dates which is still most advantageous to the Government 103

Determinable factors requirement
Failure to list in solicitation
Not prejudicial to protester

While solicitation failed to set forth objectively determinable evaluation factors, protester was not prejudiced thereby 89

Disclosure of evaluation factors
Failure
Not prejudicial to protester

Protester was not prejudiced by Air Force's failure to disclose that award under "storage credits" pricing option might be decided, in part, by results of "storage credits" bids under other solicitations. Moreover, since Government could not disclose Government's cost estimate of construction of storage facility to be built by use of offered storage credits, and given clear right of Government to determine reasonableness of submitted bids by appropriate information, use of separate bidding results to determine award is not objectionable. Analogy is made to "stepladder" bidding procedure 103

Factors not listed in invitation

Failure to consider present value of money factors or residual values in determining low bidder under lease/purchase alternatives is proper where invitation for bids (IFB) does not include such factors for evaluation. In advertised procurements, if any factors other than bid price are to be considered in determining low bidder, IFB must advise of such factors 89

Options
Price omission

Both invitation for bids' (IFB) "Schedule" and "Storage Facilities" provisions clearly provided that Air Force might award under "storage credits" pricing option notwithstanding lack of mention of pricing option in IFB clause entitled "Evaluation Factors For Award" 103

Storage time-related costs. (*See* **BIDS, Evaluation, Costs, Storage-time related costs**)

BIDS—Continued
Invitation for bids
Cancellation
Erroneous
Reinstatement recommended Page
An invitation for bids which solicits bids on four alternate methods of performance, without indicating method of selecting among alternates, should not be resolicited where bid selected by grantee for award is low under any one of the four 73
Requirements
Submission of test data
Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive 17
Late
Mishandling determination
Telegraphic modifications. (*See* **BIDS, Late, Telegraphic modifications, Mishandling by Government**)
Telegraphic modifications
Delay due to Western Union
Failure to use tie-in line to installation
Erroneous information provided by agency and agency's acceptance of telegraph company's delivery by telephone did not constitute Government mishandling solely responsible for or the paramount reason for untimely receipt of telegraphic bid modification where telegram was qualified on its face as official Government business and telegraph company should have been aware of existence of its own tie-in line to Government installation 127
Delivered subsequent to bid opening
Telephone notification received prior to bid opening
Bid modification was untimely where telegram was received after bid opening, notwithstanding fact that agency had received telephone call from telegraph company prior to bid opening indicating that bidder was modifying its bid 127
Transmission by other than mail
Improper Government action
Commercial carrier attempted to deliver protester's bid to office designated in invitation for bids for receipt of hand-delivered bids. Government personnel directed carrier to deliver bid to Central Receiving Warehouse instead and, consequently, bid was "late." Since bid was late due to improper Government action, and protester's bid was in Government hands before bid opening, protester's bid was properly for consideration 119
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Prices
Cost, etc., data
Failure to consider present value of money factors or residual values in determining low bidder under lease/purchase alternatives is proper where invitation for bids (IFB) does not include such factors for evaluation. In advertised procurements, if any factors other than bid price are to be considered in determining low bidder, IFB must advise of such factors 89

BIDS—Continued
Protests. (*See* **CONTRACTS, Protests**)
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Responsiveness
Responsiveness *v.* bidder responsibility Page
General Accounting Office finds that questioned bid contains unconditional commitment to furnish that which procuring agency requires contrary to assertion that bid is nonresponsive 67
Small business concerns
Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole-source basis**)
Specifications. (*See* **CONTRACTS, Specifications**)
Unbalanced
Responsiveness of bid
Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for that fiscal year; however, had bidder unbalanced its bid by including the capital cost of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. 529 89

BOARDS, COMMITTEES, AND COMMISSIONS
National Commission on Observance of International Women's Year. (*See* **NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR**)

BONDS
Performance
Premium payment
Inclusion in first progress payment
Reimbursement to Government contractors of the total amount of paid performance and payment bond premiums in the first progress payment can be authorized by amending the relevant Armed Services Procurement Regulation and Federal Procurement Regulations clauses to specifically so provide. Such reimbursements are not payments for future performance, but are reimbursements to the contractor for his costs in providing a surety satisfactory to the Government as required by law, and therefore, are not prohibited by 31 U.S.C. 529. Prior Comptroller General decisions, clarified 25

BUY AMERICAN ACT
Contracts
Provisions of Act not applicable to grantee contracts
The Buy American Act (41 U.S.C. 10 (1970)) provisions do not apply to contracts made by grantees 85

BUY AMERICAN ACT—Continued
Small business concerns
Effect of appropriation prohibition
Price differential prohibition *v.* preference for domestic products Page
Prohibition, contained in Department of Defense (DOD) Appropriation Act, of payment of contract price differential for relieving economic dislocations must be given effect notwithstanding earlier amendments to Small Business Act which allows such price differentials to be paid--- 34
Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations---------- 34

CLAIMS
Transportation
Claim simultaneous with court action
***Res judicata* doctrine applied after court adjudication**
When GAO makes no representations that it will consider a claim simultaneously submitted to it and a court of competent jurisdiction after the court has adjudicated the claim, GAO is not estopped from applying the doctrine of *res judicata* to the claim---------- 14
Household goods forwarders
Shipment under a Government Bill of Lading (GBL) is a single cause of action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata*-- 14
Loss and damage claims
Liability determination
Prima facie case of liability of common carrier is established when shipper shows delivery to carrier at origin in good condition and delivery by carrier at destination in damaged condition. Once prima facie case is established, burden of proof shifts to the carrier and remains there. To escape liability, carrier must show that loss or damage was due to one of the excepted causes and that it was free of negligence---- 170
Settlement
Review
Carrier allegations *v.* record
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case---------- 155

COMMISSIONS. (*See* **NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR**)

COMPENSATION
Additional
Supervision of wage board employees
Conditions Page
Decision in *Billy M. Medaugh*, 55 Comp. Gen. 1443 (1976) held that pay adjustment for General Schedule supervisor of wage board employee must be eliminated or reduced when conditions prescribed in 5 U.S.C. 5333(b) are no longer met. That holding is not to be implemented while Civil Service Commission reviews regulations to determine what regulatory modifications may be needed to implement the decision---------- 97
First-forty-hour employees. (*See* **OFFICERS AND EMPLOYEES, Hours of work, Forty-hour week, First forty-hour basis**)
Overtime
Day and week definitions
In 42 Comp. Gen. 195 at 200 it was held, in regard to overtime of wage board employee under 5 U.S.C. 673c (now 5 U.S.C. 5544), that agency could regard any 24-hour period as "day." That holding is applicable to General Schedule employees since provisions of 5 U.S.C. 5544 and 5 U.S.C. 5542 are comparable---------- 101
Work in excess of daily and/or weekly limitations
In 32 Comp. Gen. 191 it was held that employees who worked two shifts which began within same 24-hour period in basic workweek could be paid for 2 days' work at basic rate. That decision is no longer to be followed since 5 U.S.C. 5542 provides that hours in excess of 8 in day are overtime work. Therefore, Department of Agriculture employees whose workweek includes two shifts on Monday, 0100 to 0830, and 2000 to 0430, are entitled to overtime compensation for hours worked in excess of 8 hours in 24-hour period agency treats as day---------- 101
Premium pay
Sunday work regularly scheduled
Couriers
The workweek of diplomatic couriers consists of the first 40 hours of employment or work in an administrative workweek beginning on Sunday. Therefore, work performed by them on Sunday falls within their basic workweek and although not regularly scheduled in the usual sense, may be compensated at Sunday premium rates up to 8 hours on and after the first day of the first pay period beginning after July 18, 1966, the effective date of the law authorizing such premium pay------ 43
Supervision of wage board employees
Additional compensation. (*See* **COMPENSATION, Additional, Supervision of wage board employees**)
Traveltime
Entitlement
Couriers
Diplomatic couriers' travel with pouch-in-hand is travel involving the performance of work while traveling and is, therefore, hours of employment or work under 5 U.S.C. 5542(b)(2)(B). But their travel is not carried out under arduous conditions within the meaning of that provision since such travel is that imposed by unusually adverse terrain, severe weather, etc., and does not include travel by common carriers, including airlines---------- 43

COMPENSATION—Continued
Traveltime—Continued
Entitlement—Continued
Couriers—Continued Page

On and after the effective date of the amendment to 5 U.S.C. 5542(b), January 15, 1968, diplomatic couriers' officially ordered or approved "dead head" travel qualifies as hours of employment or work as travel incident to travel that involves the performance of work while traveling. It is not necessary to determine whether their travel results from an event which could not be scheduled or controlled administratively because they are being credited with all officially ordered and approved actual travel time as pouch-in-hand time or "dead head" time 43

