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[B-190505]

Contracts—Labor Stipulations—Service Contract Act of 1965—Applicability of Act—Contracting Agency *v.* Labor Department

Where Department of Labor (DOL) notifies agency that it has determined Service Contract Act (SCA) is applicable to proposed contract, agency must comply with regulations implementing SCA unless DOL's view is clearly contrary to law. Since determination that SCA applies to contract for overhaul of aircraft engines is not clearly contrary to law, solicitation which does not include required SCA provisions is defective and should be canceled. Contention that applicability of SCA should be determined by Office of Federal Procurement Policy (OFPP) does not justify agency's failure to comply with SCA under circumstances where OFPP has not taken substantive position on issue.

Contracts—Requirements—Estimated Amounts Basis—Best Information Available

Use of estimated needs instead of precise actual needs is not objectionable where solicitation is for multi-year requirements contract and agency states it cannot determine its needs with precision but has based its estimates on best available information.

Advertising—Advertising *v.* Negotiation—Negotiation Propriety—Small Business Concerns—Set-Asides

Even though small business set-aside procurement is technically a negotiated procurement, where contract is to be awarded solely on price, mere fact that negotiations are desirable to enhance offeror understanding of complex procurement does not provide legal basis for use of negotiation procedures in lieu of small business restricted advertising. since record does not support agency assertion that specifications are not sufficiently definite to permit formal advertising.

Contracts—Requirements—Multi-Year Procurement—Cancellation Ceiling—Adjustment

Agency is not required to adjust cancellation ceiling in multi-year requirements contract after first year's estimated quantities are reduced even though such adjustments might result in lower overall prices.

Contractors—Incumbent—Competitive Advantage

Agency is not required to furnish production equipment to prospective offerors to overcome competitive advantage of incumbent which already owns necessary equipment, since Government does not own such equipment and incumbent's competitive advantage results from its prior contracting activity and not through any action of the Government.

Contracts—Negotiation—Requests for Proposals—Inconsistent Provisions—Not Established in Record

Responsibility provisions in request for proposals (RFP) which require contractor to have certain personnel "on board" by time of award but also provide for contractor commitment to obtain personnel for contract performance do not conflict since latter provision refers to personnel other than those required to be "on board."

Contracts—Negotiation—Requests for Proposals—Omissions—Cost Estimates—Spare Parts Furnished by Contractor

Agency is not required to furnish cost estimate of spare parts in RFP where such parts are to be principally furnished by the Government and contractor will be reimbursed for contractor acquired parts on a normal billing cycle so that contractor investment is minimal. However, it is suggested that consideration be given to including such estimates in future solicitations.

Contracts—Negotiation—Evaluation Factors—Cost, etc., of Changing Contractors

Use of evaluation factor to reflect cost of changing contractors is not improper even though such factor may penalize every offeror except the incumbent since Government may legitimately take into account all tangible costs of making particular award.

In the matter of B. B. Saxon Company, Inc., June 1, 1978:

B. B. Saxon (Saxon) protests request for proposals (RFP) F41608-77-R-8635 issued by the Department of the Air Force, Kelly Air Force Base, Texas. The solicitation is for a multi-year requirements contract for the repair, overhaul and modification of aircraft engines and repairable parts. Saxon asserts the following solicitation deficiences as its bases for protest:

1. The exclusion of this procurement from the coverage of the Service Contract Act;

2. The use of best estimated quantities (BEQ) instead of specified quantities for anticipated annual requirements;

3. The use of a negotiated procurement rather than a formally advertised procurement;

4. The failure to adjust the "cancellation ceiling" after the BEQ for the first year was reduced;

5. The failure of the Government to furnish production equipment to assure that meaningful competition is obtained;

6. A conflict in the responsibility criteria relative to equipment and personnel;

7. The absence of a cost estimate for spare parts;

8. An evaluation method which is unfair to all offerors except the incumbent.

For the reasons set forth below, the protest is sustained on issues 1 and 3 and denied as to issues 2, 4, 5, 6, 7 and 8.

1. Service Contract Act

The RFP incorporated Walsh-Healey Public Contracts Act provisions; it did not include Service Contract Act (SCA), 41 U.S.C. 351 *et seq.* (1970 and Supp. V, 1975) provisions or an SCA wage determination, although it did include a clause entitled "Potential Application of the Service Contract Act (Fixed Price)." Saxon argues that there is no justification for this procurement to be outside the scope of the SCA, while the Air Force maintains that the Walsh-Healey Act, 41 U.S.C. 35 (1970), dealing with supplies, and not the SCA, applies to this procurement, because the contract is to be one for materials, supplies or equipment (overhauled aircraft engines) and not one for services. The Department of Labor (DOL), however, has informed the Air Force "that this type of contract has as its principal purpose

the furnishing of services through the use of service employees, and as such, is clearly subject to the Service Contract Act."

The Air Force and DOL have previously disagreed over the applicability of the SCA to various Air Force contracts. For example, in 53 Comp. Gen. 412 (1973), we considered a case where the Air Force contracting officer believed the SCA was not applicable to a procurement for aircraft modification and depot maintenance, but DOL subsequently determined that the SCA was applicable. A similar situation, involving an Air Force procurement for aircraft engine overhaul and maintenance, was considered in *Curtiss-Wright Corporation* v. *McLucas*, 381 F. Supp. 657 (D.N.J. 1974).

In both *Curtiss-Wright* and 53 Comp. Gen. *supra*, the Air Force acted in the belief that the procurements were subject to the provisions of the Walsh-Healey Act rather than the SCA. As a consequence, it did not submit a Notice of Intention To Make a Service Contract (Standard Form (SF) 98) to DOL. Under applicable regulations, contracting officers were required to file an SF 98 with DOL at least 30 days prior to the issuance of a solicitation leading to the award of a contract "which may be subject to the Act." 29 CFR 4.4–4.6 (1976); Armed Services Procurement Regulation (ASPR) 12.1004, 12.1005 (1976 ed.). In response, DOL was to notify the agency of any minimum wage rate determination applicable to the contract, which thereafter was to be included in the solicitation and any resulting contract. ASPR 12–1005.3. It was concluded in both cases that the Air Force's failure to submit the SF 98 did not invalidate the contract because the Air Force had acted in good faith.

In the case before this Office, we found that the regulations required the initial decision as to the applicability of the SCA to be made by the contracting agency, not DOL. Thus we stated:

> If the agency does not believe a contract may be subject to the act * * * there is no duty on its part to submit anything to DOL or to include a Service Contract Act clause in the solicitation. Accordingly, we think the only issue that must be determined is whether or not the Air Force Contracting Officer had a reasonable basis for believing that his procurement was not one that "may be subject to the Act." 53 Comp. Gen. at 416.

We found that the Air Force, relying on what it regarded as a "significant amount of rebuilding or replacement of aircraft components called for by the contract specification, ha[d] traditionally treated this type of contract, both before and after the enactment of the SCA, as subject to the Walsh-Healey Act." We also found that the record reasonably supported the Air Force's assertions that it relied on several "judicial and DOL decisions, which appear to treat reasonably similar type of work as subject to the Walsh-Healey Act," as a basis for its failure to include SCA coverage in the solicitation and resulting contract.

We concluded that the contracting officer had acted in *good faith*, that there had not been "a deliberate, arbitrary attempt to circumvent any statutory or regulatory provision," and that the contract had not been awarded illegally since "the validity of a service contract was not affected by the absence therefrom of a DOL wage determination when the absence was not due to 'any misfeasance or nonfeasance on the part of the contracting agency.'" We suggested, however, that consideration be given to the promulgation of a contract clause which would protect the workers concerned without disrupting the procurement process in circumstances where *DOL, after contract award*, disagrees with the contracting agency determination of non-applicability of the SCA to the particular procurement. (The "Potential Application of the Service Contract Act" clause, set forth in Defense Procurement Circular 76-1 (Item XX11), and incorporated in the solicitation in this case, is a result of our suggestion.)

Similarly, in *Curtiss-Wright*, the court held that the contract under consideration in that case was not void, but could be amended to include the SCA provisions and wage rate determinations under the "Christian doctrine." This holding followed the court's finding that the Air Force had acted in good faith because of its understanding of prior DOL policy and its lack of notice from DOL to revise its contract policies until after the award of the contract. 381 F. Supp. at 664-666.

Subsequently, in *Hewes Engineering Company, Incorporated*, B-179501, February 28, 1974, 74-1 CPD 112, we considered a situation where the Air Force initially determined that the procurement (for technical data in the form of reproducible copy) was not subject to the SCA, but before the closing date for receipt of proposals was placed on notice that DOL had ruled in a similar Army procurement that the SCA was applicable. Distinguishing that situation from the one in 53 Comp. Gen. 412, we pointed out that while the initial Air Force determination was not subject to question, the contracting officer was now on notice that DOL "may regard this procurement as subject to the Act," and that under those circumstances the regulatory scheme contemplated submission of an SF 98. We further stated:

> [T]he Secretary of Labor is responsible for administering the Act and for promulgating rules and regulations under the Act. [citations omitted] Thus in determining whether or not Service Contract Act provisions are applicable to a given procurement, we think it is reasonably clear that contracting agencies must take into account the views of the Department of Labor unless those views are clearly contrary to law.

We concluded that under the circumstances the Air Force could not properly view the DOL position as contrary to law, and pending the enactment of clarifying legislation, had to give "due regard" to DOL's position by submitting the SF 98.

In this case, the Air Force states its position as follows:

> For a number of years the Department of Labor considered these [overhaul contracts] supply contracts to which the Walsh-Healey Act would apply. This position was apparently based on the fact that we receive an end item (rebuilt or overhauled equipment). We are aware of nothing in the SCA which changes the character of these * * * contracts. Nonetheless, on occasion, we have been informed by the Department of Labor that specific overhaul * * * contracts should have contained the SCA provisions. *Moreover, on at least one occasion, DOL requested we include the SCA in all such contracts. Finally, on 2 December 1977, the Department of Labor corresponded with us regarding this specific solicitation, requesting that we include the SCA. * * * It * * * continues to be our position that these are supply contracts subject to the Walsh-Healey Act rather than SCA.* [Italic supplied.]

The Air Force further points out that its policy is consistent with that of the Department of Defense (DOD), that the "Potential Application of the Service Contract Act" clause was included in the RFP to protect the contractor's employees "in the event appropriate authority determines SCA applies," and that it considers the "appropriate authority" to be the Office of Federal Procurement Policy (OFPP). In recognition of the foregoing it is the Air Force position that OFPP and not DOL has "final authority to determine whether and how the Service Contract Act applies to certain types of contracts *when such application could have serious and direct impact on the Federal Procurement Process*" [Italic supplied.] and "that the OFPP is the appropriate office to decide this procurement *policy* question." [Italic supplied.]

OFPP concurs with the Air Force view. In comments filed with this Office, OFPP states that: "Public Law 93–400, 41 U.S.C. 401 *et seq.* (Supp. V, 1975), clearly establishes OFPP's authority to formulate policies for the executive agencies with regard to the procurement of services and property"; that this authority extends to the procurement aspects of regulations issued by the social and economic agencies such as the Department of Labor; that any other agency authority to prescribe policy is subject to that of OFPP; and that "OFPP has a clear role as the final arbiter of procurement matters for the Federal agencies." OFPP states that it is "presently planning to begin work with the Department of Labor and other agencies to review existing labor statutes that impact on procurement policy. We will then undertake to exercise our authority in this area and deal with the procurement aspects of these laws as well as the issues arising under them."

The extent of OFPP authority is not an issue in this protest. At present, OFPP is only "planning to begin work with the Department of Labor and other agencies to review labor statutes"; it has taken no action concerning the current application and interpretation of the SCA and implementing regulations. Thus, we need not and do not decide the extent of OFPP authority in this area, and under the circum-

stances the only issue for resolution is whether the Air Force has complied with *existing* requirements concerning the SCA.

As we have previously indicated, under those existing requirements the Secretary of Labor has been regarded as having the primary responsibility for administering and interpreting the SCA, so that to the extent there is a disagreement between DOL and a contracting agency over the application of the SCA to a particular contract or class of contracts, DOL's views must prevail, "unless they are clearly contrary to law," *Hewes Engineering*, *supra*. The Air Force has previously recognized the appropriateness of adhering to DOL's position in matters concerning the SCA, even though the Air Force did not agree with that position. See *Central Data Processing, Inc.*, 55 Comp. Gen. 675 (1976), 76-1 CPD 67. See also *Curtiss-Wright Corporation* v. *McLucas*, *supra*, where the court suggested that the Secretary of Labor's determinations under the SCA were final and binding.

We note that the term "services" as used in the SCA is not defined in the Act, and that resort to the legislative history of the Act is not helpful. Therefore it appears that the determination of whether the "principal purpose" of a contract is to furnish "services" through the use of "service employees" is a matter within the reasonable discretion of the Secretary of Labor. We do not believe that a determination that an aircraft engine overhaul contract is one which has for its principal purpose the "furnishing of services" (overhauling and repair of Government property) may be considered "clearly contrary to law" since there is nothing in the Act which prohibits that determination. *Cf.* 53 Comp. Gen. 370 (1973). Accordingly, since the Air Force is on notice that DOL has determined that the SCA applies to this procurement, the mere inclusion of the "Potential Application of the Service Contract Act" clause in the RFP does not comply with applicable requirements, which under the circumstances mandate that the Air Force submit an SF 98 to DOL and include in its solicitation whatever wage determination DOL finds to be applicable.

2. Best Estimated Quantities

Protester takes issue with the use of estimates for the contract requirements, instead of firm figures, claiming that 12 years of historical data should enable the Air Force to quantify its requirements with "pinpoint accuracy." It particularly objects to portions of Exhibit "B" of the RFP (repairable overhaul support items) where 12 of 14 items of repairable engine parts have a BEQ of zero. Protester implies that the Air Force managers "know precisely what these estimates are," but for some reason have not revealed them, with the consequence that

unfair competition is engendered because the incumbent has that knowledge by virtue of its own experience.

The Air Force claims that its overhaul requirements are not definite, that the usage of the engines in question cannot be predicted absolutely accurately, and that its estimates are the "best" available under the circumstances. It claims that it does not expect any requirements for those items where the estimates are shown as zero, but requested prices in case such requirements materialize. The Air Force notes that the zero estimates for these items do not affect the price evaluation, and that if the prices received for the zero estimate items are excessive, it will either negotiate the prices to those which are fair and reasonable, or will negotiate those items out of the contract so that its needs, should they arise, could be satisfied elsewhere.

In view of the Air Force's statements, we are unable to accept the protester's contentions. Although the Air Force presumably has data regarding its past requirements, the protester has not established that the Air Force is incorrect when it states that its future needs can, in fact, only be estimated and cannot be stated with precision. It is true that "when the Government solicits bids on the basis of estimated quantities to be utilized over a given period, those quantities must be compiled from the best information available." *Union Carbide Corporation*, B–188426, September 20, 1977, 77–2 CPD 204. However, taking the record in its entirety, we find no basis for concluding that the Air Force has not done so.

3. Legal Justification for Negotiation

Saxon asserts that there "is no legal justification for this procurement being in the form of a negotiated procurement instead of a formally advertised procurement as required by law." Saxon notes that there is nothing extraordinary about an overhaul program, and states that formal advertising is the most common way of handling overhaul programs and that "it usually results in a much lower price to the Government."

It is the Air Force's position that negotiation is appropriate for the instant procurement because the contract is a small business set-aside, and pursuant to ASPR 3–201, it is mandatory that "we cite 10 U.S.C. 2304(a)(1) as 'our negotiation authority.'" The agency also claims that if the procurement had not been set aside for small business, it would have negotiated the contract pursuant to ASPR 3–210.1(ix) which contemplates procurements involving construction, maintenance, repairs, alterations or inspections, "in connection with any one of which the exact nature or amount of the work to be done is not known," because "the procedures contemplated in the specifications of this solici-

tation are not finite, as in any overhaul program, and discussion with any or all prospective offerors may be necessary for clarification of the overall program." The Air Force futher explains its position as follows:

> The exact amount or nature of this repair work is not known. For example, the number of engines to be repaired can only be estimated. The timing of when engines will require repair is only an estimate. The amount of repair on each engine can vary depending on the amount of repair or replacement required for accessories. The contractors must provide their own procedures on how to determine when to repair or when to replace parts * * *. Negotiated prices are necessary for those engines in which the BEQ is 0 to prevent unbalanced bids. The number of over and above hours are estimates. These considerations clearly show that formal advertising is impractical.

The Air Force also notes that no Determination and Findings exist to support the negotiation, because it is not required for a small business set-aside negotiated pursuant to ASPR 3-201 ("exception 1").

An examination of the RFP reveals that the contract is to be awarded solely on the basis of price, e.g., no technical proposal is required in this RFP. Under the provisions of the RFP, offerors are requested to propose fixed unit prices for the "repair, overhaul, modification, testing, preparation for storage and shipment" of the aircraft engines listed in items 1-5 of the RFP and for the repair of certain components, and fixed hourly rates for "over and above work" to be accomplished by the contractor at the direction of the contracting officer. The RFP sets forth 54,164 manhours as the estimate of the "over and above" work to be accomplished during the contract, and provides for evaluation of the contractor's offer for these items on the basis of the proposed hourly rates multiplied by the estimated hours. The RFP also provides an additional evaluation factor of $37,112.00 (plus transportation) which is to be added to all offers, save that of the incumbent's, as the estimated cost for the removal of Government furnished property from the incumbent contractor's facility to the facility of any new contractor. In addition, paragraph 10(g), Standard Form 33A, incorporated into the solicitation by reference, cautions bidders that the Government may award a contract on the basis of initial offers received without discussion, so that offers should be submitted on the most favorable terms.

Also, although the agency claims that the specifications are not "finite," there is no hint in the RFP that those specifications which are detailed and require adherence to the provisions set forth in more detailed Technical Orders, are not complete or are otherwise inadequate so that "discussions with any or all" offerors might be required. Also, although the Air Force claims that as a result of face-to-face negotiations with the four offerors submitting "responsive proposals," changes were made to the specifications and "[M]any questions of clarifica-

tion were answered," we have not been furnished with any documents reflecting specification changes.

ASPR 1-706.5(b) provides in pertinent part that:

> Contracts for total small business set-asides may be entered into by conventional negotiation or by * * * "Small Business Restricted Advertising." *The latter method shall be used wherever possible.* [Italic supplied.]

Thus, even though a set-aside procurement is technically a negotiated procurement because competition was restricted to one class of bidders under "exception 1" negotiation authority, the procurement should otherwise be conducted under the rules of formal advertising unless there are other reasons permitting the use of negotiation procedures. See *Nationwide Building Maintenance, Inc.*, 56 Comp. Gen. 556 (1977), 77-1 CPD 281, where we concluded that the award of a small business set-aside pursuant to negotiation procedures had not been justified under any of the statutory exceptions to formal advertising but was not subject to legal objection solely because the agency had been granted a waiver from the requirement to use small business restricted advertising procedures.

In this case, we do not find persuasive the Air Force's basis for claiming it would have negotiated the contract under the "exception 10" negotiating authority because the specifications are not "finite." In that regard, we have previously considered a case which, while involving a sole source negotiation under "exception 10," sets forth principles that we believe are equally applicable here. In that case, the Navy attempted to award a contract for the renovation of midshipmen's quarters at the Naval Academy on a noncompetitive basis to a contractor which was performing other construction work at the construction site, and which was asserted to have been familiar with the building to be renovated. Detailed plans and specifications had been prepared for the project, but the Navy was nonetheless concerned that among other things, (1) the plans and specifications, although "fairly complete," did not fully delineate all areas or obviate all uncertainties, and that it was impossible for the specifications to do so; (2) a satisfactory bid could not be obtained by formal advertising because a bidder, without "special knowledge of the site might include in his bid * * * significant contingency factors to protect himself" from hidden conditions, thus increasing the cost to the Government; and (3) a low bidder under formal advertising procedures, lacking such "special knowledge," might bid too low and thus operate at a loss which could result in delay or which it might attempt to recoup through inferior workmanship. Considering all of those factors, we stated:

> *There is no requirement that competitive bidding be based upon plans and specifications which state the work requirements in such detail as to eliminate all possibility that the successful bidder will encounter conditions or be required*

to perform work other than that specified in detail in the plans and specifications. Such perfection, while desirable, is manifestly impracticable in some advertised procurements * * *. Whether provision is made in an advertised invitation and resulting contract for the cost of additional work resulting from unknown conditions to be borne by the Government by change order to the contract, or whether bids are solicited and contracts awarded on a basis which will require the bidder to perform all work at the bid price regardless of the conditions encountered, is within the discretion of the contracting agency. However, where the plans and specifications are sufficiently complete to permit bidding on an equal competitive basis, a possibility that hidden or unknown conditions may exist and prove such plans and specifications to be incomplete does not in itself justify a failure to obtain for the Government the benefits of full and free competition by submitting such plans and specifications to competitive bidding.

Where competitive bids are solicited under conditions by which the contracting agency either expressly or impliedly warrants the completeness and accuracy of the plans and specifications, or provides for adjustment in the contract price for additional work resulting from changed or unknown conditions, and thus assumes liability to pay an amount over and above the bid and contract price for any work not specified in or contemplated by the plans and specifications, the problem of inflated bid prices resulting from the addition of amounts to cover contingencies, as well as the possibility of inadequate bid prices resulting from failure to include amounts to cover contingencies, would appear to be, for all practical purposes, nonexistent. * * *

In the absence of either a warranty as to the accuracy and completeness of the plans and specifications or express provision for adjustment in the contract price for additional work resulting from changed or unknown conditions, the possibility of receiving both inflated and inadequate bid prices is always present. However, we are aware of no sound basis upon which it may be contended that the possibility of receiving some bid prices containing contingency allowances which may later prove to be excessive, and other bid prices containing contingency allowances which may later prove to be inadequate, constitutes a justification for failing to submit the procurement to competitive bidding. In the event all bids are considered excessive they may, of course, be rejected, in which event specific and adequate authority exists under 10 U.S.C. 2304(a)(15) to negotiate a fair price to the Government. [ASPR 3-201.3 provides for dissolution of the small business set-aside in this instance.] Conversely, in the event a bid is received from a responsible bidder in an amount which the contracting agency considers improvident, it would appear to be incumbent upon the contracting agency to verify the bid price and, in the absence of such error as would justify its rejection, to accept such bid and to protect the interest of the Government by vigilant inspection and supervision of the work to assure that the quality of both materials and workmanship is in accord with the contract requirements. 41 Comp. Gen. 484, 488-9 (1962).

The eighteen situations listed in ASPR 3-210.1 are apparently intended to be merely illustrative, and we do not interpret the paragraph as *requiring* invocation of negotiating authority in all similar situations, but only those where the underlying reason for the exception exists. Indeed, ASPR 3-101(a) requires that even when one of the negotiation exceptions could be invoked, formal advertising is still to be used when that method is feasible. *See* 51 Comp. Gen. 637, 639 (1972); *Washington Patrol Service, Inc., et al.*, B-188375, September 21, 1977, 77-2 CPD 209. The use of "exception 10," therefore, is dependent upon the existence of specified situations where it is not practicable to obtain competition by means of formal advertising. Thus, the pertinent criterion in this case is not the inability to predict the exact amount of the work to be done or the desirability of negotiating with offerors to enhance their understanding of the specifi-

cations requirements, but rather the impracticability of obtaining competition through formal advertising because of the *impossibility* of drafting a *reasonably* adequate specification of what is to be purchased or for some other valid reason. Negotiation is not authorized merely because a complex product or service is being procured and the agency desires only to insure the offerors' understanding of an admittedly detailed specification, see *Informatics, Inc.*, B–190203, March 20, 1978, 78–1 CPD 215; *Cincinnati Electronics Corporation, et al.*, 55 Comp. Gen. 1479 (1976), 76–2 CPD 286, or because of the possibility of unbalanced bidding, or because contractors have to provide their own procedures when such procedures are not an element of proposal evaluation. As indicated, the RFP contemplated only a price competition. *See*, e.g., 37 Comp. Gen. 72 (1957). We therefore conclude that no reasonable basis exists to conduct this procurement under negotiated procedures, and that the Air Force requirement should be recompeted under small business restricted advertising procedures.

4. The Cancellation Ceiling

Saxon complains that the original "cancellation ceiling" of 6.48% included in the RFP by Amendment 1 was not revised after the BEQ of engines for item 4AA for the first contract year was reduced by 626. That change in the BEQ reduces the total first year quantities by 37% (40% of the specific item involved). Saxon asserts that the failure to adjust the cancellation ceiling will result in unnecessarily higher prices to be paid by the Government because of the increased risk involved. Saxon also questions the source of the original cancellation ceiling figure, claiming that it suspects it was "pulled out of the air."

With respect to protester's latter contention, the RFP requests that offerors furnish the agency with their "estimated start-up non-recurring costs with supporting data" so that the contracting officer can evaluate the data and determine a "fair and reasonable percentage factor" for the cancellation ceiling. The RFP requires that such information be submitted by the 25th day after issuance of the RFP. Saxon did *not* submit its estimates, but claims the percentage was established by the contracting officer before it had a chance to respond. We note that the amendment to the RFP establishing the cancellation ceiling was issued *29* days after the date of the RFP, so that protester's contentions in this regard are without merit.

With respect to the protester's primary concern, we agree that the failure to increase the cancellation ceiling (which is expressed as a percentage of the contract price) after a reduction of the estimated quantities for the first year of the contract substantially increases

offeror risk of being unable to recover nonrecurring start-up costs in the event the contract is terminated prior to completion unless unit prices are increased to cover that contingency. In that case, if the contract proceeds to completion, the Government will pay a higher price than it might have had the cancellation ceiling been increased in proportion to the reduced quantities.