Two work shifts beginning within same 24-hour period
Overtime. (*See* COMPENSATION, Overtime, Work in excess of daily and/or weekly limitations)
Wage board employees
Supervision by classified employees. (*See* COMPENSATION, Additional, Supervision of wage board employees)

CONFERENCES
National Women's Conference
National Commission on Observance of International Women's Year. (*See* NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, National Women's Conference)

CONTRACTORS
Incumbent
Selection justified
Delay and risk in training new contractor

Sole-source award for technical services to incumbent contractor is justified where new contractor, in order to perform services adequately, would have to learn technical history previously available only to incumbent and agency cannot afford delay and risk involved in training a new contractor 3

Responsibility
Determination
Small business concerns

Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31

CONTRACTS
Automatic Data Processing Systems. (*See* EQUIPMENT, Automatic Data Processing Systems)
Awards
Labor surplus areas
Defense Department procurement
Set-aside restriction

While order of preference for procurement set-asides set forth in Small Business Act does not control DOD procurement because of provision in DOD Appropriation Act, civilian agencies of Government are controlled by such order of preference since DOD Appropriation Act does not apply to them 34

CONTRACTS—Continued
Awards—Continued
Labor surplus areas—Continued
Set-asides
Order of preference
Page
Where Small Business Act amendment sets forth order of preference for procurement set-asides, with first priority for labor surplus area set-asides, and where such labor surplus area set-asides are subsequently prohibited by appropriation act provision, remaining order of preference set forth in Small Business Act is in effect "repealed" 34
Propriety
Status of bidder, offeror, etc.
Mere fact that bidder enters into post-bid-opening agreement to obtain needed resources is not reason in itself to reject bid, unless effect of agreement is to cause bidding entity to "no longer exist" and to cause effective transfer of bid to nonbidding entity 67
Since bidding entity has no formal plans to dissolve and because entity may possibly do some business in its own name in the future so long as it does not compete with Bendix Corporation, infusion of resources from Bendix Corporation to bidding entity may be recognized in determining bidding entity's responsibility 67
Small business concerns
Certifications
Tenacity and perseverance
Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31
Bids
Generally. (*See* BIDS)
Buy American Act
Defense Department procurement
Award to labor surplus firm
Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations 34
Inapplicable
Grantee contracts
The Buy American Act (41 U.S.C. 10 (1970)) provisions do not apply to contracts made by grantees 85
Cost accounting
Cost Accounting Standards Act application
Negotiated contracts
Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000 151

CONTRACTS—Continued
Default
Indebtedness of contractor to supplier
Government liability Page
Even if Government negligently fails to insure that Miller Act bonds are filed with construction contract, unpaid supplier's remedy lies against prime contractor and not the Government---- 176
Monies owing contractor
Disposition
Where Government completes contract work after default of prime contractor, unpaid supplier of defaulted contractor is not entitled to contract balance remaining in hands of Government for work which Government rather than defaulted contractor completed. However, unpaid supplier may have equitable claim to contract money earned by defaulted contractor but which has been retained by Government---- 176
Labor stipulations
Walsh-Healey Act
Manufacturer or regular dealer determination. (*See* **BIDDERS, Qualifications, Manufacturer or dealer**)
Mistakes
Correction
Bid verification requirement
Specificity of verification
Request for modification of contract price due to alleged error in bid, claimed after award, is allowed because contracting officer, in discharging bid verification duty, failed to specifically point out discrepancy in contractor's bid---- 159
Modification
Beyond scope of contract
Subject to General Accounting Office review
Contrary to usual view that protests against proposed contract modifications are not for review since they are within realm of contract administration, protest which alleges that proposed modification is beyond scope of contract is reviewable by General Accounting Office, if otherwise for consideration---- 140
Mistake in bid alleged after award. (*See* **CONTRACTS, Mistakes, Correction**)
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
After advertising
Grantee contracts
Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74–7, attachment 0 and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs---- 85
Auction technique prohibition
Disclosure of funds available for procurement
Agency did not utilize prohibited "auction technique" when it informed offerors of monctary amount available for the procurement---- 8

CONTRACTS—Continued
Negotiation—Continued
Awards
Allegation of improper predetermination
Not supported by record
Page
Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester 185
Notice
To unsuccessful offerors
Postaward notice to unsuccessful offerors is a procedural requirement which does not affect the validity of an award and the failure of an agency to notify protester until the 11th working day after award is not an "unlawful concealment of the contract award" 151
Changes, etc.
Specifications
Estimated manning requirements reduced
Reduction of scope of work statement not required
Agency was not required to reduce scope of work statement in solicitation when it reduced estimated manning requirements. Contract awarded did not obligate Government to pay an amount in excess of its current funding because Government was obligated to make payments only up to the estimated cost, which was less than the known funding limitation 8
Level of effort changes
Not prejudicial
While agency should have confirmed, in writing, an oral change in recommended level of effort, all offerors were informed of the change and were able to offer on a common basis. Therefore, deficiency was not prejudicial to offerors or Government 8
Changes during negotiation
Notification
Failure to notify not prejudicial
Agency should not have informed one offeror that it had a good chance of award in one region and almost no chance in two other regions, at least not without providing similar assistance to other offerors. However, agency did not prejudice protester, in this case, because offeror who received information as to his relative chances between two regions did not use that information by significantly changing its proposal 8
Competition
Adequacy
Cost analysis requirement
Protester's contention that agency violated regulations by not requiring prospective cost-type contractor to furnish certified cost or pricing data and by not performing cost analysis of such data is without merit since adequate price competition existed for procurement, and therefore requirements for submission of cost and pricing data and cost analysis of such data were not applicable 185

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Incumbent contractor
Competitive advantage Page
Competitive advantage of incumbent contractor need not be equalized where advantage does not result from Government preference or unfair action 109
Prices
Ceiling
Possibility that ceiling price on award under software solicitation will eliminate competition from software vendors, where purpose of ceiling price is to assure lowest total system cost to Government, does not outweigh requirement that Government obtain its needs at lowest total cost 109
Sole source of supply. (*See* CONTRACTS, Negotiation, Sole-source basis)
Cost accounting standards requirements
Standard 402
Not applicable to negotiated contracts under $100,000
Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000 151
Cost, etc., data
As evaluation factor
Lowest probable cost to Government
Where RFP excludes certain nonallowable software conversion efforts, which will be competed under separate procurement, protest that separate procurement may not result in lowest cost to Government is denied, since overall effect of separate procurements is to increase competition and thereby give Government best opportunity for obtaining lowest cost 109
Requirement to furnish
Whether or not contracting officer has made determination under Federal Procurement Regulations 1-3.807-3(b) that there is adequate price competition, there is nothing objectionable in requiring cost and pricing data to be submitted with proposals since cited regulation makes it discretionary with contracting officer as to when data will be requested and data will be utilized in deciding whether proposals are unbalanced 109
Cost-type
Technical/cost justification
Where instructions to offerors contained in request for proposals advises that "major consideration shall be given to technical proposals, as well as price," there is no basis to conclude that award of cost-type contract would be based solely on technical criteria 151
Evaluation factors
Cost, etc., of changing contractors
Sole-source award for technical services to incumbent contractor is justified where new contractor, in order to perform services adequately, would have to learn technical history previously available only to incumbent and agency cannot afford delay and risk involved in training a new contractor 3

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria
Misleading, ambiguous and subjective
Allegation without merit
Page
Contention that evaluation criteria are misleading, ambiguous and subjective is found to be without merit, because, upon review, criteria adequately advise offerors of manner in which proposals will be evaluated and evaluation of proposals is essentially a subjective judgment..... 109
Evaluators
Allegations of bias, unfairness, etc.
Not supported by record
Cost estimate in cost-type proposal may be properly compared, for evaluation purposes, to fixed-price proposal so long as cost estimate is determined to be reasonable and realistic. Protester's contention that evaluators disregarded advantages of fixed-price proposal in making the comparison is not supported by record..... 185
Manning requirements
Reduction
Reduction of scope of work statement not required
Agency was not required to reduce scope of work statement in solicitation when it reduced estimated manning requirements. Contract awarded did not obligate Government to pay an amount in excess of its current funding because Government was obligated to make payments only up to the estimated cost, which was less than the known funding limitation.. 8
Method of evaluation
Fixed-price *v.* cost-type offers
Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award..... 185
Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester..... 185
Phasing in new contractors. (*See* CONTRACTS, Negotiation, Evaluation factors, Cost, etc., of changing contractors)
Price elements for consideration
Cost estimates
Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts..... 185
Evaluators. (*See* CONTRACTS, Negotiation, Evaluation factors, Evaluators)
Fixed-price
Cost, data, etc. (*See* CONTRACTS, Negotiation, Cost, etc., data)

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals
Preparation
Costs Page

Where record shows that there is no basis to conclude that agency actions deprived unsuccessful offeror from receiving an award to which it was otherwise entitled, offeror would not be entitled to proposal preparation costs ---- 151

Recovery

Claimant is not entitled to proposal preparation costs because agency selection was not arbitrary ---- 8

Unbalanced
Determination
Criteria

"Unbalanced Prices" clause in RFP, which was supplemented by list of three criteria which would be utilized to determine if proposal was unbalanced, complies with past General Accounting Office decisions that offerors should be advised of standards or guidelines which will be employed in deciding whether prices are unbalanced ---- 109

Utilization of cost and pricing data

Whether or not contracting officer has made determination under Federal Procurement Regulations 1–3.807–3(b) that there is adequate price competition, there is nothing objectionable in requiring cost and pricing data to be submitted with proposals since cited regulation makes it discretionary with contracting officer as to when data will be requested and data will be utilized in deciding whether proposals are unbalanced ---- 109

Prices
Cost and pricing data evaluation

Protester's contention that agency violated regulations by not requiring prospective cost-type contractor to furnish certified cost or pricing data and by not performing cost analysis of such data is without merit since adequate price competition existed for procurement, and therefore requirements for submission of cost and pricing data and cost analysis of such data were not applicable ---- 185

Lowest overall cost to Government

Where RFP excludes certain nonallowable software conversion efforts, which will be competed under separate procurement, protest that separate procurement may not result in lowest cost to Government is denied, since overall effect of separate procurements is to increase competition and thereby give Government best opportunity for obtaining lowest cost ---- 109

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Protests
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals, Protests under**)

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals
Ceiling price
Failure to disclose Page

Failure to disclose amount of ceiling price which must not be exceeded for offerors under solicitation to be eligible for award is not objectionable because ceiling price is equivalent to Government estimate which will be used to decide reasonableness of prices submitted and there is no requirement that Government estimates be disclosed 109

Protests under
Unsubstantiated allegations

Record does not support contention that agency suggested to protester an allocation of personnel which exceeded agency's known budgetary limitations 8

Protester's allegation of improprieties occurring at the negotiation session are untimely because they were filed more than 10 days after they occurred 8

Restrictive of competition

Requirement in request for proposals (RFP) that hardware vendors must submit price for mandatory option for software conversion does not constitute unreasonable restriction on competition, because, despite allegation that hardware vendors are being forced into software field, RFP contained no restriction on subcontracting 109

Sole-source basis
Justification
Delay and technical risk involved

Sole-source award for technical services to incumbent contractor is justified where new contractor, in order to perform services adequately, would have to learn technical history previously available only to incumbent and agency cannot afford delay and risk involved in training a new contractor 3

Payments
Advance
Lessor's capital cost at beginning of lease

Agency's annual appropriation is not available for payment of equipment lessor's entire capital cost at commencement of lease, and consequently low bid for lease of telephone equipment for 10 years which requires payment of bidder's capital cost at the outset of lease is properly rejected as requiring an advance payment contrary to law 89

Limitation

Advance payments authorized by statute and implementing regulations are financing tool used where no other means of contract financing are available; a bid conditioned upon the receipt of advance payments would be required to be rejected pursuant to Federal Procurement Regulations 1-30.407(b) 89

Service contracts

Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for

CONTRACTS—Continued
Payments—Continued
Advance—Continued
Service contracts—Continued Page
that fiscal year; however, had bidder unbalanced its bid by including the capital costs of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. 529 89
Progress
First payment
Inclusion of total performance or payment bond premiums
Reimbursement to Government contractors of the total amount of paid performance and payment bond premiums in the first progress payment can be authorized by amending the relevant Armed Services Procurement Regulation and Federal Procurement Regulations clauses to specifically so provide. Such reimbursements are not payments for future performance, but are reimbursements to the contractor for his costs in providing a surety satisfactory to the Government as required by law, and therefore, are not prohibited by 31 U.S.C. 529. Prior Comptroller General decisions, clarified 25
Prices
Cost, etc., data
Negotiated procurements. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Protests
Administrative actions
Filing protest
"Adverse agency action" conclusion
If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 consitituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met 140
Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed 140
Allegations
Not supported by record
Contention that personnel exceeded budget limitation
Record does not support contention that agency suggested to protester an allocation of personnel which exceeded agency's known budgetary limitations 8

CONTRACTS—Continued
Protests—Continued
Allegations—Continued
Not supported by record—Continued
Improprieties allegation Page
Protester's allegation of improprieties occurring at the negotiation session are untimely because they were filed more than 10 days after they occurred 8
Conflict in statements of contractor and contracting agency
Protest before or after award
It is concluded that protester was specifically informed on February 18, 1977, of Navy's intent to modify contract in ways which were later made subject of March 31 protest notwithstanding that, as of February 18, Navy contracting office had not received internal Navy document describing modification and that some details of intended modification—unrelated to basic grounds of protest—were later changed. 140
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Fraud
Ground of protest questioning finding that prospective awardee is responsible will not be considered since neither fraud on part of procuring agency is alleged nor "definitive" responsibility criteria are involved ... 67
General Accounting Office (GAO) does not review grantee's affirmative determination of responsibility unless fraud has been alleged or solicitation contains definitive responsibility criteria which have allegedly not been applied. This is consistent with position of GAO in Federal procurement area 85
"Defensive protests"
Basic concepts evident from review of cases holding protesters need not file "defensive protests" are: (1) protesters need not file protests if interests are not being threatened under then-relevant factual scheme; and (2) unless agency conveys its intended action (or finally refuses to convey its intent) on position adverse to protester's interest, protester cannot be charged with knowledge of basis of protest 140
Options
Pricing
Not mentioned in IFB
Both invitation for bids' (IFB) "Schedule" and "Storage Facilities" provisions clearly provided that Air Force might award under "storage credits" pricing option notwithstanding lack of mention of pricing option in IFB clause entitled "Evaluation Factors For Award." 103
"Storage credits"
Protester was not prejudiced by Air Force's failure to disclose that award under "storage credits" pricing option might be decided, in part, by results of "storage credits" bids under other solicitations. Moreover, since Government could not disclose Government's cost estimate of construction of storage facility to be built by use of offered storage credits, and given clear right of Government to determine reasonableness of submitted bids by appropriate information, use of separate bidding results to determine award is not objectionable. Analogy is made to "stepladder" bidding procedure 103

CONTRACTS—Continued
Protests—Continued
Preparation
Costs
Noncompensable
Page
Claim for anticipated profits and for cost of pursuing bid protest is rejected 125
Responsibility of small business concerns to perform contract
Conclusive determination vested in SBA
Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31
Timeliness
Basis of protest
Constructive notice
Although protester hedges admission that it was aware—as of March 30—that "grounds of protest *would* exist" if Navy modified contract as it intended, fact that protester actually filed protest on March 31 goes against protester's argument that companies need not file "defensive protests." In any event, information conveyed by Navy on March 30 was no more than that which had been conveyed in February 18 conference about intended modification 140
Date made known to protester
If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 constituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met 140
Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed 140
Negotiated contracts
Evaluation method unknown
Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award 185
Significant issue exception
Lacking
Protest against alleged solicitation defect is untimely filed under General Accounting Office's Bid Protest Procedures notwithstanding protester's asserted lack of knowledge of defect, and issue is not considered under exception as "significant" because it does not affect class of procurements 103

CONTRACTS--Continued
Protests--Continued
Upheld
Bidder's option to accept award
Conditioned acceptance
Effect Page

Invitation for bids (IFB) provided that performance period was from March 15, 1977, or 5 days after award, if later, until March 14, 1978. Bidder confirmed bid on August 15, 1977, after General Accounting Office (GAO) decision upholding its preaward bid protest and during GAO review of another firm's request for reconsideration of that decision, on condition that award be for performance period of 1 year from award. Bid was thereby rendered ineligible for acceptance, since award of contract pursuant to advertising statutes must be on same terms offered all bidders, and various IFB clauses cited by bidder concern post-award situations 125

Although bids under canceled IFB expired during GAO consideration of protest against cancellation, where GAO decision recommends reinstatement of IFB, successful bidder may still, at its option, accept award thereunder 125

Small business concern awards. (*See* **CONTRACTS, Awards, Small business concerns**)

Sole-source procurements. (*See* **CONTRACTS, Negotiation, Sole-source basis**)

Specifications
Failure to furnish something required
Test data
Purpose

Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive 17

Status
Federal grants-in-aid

Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74-7, attachment O and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs 85

COURTS
Judgments, decrees, etc.
Res judicata
Subsequent claims

Shipment under a Government Bill of Lading (GBL) is a single cause action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata* 14

COURTS—Continued
Jurisdiction
Military Courts Page
Decision by a military court that it does not have personal jurisdiction over an individual for purposes of military law because the Government has failed to prove that the individual was validly enlisted does not automatically void the enlistment for purposes of determining the person's entitlement to pay and allowances ---------- 132
Unless by court-martial authority, or by another method prescribed by law, an individual is deprived of his pay and allowances as a member of the armed forces, an administrative determination should be made, pursuant to the authority of the Secretary of the service concerned, to determine the validity of an enlistment for purposes of pay and allowances when a military court finds it lacks jurisdiction over the individual due to a defect in his enlistment ---------- 132

DAMAGES
Public property. (*See* PROPERTY, Public, Damage, loss, etc.)