The ASPR provides essentially identical provisions for cancellation ceilings on multi-year supply and service contracts. *See* ASPR 1–322.2 (d) and (e) (supply contracts) and ASPR 1-322.6 (c) and (d) (service contracts). Those provisions in essence specify that the contracting officer is to develop reasonable nonrecurring costs for an "average" prime or subcontractor; that a "best estimate" of the total procurement cost is to be developed; that the "cancellation ceiling," expressed as a percentage of the total multi-year cost, be established by comparing the non-recurring cost estimate to the total multi-year cost estimate; and that the original cancellation ceilings may be revised from information received after the original ceilings were established which would indicate that the original ceilings are no longer realistic.

Some risk is inherent in most types of contracts and offerors are expected to allow for that risk in computing their offers. See *Palmetto Enterprises*, 57 Comp. Gen. 271 (1978), 78–1 CPD 116. Here, the cancellation ceilings do not guarantee that any particular offeror will escape all elements of risk in the event of termination, and consequently each offeror must consider the cost of such termination and adjust its prices as its own particular interests dictate. While the contracting officer, in anticipation of lower prices, could have increased the cancellation ceiling in a proportion related to the reduction of the first year's estimated quantities, we are not aware of any statutory or regulatory requirement that he do so. Thus, while prices offered might be higher as a result of the increased risk, we fail to see how the agency's action was improper or how Saxon could be prejudiced in any way since the failure to adjust the cancellation ceiling would impact on all offerors equally. Nonetheless, in view of our conclusions with respect to issues 1 and 3, we are suggesting that the Air Force consider revising the cancellation ceiling for use in its resolicitation.

5. Production Equipment

Saxon complains that no meaningful competition can be obtained in this procurement unless the Government furnishes the equipment necessary for the performance of the contract. Saxon contends that because of the "minimum input of items on a non-guaranteed basis" under the contract, no prospective contractor could afford the invest-

ment necessary to acquire the equipment needed for the performance of the contract. Saxon implies that because the incumbent now possesses the necessary equipment, prospective offerors (other than the incumbent) could not be expected to offer prices which are competitive with the incumbent's in view of the risks involved, and that as a result the incumbent is a "virtual sole source."

The Air Force reports that the Government does not have the required equipment or special tooling to supply to any contractor, and that the incumbent does own all the required equipment, "which he acquired with his own capital."

We believe that the contracting officer's statements that the Government lacks the equipment necessary to supply any potential contractor is dispositive of the matter. Although ASPR 13–308 authorizes the contracting officer to furnish Government Production and Research Property "AS IS," obviously such equipment must be in existence before it can be offered for use. Moreover, there is nothing improper about the competitive advantage that results from incumbency. We have long recognized that certain firms may enjoy a competitive advantage by virtue of their own incumbency or their own particular circumstances or as a result of Federal or other public programs. *Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404; *Aerospace Engineering Services Corporation*, B–184850, March 9, 1976, 76–1 CPD 164. The fact that the incumbent, by virtue of its prior contracts, may have previously acquired and amortized the cost of the equipment necessary to perform the proposed contract is a legitimate competitive advantage which the Government is not required to equalize. See *Aerospace Engineering Services Corporation, supra*. As a consequence, where one firm may be able to offer a lower price than another firm because of the competitive advantages it has gained from its prior contracting activity the Government is not precluded from taking advantage of that offer. *Cf. Braswell Shipyards, Inc.*, B–191457, March 24, 1978, 78–1 CPD 233. We do point out, however, that the RFP is structured to provide for contractor recovery of nonrecurring costs over the life of the contract, so that the competitive advantage complained of is equalized to some extent.

6. Responsibility Provisions

Saxon claims that the RFP provisions relating to offeror responsibility conflict because "[s]ection C–11(b) sets forth mandatory personnel and equipment requirements" and section C–11(c) indicates "that these personnel and equipment could merely be available instead of on board." Saxon suggests that the "procurement has been custom designed for * * * the incumbent," also complains that the master

equipment list which an offeror must have available to demonstrate its responsibility "gives rise to the question as to whether this is an Air Force master equipment list or simply an asset list of the incumbent contractor."

Paragraph C–11 is set forth in pertinent part as follows:

C–11. DEMONSTRATION OF RESPONSIBILITY:

* * * * * * *

(b) Demonstration of Ability to Perform. Prospective contractors must demonstrate affirmatively their capability * * * to perform all of the work called for in strict accordance with the specifications. * * * For this purpose prospective contractors must have available for Government review at any time after submission of the offer, documented evidence of their qualifications. This documentation will, as a minimum, include (i) qualifications of the management; * * * (iii) evidence of the assured availability of all necessary facilities and technical skill; * * * In addition to the above, it is mandatory that:

(1) The facility proposed for contract performance must have prior to award of contract:

(i) A full time facility manager with experience and training to qualify him for managing a complex program;

(ii) A property manager experienced in the administration of Government property under Defense Maintenance Contracts who has demonstrated an ability to effectively requisition, account for, and control material obtained from/for the U.S. Government.

(iii) Qualified contract administrator(s);

(iv) A production manager experienced in engine scheduling and maintenance work;

(v) A quality control manager experienced in implementing Quality Assurance and Inspection Procedures and Standards;

(vi) A safety manager experienced with government safety standards applicable to engine contracts.

* * * * * * *

(3) The offeror, as a company, has available for performance of proposed procurement any facilities and equipment set forth in Appendix "A", attached hereto and Master Equipment List available for review * * *.

(4) The foregoing information must in all cases be ready and available for presentation to the government no later than the date of commencement of the Pre-Award Survey conducted in accordance with ASPR 1–905.4.

(c) Evidence submitted under paragraph (b) above and commitment made at the time of any Pre-Award Survey such as, but not limited to, acquiring facilities, equipment, additional personnel, etc., may be incorporated in any such resultant contract. * * *

We see no conflict in the cited provision. Paragraph (b) sets forth requirements for documented evidence of responsibility which offerors must have available for review and lists specific personnel who must be employed ("on board") by the facility (not merely available) prior to award; paragraph (c) warns that the evidence submitted under paragraph (b), as well as any commitment made at the time of the preaward survey relative to acquiring additional personnel, may become a contract commitment. The fact that specific managers and other personnel are required to be "on board" prior to award is not inconsistent with the requirement that the offeror be prepared to commit itself that other skilled personnel (or other facilities) necessary or asserted to be available for contract performance in fact will be employed if the offeror is awarded a contract.

With regard to the Master Equipment List identified in paragraph (b)(3), the Air Force reports that it is not a list of the incumbent's

equipment but rather a list of equipment used by the Air Force when it was performing the overhauling tasks "in-house."

7. Estimate for Spare Parts

The RFP schedule includes three line items covering parts and materials to be acquired by the contractor, and provides for reimbursement to the contractor either on the basis of vendor invoices or as negotiated by the contractor and contracting officer. Saxon claims that the agency's failure to disclose the cost estimate for spare parts which may be required over the initial 3-year term of the contract "leaves contractors in the dark as to their capital requirements for this item," and gives offerors "no basis for estimating personnel or automotive requirements" which Saxon claims could have a material effect on their offers.

The Air Force reports that spare parts are furnished by the Government in most cases, but that it is estimated that the contractor will have to provide some $1.5 million in spare parts over the 3-year contract period. In those cases where spare parts are not available from the Government, the contractor is reimbursed for its costs, as indicated in the RFP.

According to the Air Force, the only capital required is "that investment needed to cover the time period between when the contractor pays for a contractor acquired part and when the Air Force reimburses that purchase"; the period of the investment depends on the efficiency of the contractor's billing process. An efficient billing process, the Air Force claims, could keep the capital investment for spares near zero. The Air Force further reports that while it did not include the $1.5 million estimate in the RFP, it planned to discuss the matter with competitive range offerors during negotiations.

We do not think the Air Force was required to include this information in this RFP. Nonetheless, since the Air Force does have an estimate, since that information appears to be of importance to at least one potential offeror, and in view of our conclusion that the use of negotiation procedures for this procurement is not justified, we are suggesting to the Secretary of the Air Force that consideration be given to including this information in future solicitations.

8. Evaluation Method

Saxon complains that the addition of a factor of $37,112 to all offers except the incumbent's, as the estimated cost to the Government for the packing and transportation of Government property necessary for the performance of the contract from the incumbent's facility to a new contractor's plant, results in an unfair competitive advantage. We

reject this argument. We know of no requirement that the Government ignore costs associated with a change in contractor so that all competitors will be on an equal footing. Indeed, a proper price evaluation should reflect the true costs to the Government of making a particular award by taking into account those tangible factors relating to costs that the Government would have to bear. In this respect, ASPR 19-301.1(b) specifies that transportation costs be included as a cost factor in the evaluation of bids or proposals when Government property is to be furnished to a contractor. Moreover, this Office has recognized the validity of the cost of changing contractors as a legitimate evaluation factor, even though such factor may penalize every bidder or offeror except the incumbent. 52 Comp. Gen. 905 (1973). We therefore find no merit to the protester's assertions in this respect.

Conclusion

Although the protest is denied with respect to most issues, the protest is sustained with respect to the Service Contract Act issue and the negotiation issue. We therefore are recommending that the Air Force submit an SF 98 to DOL and incorporate into its solicitation the appropriate ASPR Service Contract Act provisions as well as any wage rate determination issued by the Department of Labor. We are further recommending that the RFP be canceled and that the requirement be resolicited in the form of small business restricted advertising. In addition, we are suggesting that the Air Force consider 1) including in subsequent solicitations its estimate of spare parts that a contractor will have to furnish under the contract, and 2) revising the cancellation ceiling to be specified in the resolicitation in view of the revised estimated quantity for item 4AA.

Because this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, the Senate Committee on Governmental Affairs and the House and Senate Committees on Appropriations concerning action taken with respect to our recommendation.

[B-191041]

Leaves of Absence—Forfeiture—Administrative Error

Where employee seeks and obtains an unofficial estimate of projected retirement annuity, wherein an error in division was made causing an overstatement of such annuity, but by the time the error was discovered and the employee decided to postpone retirement, he was unable to schedule and use all excess annual leave, since calculation error did not involve consideration of leave matters

such error as was made does not qualify under 5 U.S.C. 6304 as a basis for restoration of forfeited annual leave.

In the matter of Edwin W. Guilford—forfeited annual leave, June 2, 1978:

This action is in response to a request dated December 30, 1977 (reference 9403: RJG), with enclosures, from Mr. Robert J. Griffin, Civilian Personnel Division, Naval Air Systems Command, requesting a decision concerning the right of Mr. Edwin W. Guilford, a civilian employee of that activity, to have 120 hours of annual leave which was forfeited at the close of the 1976 year restored to his leave account.

The file indicates that in November 1976, the employee, who had been contemplating retirement, requested an unofficial computation of his estimated annuity from his servicing personnel office. At that time, the employee apparently had 184 hours of annual leave to use without losing it and it is indicated that he was in a position to use it should computation of his annuity prove to be unsatisfactory. Upon being given that annuity estimate, apparently there were some doubts in his mind as to its correctness, for on November 17, 1976, he had the computation again checked for accuracy. On recheck, he was assured of the minimum accuracy of his projected annuity.

On December 17, 1976, the employee, after making annuity comparisons with a similarly situated co-worker, again had doubt as to the accuracy of his annuity estimate. On recomputation that date by a different employee of the same personnel office he was advised that his projected annuity as originally computed was erroneously overstated by approximately $84 a month. The file indicates that the error was the result of incorrect division.

At this point, the employee decided to postpone retirement and immediately went on annual leave for the remainder of the year in order to use as much of his use-or-lose leave. However, he was only able to schedule and use 64 hours during the remainder of the leave year and lost 120 hours.

It is the employee's contention that but for the administrative error in the computation of his projected annuity, he would not have lost this leave. Further, that since the error was not administratively discovered and corrected until a date after the first date such leave could be taken to avoid forfeiture, he should have such forfeited leave restored to his account.

The controlling law, 5 U.S.C. 6304(d)(1), which was added to title 5, United States Code, by subsection 3(2) of Public Law 93-181, approved December 14, 1973, 87 Stat. 705, provides in part:

(d)(1) Annual leave which is lost by operation of this section because of—
(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

* * * * * * *

shall be restored to the employee.

The Civil Service Commission has, pursuant to 5 U.S.C. 6311 (1970), issued regulations implementing the provisions of 5 U.S.C. 6304(d)(1), *supra*. These regulations are contained in the attachment to Federal Personnel Manual (FPM) letter No. 630–22, dated January 11, 1974, and are codified in subpart c, part 630 of title 5, Code of Federal Regulations.

That which is considered as constituting error under the before-cited provisions is a matter for which primary jurisdiction has been determined to lie with the agency involved. See 55 Comp. Gen. 784 (1976). In that decision at page 785 we pointed out that decisions of our Office have construed as administrative error such matters as the failure of an agency to carry out written regulations which have mandatory effect for the purpose of correcting erroneous pay rates. Also, when counseling of an employee is required by administrative regulation, such as in cases involving retirement, the failure to give correct advice on such matters as the employee's service credit constitutes an administrative error. See B-174199, December 14, 1971.

Appendix A of Navy Department Civilian Manpower Management Instructions (CMMI) 831.S1, implementing the provisions of the FPM, provides in section A–1:

> a. As a minimum, every employee who is approaching retirement should have access, on an individual basis, to full information concerning retirement benefits and to consultation on individual questions concerning retirement.
>
> * * * * * * *
>
> e. Annuities should be computed with maximum accuracy possible, but it should be made clear to the employee that the Civil Service Commission is the authority on this. It is better to under-estimate than to over-estimate.

Leave matters, while incident to retirement, are not an inherent part of an inquiry regarding retirement, service credits for computation purposes, or the amount of an annuity, nor are they by regulation made so.

According to the information in the file, the counseling which the employee requested and received specifically related to the computation of his retired annuity if he should retire at the end of the year. By the employee's own statements in the file, he neither requested nor received any counseling regarding possible forfeiture of leave. The file indicates he already knew that he was in a take it or lose it leave status if he remained in his position and did not retire at the end of the year.

It is clearly evident that the calculation error did not in any way involve consideration of leave. It related only to a computational error in his projected, but unofficial retirement annuity. According to the file, service credits and rates of pay were properly used in that computation. While there was an error in that computation, such error was one of division and related only to the annuity being un-

officially estimated. In this connection, it is noted that such error was corrected in a timely manner, thus, avoiding the employee electing to retire and being unpleasantly surprised by receiving an annuity considerably less than anticipated.

Accordingly, since there was no error made in the employee's leave account, there is no legal basis upon which his forfeited annual leave may be restored.

[B-138942]

Travel Expenses—Air Travel—Foreign Air Carriers—Prohibition—Applicability

Where U.S. Air carrier service originating in Vienna. Austria, requires connections in New York en route to Washington, D.C., traveler may not use foreign air carrier between Vienna and London, England, or Paris, France, to connect with a direct flight to Washington, to avoid the congestion of JFK International Airport, New York. The inconvenience of air traffic routed through New York is shared by approximately 40 percent of all U.S. citizens traveling abroad. It does not justify deviation from the scheduling principles that implement 49 U.S.C. 1517 inasmuch as the proposed deviation would diminish U.S. air carrier revenues.

In the matter of the Joint Chiefs of Staff—Fly America Act—connecting service in New York, June 5, 1978:

We have been asked by the Per Diem, Travel and Transportation Allowance Committee to consider a request by the Director, Joint Staff, Office of the Joint Chiefs of Staff, to waive the requirement imposed by 49 U.S.C. § 1517 for use of certificated U.S. air carrier service available at point of origin for travel from Vienna, Austria, to Washington, D.C. In addition, we are asked to consider a proposed change to the Joint Travel Regulations (JTR), Volume 1, to permit deviations in cases of "undue hardship" from the routing principles set forth in the Comptroller General's Guidelines for Implementation of Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, B-138942, March 12, 1976, as clarified by our decisions.

The Guidelines require use of certificated U.S. air carriers for all Government-financed commercial foreign air transportation of persons or property if certificated service is available. Certificated service is defined as available "if the carrier can perform the commercial foreign air transportation needed by the agency and if the service will accomplish the agency's mission," and even though:

(a) comparable or a different kind of service by a noncertificated air carrier costs less, or
(b) service by a noncertificated air carrier can be paid for in excess foreign currency, or
(c) service by a noncertificated air carrier is preferred by the agency or traveler needing air transportation, or
(d) service by a noncertificated air carrier is more convenient for the agency or traveler needing air transportation.

The Guidelines set out four conditions, all involving periods of en route delay, under which certificated air carrier service may be considered unavailable. None of the conditions are applicable to the present case.

In 55 Comp. Gen. 1230 (1976) we held that, consistent with the Guidelines, the traveler should use certificated U.S. air carrier service available at point of origin to the furthest practicable interchange point on a usually traveled route and that where the origin or interchange point is not served by a certificated carrier, noncertificated service should be used to the nearest practicable interchange point to connect with certificated service. Our decisions at 56 Comp. Gen. 216 (1977), 56 *id.* 629 (1977), and 57 *id.* 76 (1977) have served to further define availability of certificated service. The employee's personal financial responsibility for improper travel aboard foreign carriers is spelled out in 56 Comp. Gen. 209 (1977). The basic concepts of scheduling travel to comply with the mandate of 49 U.S.C. § 1517 apply to travel by military officers and enlisted members as well as to the travel of civilian officers and employees of the Government.

The specific itinerary with which the Director is concerned involves return travel from Vienna to Washington. While certificated service is available in Vienna, such service involves a change of planes in New York. Under the Guidelines and our decisions, employees returning to Washington, D.C. from Vienna would be required to use this service. The Director suggests that this requirement imposes an undue hardship upon the traveler and asks that a waiver be granted permitting travel to be routed with connections in Frankfurt, Germany, direct to Washington, D.C., avoiding the congestion of the JFK International Airport in New York. The proposed scheduling would involve use of a foreign air carrier for that segment of the travel between Vienna and Frankfurt which, in the absence of justification, would subject the traveler to a financial penalty under 56 Comp. Gen. 209, *supra*.

In support of his waiver request, the Director has submitted, as an illustration of the travelers' burden in complying with the Fly America scheduling principles, a trip report filed by a staff member recounting the inconvenience experienced in connection with his return trip from Vienna to Washington, in July of 1976. The TWA flight from Vienna was temporarily diverted to Hartford, Connecticut, apparently as a result of air traffic congestion over New York, resulting in arrival at the JFK International Airport too late for connecting flights to Washington. The staff member continued his travel the following day, having spent an uncomfortable night in New York. The documentation forwarded for our consideration includes a letter from the same staff member addressed to TWA describing similar cir-

cumstances in July of 1977. The delay in that case was attributable to bad weather. Together with these examples, we have been furnished the following listing of factors which is felt by the Director to impose personal hardship and inconvenience to travelers required to route their travel through New York in accordance with the Fly America scheduling principles:

> * * * delayed departure from negotiating site awaiting U.S. carrier up to four hours); another four-hour delay in New York awaiting connection to Washington, D.C.; multiple baggage handlings greatly increasing the likelihood of loss or misrouting; bus and/or taxi rides from JFK to La Guardia to make a connecting flight; wasted time, additional expense and further inconvenience when delayed arrival and/or weather conditions require remaining in New York overnight; and the usual frustrations associated with flights requiring customs clearance before arrival at final destination. * * *

Although the Director's specific waiver request covers only travel between Vienna and Washington, the inconvenience on which the request is based is applicable to all international travel involving routing via New York. There is little, if any, difference between travel originating in Vienna and travel from most of the other locations in Europe in terms of the inconvenience experienced by the traveler. To illustrate the scope of the problem, we point out that in the summer of 1977, of the 255 flights provided each week by U.S. air carriers between the U.S. and 13 gateway cities in Europe, 154 involved routings with connections or stopovers in New York. Travel from Europe to Washington, without intermediate baggage handling and customs clearance in New York, can be avoided only by initiating travel on one of the two nonstop flights departing daily from either London, England, or Paris, France. In this connection we note that the certificated service between Frankfurt and Washington, to which the Director refers as imposing less hardship on travelers, is in fact routed through New York. While the same flights continue on to Washington, the traveler is required to deplane, claim his baggage, and clear customs in New York.

In view of the above, we consider the Director's request for waiver as posing the broader issue of whether travelers may deviate from the requirement to travel by U.S. air carrier available at point of origin to the extent necessary to connect with a certificated U.S. air carrier providing direct service to a gateway airport which is determined to be more convenient by the agency. In general, the proposed deviation would involve travel aboard a foreign air carrier from the point of origin at which travel is begun to one of a very few gateway cities abroad offering certificated service that avoids connections or layovers in New York. The Director's waiver request involves essentially the same considerations as does his request for approval of the following proposed change to 1 JTR para. M2150–3 to recognize as an addi-

tional circumstance of unavailability of certificated service occasions where:

> * * * the traveler would be subjected to undue hardship which can be avoided by using a noncertificated air carrier to the nearest practicable interchange point on a usually traveled route to connect with service by a certificated air carrier to the intended destination.

Neither the Fly America provisions of 49 U.S.C. § 1517 nor the Guidelines issued thereunder include a provision for waiver of the Act's requirements. The Guidelines do, however, recognize broad authority on the part of the agency to determine that certificated service otherwise available cannot provide the foreign air transportation needed or will not accomplish the agency's mission. Thus, the concept of availability of U.S. air carrier service includes such basic assumptions as that reservations can be secured and a reasonable degree of certainty that the service which the airline offers to provide will be provided without unreasonable risk to the traveler's safety. The Guidelines specifically provide that convenience to the traveler or agency will not support a determination that certificated U.S. air carrier service is unavailable. We recognize that there are considerations that surpass mere inconvenience that may well warrant deviation from strict adherence to the Fly America scheduling principles. For example, we understand that for a period of time hotels in Cairo refused to make or keep reservations for U.S. travelers. Based on its finding that travelers routed through Cairo with connections the following day faced a substantial risk of being left stranded without overnight accommodations, the Department of State, for that period of time, permitted travelers to avoid U.S. air carrier service requiring overnight connections in Cairo. We believe this was a proper exercise of administrative discretion in determining that the U.S. carriers involved could not provide the commercial foreign air transportation needed.

In general, the determination that a U.S. air carrier cannot serve the agency's transportation needs is to be made by the agency and will not be questioned by this Office unless it is arbitrary or capricious. However, because of the potentially far reaching consequences of a determination that U.S. air carrier service requiring connections or layovers in New York falls within this category, and because the matter has been raised informally on several occasions, we feel it is appropriate to specifically address the question of whether the inconvenience to the traveler described by the Director is of such magnitude as to surpass mere inconvenience and warrants a determination that the U.S. air carrier available at point of origin cannot provide the transportation required.

We take note of the fact that the JFK International Airport in New York is the busiest of the international airports in the U.S. and

that experienced travelers may sometimes prefer to avoid its congestion. The Department of Commerce's figures indicate that of the 6,226,290 U.S. citizens who traveled abroad in 1975, 2,648,752, or 42.5 percent, departed from the JFK International Airport. Although there is no breakdown, it has been estimated that more than 75 percent of the passengers departing from that airport travel eastward. While we do not have data indicating how many of those U.S. citizens returned to the U.S. by way of New York, we have no reason to believe that the percentage would deviate substantially from the departure figure. Whatever inconvenience is imposed upon the Government traveler in requiring his use of a carrier routed through New York, that inconvenience is shared by more than 40 percent of all U.S. citizens traveling abroad and does not warrant a deviation from the Fly America scheduling principles that would diminish U.S. air carrier receipts of Government revenues.

The on-time arrival figures for the two major international air carriers indicate that the cases which the Director offers as illustrative of the traveler's hardship in traveling via New York are atypical. A review of the airline schedules indicates that most flights from Europe arrive sufficiently early in the afternoon so that even when arrivals are delayed, connections to Washington can be obtained the same day. The fact that departure from the negotiating sites and connections in New York may each involve 4 hours of waiting time poses no unusual hardship. In this connection the Guidelines recognize that where a traveler is required to wait 6 hours or more to make connections en route, certificated service may be considered unavailable. Under 56 Comp. Gen. 216, *supra*, an employee is expected to delay his departure to use certificated service for a period that may well exceed 4 hours. The suggestion that the deviation proposed would reduce the number of baggage handlings does not take into account the fact that the transfer of baggage in New York would merely be replaced by another transfer of baggage at the alternative locations in Europe. Although the traveler may be faced with customs inspection at JFK International Airport instead of a less congested airport and that some connections may require a transfer between New York airports, we do not believe these facts evidence greater inconvenience than that shared by the greater proportion of all individuals traveling to Europe.

We recognize that international travel is not always a pleasant experience. However, the inconveniences complained of by the Director are no greater than the inconveniences that confront most international travelers. For this reason and inasmuch as the deviation proposed by the Director would result in a diversion of revenues from U.S. to foreign air carriers, we are unable to agree that such deviation com-

ports with the requirement of 49 U.S.C. § 1517 for use of available U.S. air carrier service.

[B–139965]

Personal Services—Detective Employment Prohibition—Applicability

Fifth Circuit Court of Appeals, in *United States ex rel. Weinberger v. Equifax*, construed 5 U.S.C. 3108, the Anti-Pinkerton Act, as applying only to organizations which offer "quasi-military armed forces for hire." Although the Court did not define "quasi-military armed force," we do not believe term covers companies which provide guard or protective services. General Accounting Office will follow Court's interpretation in the future. Prior decisions inconsistent with *Equifax* interpretation will no longer be followed. See 57 Comp. Gen. 480 (B–190784, May 25, 1978).

To the Heads of Federal Departments and Agencies, June 7, 1978:

Over the years we have had numerous occasions to interpret and apply the so-called Anti-Pinkerton Act, 5 U.S.C. § 3108 (1976). It occurs most frequently in connection with protests against the award of contracts for guard services, but occasionally arises in other contexts as well. The Act provides:

> An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia.

The original Anti-Pinkerton Act was enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368. It was made permanent the following year by the Act of March 3, 1893, 27 Stat. 591. The legislation was the result of congressional concern over the use of private detectives as strikebreakers and labor spies by private industry in the labor disputes of the 1880's and 1890's, a practice which gave rise to acts of violence and became an emotionally charged issue. The Act was given its present wording by the 1966 recodification of title 5 of the United States Code, Public Law 89-554, 80 Stat. 378, 416 (5 U.S. Code 1–8913 (1970)). Many bills have been introduced over the years to repeal or modify the Act, but none have been enacted. A comprehensive discussion of the origins of the Act is contained in S. Rept. No. 447 (to accompany S. 1543), 88th Cong., 1st Sess. (1963). It has become apparent in recent years that the Act has outlived the circumstances which produced it, and whether the Act continues to serve a useful purpose has been frequently questioned.

Interpretation of the Act began shortly after its enactment, and has evolved through a series of decisions by this Office and its predecessor, the Office of the Comptroller of the Treasury. In brief, the decisions have held that the Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appoint-

ments of individual employees of such agencies; that it prohibits the employment of a detective agency or its employees regardless of the character of the services to be performed, but does not prohibit the employment of a "protective agency"; that it applies only to direct employment and does not extend to subcontracts; that it does not extend to a wholly owned subsidiary of a detective agency if the subsidiary itself is not a detective agency. In distinguishing between a detective agency and a protective agency, we have considered the nature of the functions the agency may perform under its corporate charter and State licensing arrangements, as well as the functions it in fact performs. 8 Comp. Gen. 89 (1928); 26 *id.* 303 (1946); 38 *id.* 881 (1959); 41 *id.* 819 (1962); 44 *id.* 564 (1965); 55 *id.* 1472 (1976); 56 *id.* 225 (1977).

These administrative decisions evolved without the benefit of judicial precedent since, until recently, the Anti-Pinkerton Act had never been interpreted or discussed in a reported decision of any court. In 1977, the Fifth Circuit Court of Appeals construed the Act in connection with *United States ex rel. Weinberger* v. *Equifax*, 557 F.2d 456 (5th Cir. 1977), *cert denied* January 16, 1978 (46 U.S.L.W. 3445), *rehearing denied* March 6, 1978 (46 U.S.L.W. 3556). In that case, the plaintiff-relator contended that the defendant, a credit reporting company, was a detective agency for purposes of the Act, was thereby barred from doing business with the Government, and that its billing of the Government for services rendered violated the False Claims Act, 31 U.S.C. §§ 231–32. The Court of Appeals affirmed the District Court's dismissal of the complaint for failure to state a cause of action. In so doing, the Court concluded as follows:

> In light of the purpose of the Act and its legislative history, we conclude that an organization is not "similar" to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire. 557 F.2d at 463.

We have carefully considered the Court's decision and find ourselves in essential agreement with it. We note that the Court did not define "quasi-military armed force," nor do we see the need to attempt it here. Nevertheless, it seems clear that a company which provides guard or protective services does not thereby become a "quasi-military armed force," even if the individual guards are armed, and even though the company may also be engaged in the business of providing general investigative or "detective" services.

In the future, we will follow the decision of the Fifth Circuit in *Equifax* in interpreting and applying the Anti-Pinkerton Act; that is, the statutory prohibition will be applied only if an organization can be said to offer quasi-military armed forces for hire. Prior decisions of this Office inconsistent with the *Equifax* interpretation will no longer be followed.

[B-103315]

Fees—Membership—Appropriation Availability

Purchases of individual travel club memberships in the name of a Federal agency for the exclusive use of named individual employees is approved where the purchases will result in the payment of lower overall transportation costs by the Government.

In the matter of payment for travel club membership fees, June 8, 1978:

The San Francisco, California, Office of the Department of Housing and Urban Development Agency has requested our decision on the legality of using appropriated funds to purchase air travel club memberships for use in the procurement of official travel between points in the Hawaiian Islands. Similar requests have been received orally from other Government agencies.

Travel club cards are issued by Hawaiian Airlines, Inc. and by Aloha Airlines, Inc. There is a one-time charge of $5 for each membership. Presentation of a validated travel club card entitles the passenger to discount fares which apply during the off-peak hours from 12:01 a.m. to 6:30 a.m., 7 days a week, and from 8 p.m. to midnight on all days except Friday and Sunday. The discount fares are approximately 20 percent lower than regular fares, with certain exceptions. The $5 membership fee can be recouped from the lesser charges paid on one or two trips.

Ordinarily the travel club cards are issued in the name of each individual passenger and remain valid for the life of the member or until termination of the discount fares, whichever occurs first. One of the airlines has agreed, however, to the purchase of individual cards in the name of the Federal agency for the exclusive use of each individual employee when travelling on official business.

Section 5946, Title 5, U.S. Code, prohibits the use of appropriated funds for the payment of membership fees or dues of employees of the Government as individuals, except as authorized by specific appropriation, by express terms in a general appropriation, or in connection with employees training under sections 4109 and 4110 of Title 5. See 52 Comp. Gen. 495 (1973). The prohibition contained in section 5946 is against the payment of membership fees or dues of employees of the Government as individuals and does not apply so as to prevent a Federal agency as such from becoming a member for the purpose of carrying out the authorized functions of the agency. See 33 Comp. Gen. 126 (1953); 31 *id.* 398 (1952).

The appropriation for salaries and expenses of the Department of Housing and Urban Development, Public Law 95-119, approved October 4, 1977, 91 Stat. 1073, provides funds for the necessary admin-

istrative expenses of carrying out the functions of that Department. Transportation is a necessary function of that Department.

Accordingly, where it is administratively determined that the purchase of travel memberships in the name of the Department, for the exclusive use of named employees, will result in the payment of lower transportation costs by the Department, we will not object to the purchase.

[B–191318]

Energy—Department of Energy—Contracts—Subcontracts—Government–Owned, Contractor–Operated Facilities—Procurement Procedures

One exception to General Accounting Office (GAO) general policy of not reviewing award of subcontracts by Government prime contractors is for awards made "for" Department of Energy (DOE) by prime management contractors who operate and manage DOE facilities and although these prime contractors may engage in variations from the practices and procedures governing direct awards by Federal Government, general basic principles pertaining to contracts awarded directly by Federal procurement (Federal norm) provide the standard against which award actions are measured.

Contracts—Negotiation—Requests for Quotations—Evaluation Criteria

Although it would have been proper to cancel solicitation and make sole-source award when sole-source requirement is discovered after receipt of responses to request for quotations (RFQ), award to sole-source supplier under RFQ was not prejudicial to other competitor since ultimately the same result would have been attained and RFQ did not set forth any particular basis (such as price) for award, so that award cannot be said to have violated award criteria.

Contracts—Subcontracts—Competition—Applicability of Federal Procurement Rules

Federal procurement principles of fair play and impartiality require that evaluation and award factors be included in solicitations. GAO recommends that DOE require its prime management contractor to include such factors in its competitive solicitations.

Contracts—Negotiation—Sole-Source Basis—Justification

Materials to be tested may be purchased sole-source from only approved producer.

Contracts—Negotiation—Offers or Proposals—Preparation—Costs—Recovery

Prime contractor's failure to restrict solicitation to sole source does not rise to level of arbitrary or capricious action entitling protester to bid and proposal costs. Costs of preparing and filing protest are in any event unallowable.

In the matter of Fiber Materials, Inc., June 8, 1978:

Fiber Materials, Inc. (FMI) protests the award of a subcontract for a "rigidized but undensified preform of fine-weave-pierced-fabric (FWPF) carbon material woven from polyacrylonitrile (PAN) yarn" under request for quotations (RFQ) BKH/07–5583 issued by Sandia

Corporation (Sandia), the operating contractor for the Department of Energy's (DOE) Sandia Laboratories.

FMI complains that notwithstanding its lower priced offer ($14,904), Sandia awarded a contract to AVCO Corporation (AVCO) for $16,000 on the basis of technical concerns not specified in the RFQ. FMI requests termination of the AVCO contract, or if termination is "inappropriate," a dual award to FMI, plus bid and proposal costs and the costs of filing "this protest." For the reasons set forth herein, the protest is denied.

This Office does not ordinarily review the award of subcontracts by Government prime contractors, except in certain limited situations. *See Optimum Systems, Inc.*, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. One of the exceptions to our general policy is for those awards made "for" DOE (previously the Atomic Energy Commission and the Energy Research and Development Administration) by prime management contractors who operate and manage DOE facilities. See *General Electrodynamics Corporation*, B-190020, January 31, 1978, 78-1 CPD 78. Accordingly, since Sandia is purchasing the material to be supplied by AVCO under Sandia's prime contract with DOE for the operation of Sandia Laboratories, it falls within our subcontract award review policy.

Sandia (a subsidiary of Western Electric) operates Sandia Laboratories under a cost type, no profit, no fee contract with the Department of Energy and its procurement policies and practices are as agreed by Sandia and DOE. The DOE/Sandia agreement does not require Sandia to procure goods and services under the provisions of the Federal Procurement Regulations (FPR), although it does require Sandia to include specific clauses in its contracts "as are required by statute, and Executive Order." Since Sandia is not contractually limited in its procurement activities by the advertising requirements of the Federal Property and Administrative Services Act, 41 U.S.C. 252(c) (1970), or the Federal Procurement Regulations, 41 C.F.R. 1-1.301-2 (1977), Sandia conducts all of its procurements on the basis of negotiation, "seeking to avoid sole source" procurements, it claims, "to the extent possible." We have recognized that these practices and procedures of the Government's prime contractors are not by themselves subject to the statutory and regulatory requirements governing direct procurements by the Federal Government, 51 Comp. Gen. 329, 334 (1971); 49 *id.* 668 (1970), i.e., these contractors may engage in variations from the practices and procedures governing direct awards by the Federal Government. However, since the subcontract awards are regarded as "for the Government," we think it appropriate to measure the award actions against the general basic principles which govern the award of contracts by the

Federal Government. Cf. 49 Comp. Gen., *supra;* 51 *id.* 678 (1972); *Optimum Systems, Inc., supra* (where the "Federal norm" is the frame of reference applied to Federal agency approval of its prime contractor's subcontract awards) and *Griffin Construction Company*, 55 Comp. Gen. 1254 (1976), 76-2 CPD 26; *Union Carbide Corporation*, 56 Comp. Gen. 487 (1977), 77-1 CPD 243; *BBR Prestressed Tanks*, 56 Comp. Gen. 575 (1977), 77-1 CPD 302 (regarding application of the "Federal norm" to procurements conducted under Federal grants).

The RFQ did not contain any award criteria, i.e., there was neither a specified technical basis for the evaluation of offers received, nor an indication that price would or would not be controlling. The determination *not* to award to FMI was based on a memorandum received from Sandia technical personnel after Sandia's receipt of offers recommending award be made to AVCO as a sole-source supplier. The basis for that recommendation was that:

> The material being procured is intended for extensive evaluation and testing in order to provide data characteristic of future Navy and Air Force re-entry vehicles. The Air Force is just now completing its qualification program of FWPF-PAN for future re-entry vehicle applications [and] only AVCO has met Air Force Quality standards for FWPF-PAN billet preforms. The quality of FMI material is yet to be determined. FMI has produced only other products for the Air Force in the past. * * *
>
> Y-12 [another firm] is the inventor of the high pressure densification process for billet preforms and has been the Air Force technical consultant for carbon/carbon materials. * * * Y-12 states that on the basis of their experience with preform manufacturers, he would strongly recommend purchasing billet material for evaluation purposes only from Air Force-qualified vendors, in this case AVCO.
>
> Because the difference in price is relatively small and represents a minor portion of total material evaluation program expenses, we wish to have you place the order with AVCO. Only in this way can we be assured of receiving material of the quality we require.

DOE further reports that the material to be supplied under the contract was to be subjected to materials analysis tests, and that the resulting data is needed "in conjunction with future development and design work * * * on weapon components that will be required to function properly in association with the FWPF-PAN materials which the Air Force may use in future re-entry vehicle programs." In other words, it is Sandia's position that since it wanted to test material that was being used by the Air Force, its needs could only be satisfied by acquiring the material from the one firm whose material had received Air Force approval.

DOE concedes that the RFQ should have specified the requirement that the material be Air Force qualified, and that the RFQ should have been canceled with a subsequent sole-source award to AVCO. DOE asserts, however, that Sandia's negotiation with AVCO on a sole-source basis under the existing RFQ achieved the same result and that therefore there is no reason to terminate the AVCO contract.

The touchstone of Federal procurement is that goods and services will be obtained in such a way as to promote full and free competition for the award of contracts consistent with the nature and extent of the goods or services being procured. *See* 53 Comp. Gen. 209 (1973); 41 U.S.C. 253(a) (1970); 41 C.F.R. 1-3.101(c) (1977). Where competition is *feasible*, competing offerors should be treated in a fair and impartial manner. See *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74-2 CPD 368. In this regard, we have often stated that intelligent competition requires, *as a matter of sound procurement policy*, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. See, e.g., *Minjares Building Maintenance Company*, 55 Comp. Gen. 864 (1976), 76-1 CPD 168; *Signatron, Inc.*, *supra*. We regard this as basic to any fairly conducted procurement and view as inimical to fundamental Federal procurement principles of fair play and impartiality any procedures and practices which do not comport with this "requirement." We therefore concur with FMI and DOE that the RFQ was defective not only because it failed to specify Sandia's actual needs, but also because it failed to provide *any* basis (price or other factors) upon which evaluation for award would be based. We are recommending to DOE that it require Sandia to include evaluation factors for award in its solicitations for competitive procurements.

Notwithstanding these deficiencies, however, we do not believe that FMI was unduly prejudiced by them. As we have noted, nothing in the solicitation *obligated* Sandia to make award under the RFQ on the basis of price or any other factor—FMI merely *assumed* that the low offeror would receive the contract award. The time for FMI to have questioned this obvious solicitation impropriety, which was apparent prior to the date set for the receipt of proposals, was prior to that date. 4 C.F.R. 20.2(b)(1) (1977). Thus, FMI cannot now assert entitlement to award on the basis of its lower price.

With regard to the RFQ's failure to set forth Sandia's actual, more restrictive needs, we see no point in objecting to Sandia's failure to cancel the RFQ and make a separate award to AVCO since it appears that Sandia has established that a sole-source award to AVCO would have been proper. The record shows that the AVCO material had been "flight tested" and extensively evaluated prior to being qualified by the Air Force for use on re-entry vehicle applications, and that Sandia needed its own data on this material for application for future re-entry vehicle programs for use with military weapon components to be designed and developed by Sandia. The record further shows that the FMI material had not been Air Force qualified, and that Sandia, without the Air Force qualification, could not be certain that the properties of the materials proposed by FMI are sufficiently similar to

the qualified AVCO material to provide meaningful data for Sandia's own design programs. A sole-source award to AVCO under such circumstances is not objectionable. *See*, e.g., *Allen and Vickers, Inc., et al.*, 54 Comp. Gen. 445 (1974), 74–2 CPD 303; *H.J. Hansen Company*, B–181543, March 28, 1975, 75–1 CPD 187. Thus we conclude that award to AVCO was appropriate. There is, of course, no basis to recommend a "dual award" as FMI requests. Moreover, the foregoing does not, in our opinion, preclude FMI from supplying similar materials for "other" Sandia research or design programs as it asserts.

With respect to FMI's request for bid and proposal costs, bid preparation costs will be allowed where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal; mere negligence by the procuring activity is generally not sufficient to support a claim for bid preparation costs. *R. J. Beasley Construction Corporation*, B–190154, October 5, 1977, 77–2 CPD 274. In view of our conclusions, we believe the *most* Sandia can be charged with in this respect is negligence in failing to restrict the procurement to a sole-source—and this does not rise to the level of arbitrary or capricious action. *Cf. William D. Freeman, M.D.*, B–191050, February 10, 1978, 78–1 CPD 120. Moreover, even if FMI were able to show entitlement to bid and proposal costs, such costs would not include the costs of filing this protest because:

> Expenses incurred subsequent to bid opening * * * to pursue a protest are not expenses in undertaking the bidding process * * *. *See Descomp, Inc.* v. *Sampson*, 377 F. Supp. 254 (D. Del. 1974); *Matter of Frequency Electronics, Inc.*, B–178164, July 5, 1974.
>
> In *Descomp, supra*, at 367, the court * * * held that since the claimant "* * * has pointed to no statute or court-made exception authorizing the award of the protest costs or attorney fees, they will not be allowed." *T & H Company*, 54 Comp. Gen. 1021, 1027 (1975), 75–1 CPD 345.

Accordingly, the protest, and the claims for bid and proposal costs and bid protest costs are denied.

[B–145455]

Transportation—Vessels—American—Cargo Preference—Routing

Where service in United States vessels is not available for entire distance between U.S. port of origin and overseas destination, 1904 Cargo Preference Act requires transportation by sea aboard U.S. vessels with transshipment to foreign land carrier to be preferred over transportation by sea aboard U.S. vessels with transshipment to foreign-flag feeder ship even though latter is less costly.

In the matter of interpretation of 1904 Cargo Preference Act, 10 U.S.C. 2631 (1976), June 12, 1978:

The Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) requests an advance decision involving the 1904 Cargo

Preference Act, 10 U.S.C. 2631 (1976). He states that the question is whether that Act prohibits the Department of Defense from using in overseas areas foreign-flag shipping services for shipping military supplies where there is no United States vessel available and where use of the foreign-flag shipping services would result in the overall lowest transportation cost to the Government.

The Assistant Secretary states that the need for this authority arises from the increased use of containers and containerships for transportation of cargo by sea and the increasingly common use of large transoceanic containerships to serve only one or two major ports. Assembly and distribution of container cargo from and to ports a relatively short distance away from these major ports ordinarily is performed in auxiliary ships operated under foreign flag. These auxiliary ships are referred to as foreign-flag feeder ships and their service has been called foreign-flag feeder service.

The Secretary refers to our decision in 49 Comp. Gen. 755 (1970) in which we held that the 1904 Cargo Preference Act prohibits the use of foreign-flag feeder shipping services for any part of a voyage where shipping services are available in United States vessels for the entire distance between ports of origin in the United States and the destination port overseas. He mentions difficulties and inconsistencies which arise because of that decision which he believes require our further review.

As examples of the types of problems now encountered, the Assistant Secretary refers to the transportation of dry containerized military cargo between U.S. East Coast ports and places in Scotland such as the ports of Grangemouth and Greenock and the city of Thurso. This trade is served by three U.S.-flag carriers.

One U.S.-flag carrier sails to Rotterdam, Netherlands, where it transships to foreign-flag feeder ships cargo destined to Grangemouth; cargo for Greenock and Thurso is further transshipped at Grangemouth to foreign land carriers.

The other two U.S.-flag carriers sail to Felixstowe, England, where they transship to foreign land carriers cargo destined to the three places in Scotland. One of these carriers offers an alternative route to Greenock utilizing transshipment at Felixstowe to a foreign-flag feeder ship; it also offers an alternative route to Thurso utilizing transshipment at Felixstowe to a foreign-flag feeder ship and a further transshipment at Greenock to a foreign land carrier.

In the Assistant Secretary's view, use of the U.S.-flag carrier which transships cargo at Rotterdam to foreign-flag feeder ships should be preferred because it offers the overall lowest transportation cost to the Government. This view, he says, is clearly consistent with the 1970 decision because none of the three carriers serves the three places

in Scotland with United States vessels. He believes that the alternative of using the other two carriers who transship at Felixstowe to foreign land carriers would result in a preference for foreign land transportation over foreign water transportation, a preference he cannot read into the 1904 Act.

The Assistant Secretary also states that if we believe that service through Felixstowe is required by the Act, a further question is presented: Should the less expensive foreign-flag feeder service be favored over the more expensive foreign land service?

The 1904 Cargo Preference Act, as amended, 10 U.S.C. 2631 (1976) reads:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

In 49 Comp. Gen. 755 we recognized that the statute is subject to two exceptions, one express and the other implied. If the President finds that the freight charged by United States vessels is excessive or otherwise unreasonable, the statute explicitly provides that contracts for transportation may be made as otherwise provided by law. And in the present case we assume that no such determination has been made.

The second exception arises by necessary implication in circumstances where United States vessels are not available to perform the transportation by sea that is required. In such circumstances, foreign-flag vessels may be used. 26 Op. Atty. Gen.. 415, 419 (1907). As *Curran* v. *Laird*, 420 F.2d 122, 133 (D.C. Cir. 1969) makes clear, the implied exception may be used where ". . . military supplies, perhaps urgently needed, must sit upon the docks despite the availability of foreign vessels to carry them" which is not the case here.

We declined in 49 Comp. Gen. 755 to read a third exception into the Act to permit transportation by sea of containerized military cargo in a U.S.-flag ship for the major part of the voyage and in a foreign-flag feeder ship for a minor part of the voyage where United States vessels were available for the entire distance at charges not excessive or otherwise unreasonable. Here, United States vessels are are not available for the entire distance. The question then is whether the Act prohibits transshipment to foreign-flag vessels when transshipment to foreign land carriers is available.

In our view the plain words of the 1904 Cargo Preference Act prohibit the use of foreign-flag vessels for any "transportation by sea" absent circumstances justifying the use of either of the two recog-

nized exceptions. The fact that U.S.-flag carriers in the exercise of their managerial discretion chose different intermodal arrangements for moving containerized transportation between places is immaterial; the law in requiring the use of United States vessels necessarily forbids the use of foreign vessels.

The idea that use of the U.S.-flag vessel which transships cargo at Rotterdam to foreign-flag feeder ships should be preferred because it offers the lower overall transportation cost also is immaterial. The mandatory language of the law clearly indicates that cost considerations cannot be used to avoid the requirement that United States vessels be used except where the President finds that the freight charged is excessive or otherwise unreasonable. 48 Comp. Gen. 429, 432 (1968); 43 *id.* 792, 797 (1964). Furthermore, our decision in 49 Comp. Gen. 755 (1970) is inapposite because that decision involved a situation where the transportation by sea could be performed entirely by United States vessels.

The use of the two carriers who transship cargo at Felixstowe to foreign land carriers in our opinion does not introduce into the 1904 Cargo Preference Act a preference for foreign land transportation over foreign water transportation. One purpose of the law is to protect American shipping from competitive foreign shipping, not from foreign land transportation. Further, the form of inland movement from the port is immaterial. See 43 Comp. Gen. 792 (1964).

The last consideration prohibiting the use of foreign-flag vessels in this case, besides the plain words of the 1904 Act, is the practical difficulty of determining the acceptability of the alternatives involving the use of foreign-flag vessels. The objectives of the Act are to aid United States shipping, foster employment of United States seamen, and promote the shipbuilding industry in the United States. 52 Comp. Gen. 809, 811 (1973). Would using a foreign-flag vessel from Rotterdam, Netherlands, to complete the voyage to the three destinations in Scotland better fulfill the Act's objectives than using a foreign-flag vessel from Felixstowe, England? Should this determination be made by comparing the nautical mileage from Rotterdam to destination with the nautical mileage from Felixstowe to destination, or by comparing other factors or alternatives? If there were an alternative of using a United States flag vessel to a port in the Caribbean which used a foreign-flag vessel to complete the voyage to any of the three destinations in Scotland, would that be an acceptable alternative? There is nothing in the 1904 Act or its legislative history to help answer these questions. And we think that given these problems, relaxation of strict enforcement could lead to reduction in the use of United States vessels contrary to the intention of the 1904 Act.

Since we have decided that service through Felixstowe with a transshipment to foreign land carriers is required by the Act, no answer is necessary to the question of choosing at Felixstowe between the more expensive foreign land transportation and the less expensive foreign-flag feeder services.

[B-191076]

Leaves of Absence—Sick—Substitution for Annual Leave

Employee entitled to use sick leave specifically requested that such time be charged to annual leave. Family's timely request subsequent to employee's death that sick leave be substituted for annual leave may in agency's discretion be allowed and be basis for agency to pay additional lump-sum leave payment to survivor. B-164346, June 10, 1968, and B-142571, April 20, 1960, modified.

In the matter of Interstate Commerce Commission—retroactive substitution of sick leave for annual leave, June 12, 1978:

The Chairman of the Interstate Commerce Commission has requested a decision as to whether an absence, which could have been charged to sick leave but was charged to annual leave at the employee's request, may after the employee's death be charged to sick leave with the recredited annual leave included in a lump-sum leave payment to the survivor of the deceased employee.

The Chairman states the circumstances as follows:

An employee of this Commission requested annual leave, which was approved for the period, November 7–18. He signed the time and attendance cards before commencing the leave. He committed himself to a hospital on November 7, for psychiatric care and was discharged shortly before his death. He did not wish it to be known he was seeking professional care and did not inform anyone at the Commission that he was going to the hospital. His hospitalization was learned only after his death, when we were informed by a member of his family. The family then requested that his annual leave be recredited and his absence be charged to sick leave. This request initially was denied by the Commission as the employee had requested the annual leave purposely.

Further, it is administratively reported that the employee was on duty immediately prior to the period of leave in question, and that he returned to duty on November 21, 1977, was on sick leave on November 25 and returned on duty on November 28 until his death on November 29, 1977.

In 31 Comp. Gen. 524 (1952), it was recognized that absence due to illness may be charged to accrued annual leave if timely requested by the employee and approved by the administrative office concerned. The charge to annual leave in the present case is in accord with that decision.