DISLOCATION ALLOWANCES
Military personnel. (*See* MILITARY PERSONNEL, Dislocation allowance)

DISPUTES
Fact questions
Resolved in favor of administrative office
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case ---------- 155

DRUG ENFORCEMENT ADMINISTRATION. (*See* DRUGS, Drug Enforcement Administration)

DRUGS
Drug Enforcement Administration
Employment of South Vietnamese
Drug Enforcement Administration could employ South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1977 despite restriction against Federal employment of aliens in Public Law 94–419, which permitted employment only of South Vietnamese refugees paroled into United States. Appropriation act previously enacted for same fiscal year permitted employment of South Vietnamese aliens lawfully admitted into United States for permanent residence, and legislative history does not indicate second act was intended to repeal first ---------- 172
Under express terms of only statute now applicable, there is no basis for continued employment by Drug Enforcement Administration of South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1978, since restriction against Federal employment of aliens contained in Public Law 95–81 contains exception permitting employment only of South Vietnamese refugees

DRUGS Continued
Drug Enforcement Administration—Continued
Employment of South Vietnamese—Continued Page
paroled into United States and no additional exception to employment restriction provision has been enacted. However, it is doubtful that this result was intended. Therefore General Accounting Office recommends clarifying legislation and will defer action pending its consideration by Congress 172

ENLISTMENTS
Constructive
Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a *de jure* enlisted status and entitled to pay and allowances 132

A constructive enlistment has been held to arise for purposes of pay and allowances when an individual who was originally ineligible to acquire the status of a member of the armed forces conceals his disability and enlists and after removal of the disability the individual remains in the service and voluntarily performs duties and such work is accepted by the Government without reservation 132

De jure **status**
When an enlistment contract is found to be voidable by either the Government or the individual because of a defect in the enlistment, either the Government or the individual may waive the defect and affirm the enlistment so as to confer upon the individual *de jure* member status for purposes of pay and allowances 132

Pay rights, etc.
Validity determination
Unless by court-martial authority, or by another method prescribed by law, an individual is deprived of his pay and allowances as a member of the armed forces, an administrative determination should be made, pursuant to the authority of the Secretary of the service concerned, to determine the validity of an enlistment for purposes of pay and allowances when a military court finds it lacks jurisdiction over the individual due to a defect in his enlistment 132

Validity
Administrative determination requirement
Pay and allowances until
Where an individual has been held by a military court to be outside the jurisdiction of the Uniform Code of Military Justice and the validity of the individual's enlistment has not been administratively determined to be invalid, the individual's military pay and allowances may be continued until the administrative determination is made. In such cases a prompt administrative determination should be made as to whether the enlistment is void, voidable, or valid 132

Void
Pay and allowances entitlements
Decision by a military court that it does not have personal jurisdiction over an individual for purposes of military law because the Government has failed to prove that the individual was validly enlisted does not automatically void the enlistment for purposes of determining the person's entitlement to pay and allowances 132

EQUIPMENT
Automatic Data Processing Systems
Computers
Hardware/software vendors Page
Requirement in request for proposals (RFP) that hardware vendors must submit price for mandatory option for software conversion does not constitute unreasonable restriction on competition, because, despite allegation that hardware vendors are being forced into software field, RFP contained no restriction on subcontracting 109
Telephones. (*See* **TELEPHONES**)

FEDERAL ADVISORY COMMITTEE ACT
"Balance" requirements
Not violated by National Women's Conference
The National Women's Conference does not violate the "balance" requirements of the Federal Advisory Committee Act since the Commission regulations on organization and conduct of State meetings, where Conference delegates are selected, afford an extremely broad basis for participation and leaves the degree of "balance" essentially to the participants through the normal democratic process. The objective of balance goes only to the composition of the voting bodies rather than support or opposition on any given issue 51
National Commission on Observance of International Women's Year not subject to Act
Upon reconsideration of B–182398, August 10, 1977, General Accounting Office adheres to its original position that the National Commission on the Observance of International Women's Year (IWY) is not an "advisory committee" subject to the Federal Advisory Committee Act (5 U.S.C. App. I (Supp. V, 1975)) since there is nothing in Executive Order 11832 or Public Law 94–167 which assigns the Commission any advisory functions. While it may make its own recommendations in the report on the National Conference of Women it submits to Congress and the President, the Commission was not "established" or "utilized" for this purpose 51
National Women's Conference subject to Act
Since the National Women's Conference, to be organized by the National Commission on IWY which will, among other functions, make findings and recommendations on various subjects to be submitted through the Commission's report to the President, it is an advisory committee subject to the Federal Advisory Committee Act 51

FEDERAL PROCUREMENT REGULATIONS
Progress payment clause
Inclusion of total performance or payment bond premiums in first payment
Reimbursement to Government contractors of the total amount of paid performance and payment bond premiums in the first progress payment can be authorized by amending the relevant Armed Services Procurement Regulation and Federal Procurement Regulations clauses to specifically so provide. Such reimbursements are not payments for future performance, but are reimbursements to the contractor for his costs in providing a surety satisfactory to the Government as required by law, and therefore, are not prohibited by 31 U.S.C. 529. Prior Comptroller General decisions, clarified 25

FOREIGN SERVICE

Travel expenses

Circuitous routes

Personal convenience Page

Dependents traveled by foreign air carrier from Accra, Ghana, to Frankfurt, Germany, and completed travel from Frankfurt to U.S. aboard U.S. air carriers. Employee is liable for 15 percent amount by which fare via Frankfurt exceeds fare by usually traveled route. Since travel via Frankfurt involved certificated U.S. air carrier service for 4,182 of 7,450 miles traveled, and proper routing via Dakar would have involved travel of 4,143 of 5,610 air miles by U.S. air carriers, employee is liable for loss of U.S. carrier revenues computed in accordance with formula at 56 Comp. Gen. 209 76

FUNDS

Appropriated. (*See* **APPROPRIATIONS**)

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)

GENERAL ACCOUNTING OFFICE

Decisions

Effective date

Date of decision

Applicant received travel expenses incident to preemployment interview. Travel occurred after issuance of a Comptroller General decision allowing such expenses, but prior to the issuance of a Civil Service Commission instruction on the matter. Since neither the decision nor the instruction has any contrary effective date, the authority to pay for preemployment interview travel expenses is the date of the decision, subject to such limitations as the Commission subsequently prescribed. Applicant's expenses were properly paid 192

Jurisdiction

Contracts

Contracting officer's affirmative responsibility determination

General Accounting Office review discontinued

Exceptions

Ground of protest questioning finding that prospective awardee is responsible will not be considered since neither fraud on part of procuring agency is alleged nor "definitive" responsibility criteria are involved 67

General Accounting Office (GAO) does not review grantee's affirmative determination of responsibility unless fraud has been alleged or solicitation contains definitive responsibility criteria which have allegedly not been applied. This is consistent with position of GAO in Federal procurement area 85

Modification

Contrary to usual view that protests against proposed contract modifications are not for review since they are within realm of contract administration, protest which alleges that proposed modification is beyond scope of contract is reviewable by General Accounting Office, if otherwise for consideration 140

Protests generally. (*See* **CONTRACTS, Protests**)