The Chairman has cited two decisions of our Office, B-142571, April 20, 1960, and B-164346, June 10, 1968, which hold that sick leave may not be retroactively substituted for annual leave granted specifically at the employee's request for the purpose of a greater lump-sum

payment to the survivor of a deceased employee. He states, however, that those rulings may not necessarily apply to the present situation.

The Court of Claims recently decided *Lindsey* v. *United States*, No. 213-76 (Ct. Cl. July 8, 1977), an analogous case wherein an employee requested and was granted annual leave for a period of incapacity to prevent possible forfeiture. Later that calendar year the employee elected to retire and requested that sick leave be retroactively charged for the period in lieu of the annual leave previously requested and granted. His request was motivated by the fact that the annual leave could be included in his lump-sum payment, while the fractional month credit for sick leave gave him no benefit for retirement purposes. The court held that when an employee seeks leave substitution to be compensated for all his accumulated annual leave in the same year of his retirement, substitution of sick leave for annual leave is allowable. The court, although affirmatively limiting its holding to the specific facts of the case, made the following suggestion to our Office:

> It would not be inappropriate for the General Accounting Office to review *de novo* its over-all *post hoc* leave-substitution policy in the light, first, of the new 1969 and 1973 legislation, and, second, of the reality and measure of the burden on the employing agencies of permitting such retroactive adjustments. It may well be that leave changes should be allowed unless the agency itself feels that the administrative burden is too great, and accordingly adopts an internal regulation limiting or curtailing the privilege. It may even be that no rule applicable to the whole Government need be continued or promulgated, but that the matter should be left to each agency's own assessment of the needs of its employees balanced with the administrative ease or trouble in accommodating those needs.

Without attempting to set forth a new general policy at this time, we now believe that, at least in those cases where the employee retires or dies during the same year in which the leave is taken, and a timely request is made, it is appropriate to permit agencies to allow retroactive leave substitution in their discretion depending upon the circumstances of each case. Our prior decisions to the extent of any inconsistency with this decision will no longer be followed.

In the present case, therefore, we have no objection to the retroactive recrediting of annual leave of the deceased employee and the charging his absence for the period of November 7–18, 1977, to sick leave if the Interstate Commerce Commission, in its discretion, determines that such action is appropriate.

[B–191266]

Compensation—Promotions—Temporary—Detailed Employees

Arbitrator awarded backpay to two employees based on provision in negotiated agreement requiring a temporary promotion when an employee is assigned to higher grade position for 30 or more consecutive work days. Award may be implemented since arbitrator reasonably concluded that agency violated agreement in assigning higher grade duties to grievants for over 30 days. Award is con-

sistent with prior General Accounting Office decisions and does not conflict with rule against retroactive entitlements for classification errors.

In the matter of Roy F. Ross and Everett A. Squire—arbitration award of temporary promotions for higher level duties, June 12, 1978:

This action involves a request by the Federal Labor Relations Council, dated February 7, 1978, for an advance decision as to the legality of implementing the backpay award of an arbitrator in the matter of *Internal Revenue Service, Jacksonville District and National Treasury Employees Union, Florida Joint Council* (Russell A. Smith, Arbitrator), FLRC No. 77A–97. The arbitrator found that the agency (IRS) had violated its collective bargaining agreement with the union (NTEU) in failing to temporarily promote the two grievants during their assignments to higher grade duties, and he awarded them backpay as a remedy. This case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

BACKGROUND

The background of this case, as presented in the arbitrator's award and opinion dated July 21, 1977, is as follows. The grievants, Roy F. Ross and Everett A. Squire, were employed as Revenue Officers, grade GS–9, by the Internal Revenue Service, Jacksonville District, and were assigned to the Collection Division in the IRS office in St. Petersburg, Florida. The principal duties of a Revenue Officer in the Collection Division are to arrange for the collection of delinquent taxes and to secure delinquent returns. Each case is assigned a numeric indicator supplied by the IRS computer on the basis of selected objective criteria. Pursuant to the "Case Assignment Guide for Revenue Officers" of the IRS Manual, the numeric level assigned indicates the predicted grade level of the case and is the primary consideration in the assignment of cases for field contact. Numeric Level 1 cases meet the predicted work requirements of grade GS–12; Level 2 cases meet such requirements of grade GS–11; and Level 3 cases are for lower grades. The general objective is that Level 1 and 2 cases are to be assigned to Revenue Officers in grades GS–12 and GS–11 to the maximum extent feasible, but they may be assigned as developmental work to lower graded officers to enable them to gain experience in higher grade work. Such developmental work normally should be no more than 25 percent of their work. Finally, group managers are authorized to review the cases and make changes in the numeric level indicators.

On or about November 24, 1975, there was a general reallocation of case assignments to Revenue Officers in the St. Petersburg office.

As a result of that action, Messrs. Ross and Squire filed grievances in late January, 1976, requesting temporary promotions to grade GS-11 for the period from November 24, 1975, to January 26, 1976, in the case of Mr. Ross and from December 9, 1975, to January 26, 1976, in the case of Mr. Squire. The grievants also requested permanent promotions to grade GS–11, but it appears that they later withdrew that request.

The grievants sought these temporary promotions under the provisions of Article 8 (Details), Section 1, of the Multi-District Agreement between Internal Revenue Service and National Treasury Employees Union, on the ground that more than 50 percent of their case load and completed work had been classified Level 2 (GS-11) work for a period of more than 30 working days. Almost immediately after the two grievances were filed, the agency conducted a review of the grievants' case inventories in order to evaluate the grievances. The review was conducted on January 29, 1976, by two management officials and a union representative. They concluded that only a small portion of the cases then assigned to Messrs. Ross and Squire actually belonged in Level 2 and, therefore, that the prior assignment of Level 2 cases to them did not constitute a detail to a higher grade position. They did not, however, change the coded level of the cases to Level 3 or reassign the cases to other officers at that time. Then, on March 1, 1976, there was another reshuffling of assignments and the bulk of the Level 2 cases assigned to the grievants were transferred to Revenue Officers of grade GS–11 classification.

The Acting District Director of IRS denied the grievances on the ground that Messrs. Ross and Squire were not assigned or detailed to a position of a higher grade since no vacant position of a higher grade existed, and therefore, there was no violation of Article 8, Section 1, and no basis for the relief requested.

ARBITRATOR'S OPINION AND AWARD

The arbitrator first addressed the issue of whether the grievants did in fact perform grade GS–11 work during the periods claimed. The standard he applied is whether the higher level duties assigned are greater than normally expected of "developmental" work and have been performed at least at the minimum range of skill and responsibility expected.

He found that, on November 24, 1975, each grievant was assigned to preponderance of cases that were coded Level 2 and thus presumably involved grade GS–11 work. Mr. Squire received 75 cases, of which 62 (84 percent) were coded at Level 2. Mr. Ross received 26 cases, of which 22 (85 percent) were Level 2. After November 24,

1975, Mr. Squire testified that a preponderance of his work was on Level 2 cases and that in the next weeks he closed 36 cases, of which 30 were Level 2. Mr. Ross testified that, between November 24, 1975, and January 28, 1976, he received 92 more cases, of which 58 (62 percent) were Level 2, and an additional 42 cases by transfer, of which 33 were coded Level 2. He closed 33, of which 21 were Level 2.

This data was not challenged by the IRS nor was there any evidence submitted that, prior to the file review of January 29, 1976, the agency revised the level of any assigned case or questioned the job performance of grievants. As to the January 29 review, the arbitrator noted that it did not focus on the cases closed after November 24 and prior to the filing of the grievances and should not be given retroactive effects as an evaluation of the work performed prior to January 29.

On the basis of the foregoing analysis, the arbitrator found that the grievants had performed a substantial amount of grade GS–11 level work during the period November 24, 1975, to January 29, 1976, such as to warrant a finding that they had been assigned to grade GS–11 work for that period within the meaning of Article 8, Section 1, assuming its applicability. He further found that the proportion of such higher level work far exceeded the normal maximum of 25 percent properly assignable for "developmental" purposes. After January 29, he found that the grievants did not perform a significant amount of grade GS–11 work.

The arbitrator then turned to the issue of whether Article 8, Section 1, of the agreement applies to the facts of this case. It reads as follows:

> The Employer agrees that an employee who is assigned to a position of higher grade for thirty (30) consecutive work days or more will be temporarily promoted and receive the rate of pay for the position to which he is temporarily promoted. The Employer further agrees to refrain from rotating assignments of employees to avoid compensation at the higher level.

The arbitrator concluded that this provision applied to the grievance on the basis of an analysis of the nature of work performed, without regard to whether there had been a formal assignment or detail of the employee to the higher graded position or whether a vacancy existed in the higher graded position, provided that the job duties assigned at the higher level were of a quantity or magnitude beyond that normally expected of "developmental" work assignments and were performed at the minimum level of skill and responsibility properly expected. In so holding, he rejected the agency's contention that Article 8, Section 1, applies only when an employee has been detailed to a position for which there is a funded vacancy.

The arbitrator also rejected the agency's contention that the grievances involving Messrs. Ross and Squire must be considered under

Article 9, Section 2, of the agreement dealing with Evaluations of Performance. That section provides, in pertinent part, as follows:

> * * * Where it has been administratively determined that an employee has performed:
>
> 1. higher graded duties for 50% or more of the previous 12 month period,
> 2. in a manner which fully meets the performance requirements or the higher graded duties,
>
> such performance will be recognized by a Special Achievement Award. * * *

The arbitrator stated that Article 9, Section 2, can be read as dealing with a situation where, over a long-term period, the employee intermittently performs higher graded duties aggregating 50 percent or more of his time, while Article 8, Section 1, can be read as dealing with a situation where the employee for a shorter period of time (but at least 30 consecutive days) performs such duties as a significant portion of his total work load.

The arbitrator also rejected the agency's contention that the grievant's complaint involves a classification error for which a statutory appeal procedure exists. He found that, since the complaint dealt with the *temporary* assignment of higher graded work which was normally assigned to someone in an established grade GS–11 Revenue Officer position, the Civil Service Commission (CSC) classification appeals procedure would not be available. Finally, he ruled that backpay was not precluded by rulings of the Supreme Court or the Comptroller General.

Therefore, the arbitrator sustained the grievances and awarded the grievants backpay based upon the pay differential between grades GS–9 and GS–11 for the applicable periods.

On appeal to the Federal Labor Relations Council, the agency contends that the arbitrator's award is inconsistent with and in violation of the classification requirements of the CSC since the arbitrator ignored the position classification standards promulgated by the CSC for the Internal Revenue Officer Series, GS–1169–0, and substituted the agency's "case assignment guide" in determining whether the grievants had actually performed higher level duties. The agency also argues that the issue is essentially a classification question, that is, whether the duties which the grievants were assigned should have been classified at the grade GS–11 level. Thus, the agency concludes: (1) that the award may not be implemented since the issue involves classification appeals which are subject to a statutory appeals procedure and are, therefore, outside the scope of arbitration; (2) that backpay may not be awarded for classification errors; and (3) that the decisions of our Office concerning extended details are not applicable.

The union contends that the arbitrator's finding that the grievants performed grade GS–11 work is a finding of fact which is not reviewable by the Council and is not otherwise in contravention of CSC

classification standards. The union also argues that the classification appeals procedure is inappropriate in this case since the grievants do not seek to have their positions reclassified but rather seek only higher pay for temporarily assuming the duties of a higher graded position. Finally, the union states that the award of backpay is appropriate under decisions of our Office since there has been a violation of a collective bargaining agreement.

DISCUSSION

Because of the Comptroller General's authority over the expenditures of appropriated funds (31 U.S.C. §§ 74, 82d), the Federal Labor Relations Council has requested our decision as to whether the arbitrator's award violates applicable law. In deciding the issue, we fully agree with the Council's view that courts and agencies authorized to review an arbitration award must be reluctant to interfere with it. At the same time, we must carry out our statutory duty to make sure that Federal funds are spent only in accordance with the laws passed by the Congress. Accordingly, our duty is to determine whether the award made by the arbitrator is consistent with applicable laws, regulations, and Comptroller General decisions so that it may be validly implemented through the expenditure of appropriated funds for backpay.

We have held that the violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. See *Annette Smith, et al.*, 56 Comp. Gen. 732 (1977) and decisions cited therein. The Back Pay Act, 5 U.S.C. § 5596 (1976), and the implementing Civil Service Commission regulations contained in 5 C.F.R. Part 550, Subpart H, are the appropriate authorities for compensating employees for such violations of a negotiated agreement assuming there is a finding that the denial or loss of pay or allowances is a result of and would not have occurred but for the unjustified or unwarranted personnel action. *Smith, supra.* See also 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Fed. Reg. 16125.

In ruling upon the legality of appropriated fund expenditures incident to arbitration awards, we generally will not rule upon any exceptions to the arbitrator's award relating to the facts, and thus, in the present case, we shall limit our consideration to the legality of implementing the award based on the facts as found by the arbitrator

that the grievants had performed a substantial amount of grade GS 11 work during the period in question.

In the case before us, the IRS, in effect, maintains that the arbitrator misinterpreted Article 8, Section 1, of the agreement. The agency's view is that the section applies only to details to higher grade positions and not to the assignment of higher level duties. Thus, according to the agency, the section does not apply to the instant case because the grievants were not "detailed" to vacant, budgeted positions within the meaning of the Federal Personnel Manual, but were merely assigned higher graded duties.

The arbitrator carefully considered the IRS arguments on this issue. He posed the question and answered it as follows (Opinion, p. 24):

> In view of the conclusions reached above, it is necessary to determine whether Article 8, Section 1, applies to a fact situation such as that posed in the instant cases. The material interpretative question is whether it has application on the basis alone of an analysis of the nature of the work performed during a consecutive 30-day period, without regard to whether there has been a formal assignment or "detailing" of the employee to the higher GS grade and whether or not there exists a "vacancy" in the GS 11 position. In my judgment, although the question is not free from doubt, a proper interpretation is that it has application in the former circumstance provided the employee's performance of job duties of the higher grade level is such as to meet the standards outlined in the analysis in Part I of this Opinion, i.e., where the job duties assigned are of a quantity or magnitude beyond that normally expected of "developmental" work assignments and have been performed at least at the minimum level of skill and responsibility properly to be expected.

He, therefore, determined that Article 8, Section 1, of the agreement applied to the grievances before him based on the nature of the work performed, without regard to whether there had been a formal assignment or detail to the higher grade or whether there was a vacancy in the higher grade position. He stated (Opinion, p. 27) that "[i]f the proper performance of higher graded work of significant amounts constitutes, in effect, an 'assignment' of the employee to the classification to which such work is normally assigned, then it follows that there was a temporary assignment to a 'position,' namely that of the classification. The GS 11 Revenue Officer classification obviously is a 'position'."

In our consideration of an arbitration award, we will give great weight to the arbitrator's interpretation of the collective bargaining agreement. If it represents a reasonable interpretation of the negotiated agreement under the circumstances of the case, we will accept the arbitrator's interpretation, even if more than one interpretation could be made or we might have interpreted the agreement differently in the first instance.

In the present case, the negotiated agreement clearly could be interpreted to apply only to formal details to vacant higher level positions, as the IRS has interpreted it. But the agreement must be looked

at in the context of the facts of the case. Here, the difference between the grades of Revenue Officers is based in large part on the level of difficulty of the cases assigned. As stated above, the IRS has established a system of coded numeric levels for case assignments equated to grade levels, as well as a procedure for revising the coded level if necessary. Under such a system it seems clear that assigning all or substantially all higher grade work to a Revenue Officer would be tantamount to a detail to the higher grade position. The arbitrator found that 84 percent and 85 percent, respectively, of the cases assigned to the grievants on November 24, 1975, were higher grade work.

We note that in the last sentence of Article 8, Section 1, the agency has agreed "to refrain from rotating assignments of employees to avoid compensation at the higher level." We think it is reasonable to interpret Article 8, Section 1, as also applying to prohibit the agency from assigning a significant amount of higher level cases to a Revenue Officer for 30 days or more to avoid compensation at the higher level. In our opinion, therefore, the arbitrator's interpretation of the collective bargaining agreement between IRS and NTEU is reasonable and proper and we will accept it for purposes of determining whether his award is valid.

We have considered the objections to the award raised by IRS and have concluded that the award does not violate law or regulation for the reasons set forth below.

The award is consistent with prior decisions of this Office. We have upheld prior awards of retroactive temporary promotions with backpay based on the assignment of higher level duties to employees. Thus, in *Annette Smith*, 56 Comp. Gen. 732 (B–183903, June 22, 1977), the arbitrator had found that, in addition to periods of formal details, the agency had on numerous occasions assigned custodial employees to perform higher grade duties for extended periods without officially recording such details. We upheld the award of backpay for both periods based on our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 *id.* 427 (1977), which permitted backpay for details of more than 120 days to higher grade positions.

Although our *Turner-Caldwell* decisions are based on the 120 day period for details to higher grades specified in the Federal Personnel Manual, they do not preclude retroactive promotions for shorter periods when specified in agency regulations or in negotiated agreements. In *Kenneth Fenner*, B–183937, June 23, 1977, where nondiscretionary agency regulations provided for temporary promotions for details of more than 60 days to higher grade positions, we held that the agency had a mandatory duty to promote an employee beginning on the 61st day of such a detail. See also *Burrell Morris*, 56 Comp. Gen.

786 (B-187509, July 11, 1977), where we held that an 8-day detail of a prevailing rate employee to perform the duties of a higher level General Schedule position was a violation of a collective bargaining agreement provision. We concluded that the violation constituted an unwarranted personnel action which entitled the employee to corrective action under the Back Pay Act.

Accordingly, in the present case, the 30-day period specified in Article 8, Section 1, of the agreement is not precluded by *Turner-Caldwell*. Since the Federal Personnel Manual (Chapter 300, § 8-4e) permits an agency to provide for temporary promotions for brief periods of service, an agency may enter into a collective bargaining agreement making such promotions mandatory for periods of less than 120 days.

Another decision of this Office involved facts very similar to those involved in the present grievance of Ross and Squire. In B-181173, November 13, 1974, two grade GS-5 voucher examiners, who normally worked on travel vouchers, were requested to process more difficult employee relocation vouchers because the office has accumulated a backlog of this work. The relocation vouchers were normally assigned to grade GS-6 voucher examiners. After a period of training they spent 5½ months processing the relocation vouchers before they were returned to their regular duties. The employees filed a grievance, through their union, under a negotiated agreement provision requiring temporary promotions for details to higher grade positions of 60 days or more. Even though there had been no formal detail, the arbitrator found that the two employees had been "detailed" to a temporary assignment of performing higher level duties and that the agency had violated the agreement by failing to compensate them as "temporarily promoted" to grade GS-6 during the 5½-month period. We upheld the award on the ground that the agency's failure to temporarily promote in violation of the agreement was an unjustified personnel action under the Back Pay Act which entitles the employees to backpay. See also 54 Comp. Gen. 263 (1974).

This case does not involve the situation of a detail to a position which has not been established or classified. See *Willie W. Cunningham*, 55 Comp. Gen. 1062 (1976). It is clear in the record before us that the position of Revenue Officer, grade GS-11, is an established and classified position with position classification standards which describe the nature and complexity of assignments as presenting a wider range of problems than those encountered at the grade GS-9 level.

The agency has not denied the existence of an established grade GS-11 position, but it argues there were no vacant, funded positions

at grade GS–11 to which the grievants could be assigned. We are unaware of any requirement that a position be vacant in order for an employee to be detailed to that position, and we would point out that the definition of a detail as set forth in the FPM Manual, Chapter 300, Subchapter 8, states that a position is not filled by a detail since the employee continues to be the incumbent of the position from which he is detailed.

Finally, the agency contends that the grievance actually involves a classification appeal which is outside the scope of arbitration and that the award violates classification requirements of the CSC. Classification appeals to the Civil Service Commission are subject to the procedures set forth in 5 U.S.C. § 5112 (1976) and 5 C.F.R. Part 511, Subpart F (1977). These provisions establish the right of an employee to have his current position reviewed and classified based upon those duties officially assigned to the employee at the time the appeal is filed. However, we believe that grievances or claims concerning temporary assignments of higher level duties or details do not involve improper classification and are not cognizable under the classification appeal procedure. The rule against retroactive entitlements to backpay for classification errors was reaffirmed by the United States Supreme Court in *United States* v. *Testan*, 424 U.S. 392 (1976), but it is our view that the *Testan* case is limited to improper classification and does not affect entitlement to *temporary* promotions for improper details. See *Reconsideration of Turner-Caldwell*, *supra*. Moreover, we do not agree with IRS that the arbitrator disregarded the CSC's classification standards. It appears to us that he followed the agency's own practices implementing the classification standards by assigning numerical levels to the cases assigned to Revenue Officers, representing the predicted degree of difficulty of each case.

This decision is not intended to change the general rule that the mere accretion of duties in a position does not entitle the occupant to a promotion. We simply hold that where there is a mandatory provision requiring temporary promotion for assignments to higher level positions and where the fact-finder has determined that the assignment of higher level work is of such magnitude as to be equivalent to a "detail" to the established higher level position, an award of a retroactive temporary promotion with backpay may be proper depending upon the circumstances of the case.

CONCLUSION

We believe the arbitrator's interpretation of the contract and his award are reasonable and consistent with law, regulations, and prior

decisions of our Office. Accordingly, we conclude that the arbitrator's award is valid and may be implemented.

[B-138942]

Travel Expenses—Air Travel—Fly America Act—Applicability

Joint Travel Regulations may be revised to indicate that section 5 of International Air Transportation Fair Competitive Practices Act (49 U.S.C. 1517) does not restrict the use of foreign air carriers when such transportation is paid for in full by a foreign government, international agency or other organization either directly or by reimbursement to the United States. However, the Merchant Marine Act requirement for use of vessels of U.S. registry applies regardless of whether the transportation is ultimately paid for by a foreign government, international agency or other organization.

Funds—Nonappropriated—International Air Transportation

The requirement of 49 U.S.C. 1517 for use of certificated U.S. air carrier for government financed foreign air transportation applies not only to transportation secured with appropriated funds but to transportation secured with funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States * * *." Where international air transportation is secured with other than appropriated funds, agencies should apply the Fly America Act Guidelines.

In the matter of Fly America Act—revision of Joint Travel Regulations, June 13, 1978:

This decision is in response to a letter dated February 9, 1978, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting an advance decision as to whether the Joint Travel Regulations may be revised to indicate that the provisions of section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, Public Law 93-623, January 3, 1975, 88 Stat. 2102, 2104, amending the Federal Aviation Act of 1958 by adding section 1117, 49 U.S.C. 1517 (Supp. V, 1975), do not apply to foreign air travel when such travel is either paid for directly and in full by a foreign government or international organization, or paid for out of appropriated funds which are later reimbursed by a foreign government. A decision is also requested concerning the requirement imposed by 46 U.S.C. 1241(a) (1970) with respect to the use of vessels registered under the laws of the United States and whether the Joint Travel Regulations may be revised to exempt from that requirement transportation which is ultimately paid for by other than the United States Government. The Per Diem, Travel and Transportation Allowance Committee has assigned this matter PDTATAC Control No. 78-6.

The amendment made by Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 requires the Comptroller General to disallow any expenditures from appropriated funds

for payment for personnel or cargo transportation on noncertificated air carriers (those carriers that do not hold certificates under section 401 of the Federal Aviation Act of 1958, 49 U.S.C. 1371) "in the absence of satisfactory proof of the necessity therefor." In order to carry out our responsibilities under section 5, our Office issued guidelines on June 17, 1975, B–138942, revised March 12, 1976, which directed the Executive departments, agencies, and instrumentalities of the United States to modify their current regulations concerning Government-financed commercial foreign air transportation. The application of these guidelines was later clarified in 55 Comp. Gen. 1230 (1976), and they are now reflected in Volume 1, Joint Travel Regulations, para. M2150 (change 298, December 1, 1977) and Volume 2, Joint Travel Regulations, para. C2204–4 (change 147, January 1, 1978).

The purpose behind section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 is to counterbalance the advantages many foreign airlines enjoy by virtue of financial involvement and preferential treatment by their respective governments. Thus, the clear intent of Congress was for United States Government–financed foreign air transportation to be accomplished by certificated United States air carriers to the greatest extent possible. 55 Comp. Gen. 1230, 1232. We find nothing in the act or its legislative history to suggest that a Government employee or any other person is required to use certificated United States air carriers when no expenditure of Government revenues is involved. This intent to limit the scope of this provision to those occasions when Government funds are expended is reflected in S. Rep. No. 1257, 93 Cong., 2d Sess. 9(1974) where it is stated:

> We do not suggest, of course, that U.S. business traffic ought to be reserved exclusively for U.S. flag airlines. But it certainly is in order to require that all government-financed transportation is accomplished on U.S. flag airlines wherever and whenever possible.

With respect to transportation secured on behalf of a foreign nation or international agency, section 5 imposes the requirement to use certificated United States air carriers for foreign air transportation only in those cases where international air transportation is furnished:

> * * * to or for the account of any foreign nation, or any international agency or other organization of whatever nationality, without provision for reimbursement * * *

In view of the clear statutory language and its purpose, we concluded that the Joint Travel Regulations may be revised to indicate that 49 U.S.C. 1517 as added by section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 does not apply to foreign air transportation paid for directly and in full by a foreign government, international agency or other organization, or when the

expense for such travel is paid out of funds which are later reimbursed by a foreign government, international agency, or other organization. Where transportation costs are initially paid by the United States, the requirement to use certificated air carrier service does not apply only when there is a specific provision for reimbursement to the United States for the cost of the transportation involved.

It is noted that although the Fly America Guidelines referred to above apply to transportation secured with appropriated funds, the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service applies more broadly to transportation secured with funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States." In implementing the Fly America Act provisions with respect to transportation procured with other than appropriated funds, agencies should apply the standards set forth in the Fly America Act Guidelines.

Regarding the application of the suggested rule to travel aboard ships not registered under the laws of the United States, section 901 (a) of the Merchant Marine Act of 1936, June 29, 1936, ch. 858, 49 Stat. 1985, 2015 as amended, 46 U.S.C. 1241(a) provides:

> (a) Any officer or employee of the United States traveling on official business overseas or to or from any of the possessions of the United States shall travel and transport his personal effects on ships registered under the laws of the United States where such ships are available unless the necessity of his mission requires the use of a ship under a foreign flag: *Provided*, That the Comptroller General of the United States shall not credit any allowance for travel or shipping expenses incurred on a foreign ship in the absence of satisfactory proof of the necessity therefor.

Since that provision applies to all official travel of officers and employees of the United States and transportation of their personal effects without regard to the source of funds used to pay for the transportation, no general exception to its restrictions may be made based upon the fact that funds used to pay for travel are those of a foreign nation or international organization.

Although in B–185465, May 7, 1976, we held that the general prohibition against the use of foreign flag carriers applied to those situations where the appropriated funds expended were recoverable in full from a foreign government, the travel involved in that case predated enactment of Public Law 93–623 and the decision was specifically predicated upon the then current provision of the Joint Travel Regulations implementing Senate Concurrent Resolution 53, 76 Stat. 1428, expressing the sense of Congress that travel by officers and employees on official business be performed on U.S. air carriers. It therefore poses no impediment to a revision of the present regulations based on the foregoing discussion.

[B-187665, B-188119]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Locality Basis for Determination

Department of Labor's policy of basing wage determinations, issued pursuant to Service Contract Act, on wide geographic area within jurisdiction of Government procuring activity, when place of performance is not known prior to receipt of bids, although questionable, is not clearly contrary to Act.

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Locality Basis for Determination—More Than One Service Area

When solicitation for services to be provided throughout 5-state region divides region into service areas and requires successful bidders to perform within each service area, separate wage determinations for each service area, rather than single composite wage determination for entire area, are more appropriate.

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, etc., Determinations—Locality Basis for Determination—Locality Erroneously Stated in Solicitation

Agency's improper designation of 5-state area on Standard Form 98, Notice of Intention to Make a Service Contract, as place of performance is not prejudicial to protester who points out that performance would not be limited to 5-state area, since under current Department of Labor approach same wage determination, reflecting 5-state area as locality of performance, would have been issued.

In the matter of The Cage Company of Abilene, Inc., June 13, 1978:

This case involves the propriety of wage determinations included in two solicitations issued by Region 7 of the General Services Administration (GSA) pursuant to the Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (1970 and Supp. V, 1975) (hereinafter the Act).

In each solicitation, the "locality" covered by the wage determination is the 5-State area comprising GSA Region 7. The protester objects to the wage determinations on the grounds that each encompassed an overly broad economic area and that each was determined by the location of the contracting agency (Government installation) rather than the place of contract performance. The protester contends that the wage determinations placed it in an unfair competitive position. For the reasons stated herein, we are denying the protests.

The protester, The Cage Company of Abilene, Inc. (Cage), a small business located in Abilene, Texas, initially protested the two solicitations to the GSA contracting officer. The first was invitation for bids (IFB) No. GSW-7FWR-70009, a solicitation for services involving the rebuilding of compressors for air conditioners and refrigeration units. Awards were made by service area, with each of the 5 states in Region 7 identified as a separate service area. The

second solicitation, IFB GSW-7FWR-70008, was for maintenance, repair, and overhaul of Government-owned vehicles. Twenty-six service areas were named in that solicitation. Under solicitation -70009, bidders were not required to perform the work at the Government installation, nor were they required to be located within the service areas for which they chose to bid. IFB-70008, however, did require that the bidder have facilities within the service area for which it submitted a bid. Both solicitations contained wage determinations setting forth the minimum wages and fringe benefits to be paid service employees working under the contracts to be awarded. The "locality" covered by the wage determinations was stated to be "[GSA] Region 7, States of Arkansas, Louisiana, New Mexico, Oklahoma and Texas."

GSA denied the protests, stating that the Department of Labor (DOL) had advised GSA that the wage determinations had been issued in accordance with applicable laws and regulations. Cage then timely filed its protests with this Office. However, Cage did not bid on these solicitations.

Cage asserts that DOL's position is contrary to both the legislative history of the Act and judicial precedent construing the Act. Cage also asserts, with respect to IFB-70009, that an improper wage determination was issued because GSA submitted to DOL an incorrectly completed Standard Form (SF) 98, "NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT," regarding the place of performance. According to Cage, GSA should have entered "unknown" as the place of contract performance rather than the Region 7 5-state area, since it was possible that the successful bidder would perform outside the service area. Cage contends that GSA's erroneous entry on the SF 98 misled DOL into believing that performance would be limited to the area encompassed by Region 7.

The Act requires that every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain a provision specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder as determined by the Secretary of Labor, or his authorized representative, in accordance with the "prevailing rates" and fringe benefits "for such employees in the locality." If a collective-bargaining agreement covers any such service employees, the specified rates and fringe benefits for such employees are to be as provided for in such agreement, including any prospective wage and fringe benefit increases

provided for in such agreement as a result of arm's-length negotiations. 41 U.S.C. 35(a) (Supp. V, 1975).

DOL believes that the term "locality" must have "an elastic and variable meaning" depending upon all the facts and circumstances of a given situation and that therefore it is "not possible to devise any precise single formula which would define the exact geographic limits of a 'locality' that would be relevant or appropriate for" all situations. 29 C.F.R. 4.163 (1977). Thus, when, pursuant to DOL's regulations, a contracting officer submits an SF 98 to DOL 30 days prior to the issuance of a solicitation for a procurement which may be subject to the Act, *see* 29 C.F.R. 4.4, and it is indicated therein that the services are to be performed at a known location, a prevailing wage rate determination is made based on where the contract will be performed. If, however, the actual place of performance is not known, DOL takes the position that a wage determination based upon an assumed place of performance, rather than upon the actual place of performance as determined after the award is made, represents a proper application of the Act to these procurements.

In this case, DOL believes that the 5-State region designation it used in establishing wage rates applicable to these procurements is not violative of the "locality" concept. DOL argues that the "locality" used for wage determination purposes must be a single locality of appropriate scope—not "a congerie of separate localities" with wages separately determined for each—to provide uniform minimum wages for all bidders. Accordingly, for both procurements, the wage rates and fringe benefits were derived from data collected by the Bureau of Labor Statistics in cross-industry surveys conducted in various areas throughout GSA's Region 7. The use of this "co-mingled data," plus an anlysis of the wage board rates applicable to direct-hire employees of the Federal Government, yielded the rates quoted in the wage determinations.

The major question raised by this protest—concerning the proper interpretation and application of the statutory term "locality"—has been the subject of detailed consideration and review by this Office, the courts, the Executive branch, and the Congress. In the first major case to treat the issue, DOL issued a wage determination based on the locality of the procuring activity (Washington, D.C. metropolitan area); a firm based in Wilmington, Delaware, where the work would be performed, challenged the validity of the wage determination. We questioned DOL's position, stating that "the relevant language of the Act indicates quite clearly that 'locality' has reference to the place where services are performed." 53 Comp. Gen. 370, 375 (1973). In so doing, we pointed to the legislative history of the Act, which includes testimony by the then Solicitor of Labor that the purpose of the proposed

Act was to prevent use of Federal funds to finance contracts which "undercut and depress the wage rate prevailing in a locality," Hearing before the Special Subcommittee on Labor or the House Committee on Education and Labor on H.R. 10238, 89th Congress, 1st Sess. 6 (1965), and that "the word 'locality' is comparable to * * * city, town, village, or any other political division of the state in which the contract is to be performed." *See* Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on H.R. 10238, 89th Cong., 1st Sess. 11 (1965). We further pointed out that DOL's approach of basing its wage determination on the locality of the Government installation for which services were to be performed instead of on the locality of actual performance, had an adverse impact on the Government's procurement of services because it had the effect of creating a nationwide wage rate since all bidders, whatever their location, would be bound to pay the wage rates found to be prevailing in the area of the procuring activity. We concluded, however, that while DOL's approach was thus "subject to serious question," it was not clearly contrary to the Act, but recommended that DOL obtain clarification from the Congress regarding the proper interpretation of "locality." See also *Descomp, Inc.*, 53 Comp. Gen. 522 (1974), 74-1 CPD 44. We reached a similar conclusion, and made a similar recommendation, in *A-V Corporation*, 53 Comp. Gen. 646 (1974), 74-1 CPD 111.

Subsequently, in *Descomp, Inc.* v. *Sampson*, 337 F. Supp. 254 (D. Del. 1974), it was held that the term " 'locality' as used in the Act refers to the area where the services are actually performed * * *," 377 F. Supp. at 266, and that DOL could not properly base a wage determination on the locality of the Government installation when the services were not to be performed in that locality.

As a result of these decisions, an Executive branch task force was created to study the locality issue and other problem areas involving the Act. The recommendations made by the task force culminated in the issuance by DOL of proposed regulations, pursuant to which wage determinations would be based on the locality of actual performance (determined by means of a "two-step" procedure, whereby the contracting agencies would first identify the firms that would participate in a procurement and then notify DOL of all locations where performance might take place, which would then issue a wage determination, as applicable, for each location. *See* 30 Fed. Reg. 16086 (1975). Those proposed regulations, however, were opposed as *not* reflecting the original intent of Congress, *see* Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1965), and the subcommittee expressed its preference that the proposed regulations be

"withdrawn." *id.* at 43. DOL ultimately withdrew most of what it had proposed, including the provisions dealing with locality. 41 Fed. Reg. 5388 (1976).

The Office of Federal Procurement Policy (OFPP) on January 21, 1977, then issued a statement of "Procurement Policy for the Service Contract Act," which adopted the two-step approach for determining locality. 42 Fed. Reg. 6033 (1977). However, that policy statement was canceled prior to the implementation date to enable the new Administration to fully consider the matter. 42 Fed. Reg. 8237 (1977). OFPP recently advised this Office that it is "presently planning to begin work with the Department of Labor and other agencies to review existing labor statutes that impact on procurement policy."

Throughout this period, DOL has maintained that its "flexible" approach is necessary to effectuate the purpose of the Act, which it views as the placing of all bidders on an equal footing with respect to wage rates. In this regard, DOL refers to the Walsh-Healey Act, 41 U.S.C. 35 *et seq.* (1970), under which the courts have upheld the use of nation-wide wage rates, despite the statutory language regarding "prevailing minimum wages * * * in the locality," *see* 41 U.S.C. 35 (b), because the use of individual locality wage determinations "would freeze the competitive advantage of concerns that operate in low-wage communities and * * * would defeat the purpose of the Act." *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 508 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1002 (1956). See also *Consolidated Electric Lamp Co.* v. *Mitchell*, 259 F. 2d 189 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 908 (1959); *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (D.C. Cir. 1957), *cert. denied* 355 U.S. 953 (1958).

We have once again carefully reviewed the legislative history of the Act, and have considered the arguments advanced by DOL and by the protester, along with the more recent developments described above. Our reading of the legislative history of the Act continues to indicate that what Congress had in mind when it originally considered this particular legislation was the elimination of wage cutting in a fixed locality; we do not find any indication that the Congress intended to eliminate whatever competitive advantage a firm might have because it operated in an area with prevailing wages that are lower than those that prevail in another area.

Nonetheless, we note that in the 1975 hearings cited above, members of the subcommittee made it clear that they thought DOL's position was consistent with the purposes of the Act, that in fact a uniform wage floor for each procurement for services, regardless of variable performance locations, was what had been intended and that the court's decision in *Descomp* was erroneous. We also note that the Executive

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branch is again planning a major review of the area. Under these circumstances, we find it inappropriate to abandon our prior conclusions, which is that DOL's approach is not clearly "prohibited by the language of the Service Contract Act." 53 Comp. Gen. 370, 376; *Descomp, Inc., supra; A-V Corporation, supra.*

Accordingly, the protest issues are resolved as follows:

--DOL's use of a wide geographic area, consonant with the jurisdication of a GSA regional office, as the locality basis for a wage determination in connection with a procurement conducted by that regional office, when it is not known where the services will be performed, is not clearly contrary to law.

--DOL's use of composite prevailing wage rates for an entire GSA region, when a solicitation divides the region into service areas and requires that the services be performed within each area, while not clearly illegal, is inappropriate since DOL is aware, prior to bid submission, of distinct localities within the region where contract services will be performed. In this regard, however, DOL has informed us that it is now aware that under solicitation-70008 performance was restricted to designated service areas and that because a specific locality can be ascertained when such geographic restrictions are imposed, it has commenced issuing separate wage determinations for each service area.

--GSA's designation on the SF 98 of the 5-State Region 7 area as the place of performance in connection with solicitation -70009 was not prejudicial to Cage. According to GSA, this incorrect identification of the place of performance "had no effect on the subsequent prevailing wage determination by the Department of Labor." This position is based on informal assurance "by the Service Contract Office of the Department of Labor that their determination of the locality would have been the 5-State area even if the place of performance designation had been correctly stated as unknown." This is consistent with DOL's basic approach to the locality question, and thus it appears that in fact the wage determination would not have been different had the SF 98 indicated that the place of performance was "unknown."

The protests are denied.

[B-190375]

Military Personnel—Record Correction—Payment Basis

Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in the matter or damages based on a tort theory of wrongful separation from active duty.

Military Personnel—Record Correction—Payments Resulting From Correction—Acceptance Effect

In the absence of a mutual mistake in numerical computation or similar undisputed error which remains undetected at the time of settlement, acceptance of settlement by an Army member incident to administrative action taken to correct his military records bars the pursuit of further claims by the member against the Government in the matter. 10 U.S.C. 1552(c) (1970).

Debt Collections—Waiver—Military Personnel—Pay, etc.

Acceptance of settlement by an Army member incident to the administrative correction of his military records would not operate to bar his subsequent request for waiver of erroneous payments of military pay and allowances shown as debits to his account in the settlement statement; and the the gross amount of such erroneous payments could be considered for waiver. 10 U.S.C. 2774 (Supp. II, 1972).

Military Personnel—Record Correction—Overpayment Liability

Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon his actual return to duty; however, waiver of further amounts may be granted for leave payments required to be collected but for which, due to the statutory leave limit, restoration of the leave cannot be made.

Military Personnel—Record Correction—Payment Basis—Interim Civilian Earnings

If an Army member is retroactively restored to active duty through the correction of his military records, and this produces a result showing the member to have improperly received Federal civilian compensation concurrently with military pay, the interim Federal civilian compensation is rendered erroneous and subject to recoupment, but is also subject to waiver under 5 U.S.C. 5584 (Supp. IV, 1974); a request for waiver of such erroneous civilian compensation will be favorably considered to an extent which will prevent the member from having a net indebtedness upon his actual return to active military service.

Debt Collections—Waiver—Military Personnel—Pay, etc.—Readjustment Pay

In the case of Army members retroactively restored to active duty by the correction of their military records, waiver of erroneous payments made to the members incident to their invalid release from active duty would not operate to validate the members' release or to create any valid separation payments; hence, the amounts waived would not later be subject to recoupment under 10 U.S.C. 687 (f) (1970), which requires that readjustment payments be deducted from retired pay if the member qualifies for retirement for years of service.

In the matter of reserve members restored to duty, June 13, 1978:

This action is in response to a letter dated August 22, 1977 (file reference FINCY-AB), with enclosures, from Mr. R. F. Benjamin, Special Disbursing Agent, United States Army Finance and Accounting Center, Indianapolis, Indiana, requesting a decision with respect to the proper adjustments to be made in the accounts of several hundred Army Reserve officers who were involuntarily separated from active service, but who were subsequently restored to active-duty

status retroactively as the result of action taken to correct their military records. The request was forwarded to this Office by the Office of the Comptroller of the Army by letter dated October 4, 1977 (DACA-FAF-M), and has been assigned control number DO A-1273 by the Department of Defense Military Pay and Allowance Committee.

Background

The Reserve officers concerned were released from extended active duty in the Army under the provisions of 10 U.S.C. 681 (1970) and implementing departmental regulations. However, the Secretary of the Army, acting through the Army Board for Correction of Military Records, later determined that such releases had been improper. Consequently, the members' records were corrected to expunge the fact of their release and to show their uninterrupted continuation on active duty, pursuant to 10 U.S.C. 1552 (1970) which authorizes the correction of military records in such circumstances.

As the result of this corrective action, the members became entitled to payment for the military pay and allowances they would have received had they been retained on active duty. In the settlement of the members' accounts, however, a number of questions arose concerning the proper treatment to be accorded certain amounts of money received by them in the interim. These were amounts the members would not have obtained but for their actual release from active service.

Responding to those questions in decision 56 Comp. Gen. 587 (1977), we held that the members were indebted to the United States for amounts received by them upon their separation as readjustment pay under 10 U.S.C. 687 (1970). We held the members were also indebted for unused accrued leave payments received pursuant to 37 U.S.C. 501 (1970) at the time of separation, but that they were entitled to be recredited with the days of unused accrued leave for which payment had been made. We held further that the members were indebted for any interim military pay and allowances earned for services performed with a Reserve component. In addition, we expressed the view that the members' interim civilian earnings were deductible from the net balance due them after setoff of their debts to the Government, but were not recoupable in excess of that net balance.

In that decision we observed further that payments of military pay and allowances which had been rendered erroneous by the correction action could be considered for waiver under the provisions of 10 U.S.C. 2774 (Supp. II, 1972). We said that application for waiver would have to be considered on a case-by-case basis, and that generally waiver should be granted only to an extent which would prevent the

individual member from having a net indebtedness upon restoration to active duty.

In the present submission, it is indicated that further questions have arisen as the result of problems encountered in concluding final settlements of the members' accounts in the aftermath of the correction action. It appears that a number of the members are reluctant to accept settlement and sign a claim release certificate, fearing that this might act to bar their claims for additional amounts believed due to them in the matter. In this connection it is suggested that certain members believe they are entitled to reimbursement of legal fees incurred in the record correction proceedings and also to damages for inconveniences and economic losses suffered as the result of their separation from active duty. In addition, the members apparently fear that acceptance of settlement might act to bar their applications for waiver of erroneous payments created by the correction of their records. They appear to be concerned, too, that even if waivers are granted as to erroneous payments made incident to their invalid separations from active duty, they may nevertheless be required to repay the amounts waived at some time in the future.

In the submission it is also said that in attempting to apply the principles enunciated in 56 Comp. Gen. 587, *supra*, certain inequities have been encountered in determining the precedence of collection and the amounts to be considered for waiver under 10 U.S.C. 2774. Proposed settlements in five example or representative cases are presented to illustrate the point. Among these five examples, it appears that in one case the member's interim civilian earnings were from Federal sources, and it is noted by the Special Disbursing Agent that such earnings must be regarded as a debt to be recouped in the gross amount under the dual compensation laws, with specific reference to 5 U.S.C. 5536 (1970), while in another case the member's interim earnings were from non-Federal sources, and as such are not subject to recoupment but rather only to setoff against the net amount due. In addition, it appears that in some cases members have lost days of leave recredited to their accounts, since they were also credited with days of leave for the interim period of constructive active duty, and the total amount of accrued leave thus exceeded the 60-day limit imposed by 10 U.S.C. 701(b) (Supp. II, 1972). The proper treatment to be accorded such items in the adjustment of the members' accounts is therefore brought into question.

Effect of Accepting a Settlement Under 10 U.S.C. 1552(c)

Questions "a" and "b" presented in the submission are:

a. Does the acceptance of a settlement under 10 U.S.C. 1552 bar the pursuit of other types of claims incident to these matters against the United States?

b. If a member has signed a claim certificate and accepted a settlement offered under 10 U.S.C. 1552, is he eligible to apply for consideration of waiver of erroneous payments under 10 U.S.C. 2774?

With respect to question "a," subsection 1552(c) of title 10, United States Code specifically directs that: "A claimant's acceptance of a settlement under this section fully satisfies the claim concerned." Hence, in the absence of a mutual mistake in numerical computation or similar undisputed error which remains undetected at the time of settlement, acceptance of settlement bars the pursuant of further claims against the Government incident to the records correction action. See 45 Comp. Gen. 140 (1965); *Hiett* v. *United States*, 131 Ct. Cl. 585 (1955). Therefore, a member's acceptance of settlement would bar most additional claims for reimbursement. Claims for damages based on a theory of wrongful or tortious separation from active duty would not be payable under 10 U.S.C. 1552(c) in any event nor would claims for reimbursement of legal fees. Compare decisions B-185612, August 12, 1976; *Yee* v. *United States*, 206 Ct. Cl. 388 (1975); and *Middleton* v. *United States*, 175 Ct. Cl. 786 (1966). Therefore, question "a" is answered in the affirmative.

However, acceptance of a settlement under 10 U.S.C. 1552 does not preclude a member (or former member) from applying for a waiver of collection of erroneous payments under 10 U.S.C. 2774. It should be noted that a claim against the United States is not equivalent to a request for a waiver. A claim is an alleged legal right against the Government which, if valid, may be collected. A request for a waiver of erroneous payment, on the other hand, derives from a member's indebtedness to the United States. Hence, a member's acceptance of a settlement, which would operate to satisfy his claims against the Government incident to the correction of his records, would not operate to bar from consideration a request subsequently submitted by him for waiver of the Government's claims against him resulting from erroneous payments created by the records correction action. Hence, question "b" is answered in the affirmative.

Waiver

Question "c" is as follows:

c. If the answer to "b" above is the affirmative, can the gross amount of the erroneous payments be considered for waiver under 10 U.S.C. 2774?

Under 10 U.S.C. 2774 erroneous payments of military pay and allowances may be waived "in whole or in part." Thus, a member who accepts a settlement in connection with the records correction action may properly request waiver of the gross amount of all the erroneous payments of pay or allowances deemed to have occurred as the result of

the correction action. However, while we will consider for waiver the gross amounts, there is no legal right or entitlement to an approval of a request for waiver. As we stated in 56 Comp. Gen. 587, *supra*, it is our general policy in these and similar cases to grant waivers only to the extent of preventing individual members from having a net indebtedness upon restoration to active duty, since that policy seems in keeping with the purpose of the correction of the members' records, that is, to restore the members as nearly as possible to the positions they would have been in had the errors not been made. This should not be taken to mean that requests for waiver of the total amount of the erroneous payments would be barred from consideration since the amount to be waived, if any, will be a question to be resolved in the individual case on the basis of equitable principles. Question "c" is, therefore, answered in the affirmative.

Question "d" as presented in the submission is:

d. If a member refuses to sign the claim release certificate and requests waiver, must the waiver be resolved before further action can be taken to finalize the claim under 10 U.S.C. 1552?

With regard to question "d" concerning the possibility of granting waiver in advance of settlement, we note that by accepting settlement under 10 U.S.C. 1552, a member thereby acknowledges that the items and amounts shown as debits and credits to his account are correct. If the member chooses to contest rather than accept the settlement, however, the entire matter remains in a state of suspense, and although the Government has determined the amount of the member's debt and the Government's liability, the matter is not settled. The member may request waiver at any time of a debt to the Government provided his request is made within 3 years after the debt is discovered. However, in cases of this type, if the member has not accepted settlement under 10 U.S.C. 2774, consideration of the waiver request would not be appropriate because the member has not agreed to the Government's statement of his account. Therefore, in the absence of special circumstances, consideration of the waiver request by the Department and forwarding of a report to this Office, if necessary, should be delayed until the member has accepted the Government's settlement. Question "d" is answered accordingly.

Questions "e" and "f" are:

e. If the request for waiver is favorably considered, does this validate the erroneous payments for all purposes as provided by 10 U.S.C. 2774(e)?
f. If the answer to "e" above is in the affirmative, is immediate recoupment of 75% of readjustment pay required under 10 U.S.C. 687(f) in the event a member later qualifies for retired pay or VA compensation?

Subsection 2774(e) of title 10, United States Code, provides that:

An erroneous payment, the collection of which is waived under this section, is considered a valid payment for all purposes.

Subsection 687(f) of title 10, United States Code (1970) provides:

(f) If a member who received a readjustment payment under this section after June 28, 1962, qualifies for retired pay under any provision of this title or title 14 that authorizes his retirement upon completion of twenty years of active service, an amount equal to 75 percent of that payment, without interest, shall be deducted immediately from his retired pay.

The readjustment payments to the members concerned here have been rendered completely invalid by the records correction action, and the members are liable to repay all the amounts they received. 56 Comp. Gen. 587, *supra*. If a member's request for waiver is approved in whole or in part, the provisions of 10 U.S.C. 2774(e) would convert the amount waived into a valid payment, but would not serve to validate the erroneous personnel actions giving rise to such payment. See 49 Comp. Gen. 18 (1969); and compare B-185192, March 2, 1976. Hence, waiver here would not operate to validate a member's separation or any readjustment payment made incident thereto, but would simply serve to convert an erroneous payment into a valid payment. Therefore, any amount waived would not be subject to recoupment under 10 U.S.C. 687(f). Question "e" is answered accordingly and question "f" is answered in the negative.

Question "g" is as follows:

g. Can the reductions for civilian earnings from private employment, earnings from Federal employment (Civil Service), inactive duty military pay and allowances, active duty military pay and allowances, and retired pay be applied as the first stoppage against the retroactive pay and allowances?