Small business matters

Responsibility determination by SBA

Conclusiveness

Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Contracts—Continued
Small business matters—Continued
Responsibility determination by SBA—Continued
Conclusiveness—Continued Page
dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31
Protests
Contracts. (*See* CONTRACTS, Protests)
Recommendations
Legislation
Clarifying status of South Vietnamese refugees paroled into U.S.
Under express terms of only statute now applicable, there is no basis for continued employment by Drug Enforcement Administration of South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1978, since restriction against Federal employment of aliens contained in Public Law 95–81 contains exception permitting employment only of South Vietnamese refugees paroled into United States and no additional exception to employment restriction provision has been enacted. However, it is doubtful that this result was intended. Therefore General Accounting Office recommends clarifying legislation and will defer action pending its consideration by Congress 172
Reviews
Appellate authority
To review GSA transportation settlements
Time-barred requests
Transportation audit function was transferred from this Office to General Services Administration by Public Law 93–604, approved January 2, 1975; it was effective October 12, 1975, and included all transportation functions including settled claims but left General Accounting Office with appellate authority to review GSA settlements. Review requests must be received in GAO no later than 6 months from date of final dispositive action by GSA or 3 years from date of certain enumerated administrative actions, whichever is later Carrier requesting review by GAO or GSA action after those dates is time-barred 157
GENERAL SERVICES ADMINISTRATION
Services for other agencies, etc.
Space assignment
Rental
Liability of GSA for damages to agency property
General Services Administration (GSA) is not required to reimburse tenant agencies for damage to agency property caused by building failures or to lower Standard Level User Charges by amount equal to liability insurance premium paid by commercial landlords. The general rule is that one Federal agency is not liable to another for property damages. There is no basis in Federal Property and Administrative Services Act or its legislative history to create an exception to this general rule where GSA serves as landlord 130

GRANTS
To States. (*See* **STATES, Federal aid, grants, etc.**)
HEALTH, EDUCATION, AND WELFARE DEPARTMENT
Programs
Health service
Limitations Page
Under 5 U.S.C. 7901, Public Law 91-616 and Public Law 92-255, and implementing regulations, Environmental Protection Agency may expend appropriated funds for procurement of diagnostic and preventive psychological counseling services for employees at its Research Triangle Park, North Carolina, installation 62

JUDGMENTS, DECREES, ETC.
Courts. (*See* **COURTS, Judgments, decrees, etc.**)

LEAVES OF ABSENCE
Annual
Accrual
Part-time, etc., employees
Intermittent
Immigration and Naturalization Service inspector whose position was designated "intermittent" is nonetheless entitled to annual leave benefits on a pro rata basis as a part-time employee having an established regular tour of duty, since he was routinely issued a form scheduling his work at specific times and dates for each of the 2 workweeks of the next pay period. Under these circumstances, the fact that he may not have been scheduled to work at the same time and on corresponding days of the 2 workweeks of each pay period does not defeat that entitlement 82

MARITIME MATTERS
Vessels
Crews. (*See* **VESSELS, Crews**)

MEDICAL SERVICES
Officers and employees
Psychological counseling
Under 5 U.S.C. 7901, Public Law 91-616 and Public Law 92-255, and implementing regulations, Environmental Protection Agency may expend appropriated funds for procurement of diagnostic and preventive psychological counseling services for employees at its Research Triangle Park, North Carolina, installation 62

MILEAGE
Travel by privately owned automobile
Between residence and temporary duty points
Distance between residence and headquarters
Twenty-five mile point
Decision 55 Comp. Gen. 1323 (1976) disallowed two mileage claims incident to employee's temporary duty because record showed his residence was at Oklahoma City, Oklahoma, his official station, although he had home in Ponca City, Oklahoma, 103 miles distant. Employee, who is in travel status up to 80 percent of the time, has submitted evidence that he rented motel room on daily basis only when he worked in Oklahoma City. Claims are now allowable since additional evidence shows that employee did not have "residence" in Oklahoma City within the meaning of the Federal Travel Regulations (FPMR 101-7) (May 1973) 32

MILITARY PERSONNEL
Allowances
Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE,** Basic allowance for quarters (BAQ))
Dislocation. (*See* **MILITARY PERSONNEL,** Dislocation allowance)
Quarters. (*See* **QUARTERS ALLOWANCE**)
Station. (*See* **STATION ALLOWANCES**)
Annuity election for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
De jure status Page
Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a *de jure* enlisted status and entitled to pay and allowances 132
Dislocation allowance
Members without dependents
Unable to occupy assigned quarters
Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it is our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly 178
Enlistments
Generally. (*See* **ENLISTMENTS**)
Induction into military service
Void *v.* voidable
When an enlistment contract is found to be voidable by either the Government or the individual because of a defect in the enlistment, either the Government or the individual may waive the defect and affirm the enlistment so as to confer upon the individual *de jure* member status for purposes of pay and allowances 132
Pay
Retired. (*See* **PAY, Retired**)
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Quarters allowance. (*See* **QUARTERS ALLOWANCE**)
Retired pay. (*See* **PAY, Retired**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Status
De jure. (*See* **MILITARY PERSONNEL,** *De jure* status)
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR

National Women's Conference

"Balance" requirements of Federal Advisory Committee Act Page

The National Women's Conference does not violate the "balance" requirements of the Federal Advisory Committee Act since the Commission regulations on organization and conduct of State meetings, where Conference delegates are selected, afford an extremely broad basis for participation and leaves the degree of "balance" essentially to the participants through the normal democratic process. The objective of balance goes only to the composition of the voting bodies rather than support or opposition on any given issue 51

Subject to Federal Advisory Committee Act

Since the National Women's Conference, to be organized by the National Commission on IWY which will, among other functions, make findings and recommendations on various subjects to be submitted through the Commission's report to the President, it is an advisory committee subject to the Federal Advisory Committee Act 51

Not subject to Federal Advisory Committee Act

Upon reconsideration of B–182398, August 10, 1977, General Accounting Office adheres to its original position that the National Commission on the Observance of International Women's Year (IWY) is not an "advisory committee" subject to the Federal Advisory Committee Act (5 U.S.C. App. I (Supp. V, 1975)) since there is nothing in Executive Order 11832 or Public Law 94–167 which assigns the Commission any advisory functions. While it may make its own recommendations in the report on the National Conference of Women it submits to Congress and the President, the Commission was not "established" or "utilized" for this purpose 51

State and regional meetings

Purpose

Selecting representatives to Conference

Since the State and regional meetings, organized under Public Law 94-167, have the sole statutory purpose of selecting representatives to the Conference, and they are not required to make recommendations to the IWY Commission and others, they are not "advisory committees" under the Federal Advisory Committee Act and are therefore not subject to its "balance" requirement with regard to meeting participants. Nor are the State coordinating committees "advisory" since they have only the operational role of organizing and conducting the State or regional meetings and are, in effect, grantees of the National Commission 51

OFFICERS AND EMPLOYEES

Compensation. (*See* **COMPENSATION**)

Hours of work

Day defined

Twenty-four hour period

In 42 Comp. Gen. 195 at 200 it was held, in regard to overtime of wage board employee under 5 U.S.C. 673c (now 5 U.S.C. 5544), that agency could regard any 24-hour period as "day." That holding is applicable to General Schedule employees since provisions of 5 U.S.C. 5544 and 5 U.S.C. 5542 are comparable 101

OFFICERS AND EMPLOYEES—Continued
Hours of work—Continued
Forty-hour week
First forty-hour basis
Overtime and traveltime
Couriers Page

Diplomatic couriers have a basic workweek consisting of the first 40 hours of duty performed. Consequently they do not have a regularly scheduled administrative workweek within the meaning of 5 U.S.C. 5542(b)(2)(A) and their time spent in travel status away from their official duty station does not qualify as hours of employment or work by virtue of that provision---------- 43

The workweek of diplomatic couriers consists of the first 40 hours of employment or work in an administrative workweek beginning on Sunday. Therefore, work performed by them on Sunday falls within their basic workweek and although not regularly scheduled in the usual sense, may be compensated at Sunday premium rates up to 8 hours on and after the first day of the first pay period beginning after July 18, 1966, the effective date of the law authorizing such premium pay---------- 43

Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem**)
Transfers
Relocation expenses
"Settlement date" limitation on property transactions
Extension
Date of request

Transferred employee reported at new duty station July 1, 1974, and purchased residence December 12, 1975. He did not request extension of 1-year initial authorization period to purchase residence until more than 2 years after his transfer. Paragraph 2–6.1e, Federal Travel Regulations (FPMR 101–7) (1973), requires that the purchase be made within 2 years of transfer, but does not specify time within which request for extension must be filed. His claim is allowed since purchase was made within 2 years and request may be made even after 2 years have passed. 54 Comp. Gen. 553, modified---------- 28

Temporary quarters
Beginning of occupancy
Thirty day period

Transferred employee begins occupancy of temporary quarters at 6:45 p.m. after travel of less than 24 hours. Although he occupies quarters for only one quarter day on first day, that day should be counted as full day in computing temporary quarters allowance. Calendar day is used to compute number of days for which reimbursement may be made. Therefore, maximum reimbursement for first 10-day period is 10 times daily rate (not 9¼) since the Federal Travel Regulations, para. 2–5.4c provides for daily rate without proration. 56 Comp. Gen. 15, amplified_ 6

Travel expenses. (*See* **TRAVEL EXPENSES**)

OFFICERS AND EMPLOYEES—Continued
Traveltime
Administrative determination
Layover time Page

The addition of up to 6 hours of layover time on split work days to the definition of hours or employment or work for diplomatic couriers, while not specifically authorized by statute or Civil Service Commission regulation, does not appear to be an unreasonable exercise of administrative discretion since the "usual waiting time" which interrupts travel has been held to be compensable. Accordingly this Office interposes no objection to the inclusion of this layover time in hours of employment from the date it was added to the definition of hours of work on May 24, 1971 43

"Arduous" travel

Diplomatic couriers' travel with pouch-in-hand is travel involving the performance of work while traveling and is, therefore, hours of employment or work under 5 U.S.C. 5542(b)(2)(B). But their travel is not carried out under arduous conditions within the meaning of that provision since such travel is that imposed by unusually adverse terrain, severe weather, etc., and does not include travel by common carriers, including airlines.. 43

Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)

OVERTIME
Compensation. (*See* **COMPENSATION, Overtime**)

PAY
Civilian employees. (*See* **COMPENSATION**)
Retired
Survivor Benefit Plan
Spouse
Post-participation election changes of member

A pre-Survivor Benefit Plan effective date retiree, who is unmarried with a dependent child on the first anniversary date of the Survivor Benefit Plan, may elect spouse coverage under the fourth sentence of 10 U.S.C. 1448(a) upon marriage after the close of the 18-month election period authorized under subsection 3(b) of Public Law 92-425, as amended, notwithstanding fact that he could have elected coverage for his dependent child during that period and failed to do so. Compare B-187179, November 30, 1976 98

PAYMENTS
Advance
Contracts. (*See* **CONTRACTS, Payments, Advance**)

PROPERTY
Public
Damage, loss, etc.
Between Government agencies
Liability

General Services Administration (GSA) is not required to reimburse tenant agencies for damage to agency property caused by building failures or to lower Standard Level User Charges by amount equal to liability insurance premium paid by commercial landlords. The general rule is that one Federal agency is not liable to another for property damages. There is no basis in Federal Property and Administrative Services Act or its legislative history to create an exception to this general rule where GSA serves as landlord 130

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

Prima facie case of liability of common carrier is established when shipper shows delivery to carrier at origin in good condition and delivery by carrier at destination in damaged condition. Once prima facie case is established, burden of proof shifts to the carrier and remains there. To escape liability, carrier must show that loss or damage was due to one of the excepted causes and that it was free of negligence---------- 170

Prima facie **case.** (*See* **PROPERTY, Public, Damage, loss, etc., Carrier's liability, Burden of proof**)

Evidence
Delivery receipt

A delivery receipt signed by the consignee does not establish as a matter of law that property was in good condition when delivered to him. A delivery receipt is subject to explanation and correction--------- 170

Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims, Transportation**)

PROTESTS
Contracts. (*See* **CONTRACTS, Protests**)

QUARTERS
Not assigned
Military personnel without dependents
Station allowances

Although station allowances authorized under the provisions of 37 U.S.C. 405 (1970) for members without dependents ordinarily are not payable to a member until he reports at his permanent station, the Joint Travel Regulations may be amended to provide that permanent change of station travel terminates when a member reports to the home port of a two-crew nuclear submarine at which time he becomes entitled to allowances applicable to training and rehabilitation duty at the home port of such vessel even though he has not reported on board. At that time station allowances would be payable under current rates if he is not assigned to Government quarters, since he incurs expenses which these allowances were designed to defray. Contrary decisions are modified accordingly---------- 178

Unable to occupy
Military members without dependents
Dislocation allowance

Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it it our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly---------- 178

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Assigned to Government quarters
Member on sea duty
Living with family while in port Page
A member assigned to sea duty who occupies Government family-type quarters assigned to his spouse when the vessel is in port is assigned to quarters on the vessel and is considered a member without dependents by virtue of 37 U.S.C. 420 (1970). Therefore he is not entitled to BAQ under 37 U.S.C. 403(c), and is entitled to partial BAQ authorized by 37 U.S.C. 1009(d)---- 194
Nonoccupancy for personal reasons
When a member without dependents is offered an assignment to adequate Government quarters and chooses not to occupy such quarters for personal reasons, he is considered to have been assigned Government quarters within the meaning of 37 U.S.C. 403(b) and is not entitled to a basic allowance for quarters (BAQ) even if quarters are subsequently assigned to another member. Therefore, since the member is not entitled to BAQ because of 37 U.S.C. 403(b), partial BAQ may be paid under 37 U.S.C. 1009(d)---- 194
Navy members assigned to two-crew nuclear submarines
Permanent change of station
Not assigned quarters
Regulations may be changed to provide that basic allowance for quarters authorized under 37 U.S.C. 403 (1970) may be paid to members in pay grades E–4 (with less than 4 years' service) and below, prior to reporting on board the two-crew nuclear submarine when attached thereto incident to a permanent change of station, when they arrive at the submarine's home port and are not assigned Government quarters and are not entitled to a per diem allowance by virtue of a proposed change in regulations terminating permanent change of station travel at the time the member reports to the home port of these vessels. Such allowance would then be based upon the member's entitlements in a training and rehabilitation status. Contrary decisions are modified accordingly---- 178

REPORTS
Administrative
Disputed questions of fact
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case---- 155

RETIREMENT
Military personnel
Retired pay. (*See* **PAY, Retired**)

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Determination of responsibility
Tenacity and perseverance
Contract performance Page

Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31

Contracts
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

STATE DEPARTMENT
Employees
Couriers
Hours of work

Diplomatic couriers have a basic workweek consisting of the first 40 hours of duty performed. Consequently they do not have a regularly scheduled administrative workweek within the meaning of 5 U.S.C. 5542(b)(2)(A) and their time spent in travel status away from their official duty station does not qualify as hours of employment or work by virtue of that provision 43

Dead head travel

On and after the effective date of the amendment to 5 U.S.C. 5542(b), January 15, 1968, diplomatic couriers' officially ordered or approved "dead head" travel qualifies as hours of employment or work as travel incident to travel that involves the performance of work while traveling. It is not necessary to determine whether their travel results from an event which could not be scheduled or controlled administratively because they are being credited with all officially ordered and approved actual travel time as pouch-in-hand time or "dead head" time 43

Travel with pouch-in-hand

Diplomatic couriers' travel with pouch-in-hand is travel involving the performance of work while traveling and is, therefore, hours of employment or work under 5 U.S.C. 5542(b)(2)(B). But their travel is not carried out under arduous conditions within the meaning of that provision since such travel is that imposed by unusually adverse terrain, severe weather, etc., and does not include travel by common carriers, including airlines 43

Layover time

The addition of up to 6 hours of layover time on split work days to the definition of hours or employment or work for diplomatic couriers, while not specifically authorized by statute or Civil Service Commission regulation, does not appear to be an unreasonable exercise of administrative discretion since the "usual waiting time" which interrupts travel has been held to be compensable. Accordingly this Office interposes no objection to the inclusion of this layover time in hours of employment from the date it was added to the definition of hours of work on May 24, 1971 43

STATES
Federal aid, grants, etc.
Restrictions imposed by law
Grant percentages
Page

Decision B-178564, July 19, 1977, holding that section 13(k) of National School Lunch Act as amended by Public Law 94-105, which required payment in "amount equal to 2 percent" of funds distributed to each state, limits amount payable to States for costs incurred in administration of summer food program is reaffirmed. Section 7 of Child Nutrition Act cannot be construed as additional source of funds for such payments independent of 2 percent limitation. Holding in July 1977 decision is also consistent with most significant legislative history of recent statute amending these sections 163

State and regional meetings
National Commission on Observance of International Women's Year.
(*See* **NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR**, State and regional meetings)

STATION ALLOWANCES
Military personnel
Temporary lodgings
Change of station
Government quarters not assigned

Although station allowances authorized under the provisions of 37 U.S.C. 405 (1970) for members without dependents ordinarily are not payable to a member until he reports at his permanent station, the Joint Travel Regulations may be amended to provide that permanent change of station travel terminates when a member reports to the home port of a two-crew nuclear submarine at which time he becomes entitled to allowances applicable to training and rehabilitation duty at the home port of such vessel even though he has not reported on board. At that time station allowances would be payable under current rates if he is not assigned to Government quarters, since he incurs expenses which these allowances were designed to defray. Contrary decisions are modified accordingly 178