We note that departmental regulations do not prescribe an order of precedence for stoppages with respect to the items mentioned in the question. In the absence of such regulations, it is our view that the purposes of the records correction statute will be best served by collecting the described items in the following sequence: (1) debts arising from erroneous interim payments of military pay and allowances (erroneous readjustment, retired, active duty, inactive duty pay, etc.) together with other debts incurred incident to Army service; (2) debts owed to the Government arising from transactions with other Government agencies, such as the Veterans Administration; (3) interim earnings from Government civilian employment which are subject to recoupment in full. 46 Comp. Gen. 400 (1966) and compare *Seastrom* v. *United States*, 147 Ct. Cl. 453 (1959); and (4) interim civilian earnings not from Government employment which are not subject to recoupment but only to setoff against any balance of retroactive pay and allowances due. See 56 Comp. Gen. 587, 591, *supra;* 49 Comp. Gen. 656, 662 (1970). Question "g" is answered accordingly.

Representative Cases—Lump-Sum Leave Payments

Question "h" concerns the correct order of collection in the five representative or example cases described in the submission. It does not appear that any one of the five members has accepted the settlement offered to him. Based on the information submitted to us the following should aid in the proper resolution of these five cases and the cases of other members similarly situated.

The first example is as follows:

Example #1, Davis, Sherman E., 439-44-3239. * * * The officer was relieved from active duty on 31 October 1974 and reenlisted as an E-5 on 1 November 1974. The ABCMR corrected the officer's records to show the relief from active duty on 31 October 1974 and the reenlistment on 1 November 1974 were void and without force and effect. The records were further corrected to show a promotion to O-5 on 1 August 1974. At the date of relief from active duty, the officer was paid readjustment pay in the amount of $15,000.00 and $3,623.64 for 60 days unused accrued leave. As a result of the voiding of the officer's relief from active duty these separation payments became erroneous payments. As shown by the computation sheet attached to the voucher, the officer gained entitlement to military pay and allowances in the gross amount of $53,483.00. During the same period he incurred liabilities, including the readjustment pay of $15,000.00 and the accrued leave payment of $3,623.64, for a total of $45,588.15. Net amount due officer: $7,894.85. Since the payment for accrued leave was collected in full, the 60 days accrued leave must be recredited to the member's leave account effective 1 November 1974. Due to the leave accrual limitation imposed by 10 U.S.C. 701(b), the member lost a certain amount of leave accrual as of the end of the fiscal year. The member requests that the erroneous payments of readjustment pay and accrued leave be considered for waiver in the gross amount of $18,623.64, under the provisions of 10 U.S.C. 2774.

In this case, the items shown as credits and debits in the proposed settlement appear to be correct, and since the amount of retroactive pay and allowances due to the member exceeds the total amount of his debts, the order of precedence in the collection of those debts is, in our view, not of great importance; however, the order of precedence set out in response to question "g" should be followed. As to the member's request for waiver, it appears that he lost 38 days of earned accrued leave in the transaction which, because of the statutory limitation on accrued leave, cannot be restored to him although the amount he received for such leave must be collected from him. Therefore, although he was not in debt upon restoration to active duty, it appears equitable to grant waiver of the amount to be collected for the lost leave. Thus, if he accepts settlement, favorable consideration could be given to waiver of 38/60 of $3,623.64 (the amount of the erroneous payment for 60 days accrued leave).

The member also bases his request for waiver on the premise that he was and will be subjected to unusually high Federal taxes because of lump-sum payments. The amount a person is required to pay in income tax in any given year is dependent upon his situation at the time the tax is due and the applicable tax laws and regulations, which

include provisions for income averaging to reduce tax liability for years in which unusually large amounts of income are received. 26 U.S.C. 1301 *et seq.* (1970). Our waiver authority relates to overpayments of pay and allowances and not to tax liability which may be a secondary result of overpayments or refunds thereof. Therefore, the member's tax liability is not a basis for waiver. Compare B-183430, November 28, 1975.

In addition, the member requests waiver generally on the theory that he served at reduced pay as an enlisted member after he was separated from active duty as a commissioned officer and he suggests this was against equity and good conscience; however, this has been rectified through retroactive payment of his pay and allowances as a commissioned officer, and this factor may therefore not be regarded as a proper basis for granting waiver.

The second example is:

Example #2, Wallace, Clarence C., Jr., 421-22-3037. * * * Officer was relieved from active duty effective 30 June 1974 and placed on the retired list with retired pay effective 1 July 1974. Incident to his relief from active duty he was paid $2,820.36 for 60 days unused accrued leave. The ABCMR corrected the officer's records to show that his relief from active duty was void and without force or effect and that he was promoted to the grade of CW-4, effective 1 July 1974. As a result of the ABCMR's actions and as evidenced by the attached USAFAC computation sheet, the member gained entitlement to military pay and allowances for the period 1 July 1974 to 17 November 1976, in the amount of $50,397.81. During the same period he incurred liabilities for retired pay, accrued leave payment and other miscellaneous collections in the amount of $35,800.97. Net amount due member: $14,596.84. Since the payment for unused accrued leave has been collected, it is necessary to recredit the 60 days leave to the member's leave account effective 1 July 1974. Due to the leave accrual limitation imposed by 10 U.S.C. 701(b), the member will lose accrued leave at the end of the fiscal years. The member has requested that the gross amount of the erroneous accrued leave payment be considered for waiver under the provisions of 10 U.S.C. 2774.

The comments made with respect to the order of precedence of collections in the first example are equally applicable here. Waiver of the erroneous unused accrued leave payment could be granted in an amount representing the number of days of leave earned but subsequently lost by operation of the statute.

The third example is as follows:

Example #3, Hyatt, John J., 438-62-8949. * * * The Officer was relieved from active duty on 15 November 1975. Incident to his separation from active duty, he was paid readjustment pay in the amount of $15,000.00 and $3,120.88 for 58½ days accrued leave. The ABCMR corrected the officer's records to show that his relief from active duty was void and without force or effect and that he was promoted to the grade of Major effective 1 September 1975. As a result of the ABCMR's actions and as evidenced by attached computation sheet the member gained entitlement to military pay and allowances for the period 16 November 1975 to 17 November 1976 in the amount of $22,856.37. As a further result of the correction of his records he incurred liabilities including the readjustment payment and payment for unused accrued leave, in the amount of $19,847.89. Net amount due: $3,008.48. However, in the interval between 16 November 1975 and 17 November 1976, the member earned from private civilian employment $12,-

233.91. Of this amount, $3,008.48, was collected to "zero" out the member's account or the net amount due, $3,008.48 less $3,008.48 civilian earnings, resulting in no amount due the member.

In this case, the member's debts to the Government have been first set off against backpay due to him, and his interim civilian earnings have been deducted from the remaining net balance, properly and in conformity with our views as expressed in 56 Comp. Gen. 587, *supra*, and 49 Comp. Gen. 656, *supra*. While it is not indicated that the member has expressed an interest in obtaining waiver of any of the erroneous payments he received, he may initiate a request for waiver. Such request should be treated in the same manner as the requests which may be submitted by the members in examples 1 and 2; that is, a request based on days of leave lost (if any), for example, could receive similar favorable consideration, if warranted, even though the member in example 3 had a substantial amount of interim civilian earnings.

The fourth example is:

Example #4, Fulcher, Walter H., Jr., 050-30-0537. * * * Officer was relieved from active duty on 28 October 1975. Incident to his relief from active duty he was paid readjustment pay in the amount of $15,000.00 and $3,805.10 for 60 days unused accrued leave. The ABCMR corrected the officer's records to show that his relief was void and without force or effect and that he was promoted to Lieutenant Colonel effective 1 August 1974. As a result of the ABCMR's actions and as evidenced by the attached USAFAC computation sheet, the member gained entitlement to military pay and allowances for the period 29 October 1975 to 16 November 1976 in the amount of $29,795.87. During the period, the member earned as an employee of the Federal government (Civil Service) $18,450.80. In view of the dual compensation statute, 5 U.S.C. 5536, this amount must be collected in full and not offset in the same manner as earnings from private civilian employment. Accordingly, as a further result of the ABCMR's actions, the member incurred liabilities including the readjustment pay, accrued leave payment and civilian earnings in the amount of $38,150.95. Amount due the United States: $8,355.08.

Your attention is invited to the inequity between the treatment afforded a member who had civilian earnings as opposed to a member who had earnings from employment by the Federal Government. Compare examples 3 and 4.

The order of precedence of collections should be in accord with our answer to question "g." Here, the correction of military records produced a result showing the member to have erroneously and improperly received Federal civilian compensation concurrently with military pay. The Federal civilian earnings are thus subject to recoupment, but they are also subject to waiver under the civilian compensation waiver statute, 5 U.S.C. 5584 (Supp. IV, 1974). The member may therefore request waiver of the erroneous payments of civilian compensation under that statutory provision and his request could be favorably considered for waiver in the amount of $8,355.08, so that he will not have a net indebtedness upon restoration to duty, and his interim Federal civilian earnings will effectively be treated in the same manner as ordinary outside earnings. He may also apply for

waiver of the erroneous military payments for accrued leave under 10 U.S.C. 2774; and he could receive favorable consideration on such request to the extent that he can show that he actually lost leave.

The fifth example is as follows:

Example 5, Stalder, Lee R., Jr., 497-36-7425. * * * Officer was relieved from active duty on 16 November 1975. Incident to his relief from active duty he was paid readjustment pay in the amount of $15,000.00 and $3,203.47 for 56½ days unused accrued leave. The ABCMR corrected the officer's records to show his relief was void and without force of effect and that he was promoted to the grade of Major effective 1 July 1974. As a result of the ABCMR's actions and as evidenced by the attached USAFAC computation sheet the member gained entitlement to military pay and allowances for the period 17 November 1975 to 17 November 1976 in the amount of $27,455.33. During this same period he earned as reserve member on active duty $18,114.45 and is indebted to the Veterans Administration for benefits received in the amount of $198.72. As a further result of the ABCMR's actions, the member incurred liabilities, including the readjustment payment, accrued leave payment, amounts earned as a reserve member and the VA benefits in the amount of $37,449.09. Amount due the United States: $9,993.76.

The order of precedence of collections in this case should be in accord with our answer to question "g." The member may request waiver of the erroneous interim active duty pay and allowances, and such request could be favorably considered in the amount of $9,993.76, so that he will not have a net indebtedness upon his restoration to extended active duty. The member could also receive favorable consideration for waiver of further amounts on the basis of leave lost.

Question "h" is answered accordingly.

Conclusion

In summary, the adjustment of accounts of the members concerned in the aftermath of the action taken to correct their records, should proceed in the following manner. First, the member should be offered settlement. Second, the member should ascertain that the proposed settlement is correct, since his acceptance of settlement will ordinarily bar any further claims against the Government incident to the matter. Third, upon acceptance of settlement, the member's request for waiver of erroneous payments of military pay and allowances and civilian compensation resulting from the records correction action, if any, will be considered. Requests for waiver will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon restoration to active duty; however, waiver of further amounts may be granted as noted above upon a showing that the member lost leave for which collection was required. Since presumably in most cases the amount of the erroneous payments for which waiver is sought exceeds $500, the requests for waivers in those cases should be forwarded to our Claims Division where they will be considered under the guidelines established in this decision and in 56 Comp. Gen. 587.

The submitted vouchers are returned for further processing in conformity with the views expressed herein.

[B-189000]

Officers and Employees—*De facto*—Compensation—Retention of Compensation Paid

Civil Service Commission (CSC) directed cancellation of employee's improper appointment. Since employee served in good faith, he is *de facto* employee and may retain salary earned. As a *de facto* employee, he is not entitled to lump-sum payment or to retain credit for unused leave attributable to period of *de facto* employment. Denial of service credit for that period and denial of refund of health and life insurance premiums was within jurisdiction of CSC. 38 Comp. Gen. 175, overruled.

Retirement—Civilian—Refund of Deductions—Void or Voidable Appointments

Retirement contributions previously deducted from compensation paid to a *de facto* employee may be refunded to him, less any necessary social security contributions, since reasonable value of a *de facto* employee's services includes amounts deducted for retirement. 38 Comp. Gen. 175 (1958) should no longer be followed.

In the matter of James K. Saufley—*de facto* employee, June 16, 1978:

Mr. John D. R. Cole, Director of the Bureau of Personnel Management Evaluation, United States Civil Service Commission, requested our decision concerning the propriety of certain actions taken by the Commission incident to the cancellation of the improper appointment of Mr. James K. Saufley to a position in the civil service.

The record indicates that Mr. Saufley was appointed by the U.S. Geological Survey to a position in Reston, Virginia, on October 21, 1974. Ninety days later he was reassigned to a position in Metairie, Louisiana. Pursuant to civil service regulations, the Commission investigated the appointment to assess compliance with competitive principles. Although finding that Mr. Saufley acted in good faith, the Commission determined that the Geological Survey had improperly appointed him from a Washington, D.C. register in order to circumvent established certification procedures. Because of the improper procedure, the Commission directed that Mr. Saufley's appointment be cancelled.

The Geological Survey subsequently asked the Commission's opinion regarding Mr. Saufley's entitlement to retain the salary and leave he had earned. In addition, the Commission was queried as to the disposition of the employee's contributions toward the civil service retirement and health benefits and life insurance. By a letter dated April 26, 1977, the Commission rendered its opinion to the agency concern-

ing the above matters. The Commission advised that none of Mr. Saufley's service under the cancelled appointment may be credited as Federal service for purposes of retirement, leave category, career tenure, reduction in force, or completion of probationary period. In addition, the Commission stated that under recent decisions of this Office, the employee may retain the salary and leave earned and that his retirement deductions would be returned, less any necessary social security contributions. The agency was also advised that Mr. Saufley would not be entitled to refund of premiums paid for health and life insurance because he had been covered and would have been eligible for payment under those programs. Finally, the Commission indicated that the Comptroller General is the final authority concerning issues of pay, and the matter was referred to this Office for a decision regarding the propriety of the above actions.

A *de facto* officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs the duties, his actions are those of a *de facto* officer or employee. 30 Comp. Gen. 228 (1958). We have recently extended the *de facto* rule to permit payment for the reasonable value of services rendered by persons who served in good faith. 52 Comp. Gen. 700 (1973); 55 *id.* 109 (1975); and *Matter of William A. Keel, Jr., and Richard Hernandez*, B-188424, March 22, 1977. However, because he is not an employee within the meaning of 5 U.S.C. 2105, a *de facto* employee does not accrue any annual leave during the *de facto* period so as to be entitled to a lump-sum payment. See 31 Comp. Gen. 262 (1952); *James C. Howard III*, 57 Comp. Gen. 406 (1978).

In the present case there is no evidence that Mr. Saufley had actual or constructive notice that he was improperly appointed to his position. In view thereof and since the Commission has specifically found that Mr. Saufley served in good faith, he may retain the salary which he earned during the improper appointment. *George D. Midgett, Jr.*, B-183328, April 16, 1976. Further, Mr. Saufley may retain payments for leave used during his *de facto* employment. Mr. Saufley may not, however, be paid for or retain credit for the amounts of unused leave attributable to the period of his *de facto* status. *Howard, supra.*

With respect to reimbursement of retirement contributions made while a *de facto* employee, we have previously held in 38 Comp. Gen. 175 (1958) that such refunds may not be made. At the time that decison was rendered, we had held that a *de facto* employee could retain payments of compensation already made, but denied payment of any

compensation not already received. Since the refund of retirement contributions would involve a further payment to the individual, we held that such refunds may not be made. 38 Comp. Gen. 175, *supra.* As noted above, however, we have recently extended the *de facto* rule to permit payment for the reasonable value of services rendered by persons who served in good faith. Since such persons receive no retirement service credit during a period of *de facto* employment, the reasonable value of their services would include the amount deducted for retirement purposes, less any necessary social security contributions. Thus, we have no objection to the Commission's conclusion that the retirement deductions previously made, less any necessary social security contributions, should be refunded to the individual. Accordingly, our decision in 38 Comp. Gen. 175, *supra*, should no longer be followed with respect to refunding retirement deductions to *de facto* employees.

Concerning the issues of service credits and refunds of health and life insurance premiums, we have held that such matters are within the jurisdiction of the Civil Service Commission. *Midgett*, *supra;* B–154570, May 8, 1973. We therefore have no objection to the actions taken by the Commission regarding those matters.

[B–188408]

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Reconsideration Request

Request for reconsideration filed by agency more than 10 working days after actual notice of General Accounting Office (GAO) decision was received is untimely. However, prior decision is explained in view of apparent need for clarification.

Contracts—Termination—Convenience of Government—Recommendation—Preserving Integrity of Competitive System—Purpose

GAO review of protests concerning contract modifications agreed to by procuring activity, or changes ordered by contracting officer, is intended to protect integrity of competitive procurement process.

Contracts—Modification—Scope of Contract Requirement

Mutual agreement between contractor and Government modifying original contract was in effect improper award of new agreement, which went substantially beyond the scope of competition initially conducted.

In the matter of American Air Filter Company—DLA request for reconsideration, June 19, 1978:

The Defense Logistics Agency requests reconsideration of our decision in *American Air Filter Co.*, 57 Comp. Gen. 285 (1978), 78–1 CPD 136, regarding contract DSA700–77–C–8013 to supply ground portable heaters, type H–1, Class I, conforming to Military Specifica-

tion MIL-H-4607B. The H-1 heater is the primary portable heating unit deployed throughout the Air Force and is used to preheat aircraft engines, cockpits, cargo compartments and work areas.

We sustained the protest filed by American Air Filter Co. (AAF), because the Government modified the contract awarded to Davey Compressor Co. (Davey) to require units which operate on diesel fuel rather than gasoline. We concluded that the alterations made were outside the scope of the original contract and recommended that the Defense Logistics Agency (DLA) give consideration to the practicability of terminating the contract for the convenience of the Government and of soliciting competitively its altered requirements. Our action took the form of a recommendation under § 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

DLA raises several bases upon which it urges reconsideration, arguing that:

1. GAO should defer to the contracting agency regarding whether a contract change is within the scope of the contract, and should "leave the contracting parties' agreement undisturbed unless, without question, the change is outside the scope of the contract."

2. The great weight of the evidence showed that there was a substantial basis to find that the changes made were within the scope of the contract.

3. A determination that an engineering change is outside the scope of the original contract should be based on an engineering analysis, which the decision lacked. The agency contends that our decision does not reflect that an engineering analysis was performed; that it erroneously assessed the importance of the technical changes which were made; and that it reflects a misunderstanding of statements made at a post-award conference with the contractor and Government personnel.

In this regard, DLA assumes that the impact of a contract modification is to be examined by applying the cardinal change doctrine. It argues that we should look principally to the contractor's capability to perform the change or modification, viewed in light of its individual circumstances. DLA maintains that the cardinal change doctrine was designed to protect the contractor's rights, and asserts that "Where there is a disagreement between the contracting parties over the scope of a proposed modification, the contractor's contentions as to the original meeting of the minds and the effect of the change should be given due weight." DLA believes that the contentions of a third party challenger, such as AAF, are entitled to substantially less weight, "particularly where the parties [the Government and contractor] agree as to the scope of the change."

Further, DLA disagrees with our decision because, in its opinion, the manufacture of a diesel fueled unit poses no extraordinary difficulty for Davey.

DLA reported that the Defense Construction Supply Center (DCSC) reached its original decision based upon "a lengthy analysis by DCSC and Air Force personnel of the technical changes required to accommodate the requested substitution * * *." The review was conducted "to ensure that a diesel heater was indeed feasible." The nature of the inquiry is described by DLA as being concerned with whether the alterations required "were technically feasible and within the scope of the Davey Contract." DCSC found, *inter alia*, that "use of a diesel power package would not require a research and development effort," and various changes which AAF suggested would be necessary "were either not required or [were] within the current state of the art."

AAF argues that DLA's request for reconsideration is untimely and should not be considered in view of our decision in *Department of Commerce—Request for Reconsideration*, B–186939, July 14, 1977, 77–2 CPD 23. There we refused to consider an agency request for reconsideration filed 4 months after our decision had been released. Moreover, we held that § 20.9 of our Bid Protest Procedures makes no provision for waiving the time requirements applicable to requests for reconsideration, even though it is contended that the matters involved raise issues significant to procurement practices or procedure. 4 C.F.R. § 20.9 (1978).

Although a copy of our prior decision was sent to the Director, Defense Logistics Agency, on February 16, 1978, DLA states that it only obtained a copy of our decision on February 24. Its request for reconsideration was hand delivered to our Office on March 13—11 working days later. Although the rule in § 20.9(b) requires that a request for reconsideration be filed in our Office within 10 working days after the basis for reconsideration is known or should have been known, DLA argues that our decision was never operative upon it, because the copy sent to the Director was not received and, accordingly, he was never formally notified of the decision.

In fact, DLA personnel contacted our Office prior to the expiration of the 10-day period and were advised that they should be certain that any request they cared to make was properly filed within the time limit. Inasmuch as we have consistently considered actual notice of a party's basis for protest or reconsideration to be sufficient to start the appropriate time limits established in the Bid Protest Procedures running, we find DLA's arguments unpersuasive. See, e.g., *Brandon Applied Systems, Inc.*, 57 Comp. Gen. 140 (1977), 77–2 CPD 486; *Dupont Pacific, Ltd.*, B–190350, October 26, 1977, 77–2 CPD 327;

Southwest Aircraft Services, Inc., B-188483, April 1, 1977, 77-1 CPD 227.

Even though we dismiss DLA's request as untimely filed, we have in similar situations in past decisions occasionally commented upon matters apparent on the face of the record, or because we felt that our views were required to clarify apparent uncertainty or misunderstanding regarding the issues in dispute. DLA's arguments in its request for reconsideration reflect a fundamental misunderstanding of the reasons underlying our earlier decision. In the circumstances and because our prior decision included a request that DLA consider whether remedial corrective action should be taken, we have concluded that we should clarify the basis upon which our decision was founded. In reaching our original decision, we stated that:

> * * * the modification to the contract to require a diesel powered and fired heater necessitated, *inter alia*, the following changes:
> 1. The substitution of a diesel engine for a gasoline engine.
> 2. A substantial increase in the weight of the heater.
> 3. The addition of an electrical starting system.
> 4. The design of a new fuel control.
> 5. The redesigning of the combustor nozzle.
> 6. The alteration of various performance characteristics.
> 7. An increase in the unit price by approximately 29 percent.
> 8. The approximate doubling of the delivery time.

We concluded that

> * * * the magnitude of the technical changes, and their overall impact on the price and delivery provisions compels the conclusion that the contract, as modified, is so different from the contract *for which competition was held*, that the Government should have solicited new proposals for its modified requirement. [Italic supplied.]

Even assuming that our prior decision was less than clear, nowhere did we indicate as suggested by the agency that we were applying the cardinal change test *per se*. The italicized portion of the quoted language was meant to reflect what we view as a significant difference between a determination that a proposed change would result in a Government breach of contract, and a determination that a proposed contract modification evades the requirement for obtaining competition and therefore undermines the integrity of the competitive procurement process.

Moreover, it is our practice to evaluate technical facts in resolving protest cases. See, e.g., *Earth Sciences Research, Inc.*, B-193964, January 27, 1978 (letter to the Secretary of the Interior). Our review, however, is directed at determining whether the procuring activity has acted reasonably in the discharge of its legal responsibilities. Regardless of our own views in a particular case, we defer to the agency's judgment in any matter involving the exercise of its discretion. Cases involving the exercise of technical judgment are treated no differently, and we defer to the procuring activity's opinion, provided it

has not abused its discretion. *METIS Corporation*, 54 Comp. Gen. 612 (1975), 75-1 CPD 44; *Plessey Environmental Systems*, B-186787, December 27, 1976, 76-1 CPD 533; *Jarrell-Ash Division of Fisher Scientific Co.*, B-185582, January 12, 1977, 77-1 CPD 19.

Nevertheless, an agency's technical review cannot be conducted in a vacuum without regard to applicable legal standards. While we believe that an agency's opinion regarding technical facts is entitled to consideration, a conclusion by technical personnel regarding the legal implications of their findings carries no more weight than any other conclusion of law. DCSC's conclusion that in its technical opinion there was no cardinal change, and that the modifications made were within the scope of the contract, without more, contributes little to our understanding of the essential facts. Indeed, the DCSC engineering review appears to have been concerned primarily with the feasibility of accomplishing the proposed alterations, and particularly with whether the Air Force and Davey were agreeing to work which was within the state-of-the-art.

Contrary to the agency's position, we believe that the degree of difficulty, or ease, with which Davey could perform the modification is not controlling. The difficulty in producing the item *per se* is not an ultimate—as distinguished from evidentiary—fact even if the cardinal change doctrine were applicable.

As we indicated earlier, our decision in this matter reflects considerations related to our role in bid protest cases, and to our concern that lack of competition adversely impacts upon the integrity of the competitive procurement process. In 41 Comp. Gen. 484 (1962) we held that a contract modification ostensibly negotiated on a sole source basis with the existing contractor was improper. There the Navy sought to justify the change by arguing that the existing contractor was already on the site, knew of existing conditions, and offered the greatest assurance that the work would satisfy the Navy's requirements. Citing the rule that the contracting officer's opinion as to the nonavailability of qualified bidders may not be accepted as controlling prior to solicitation of bids, we noted that "We see no basis, other than the fact that an award to * * * [the incumbent] might not have been assured * * *, for contending that it would have been impracticable to obtain competitive proposals and to negotiate such a contract based upon such proposals."

That case is consistent with the rule set out in connection with our decision in 5 Comp. Gen. 508 (1926) that an existing contract may not be expanded so as to include additional work of any considerable magnitude, unless it clearly appears that the additional work was not in contemplation at the time the original contract was entered

and is such an inseparable part of the original work that it is reasonably impossible of performance by any other contractor. *Followed*, 30 Comp. Gen. 34 (1950). Along similar lines, we have recently held that GSA acted improperly in extending a contract for plug-to-plug compatible replacement memory beyond the option periods provided in a mandatory ADP requirements contract, because there could be no justification for its failure to timely solicit a follow-on contract. *Intermem Corporation*, B-187607, April 15, 1977, 77-1 CPD 263.

Further, while recognizing that contract changes or modifications are required subsequent to award, we have cautioned that this "is not to say that the contracting parties may employ a change in the terms of the contract so as to interfere with or defeat the purpose of competitive procurement." *E. R. Hitchcock & Assoc.*, B-182650, March 5, 1975, 75-1 CPD 133. We have held that awarding a contract with the intention of significantly modifying the contract after award is improper. *A & J Manufacturing Co.*, 53 Comp. Gen. 838 (1974), 74-1 CPD 240. See, also, *Midland Maintenance, Inc.*, B-184247, August 5, 1976, 76-1 CPD 127.

The cardinal change doctrine was developed by the Courts as a means to deal with contractors' claims that the Government had breached its contracts by ordering changes which were outside the scope of the changes clause. As the court stated in *Allied Materials & Eq. Co.* v. *United States*, 569 F. 2d 562, 563-564 (Ct. Cl. 1978),

> * * * a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Even though we believe there is a significant area of overlap between the limits within which the Government may alter a contract without fear of breaching it, and the limits which act to restrain its right to do so without impacting upon the statutory requirement for competition, the evaluation of the legal problems presented in each instance have different starting points. Application of the cardinal change doctrine assumes a set of relationships between the litigants -- the Government on one side, the claimant on the other. The cases applying the doctrine reflect that relationship, molded by constraints inherent in the rules of evidence, drawing into focus what the *contracting parties* are deemed to have had in mind when *they* executed the contract.

In contrast to circumstances reflecting disagreement between the Government and its contractor, contract modification flows from the parties' willingness to agree. For an increase in price, the contractor may be expected to be amendable to performing the additional work.

Such a contractor obviously will not seriously question whether the award is outside the scope of the original contract and we do not expect the contractor to concern itself with the technical niceties of the statutory requirement that the Government award contracts competitively. Such a contractor will be prone to view the additional work as a logical extension of the original agreement.

Further, we do not agree with DLA's view that our original decision in this case unduly impacts upon the discharge of its responsibility for contract administration. There is an essential relationship between the limits of a contracting officer's power under the Changes and Disputes clauses and the statutory requirement for competition. The contract cannot be read so as to conflict with the statutory mandate for competition. Starting, therefore, with the proposition that the contracting officer's administrative authority is subordinate to the competition statute, it follows that due regard for protection of the integrity of the competitive procurement system does not interfere with the *legitimate* exercise of the contracting officer's administrative functions.

The impact of any modification is in our view to be determined by examining whether the alteration is within the scope of the competition which was initially conducted. Ordinarily, a modification falls within the scope of the procurement provided that it is of a nature which potential offerors would have reasonably anticipated under the changes clause.

To determine what potential offerors would have reasonably expected, consideration should be given, in our view, to the procurement format used, the history of the present and related past procurements, and the nature of the supplies or services sought. A variety of factors may be pertinent, including: whether the requirement was appropriate initially for an advertised or negotiated procurement; whether a standard off-the-shelf or similar item is sought; or to whether, *e.g.*, the contract is one for research and development, suggesting that broad changes might be expected because the Government's requirements are at best only indefinite.

Specifically, in reaching our decision in this matter, we gave consideration to the fact that this procurement was advertised. Bids were solicited to meet a requirement primarily defined by a Military Specification. Although the heaters perhaps cannot be fairly characterized as off-the-shelf-items, similar readily available units have been purchased by the Government for years.

In concluding that offerors would not have reasonably anticipated that the changes clause would be used as it was, we were particularly impressed by the following:

1. The amended contract requires equipment using diesel fuel exclusively. The Military Specification expressly required gasoline fueled heaters capable of being driven interchangeably by gasoline engines or electric motors. The solicitation indicated that units with gasoline engines were to be furnished.

We did not accept DLA's characterization of the Military Specifications as a mere performance specification for heaters, because we believe the solicitation documents clearly imposed a salient constraint upon the description of the items being bought permitting bidders to conclude that gasoline or electric powered equipment fell within the scope of the procurement, but that other equipment did not.

In referring to the decision by the Court of Claims in *Keco Industries, Inc.* v. *United States*, 176 Ct. Cl. 983 (1966), we explained that *Keco* differed in that award was made for both electric and gasoline driven units. The proportions were later changed to require all gasoline driven units. Although DLA suggests that this is a distinction without a difference, in our opinion the designation of fuels to be used went to the heart of the Government's description of the items sought. If choice of fuel was not material in the circumstances of this case, it is difficult to conceive of any alteration which DLA could have authorized which would have been.

2. The amendments eliminated the requirement that the units furnished be capable of using an interchangeable electric motor to provide power. Interchangeability of power units was in our view fundamental to the nature of the original procurement and reflected a second salient constraint imposed upon the scope of competition obtained. In effect, offerors were required to be capable of furnishing two distinct units, one using electric and the other gasoline power. Elimination of this requirement in our view significantly altered the framework upon which competition was predicated. (We note in passing that the interchangeability requirement distinguishes these circumstances, also, from the facts in *Keco*, inasmuch as interchangeability as such was not a requirement in that case.)

3. Along related lines, the solicitation anticipated, in our view, that the gasoline fueled unit would be a self-contained item capable of start-up in a $-65°$F environment. In this regard, the Military Specification required that the gasoline powered unit be capable of manual starting, and that it be demonstrated during first article testing that it could be started when "cold-soaked" to $-65°$F. Preheating was to be accomplished by use of a gasoline fired preheater built into the unit.

We recognize that diesel engines typically utilize high compression ratios and electrical starting. It is a matter of common engineering knowledge that storage batteries generally—including lead acid

batteries—experience a significant loss in available power when cooled to the temperatures at which these tests are to be conducted. The post award conference minutes referred to in our prior decision indicated that, "The specified cold test of −67°F [sic] will remain in effect and the impact of the switch to Diesel will be evaluated during this test." The effect of the discussion of cold starting requirements was evidently to require that Davey attempt to meet the cold starting requirement, but that the Government might not hold Davey to its agreement. Moreover, and of direct concern, DLA interprets the amended contract as not requiring that first article testing be performed with a cold-soaked battery.

At best, DLA's interpretation of the amended contract is strained. The diesel fueled units are to have a battery compartment. The battery evidently would be removed from it when operating at low temperatures. By allowing Davey to use an external power source (*i.e.*, the battery) to meet the cold start requirement, DLA has abandoned the concept of a self-contained unit. While it is entirely proper for the Government to permit use of whatever method of starting that is consistent with assuring that its minimum needs are met, there is no question that the performance requirements relating to cold starting capability were significantly altered. If, as LDA contends, these changes are part and parcel of a change to a diesel fueled system, they properly underscore the significance of the change from gasoline to diesel fuel. To the extent they do not, it is fair to ask whether DLA would have acted outside the scope of the original procurement by authorizing an alteration permitting the vendor to dispense with the requirement that it provide manual starting, self-contained gasoline fueled units. In our opinion, the Military Specification reflects the importance of such cold starting capabilities. Accordingly, we believe that DLA could not dispense with such requirements without at the same time abandoning one of the salient criteria which defined the scope of competition in the original procurement.

In our view, the contract in this instance was modified contrary to the statutory requirement for competition, amounting to an award to Davey for new requirements which were outside the competitive scope of the original procurement.

[B–189782]

Compensation—Wage Board Employees—Prevailing Rate Employees—Entitlement to Negotiate Wages—Compliance with Law and Regulations Requirement

Implementation of decision 57 Comp. Gen. 259 (1978) is postponed until end of Second Session of 96th Congress. If Congress takes no action, General Accounting

Office will apply decision to all agreements affected by 57 Comp. Gen. 259 (1978) at date of end of Second Session of 96th Congress.

In the matter of Department of the Interior—delayed implementation of decision on overtime pay under negotiated agreements, June 23, 1978:

In our decision of February 3, 1978, entitled *Matter of Department of Interior—overtime pay for prevailing rate employees who negotiate their wages*, 57 Comp. Gen. 259, we stated that although section 9(b) of Public Law 92-392, August 19, 1972, 5 U.S.C. § 5343 note, governing prevailing rate employees, exempts the wage-setting provisions of certain bargaining agreements from the operation of that law, section 9(b) does not exempt agreement provisions from the operation of other laws or provide independent authorization for agreement provisions requiring expenditure of appropriated funds not authorized by any other law. Accordingly, certain negotiated labor-management provisions relating to overtime pay which had been in effect for many years were held to be invalid.

In order to cushion the impact of the decision on those long-standing practices, our decision provided that the Department of the Interior was authorized to delay its implementation until the earliest expiration date of each agreement which contains any provision inconsistent with the decision or until a period of 3 years had elapsed, whichever occurred first.

We have subsequently been informed by Mr. Charles H. Pillard, President, International Brotherhood of Electrical Workers, that the formula for delaying implementation of our decision does not accomplish that objective in several cases. He states:

> * * * the provisions which [the Comptroller General] has ruled to be illegal are contained in collective bargaining contracts which reopen for bargaining on an annual basis. In fact, at least three of these contracts with IBEW Local Unions are open for bargaining at this time, and others will open for bargaining in the near future. Therefore, despite the Comptroller General's apparent intent to allow for the passage of legislation before his decision would be implemented, employees are losing time-honored benefits at the present time.

We noted in our decision 57 Comp. Gen. 259 that the contract provisions in question were negotiated over a long period and that our decision was the first one stating they were illegal. Accordingly, and in order to cushion the impact of our decision, we authorized the Department of the Interior to delay its implementation and suggested that the Bureau of Reclamation might wish to request legislation permitting the continued negotiation of the contract provisions in question.

As pointed out by Mr. Pillard, our instructions regarding the implementation of our decision operate unequally. Those contracts which contain the provisions in question and which have expired may not include such provisions upon renewal. On the other hand, where the

contracts have not expired, the provisions may be continued for various periods up to 3 years from the date of our decision. Upon further consideration we believe that all of the provisions should be continued for a reasonable period of time so that Congress may consider the matter. Also, it now is our view that all contract provisions should terminate on the same date if Congress takes no action. Therefore, our decision is modified to authorize the Department of the Interior to continue, or to renegotiate, the contract provisions in question until the end of the Second Session of the 96th Congress. If Congress has taken no action by that time, the decision becomes fully effective as to all agreements on that date.

[B-189272]

Highways—Construction—Federal-Aid Highway Program—Antitrust Violation Recoveries

State brought antitrust treble damages action against suppliers of asphalt used in highway construction under Federal-aid Highway Program. Although United States had declined to share costs of litigation, Federal Government is entitled to share in resultant settlement attributable to actual damages. 15 U.S.C. 15a does not allow the Federal Government to claim share of treble damages.

Highways—Construction—Federal-Aid Highway Program—Antitrust Violation Recoveries

Amount of Federal share in antitrust settlement may be applied to other allowable costs from the periods covered by settlement if the full percentage of Federal share was not used during these periods.

In the matter of Federal-Aid Highway Program—Federal reimbursement from State antitrust settlement proceeds, June 27, 1978:

The Director of Transportation, State of California, requests us to rule on the validity of a demand by the Federal Highway Administration (FHWA), United States Department of Transportation, for a share in a $5,732,433.24 antitrust action settlement received by the California Department of Transportation (Caltrans) from suppliers of asphalt used in highway construction under a Federal-aid Highway Program. (See *Western Liquid Asphalt Cases*, 309 F. Supp. 157 (N.D. Cal. 1970) and 303 F. Supp. 1053 (N.D. Cal. 1969)).

According to the California Director of Transportation:

FHWA has indicated that it will demand to participate in the settlement proceeds by reason of prior opinions of your office, particularly Comptroller General decisions B-162539, dated October 11, 1967, and B-162652, dated November 27, 1967 [47 Comp. Gen. 309], which the State of California contends are not applicable and should be reanalyzed in view of the particular facts involved. A review of the scope of those earlier decisions may assist in arriving at a mutually acceptable resolution of this matter.

Basically, the position of the State of California is that the Federal Government, when requested by the State, refused to assist in prosecuting the action,

or to share in the costs or risks involved in the prosecution of the case by the State. Under such circumstances, any claim the Federal Government may have had in any recovery has been waived. This and other matters not considered in the two earlier decisions indicate that no reimbursement is owing to the Federal Highway Administration.

According to a legal memorandum accompanying the Director's request, there are four reasons for concluding that the FHWA is not entitled to a share in the Western Liquid Asphalt antitrust settlement, despite our cited decisions. These reasons are:

First, any "partnership arrangement" between the Federal Government and the State insofar as the recovery of damages for violations of the antitrust laws was breached by the Federal Government in refusing to assist in the prosecution of the action or to share in the risk involved in the prosecution in the action by the State.

Second, the overpayments recovered by the State consisted entirely of State funds, since the Federal Government retained no interest in the grants to the State following receipt by the State of such funds.

Third, the Federal Government is not entitled to recover treble damages.

Fourth, the State was the party which suffered the real injury from the violation of the antitrust laws and the overpayments, not the Federal Government.

We will discuss each of these arguments in succession:

1. *FHWA Has Breached Its "Partnership" Arrangement with the State*

In our cited decisions concerning the recovery of a Federal share in antitrust damages in connection with State highway construction programs, we have referred to the Federal-State relationship stemming from the Federal-aid Highway Program as authorized by 23 U.S.C. § 101 *et seq.* (1970 and Supp. V. 1975), as a "partnership arrangement." For example, in our decision 47 Comp. Gen. 309, we said in part (at page 311):

We do not believe that the partnership arrangement under which the Federal-aid highway program is prosecuted may properly be said, in the absence of specific governing provisions, to reach beyond the project costs shared by the Federal and State Governments.

Previously, in decision B–162539, October 11, 1967, we said:

Full recognition of the partnership arrangement between the State and the Federal Government with respect to the recovery effected dictates that the out-of-pocket expenses incurred also be shared proportionally.

The argument of the State assumes that the "partnership arrangement" spoken of in our two decisions is in the nature of a partnership agreement in law, subject to dissolution because of failure of the partners to agree to contribute to costs of litigating partnership rights. Whether or not this is sound partnership law, the term "partnership arrangement" in our decisions was used in a metaphorical sense, as the context indicates, rather than in the sense of a specific legal relationship.

Used in this sense, the phrase "partnership arrangement" merely describes general rights, stemming from the relationship between Fed-

eral and State governments in the Federal-aid Highway Program whereby, pursuant to chapter 1 of title 23, United States Code, the United States and the respective States enter into agreements to share the cost of construction of highways on the Federal-aid highway system. Accordingly, the extent to which FHWA is entitled to share in the settlement depends upon the authority under which it awarded funds to the State and any conditions, express or implied, that attached to the award when the State accepted it.

In our view, nothing in the relationship between the State and Federal Governments under the Federal-aid Highway Program compels the conclusion that refusal of the Federal Government to participate in the cost of an antitrust action deprives it of the right to receive a share of the settlement to which it is otherwise entitled. As was said in B–162539, *supra*, to hold otherwise would be to allow the State to profit to the extent of the Federal interest. It would be recovering twice for the overcharge—once by way of reimbursement from the Federal Government and again from the defendants in the settlement.

2. *Overpayments Recovered by State are State Funds*

The State submission cites decisions to the effect that, when funds are provided to a State under a Federal grant-in-aid program, they lose their Federal character and become State funds. The State argues that:

> If Federal funds become State funds when receipted for by the State, it would be anomalous to suggest that the Federal Government retains an interest in such funds sufficient to demand repayment in the event the project costs for which the funds were used have been indirectly affected after completion of the project.

Contrary to the State's argument, we do not find our decisions inconsistent with the proposition that the funds apportioned under the Federal-aid Highway Program become State funds when received by the State. The amount of money given the State in this case for highway construction is conditional upon payment of a non-Federal or State share. 23 U.S.C. § 120 (1970). The ratio of costs established by statute (*id.*) places a maximum on Federal participation in the program. (There is no limit on the proportion of State participation, as the cases cited by the State note.) The money given to the State under a grant must be spent only for approved grant purposes.

What our earlier decision (47 Com. Gen. 310) described is basically a problem of adjusting grant costs because of a correction in the amount properly chargeable to the grant. We are unable to distinguish the process at work here from any routine adjustment in grant costs that would take place as a result of a recovery of an overcharge.

What this adjustment attempts to achieve is the identification of the actual costs to the State for highway construction under the grant, once the settlement is obtained. Where an adjustment results in the

Federal share exceeding the allowable percentage of Federal participation, the excess must be returned to the Federal Government.

The cases holding that Federal grants are gifts or gratuities, and our decisions that grant funds in the hands of a grantee lose their character as Federal funds, do not support the proposition for which they are cited by the State, that the Federal Government may not receive reimbursement in the circumstances here present. We have never considered that the United States could not recover grant funds not properly chargeable to the grant, nor do any cases of which we are aware so hold.

3. *The Fact that the Federal Government Is Not Entitled to Treble Damages Should Be Taken into Account in Determining Federal Share of Settlement*

The Federal Government is not entitled to treble damages awarded in an antitrust action under 15 U.S.C. § 15a (1970).

In 47 Comp. Gen. 309, we held that the Federal reimbursement from an antitrust judgment should be based on actual, not treble damages. We did not reach the issue here presented, which is how the Federal Government should participate in an antitrust settlement where, although no judgment has been rendered, the potential for treble damages allegedly has a bearing on the amount of settlement.

As the question of antitrust damages and their measurement is not often subject to precise determination (see *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)), we recognize the difficulty in allocating the amount of actual and punitive damages within a settlement resulting from a claim for treble damages. Since actual damages remain speculative to some extent until reduced to a final judgment and any settlement probably reflects the potential for litigative success by either side, we believe the ratio of real to treble damages can be considered to remain constant. Accordingly, we believe that the Federal share in an antitrust settlement should remain proportionate to what its share would have been had the court awarded damages. For example, if the Federal share in a project is 90 percent, its share of the amount of settlement subject to Federal recovery will be 30 percent. This is achieved by dividing 90 (90 percent of real damages) by 300 (treble real damages).

Under this formula, the United States would in no event receive more than its actual contribution to the program. When settlement is for less than the full amount of damages, trebled, the United States would receive proportionately less than its full contribution to the program. With this method of computing the Federal share of similar settlements, we can see no inherent advantage for the State either in seeking settlement prematurely or in going to trial solely on the basis

of the requirement that the Federal Government share in antitrust damages.

For purposes of clarifying our earlier decisions, the language which states that "out-of-pocket expenses incurred also be shared proportionately" means that where the State has incurred all such expenses, it is entitled to recover them from any settlement before the formula for computing the amount of Federal recovery is applied.

We believe that when both of these factors—the method for computing the Federal share in a recovery and the out-of-pocket expenses—are taken into account, Caltrans' concern over bearing the total risk of litigation is significantly lessened. We also believe that such a relationship should provide adequate incentive to the States to pursue similar actions. Since the Federal Government only participates to the extent of actual damages at most, the States will have the potential of treble damages, in terms of their contributions to the program, to encourage them to bring similar actions in the future.

With regard to the legislative history of the Antitrust *Parens Patriae* amendments to the Clayton Act, on which the State relies to contend that requiring reimbursement of the Federal Government would weaken the State's bargaining power in future litigation, the provisions under discussion were not enacted. See Public Law 94–435, 90 Stat. 1383 (15 U.S. Code 1311 note). More significantly, it was intended by the legislative proposal in question that the United States *should* be able to recover the portion of the monetary damages which it sustained or funded (S. 1284, 94th Cong.; S. Rep. No. 94–803, 55–56 (1976)), which is essentially the view we take herein.

We recognize that there may be a problem in this case in determining the amount of the settlement assigned to the various cost sharing ratios provided in 23 U.S.C. § 120 (1970); however, we do not have sufficient information before us to reach any conclusions in this regard. We believe that, because of the problems previously mentioned in arriving at the precise make-up of an antitrust settlement, FHWA and the State must first make an effort to reach a reasonable allocation. Accordingly, we believe that it would be premature for us to consider this and other specific accounting questions suggested by the State before FHWA and the State have attempted to reach an agreement.

4. *The State Was the Only Party Injured by the Violations of the Antitrust Laws*

The State argues that it, not the Federal Government, has been injured by the antitrust violation. With regard to Federal-aid Primary, Secondary, and Urban projects, the State in its submission says:

> For each year as to which there was a claim in the lawsuit for an asphalt overcharge, there were more projects undertaken in California which were eligible

for participation under these programs, and more money expended than was necessary to qualify for the full amount of the Federal apportionment to California. Obviously, the costs of such projects which were undertaken without assistance from the apportionment for California was borne entirely by the State of California. In addition, it was the practice of California at that time to seek participation only for construction costs on those programs, but not for certain other eligible project costs such as right of way acquisition and preliminary engineering. The point is that there was a specific number of dollars made available by the Federal Government to California and all those dollars were expended on various projects, with the State providing more than required to qualify for the Federal participation. To refund to the Federal Government any portion of the amount recovered in the *Asphalt Antitrust* cases would ignore the additional costs the State incurred in constructing those projects, costs which were eligible for Federal participation but for which no Federal funds were available.

Theoretically, any recovery related to claims on projects under these programs would have been available for matching otherwise eligible project costs for the years in question for which participation had not been sought (such as right of way acquisition and engineering), or for participating in the construction costs on other projects in those same Federal-Aid programs for which there were insufficient funds in California's apportionment to enable participation at that time. Therefore, refunding any part of the settlement to the Federal Government would have the effect of reducing the sums made available to California by the various Federal-Aid Highway Acts for the years in question.

Thus, it has been the State, not FHWA, which has been injured; the overcharge for asphalt on those projects in no way affected the amount of the apportionment to California, or the amount of Federal money participating in California projects. However, the effect to California was to expend more of its own money on projects on those programs. To require that the State return any of the recovery would amount to taking it out of the State's pocket.

With regard to Federal-aid projects on the Interstate system, the State says that:

> The real injured party has also been the State, because the result of the overcharge has been a reduction in the amount of highways constructed in this State with the amount of funds made available, which highways belong to the State. The program is a Federally assisted State program, not a Federal program (23 U.S.C. § 145). Therefore, the loss has been suffered by the State, which will continue to suffer the loss as long as the Interstate system is not completed.

We have no objection to the FHWA reviewing the State's approved programs under 23 U.S.C. § 105 (1970 & Supp. V 1975) and plans, specifications and estimates under 23 U.S.C. § 106 (1970 & Supp. V 1975) from the years in question to see if, as the State represents, it did not apply Federal funds against all eligible costs in approved projects. If, upon review, proper allowable costs can be found that were not claimed as Federal share, we would have no objection to the Department of Transportation applying the Federal share of the settlement in the antitrust cases to such costs as a further adjustment between the Federal and State governments. However, we are not sanctioning either the retroactive approval of projects and plans that were not approved in a timely manner for the years (fiscal year 1969 and prior years) to which the damage settlement applies or projects where, although approved, costs were not actually incurred.

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Contracts

Disputes

Law questions

In deciding issue of mistake in bid, the General Accounting Office (GAO) is not bound by prior Armed Services Board of Contract Appeals (ASBCA) decision on same case finding mistake, as result of which no contract came into being, where ASBCA has declared in *National Line Company, Inc.* ASBCA No. 18739, 75-2 BCA 11,400 (1975), that it lacks jurisdiction to decide mistake in bid questions. Existence of contract and mistake upon which relief may be granted is question of law upon which ASBCA's decision is not final under 41 U.S.C. 322 (1970) and implementing procurement regulation and will be decided *de novo* by GAO ..... Page 468

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Advertising *v.* negotiation

Negotiation propriety

Small business concerns

Set-asides

Even though small business set-aside procurement is technically a negotiated procurement, where contract is to be awarded solely on price, mere fact that negotiations are desirable to enhance offeror understanding of complex procurement does not provide legal basis for use of negotiation procedures in lieu of small business restricted advertising, since record does not support agency assertion that specifications are not sufficiently definite to permit formal advertising 501

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Negotiated contracts. (*See* **CONTRACTS, Negotiation, Basic ordering agreements**)

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Carriers

Foreign

Use prohibited

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Estimated peak monthly requirements (EPMR) for items were not halved when items were divided into set-aside and non-set-aside portions, but rather total EPMR was listed as EPMR of each subitem. Invitation for bids (IFB) required that offeror's listed monthly supply potential must be able to cover total EPMR's for which offeror was low. Therefore, it was improper and not consistent with IFB to total EPMR's for subitems in bid evaluation 484

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Where solicitation provides that written acceptance of offer otherwise furnished to bidder within bid acceptance period shall result in binding contract and bidder took no exception to provision in its bid, contract was effective on timely issuance of telegraphic notice of award and bidder's assertion of mistake to procuring activity after issuance of notice was therefore allegation made *after* award 468

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Award of contract was improper where actions of contracting agency were tantamount to waiver of clause requiring bidders to offer a "standard commercial product." However, in view of extent to which contract has been performed, General Accounting Office concludes that it would not be in Government's best interests to terminate contract for convenience 478

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Invitation for bids (IFB) may permit waiver of technical data requirement for bidders who had furnished such data under prior contracts even though not specifically authorized by Armed Services Procurement Regulation 413

Waiver of technical data under terms of IFB is not improper even though it clearly results in substantial competitive advantage to bidder 413

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Protest alleging that second low bid or award to that bidder contravenes terms of Affiliated Bidder's clause, Armed Services Procurement Regulation 7–2003.12 (1976 ed.), is without merit where bidder submitted required information with bid. In addition, failure to comply with clause is minor informality which may be waived or cured after bid opening 480

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Inclusion of typical meal preparation worksheets in IFB was clearly for informational purposes only and did not render IFB ambiguous 431

Minimum needs requirement

Specification adequacy

Contracting agency should extend limits of geographic restriction to broadest scope consistent with agency's needs. However, while SBA restriction should not be continued for future procurements, contracts awarded under protested procurement should not be terminated because record reveals that adequate level of competition was obtained despite restriction, and because SBA will need considerable time for study and analysis in order to draw new geographic areas 454

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Opinion of this Office remains unchanged from decision last year regarding geographic restriction on competition adopted by Small Business Administration (SBA). If SBA's minimum needs can be satisfied by restriction based on regional and district boundaries, they can also be satisfied by a restriction based on number of miles from a central point which is less restrictive of competition 454

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If an Army member is retroactively restored to active duty through the correction of his military records, and this produces a result showing the member to have improperly received Federal civilian compensation concurrently with military pay, the interim Federal civilian compensation is rendered erroneous and subject to recoupment, but is also subject

DEBT COLLECTIONS—Continued Page
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Acceptance of settlement by an Army member incident to the administrative correction of his military records would not operate to bar his subsequent request for waiver of erroneous payments of military pay and allowances shown as debits to his account in the settlement statement; and the gross amount of such erroneous payments could be considered for waiver. 10 U.S.C. 2774 (Supp. II, 1972) 554
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One exception to General Accounting Office (GAO) general policy of not reviewing award of subcontracts by Government prime contractors is for awards made "for" Department of Energy (DOE) by prime management contractors who operate and manage DOE facilities,

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Computer service
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FEDERAL PROCUREMENT REGULATIONS
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Agency's conducting informal competition whereby order for data base development was to be placed under one of two vendors' basic ordering agreements—where no adequate written solicitation was issued—was procedure at variance with fundamental principles of Federal negotiated procurement, and also raises question of improper prequalification of offerors. General Accounting Office (GAO) recommends that agency review its procedures for issuing such orders and conduct any further competition in manner not inconsistent with decision. Case is also called to attention of General Services Administration for possible revision of Federal Procurement Regulations 434

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Federal meat inspector was sued by supervisor for libel and malicious defamation for certain allegations contained in letters the inspector wrote to various public officials. Claim for reimbursement of inspector's legal fees may not be allowed in the absence of determinations that acts of inspector were within scope of official duties and that representation of inspector was in interest of United States. *J. N. Hadley*, 55 Comp. Gen. 408, distinguished 444

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Appropriation availability

Purchases of individual travel club memberships in the name of a Federal agency for the exclusive use of named individual employees is approved where the purchases will result in the payment of lower overall transportation costs by the Government---------- 526

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Government liability

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

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International air transportation

The requirement of 49 U.S.C. 1517 for use of certificated U.S. air carrier for government financed foreign air transportation applies not only to transportation secured with appropriated funds but to transportation secured with funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States * * *." Where international air transportation is secured with other than appropriated funds, agencies should apply the Fly America Act Guidelines---------- 546

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Military pay, etc.