STATUTES OF LIMITATION
Claims
Transportation
General Accounting Office review of GSA settlements

Transportation audit function was transferred from this Office to General Services Administration by Public Law 93-604, approved January 2, 1975; it was effective October 12, 1975, and included all transportation functions including settled claims but left General Accounting Office with appellate authority to review GSA settlements. Review requests must be received in GAO no later than 6 months from date of final dispositive action by GSA or 3 years from date of certain enumerated administrative actions, whichever is later. Carrier requesting review by GAO or GSA action after those dates is time-barred 157

SUBSISTENCE

Per diem

Calendar day

Midnight to midnight Page

Transferred employee begins occupancy of temporary quarters at 6:45 p.m. after travel of less than 24 hours. Although he occupies quarters for only one quarter day on first day, that day should be counted as full day in computing temporary quarters allowance. Calendar day is used to compute number of days for which reimbursement may be made. Therefore, maximum reimbursement for first 10-day period is 10 times daily rate (not 9¼) since the Federal Travel Regulations, para. 2–5.4c provides for daily rate without proration. 56 Comp. Gen. 15, amplified-- 6

Headquarters

Permanent or temporary

Administrative determination

Reevaluation recommended

Employee given temporary duty assignment for a 5-month period, which assignment was extended for 2 additional 6-month periods, may be paid per diem while at that location since circumstances do not demonstrate that agency's designation of assignment as for temporary duty rather than as a permanent change of station was improper. Circumstances should be reevaluated prospectively to determine whether employee's continued assgniment to that location should now be made on the basis of a permanent change of station---------- 147

Military personnel

Temporary duty

Station later designated as permanent

Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense---------- 198

Rates

Average cost of lodgings. (*See* **SUBSISTENCE, Per diem, Rates, Lodging costs**)

Lodging costs

Purchase of residence at temporary duty station

Employee purchased residence at temporary duty location after assignment there, relocated household and rented out residence at permanent duty station. He may be paid a per diem allowance in connection with occupancy of purchased residence while on temporary duty based on the meals and miscellaneous expenses allowance plus a proration of monthly interest, tax, and utility costs actually incurred. Case is distinguished from 56 Comp. Gen. 223 involving employee whose second residence, where he lodged while on temporary duty, was maintained as result of employee's desire to maintain second residence without regard to temporary duty assignment---------- 147

Temporary

Headquarters determination. (*See* **SUBSISTENCE, Per diem, Headquarters, Permanent or temporary**)

SUNDAYS
Premium pay. (*See* **COMPENSATION, Premium pay, Sunday work regularly scheduled**)

TAXES
Gasoline
State. (*See* **TAXES, State, Gasoline**)
State
Gasoline
Vermont
Government immunity Page

Vermont statute imposing a sales tax on gasoline of nine cents a gallon, requiring the distributor to collect the tax from the dealer, and the dealer to collect it from the consumer, places the legal incidence of the tax on the vendee. The United States is immune from payment of this tax. 33 Comp. Gen. 453 is overruled 59

Government immunity
Gasoline tax
Vermont. (*See* **TAXES, State, Gasoline, Vermont, Government immunity**)

TELEPHONES
Equipment
Contracts
Lease/purchase

Agency's annual appropriation is not available for payment of equipment lessor's entire capital cost at commencement of lease, and consequently low bid for lease of telephone equipment for 10 years which requires payment of bidder's capital costs at the outset of lease is properly rejected as requiring an advance payment contrary to law 89

TRANSPORTATION
Bills of lading
Description
Presumption of correctness

Presumption that bill of lading correctly describes the article tendered for transportation is not conclusive; important fact is what moved, not what was billed 155

Government
Single cause of action

Shipment under a Government Bill of Lading (GBL) is a single cause of action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata* 14

Carriers
Liability
Evidence

Prima facie case of liability of common carrier is established when shipper shows delivery to carrier at origin in good condition and delivery by carrier at destination in damaged condition. Once prima facie case is established, burden of proof shifts to the carrier and remains there. To escape liability, carrier must show that loss or damage was due to one of the excepted causes and that it was free of negligence 170

Claims
Generally. (*See* **CLAIMS, Transportation**)

TRANSPORTATION—Continued
Damage, loss, etc., of public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)
Delivery
Receipts
Effect on liability for damages Page
A delivery receipt signed by the consignee does not establish as a matter of law that property was in good condition when delivered to him. A delivery receipt is subject to explanation and correction 170
Freight
Charges
Burden of proof
Carrier
Carrier has burden of proving correctness of transportation charges originally collected on shipment 155
Property damage, loss, etc.
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)

TRAVEL EXPENSES
Air travel
Fly America Act
Employees' liability
Travel by noncertificated air carriers
Dependents traveled by foreign air carrier from Accra, Ghana, to Frankfurt, Germany, and completed travel from Frankfurt to U.S. aboard U.S. air carriers. Employee is liable for 15 percent amount by which fare via Frankfurt exceeds fare by usually traveled route. Since travel via Frankfurt involved certificated U.S. air carrier service for 4,182 of 7,450 miles traveled, and proper routing via Dakar would have involved travel of 4,143 of 5,610 air miles by U.S. air carriers, employee is liable for loss of U.S. carrier revenues computed in accordance with formula at 56 Comp. Gen. 209 76
Rest and recuperation
Primary point
Traveler entitled to rest stop under 6 FAM 132.4 should select rest stop location along routing determined in accordance with principles set forth in 55 Comp. Gen. 1230 requiring use of U.S. air carrier available at origin to furthest practicable interchange point on a usually traveled route, and, where origin or interchange point is not served by U.S. air carrier, requiring use of foreign carrier to nearest practicable interchange point to connect with U.S. carrier service. Travelers will not be held liable for nonsubstantial differences in distances served by U.S. carriers 76
Circuitous routes
Rest stops
In traveling from Accra, Ghana, to U.S. under particular circumstances, Frankfurt is not a proper rest stop location and travelers who route travel via Frankfurt and take side trip to France are deemed to have traveled by indirect route and lose rest stop entitlement under 6 FAM 132.4 76
Illness
Distress due to illness of wife, etc.
Employee was notified of sudden serious illness of his wife upon his arrival at temporary duty station. His supervisor determined that

TRAVEL EXPENSES—Continued
Illness—Continued
Distress due to illness of wife, etc.—Continued Page
employee was incapacitated for the performance of duty by his illness and ordered employee to return to headquarters. In such circumstances, claim for return trip travel expenses may be paid. *Matter of Gary B. Churchill*, B–187198, April 18, 1977, is reversed 1
Interviews, qualifications, etc.
Competitive service positions
Prospective employee who was reimbursed travel expenses for pre-employment interview travel was properly reimbursed if such reimbursement was made in accordance with the authority described in subchapter 1–3d and e of Attachment 2 to Federal Personnel Manual Letter 571–66 (i.e., 5 U.S.C. 5703 and the Federal Travel Regulations) 192
Reimbursement
Applicant received travel expenses incident to preemployment interview. Travel occurred after issuance of a Comptroller General decision allowing such expenses, but prior to the issuance of a Civil Service Commission instruction on the matter. Since neither the decision nor the instruction has any contrary effective date, the authority to pay for preemployment interview travel expenses is the date of the decision, subject to such limitations as the Commission subsequently prescribed. Applicant's expenses were properly paid 192
Military personnel
Change of station status
Member return to old station
To complete moving arrangements
Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense 198
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Overseas employees
Circuitous routes
Personal convenience
Dependents traveled by foreign air carrier from Accra, Ghana, to Frankfurt, Germany, and completed travel from Frankfurt to U.S. aboard U.S. air carriers. Employee is liable for 15 percent amount by which fare via Frankfurt exceeds fare by usually traveled route. Since travel via Frankfurt involved certificated U.S. air carrier service for 4,182 of 7,450 miles traveled, and proper routing via Dakar would have involved travel of 4,143 of 5,610 air miles by U.S. air carriers, employee is liable for loss of U.S. carrier revenues computed in accordance with formula at 56 Comp. Gen. 209 76
Preemployment interviews. (*See* **TRAVEL EXPENSES, Interviews, qualifications, etc.**)
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

TRAVEL EXPENSES—Continued
Rest stops
Location selection
Midway and practicable interchange point Page

Traveler entitled to rest stop under 6 FAM 132.4 should select rest stop location along routing determined in accordance with principles set forth in 55 Comp. Gen. 1230 requiring use of U.S. air carrier available at origin to furthest practicable interchange point on a usually traveled route, and, where origin or interchange point is not served by U.S. air carrier, requiring use of foreign carrier to nearest practicable interchange point to connect with U.S. carrier service. Travelers will not be held liable for nonsubstantial differences in distances served by U.S. carriers-- 76

Temporary duty
Place of abode determination

Decision 55 Comp. Gen. 1323 (1976) disallowed two mileage claims incident to employee's temporary duty because record showed his residence was at Oklahoma City, Oklahoma, his official station, although he had home in Ponca City, Oklahoma, 103 miles distant. Employee, who is in travel status up to 80 percent of the time, has submitted evidence that he rented motel room on daily basis only when he worked in Oklahoma City. Claims are now allowable since additional evidence shows that employee did not have "residence" in Oklahoma City within the meaning of the Federal Travel Regulations (FPMR 101-7) (May 1973)-- 32

VESSELS
Crews
Two-crew nuclear-powered submarines
Basic allowance for quarters (BAQ)

Regulations may be changed to provide that basic allowance for quarters authorized under 37 U.S.C. 403 (1970) may be paid to members in pay grades E-4 (with less than 4 years' service) and below, prior to reporting on board the two-crew nuclear submarine when attached thereto incident to a permanent change of station, when they arrive at the submarine's home port and are not assigned Government quarters and are not entitled to a per diem allowance by virtue of a proposed change in regulations terminating permanent change of station travel at the time the member reports to the home port of these vessels. Such allowance would then be based upon the member's entitlements in a training and rehabilitation status. Contrary decisions are modified accordingly---------- 178

Change of home port

Although station allowances authorized under the provisions of 37 U.S.C. 405 (1970) for members without dependents ordinarily are not payable to a member until he reports at his permanent station, the Joint Travel Regulations may be amended to provide that permanent change of station travel terminates when a member reports to the home port of a two-crew nuclear submarine at which time he becomes entitled to allowances applicable to training and rehabilitation duty at the home port of such vessel even though he has not reported on board. At that time station allowances would be payable under current rates if he is not assigned to Government quarters, since he incurs expenses which these allowances were designed to defray. Contrary decisions are modified accordingly--- 178

VESSELS—Continued
Crews—Continued
Two-crew nuclear-powered submarines—Continued
Dislocation allowances Page
Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it is our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly 178

VIETNAM
South Vietnamese refugees
Admitted to United States
Employment
Drug Enforcement Administration could employ South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1977 despite restriction against Federal employment of aliens in Public Law 94–419, which permitted employment only of South Vietnamese refugees paroled into United States. Appropriation act previously enacted for same fiscal year permitted employment of South Vietnamese aliens lawfully admitted into United States for permanent residence, and legislative history does not indicate second act was intended to repeal first 172

WOMEN
National Commission on Observance of International Women's Year. (*See* NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR)
National Women's Conference
National Commission on Observance of International Women's Year. (*See* NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, National Women's Conference)

WORDS AND PHRASES
Auction technique
Agency did not utilize prohibited "auction technique" when it informed offerors of monetary amount available for the procurement 8
"Balance" requirements of Federal Advisory Committee Act
The National Women's Conference does not violate the "balance" requirements of the Federal Advisory Committee Act since the Commission regulations on organization and conduct of State meetings, where Conference delegates are selected, afford an extremely broad basis for participation and leaves the degree of "balance" essentially to the participants through the normal democratic process. The objective of balance goes only to the composition of the voting bodies rather than support or opposition on any given issue 51
Cost Accounting Standard 402
Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000 151

WORDS AND PHRASES—Continued

"Dead head" time Page

On and after the effective date of the amendment to 5 U.S.C. 5542(b), January 15, 1968, diplomatic couriers' officially ordered or approved "dead head" travel qualifies as hours of employment or work as travel incident to travel that involves the performance of work while traveling. It is not necessary to determine whether their travel results from an event which could not be scheduled or controlled administratively because they are being credited with all officially ordered and approved actual travel time as pouch-in-hand time or "dead head" time..... 43

"Defensive protests"

Basic concepts evident from review of cases holding protesters need not file "defensive protests" are: (1) protesters need not file protests if interests are not being threatened under then-relevant factual scheme; and (2) unless agency conveys its intended action (or finally refuses to convey its intent) on position adverse to protester's interest, protester cannot be charged with knowledge of basis of protest..... 140

Deployment of the vessel

Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense..... 198

Layover time

The addition of up to 6 hours of layover time on split work days to the definition of hours or employment or work for diplomatic couriers, while not specifically authorized by statute or Civil Service Commission regulation, does not appear to be an unreasonable exercise of administrative discretion since the "usual waiting time" which interrupts travel has been held to be compensable. Accordingly this Office interposes no objection to the inclusion of this layover time in hours of employment from the date it was added to the definition of hours of work on May 24, 1971..... 43

Level of effort

While agency should have confirmed, in writing, an oral change in recommended level of effort, all offerors were informed of the change and were able to offer on a common basis. Therefore, deficiency was not prejudicial to offerors or Government..... 8

"Non-storage credits" bidders

Failure of selected bidder to quote early delivery dates under "storage credits" pricing option is not significant since blanks provided for insertion of dates applied only to "non-storage credits" bidders and procuring agency did not need early delivery dates to evaluate bids. Further, IFB contained no indication of relative preference of bid depending on date of early delivery. Moreover, in absence of dates bidder is obligated to deliver at an indefinite date prior to required delivery dates which is still most advantageous to the Government..... 103

WORDS AND PHRASES—Continued

Pouch-in-hand time Page

On and after the effective date of the amendment to 5 U.S.C. 5542(b), January 15, 1968, diplomatic couriers' officially ordered or approved "dead head" travel qualifies as hours of employment or work as travel incident to travel that involves the performance of work while traveling. It is not necessary to determine whether their travel results from an event which could not be scheduled or controlled administratively because they are being credited with all officially ordered and approved actual travel time as pouch-in-hand time or "dead head" time..... 43

Res judicata

Shipment under a Government Bill of Lading (GBL) is a single cause of action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata*..... 14

When GAO makes no representations that it will consider a claim simultaneously submitted to it and a court of competent jurisdiction after the court has adjudicated the claim, GAO is not estopped from applying the doctrine of *res judicata* to the claim..... 14

"Schedule" provision of IFB

Both invitation for bids' (IFB) "Schedule" and "Storage Facilities" provisions clearly provided that Air Force might award under "storage credits" pricing option notwithstanding lack of mention of pricing option in IFB clause entitled "Evaluation Factors For Award."..... 103

Scope of work statement

Agency was not required to reduce scope of work statement in solicitation when it reduced estimated manning requirements. Contract awarded did not obligate Government to pay an amount in excess of its current funding because Government was obligated to make payments only up to the estimated cost, which was less than the known funding limitation. 8

"Stepladder" bidding procedure

"Storage credits" pricing option

Protester was not prejudiced by Air Force's failure to disclose that award under "storage credits" pricing option might be decided, in part, by results of "storage credits" bids under other solicitations. Moreover, since Government could not disclose Government's cost estimate of construction of storage facility to be built by use of offered storage credits, and given clear right of Government to determine reasonableness of submitted bids by appropriate information, use of separate bidding results to determine award is not objectionable. Analogy is made to "stepladder" bidding procedure..... 103

"Storage credits" pricing option

Failure of selected bidder to quote early delivery dates under "storage credits" pricing option is not significant since blanks provided for insertion of dates applied only to "non-storage credits" bidders and procuring agency did not need early delivery dates to evaluate bids. Further, IFB contained no indication of relative preference of bid depending on date of early delivery. Moreover, in absence of dates bidder is obligated to deliver at an indefinite date prior to required delivery dates which is still most advantageous to the Government. 103

WORDS AND PHRASES—Continued

"Storage Facilities" provision of IFB Page

Both invitation for bids' (IFB) "Schedule" and "Storage Facilities" provisions clearly provided that Air Force might award under "storage credits" pricing option notwithstanding lack of mention of pricing option in IFB clause entitled "Evaluation Factors For Award"_____ 103

Twenty-five mile point

Decision 55 Comp. Gen. 1323 (1976) disallowed two mileage claims incident to employee's temporary duty because record showed his residence was at Oklahoma City, Oklahoma, his official station, although he had home in Ponca City, Oklahoma, 103 miles distant. Employee, who is in travel status up to 80 percent of the time, has submitted evidence that he rented motel room on daily basis only when he worked in Oklahoma City. Claims are now allowable since additional evidence shows that employee did not have "residence" in Oklahoma City within the meaning of the Federal Travel Regulations (FPMR 101–7) (May 1973)_____ 32

Vessel which is deployed away from home port

Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense_____ 198

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