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The amount of a military member's or Federal employee's pay or salary subject to garnishment for child support or alimony pursuant to 42 U.S.C. 659 (Supp. V, 1975) is limited by section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673(b) (1970), as amended by section 501(c), Title V, Public Law 95-30. Thus, a State court garnishment order, to the extent it exceeds such limitations, should not be followed by a disbursing officer---------- 420

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An Air Force disbursing officer may not pay a retired officer's pay into the Registry of a Texas State court as directed by the court in a garnishment proceeding for the collection of the officer's debt to his former wife incident to a community property settlement, since community property is not within the definition of "alimony" for which the Federal Government has waived its immunity to State garnishment proceedings pursuant to 42 U.S.C. 659 (Supp. V, 1975)---------- 420

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Authority

Fair Labor Standards Act

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Authority of GAO to consider FLSA claims of Federal employees is derived from authority to adjudicate claims (31 U.S.C. 71) and authority to render advance decisions to certifying or disbursing officers or heads of agencies on payments (31 U.S.C. 74 and 82d). Nondoubtful FLSA claims may be paid by agencies. In order to protect the interests of employees, claims over 4 years old should be forwarded to GAO for recording 441

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Abeyance

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Implementation of decision 57 Comp. Gen. 259 (1978) is postponed until end of Second Session of 96th Congress. If Congress takes no action, General Accounting Office will apply decision to all agreements affected by 57 Comp. Gen. 259 (1978) at date of end of Second Session of 96th Congress 575

Clarification

Request for reconsideration filed by agency more than 10 working days after actual notice of General Accounting Office (GAO) decision was received is untimely. However, prior decision is explained in view of apparent need for clarification 567

Hypothetical, academic, etc., questions

Where GAO finds that agency's negotiated procurement procedure was fundamentally deficient—no adequate written solicitation issued—and recommends that agency review procedures before conducting any further competition, issues concerning propriety and results of benchmark tests under deficient procurement procedure are academic 434

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In deciding issue of mistake in bid, the General Accounting Office (GAO) is not bound by prior Armed Services Board of Contract Appeals (ASBCA) decision on same case finding mistake, as result of which no contract came into being, where ASBCA has declared in *National Line Company, Inc.* ASBCA No. 18739, 75–2 BCA 11,400 (1975), that it lacks jurisdiction to decide mistake in bid questions. Existence of contract and mistake upon which relief may be granted is question of law upon which ASBCA's decision is not final under 41 U.S.C. 322 (1970) and implementing procurement regulation and will be decided *de novo* by GAO 468

Appeal pending

Incumbent contractor's protest concerning ambiguities in invitation for bids (IFB) will not be considered by General Accounting Office where claims based on same issues were previously filed by incumbent

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Agency's conducting informal competition whereby order for data base development was to be placed under one of two vendors' basic ordering agreements—where no adequate written solicitation was issued—was procedure at variance with fundamental principles of Federal negotiated procurement, and also raises question of improper prequalification of offerors. General Accounting Office (GAO) recommends that agency review its procedures for issuing such orders and conduct any further competition in manner not inconsistent with decision. Case is also called to attention of General Services Administration for possible revision of Federal Procurement Regulations---------- 434
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Amendment, etc.
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Construction

Federal-aid highway program

Antitrust violation recoveries

State brought antitrust treble damages action against suppliers of asphalt used in highway construction under Federal-aid Highway Program. Although United States had declined to share costs of litigation, Federal Government is entitled to share in resultant settlement attributable to actual damages. 15 U.S.C. 15a does not allow the Federal Government to claim share of treble damages..... 577

Amount of Federal share in antitrust settlement may be applied to other allowable costs from the periods covered by settlement if the full percentage of Federal share was not used during these periods..... 577

LEAVES OF ABSENCE

Administrative leave

Propriety

Employees who have regularly scheduled night shifts are charged 1 hour of annual leave when they work only 7 hours on the last Sunday in April when daylight savings time begins. Alternatively, agency may, by union agreement or agency policy, permit employees to work an additional hour on that day as method of maintaining regular 8-hour shift and normal pay. Administrative leave is not a proper alternative..... 429

Annual

Recredit on restoration after unjustified removal

Current accrued leave over maximum

District of Columbia Government employee was erroneously separated and later reinstated. He is entitled to backpay under 5 U.S.C. 5596, less amounts received as severance pay and unemployment compensation. Employee is also entitled to credit for annual leave earned during erroneous separation. Maximum amount of leave is to be restored and balance is to be credited to a separate leave account. Deductions are also to be made from backpay for lump-sum payment of terminal leave..... 464

Forfeiture

Administrative error

Where employee seeks and obtains an unofficial estimate of projected retirement annuity, wherein an error in division was made causing an overstatement of such annuity, but by the time the error was discovered and the employee decided to postpone retirement, he was unable to schedule and use all excess annual leave, since calculation error did not involve consideration of leave matters, such error as was made does not qualify under 5 U.S.C. 6304 as a basis for restoration of forfeited annual leave..... 516

Military personnel

Payments for unused leave on discharge, etc.

Adjustment on basis of record correction

Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon his actual return to duty; however, waiver of further amounts may be granted for leave payments required to be collected but for which, due to the statutory leave limit, resoration of the leave cannot be made..... 554

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Substitution for annual leave
Employee entitled to use sick leave specifically requested that such time be charged to annual leave. Family's timely request subsequent to employee's death that sick leave be substituted for annual leave may in agency's discretion be allowed and be basis for agency to pay additional lump-sum leave payment to survivor. B–164346, June 10, 1968, and B–142571, April 20, 1960, modified ---- 535
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Adjustments. (*See* **LEAVES OF ABSENCE, Annual, Recredit on restoration after unjustified removal**)
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Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon his actual return to duty; however, waiver of further amounts may be granted for leave payments required to be collected but for which, due to the statutory leave limit, restoration of the leave cannot be made ---- 554
Payment basis
Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in the matter or damages based on a tort theory of wrongful separation from active duty ---- 554
Interim civilian earnings
If an Army member is retroactively restored to active duty through the correction of his military records, and this produces a result showing the member to have improperly received Federal civilian compensation concurrently with military pay, the interim Federal civilian compensation is rendered erroneous and subject to recoupment, but is also subject to waiver under 5 U.S.C. 5584 (Supp. IV, 1974); a request for waiver of such erroneous civilian compensation will be favorably considered to an extent which will prevent the member from having a net indebtedness upon his actual return to active military service ---- 554
Payments resulting from correction
Acceptance effect
In the absence of a mutual mistake in numerical computation or similar undisputed error which remains undetected at the time of settlement, acceptance of settlement by an Army member incident to administrative action taken to correct his military records bars the pursuit of further claims by the member against the Government in the matter. 10 U.S.C. 1552(c) (1970) ---- 554

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Acceptance of settlement by an Army member incident to the administrative correction of his military records would not operate to bar his subsequent request for waiver of erroneous payments of military pay and allowances shown as debits to his account in the settlement statement; and the gross amount of such erroneous payments could be considered for waiver. 10 U.S.C. 2774 (Supp. II, 1972)..... 554

Reservists
Release from active duty
Readjustment pay entitlement basis

A Reserve officer scheduled for release from active duty before completing 5 years of continuous active duty for purposes of entitlement to readjustment pay under 10 U.S.C. 687 (1970) requested and was granted a 6-week extension of service due to his wife's pregnancy. Prior to beginning service on the extension he was found medically unfit for release and was retained on active duty for physical evaluation, thus serving over 5 years' continuous active duty. His release from active duty was involuntary since he had requested augmentation to the Regulars or unconditional further duty three times in the preceding 2 years but had been refused each time. Therefore, he is entitled to readjustment pay..... 451

Readjustment payment on involuntary release. (*See* **PAY, Readjustment payment to reservists on involuntary release**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

NIGHT WORK
Compensation. (*See* **COMPENSATION, Night work**)

OFFICE OF FEDERAL PROCUREMENT POLICY
Jurisdiction
Policy formulation
Procurement matters
Service Contract Act applicability

Where Department of Labor (DOL) notifies agency that it has determined Service Contract Act (SCA) is applicable to proposed contract, agency must comply with regulations implementing SCA unless DOL's view is clearly contrary to law. Since determination that SCA applies to contract for overhaul of aircraft engines is not clearly contrary to law, solicitation which does not include required SCA provisions is defective and should be canceled. Contention that applicability of SCA should be determined by Offiee of Federal Procurement Policy (OFPP) does not justify agency's failure to comply with SCA under circumstances where OFPP has not taken substantive position on issue..... 501

OFFICERS AND EMPLOYEES
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Compensation. (*See* **COMPENSATION**)

OFFICERS AND EMPLOYEES—Continued Page

De facto

Compensation

Reasonable value of services performed

Employee was hired by Forest Service and began working about 2 weeks prior to the date the position description was approved. He filed a claim for compensation and leave for this period. Employee may be considered a *de facto* employee since he performed his duties in good faith and hence may be compensated for the reasonable value of his service during *de facto* period. However, *de facto* employees do not earn leave and hence the leave portion of the claim is disallowed---------- 406

Retirement contributions previously deducted from compensation paid to a *de facto* employee may be refunded to him, less any necessary social security contributions, since reasonable value of a *de facto* employee's services includes amounts deducted for retirement. 38 Comp. Gen. 175 (1958) should no longer be followed---------- 565

Retention of compensation paid

Civil Service Commission (CSC) directed cancellation of employee's improper appointment. Since employee served in good faith, he is *de facto* employee and may retain salary earned. As a *de facto* employee, he is not entitled to lump-sum payment or to retain credit for unused leave attributable to period of *de facto* employment. Denial of service credit for that period and denial of refund of health and life insurance premiums was within jurisdiction of CSC. 38 Comp. Gen. 175, overruled---------- 565

Debt collections. (*See* **DEBT COLLECTIONS**)

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

Membership fees. (*See* **FEES, Membership**)

Moving expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Night work

Compensation. (*See* **COMPENSATION, Night work**)

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

Prevailing rate employees

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

Promotions

Compensation. (*See* **COMPENSATION, Promotions**)

Temporary

Detailed employees

Arbitrator awarded backpay to two employees based on provision in negotiated agreement requiring a temporary promotion when an employee is assigned to higher grade position for 30 or more consecutive work days. Award may be implemented since arbitrator reasonably concluded that agency violated agreement in assigning higher grade duties to grievants for over 30 days. Award is consistent with prior General Accounting Office decisions and does not conflict with rule against retroactive entitlements for classification errors---------- 536

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

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Attorneys' fees. (*See* **ATTORNEYS, Fees**)

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Transfers

Cancellation

Government liability

Agency intended to transfer employees and made firm offers of employment at new station. Travel orders were not issued because transfer was cancelled. Absence of travel orders is not fatal to claims for relocation expenses if there is other objective evidence of agency's intention to effect transfer. In present case, written offers of employment at new location to begin at specific time constitutes such objective evidence.... 447

Relocation expenses

Transfer not effected

Employees were personally informed that their function would be relocated on specific date. Preliminary offer of transfer, although advising that separations may be possible, offered agency assistance in relocating employees to receiving location or elsewhere on priority basis. Such preliminary offer of transfer constitutes communication of intention to transfer employees, and expenses incurred after that date should be further considered by certifying officer to ascertain whether they may be paid.... 447

Service agreements

Failure to execute

Agency intended to transfer employees and made firm offers of employment at new duty station. Employees did not execute service agreements because transfer was cancelled. Twelve-month service obligation prescribed by 5 U.S.C. 5724(i) (1970) is condition precedent to payment of relocation expenses. Since more than 2 years has elapsed since transfer was cancelled, service agreements need not be executed. However, employees must have remained in Government service for 1 year from date on which trasfer was cancelled.... 447

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers**)

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

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Reimbursement authorized

Agency intended to transfer employees and made firm offers of employment at new station. Travel orders were not issued because transfer was cancelled. Absence of travel orders is not fatal to claims for relocation expenses if there is other objective evidence of agency's intention to effect transfer. In present case, written offers of employment at new location to begin at specific time constitutes such objective evidence.... 447

OVERTIME

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

PAY

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Readjustment payment to reservists on involuntary release

Conditions of entitlement

A Reserve officer scheduled for release from active duty before completing 5 years of continuous active duty for purposes of entitlement to readjustment pay under 10 U.S.C. 687 (1970) requested and was granted a 6-week extension of service due to his wife's pregnancy. Prior to beginning service on the extension he was found medically unfit for

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release and was retained on active duty for physical evaluation, thus serving over 5 years' continuous active duty. His release from active duty was involuntary since he had requested augmentation to the Regulars or unconditional further duty three times in the preceding 2 years but had been refused each time. Therefore, he is entitled to readjustment pay ---- 451
Spouse
Prior undissolved marriage
A married service member retired prior to the effective date of the Survivor Benefit Plan (SBP) entered into a ceremonial marriage without having dissolved a prior marriage and subsequently elected SBP coverage for his alleged second spouse listing her by name on the election form. Since the member's entry into the SBP was pursuant to section 3(b) of Public Law 92–425, which required an affirmative election into the SBP, and since the person for whom he elected the annuity was not his lawful wife (and therefore was not entitled to an annuity under 10 U.S.C. 1450(a)(1)) his election into the SBP was invalid and no annuity is payable ---- 426
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Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.**)
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Debt liquidation
Retired pay
An Air Force disbursing officer may not pay a retired officer's pay into the Registry of a Texas State court as directed by the court in a garnishment proceeding for the collection of the officer's debt to his former wife incident to a community property settlement, since community property is not within the definition of "alimony" for which the Federal Government has waived its immunity to State garnishment proceedings pursuant to 42 U.S.C. 659 (Supp. V, 1975) ---- 420
PERSONAL SERVICES
Detective employment prohibition
Applicability
Fifth Circuit Court of Appeals, in *United States ex rel. Weinberger* v. *Equifax*, construed 5 U.S.C. 3108, the Anti-Pinkerton Act, as applying only to organizations which offer "quasi-military armed forces for hire." Although the Court did not define "quasi-military armed force," we do not believe term covers companies which provide guard or protective services. General Accounting Office will follow Court's interpretation in the future. Prior decisions inconsistent with *Equifax* interpretation will no longer be followed. See 57 Comp. Gen. 480 ---- 524
Violation
Equifax case effect
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Detective employment prohibition—Continued

Violation—Continued

***Equifax* case effect—Continued**

rel. Weinberger v. *Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir. 1977), providing that "an organization is not 'similar' to the * * * Pinkerton Detective Agency unless it offers quasi-military armed forces for hire." Where record does not show that bidder offers such a force, it is not a "similar organization" within the meaning of the act, and award may properly be made to bidder. 55 Comp. Gen. 1472, 56 *id.* 225, and other cases, overruled or modified 480

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Legality

Invitation for bids provision in mess attendant services contract allowing Government to assign military personnel to perform services where contractor fails to maintain adequate level of services does not result in illegal personal services contract 431

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Carrier's liability

***Prima facie* case**

Shipper establishes prima facie case of carrier liability for loss or damage in transit by showing failure to deliver the same quantity or quality of goods at destination 415

Once prima facie case of loss or damage in transit is established, burden is on carrier to show by affirmative evidence that loss or damage did not occur in its custody or was sole result of an excepted cause and mere suggestion or allegation is not sufficient 415

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Household effects

Carrier liability

Inventory

Household goods carrier receiving packaged goods from warehouse or another carrier is not required by provisions of Basic Tender of Service, Department of Defense Regulations 4500.34R, to unpack and examine goods to prepare inventory 415

REGULATIONS

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Joint

Amendments

Joint Travel Regulations may be revised to indicate that section 5 of International Air Transportation Fair Competitive Practices Act (49 U.S.C. 1517) does not restrict the use of foreign air carriers when such transportation is paid for in full by a foreign government, international agency or other organization either directly or by reimbursement to the United States. However, the Merchant Marine Act requirement for use of vessels of U.S. registry applies regardless of whether the transporta-

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Unjustified
Where U.S. air carrier service originating in Vienna, Austria, requires connections in New York en route to Washington, D.C., traveler may not use foreign air carrier between Vienna and London, England, or Paris, France, to connect with a direct flight to Washington, to avoid the congestion of JFK International Airport, New York. The inconvenience of air traffic routed through New York is shared by approximately 40 percent of all U.S. citizens traveling abroad. It does not justify deviation from the scheduling principles that implement 49 U.S.C. 1517 inasmuch as the proposed deviation would diminish U.S. air carrier revenues---------- 519
RELEASES
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RETIREMENT
Civilian
Refund of deductions
Void or voidable appointments
Retirement contributions previously deducted from compensation paid to a *de facto* employee may be refunded to him, less any necessary social security contributions, since reasonable value of a *de facto* employee's services includes amounts deducted for retirement. 38 Comp. Gen. 175 (1958) should no longer be followed---------- 565
Service credits
Civil Service Commission jurisdiction
Civil Service Commission (CSC) directed cancellation of employee's improper appointment. Since employee served in good faith, he is *de facto* employee and may retain salary earned. As a *de facto* employee, he is not entitled to lump-sum payment or to retain credit for unused leave attributable to period of *de facto* employment. Denial of service credit for that period and denial of refund of health and life insurance premiums was within jurisdiction of CSC. 38 Comp. Gen. 175, overruled---------- 565
SERVICE CONTRACT ACT OF 1965 (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)
STATES
Federal aid, grants, etc.
Recovery by Federal Government
Antitrust violations
State brought antitrust treble damages action against suppliers of asphalt used in highway construction under Federal-aid Highway Program. Although United States had declined to share costs of litigation, Federal Government is entitled to share in resultant settlement attributable to actual damages. 15 U.S.C. 15a does not allow the Federal Government to claim share of treble damages---------- 577
Federal-aid highway program
Amount of Federal share in antitrust settlement may be applied to other allowable costs from the periods covered by settlement if the full percentage of Federal share was not used during these periods---------- 577

STATUTES OF LIMITATION Page

Claims

Compensation

Fair Labor Standards Act

Certifying officer questions what is the statute of limitations on claims filed by Federal employees under Fair Labor Standards Act (FLSA). Although there is a time limitation on "actions at law" under FLSA, there is no statutory time limitation when such claims may be filed as claims cognizable by General Accounting Office (GAO). Therefore, time limit for filing FLSA claims in GAO is 6 years. 31 U.S.C. 71a and 237 441

TIME

Standard advanced to daylight saving

Compensation effect

Employees who have regularly scheduled night shifts are charged 1 hour of annual leave when they work only 7 hours on the last Sunday in April when daylight savings time begins. Alternatively, agency may, by union agreement or agency policy, permit employees to work an additional hour on that day as method of maintaining regular 8-hour shift and normal pay. Administrative leave is not a proper alternative.. 429

TORTS

Military personnel

Wrongful separation

Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in the matter or damages based on a tort theory of wrongful separation from active duty 554

TRANSPORTATION

Air carriers

Fly America Act

Intent of Sec. 5

Intent of Section 5 of Fly America Act (49 U.S.C. 1517) is to prefer United States air carriers over foreign air carriers rather than to prefer certificated over noncertificated air carriers 401

Foreign

American carrier availability

Authority to use foreign aircraft

Where U.S. air carrier service originating in Vienna, Austria, requires connections in New York en route to Washington, D.C., traveler may not use foreign air carrier between Vienna and London, England, or Paris, France, to connect with a direct flight to Washington, to avoid the congestion of JFK International Airport, New York. The inconvenience of air traffic routed through New York is shared by approximately 40 percent of all U.S. citizens traveling abroad. It does not justify deviation from the scheduling principles that implement 49 U.S.C. 1517 inasmuch as the proposed deviation would diminish U.S. air carrier revenues 519

"Certificated air carriers"

The requirement of 49 U.S.C. 1517 for use of certificated U.S. air carrier for government financed foreign air transportation applies not only to transportation secured with appropriated funds but to transportation secured with

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Foreign—Continued
"Certificated air carriers"—Continued
funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States * * *." Where international air transportation is secured with other than appropriated funds, agencies should apply the Fly America Act Guidelines. 546
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Vessels
American
Cargo preference
Routing
Where service in United States vessels is not available for entire distance between U.S. port of origin and overseas destination, 1904 Cargo Preference Act requires transportation by sea aboard U.S. vessels with transshipment to foreign land carrier to be preferred over transportation by sea aboard U.S. vessels with transshipment to foreign-flag feeder ship even though latter is less costly ---------- 531
Foreign
Reimbursement
Joint Travel Regulations may be revised to indicate that section 5 of International Air Transportation Fair Competitive Practices Act (49 U.S.C. 1517) does not restrict the use of foreign air carriers when such transportation is paid for in full by a foreign government, international agency or other organization either directly or by reimbursement to the United States. However, the Merchant Marine Act requirement for use of vessels of U.S. registry applies regardless of whether the transportation is ultimately paid for by a foreign government, international agency or other organization ---------- 546
TRAVEL EXPENSES
Air travel
Fly America Act
Applicability
Joint Travel Regulations may be revised to indicate that section 5 of International Air Transportation Fair Competitive Practices Act (49 U.S.C. 1517) does not restrict the use of foreign air carriers when such transportation is paid for in full by a foreign government, international agency or other organization either directly or by reimbursement to the United States. However, the Merchant Marine Act requirement for use of vessels of U.S. registry applies regardless of whether the transportation is ultimately paid for by a foreign government, international agency or other organization ---------- 546
The requirement of 49 U.S.C. 1517 for use of certificated U.S. air carrier for government financed foreign air transportation applies not only to transportation secured with appropriated funds but to transportation secured with funds "appropriated, owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States * * *." Where international air transportation is secured with other than appropriated funds, agencies should apply the Fly America Act Guidelines ---------- 546

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Foreign air carriers
Prohibition
Applicability
Where U.S. air carrier service originating in Vienna, Austria, requires connections in New York en route to Washington, D.C., traveler may not use foreign air carrier between Vienna and London, England, or Paris, France, to connect with a direct flight to Washington, to avoid the congestion of JFK International Airport, New York. The inconvenience of air traffic routed through New York is shared by approximately 40 percent of all U.S. citizens traveling abroad. It does not justify deviation from the scheduling principles that implement 49 U.S.C. 1517 inasmuch as the proposed deviation would diminish U.S. air carrier revenues 519
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Foreign
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VOLUNTARY SERVICES
Officers and employees
Waiver of portion or all of statutory salary
Agency for International Development may not pay officers and employees less than the compensation for their positions set forth in the Executive Schedule, the General Schedule, and the Foreign Service Schedule. While 22 U.S.C. 2395(d) authorizes AID to accept gifts of services, it does not authorize the waiver of all or part of the compensation fixed by or pursuant to statute 423
WAIVERS
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WORDS AND PHRASES
"Basic ordering agreement"
Agency's conducting informal competition whereby order for data base development was to be placed under one of two vendors' basic ordering agreements—where no adequate written solicitation was issued—was procedure at variance with fundamental principles of Federal negotiated procurement, and also raises question of improper prequalification of offerors. General Accounting Office (GAO) recommends that agency review its procedures for issuing such orders and conduct any further competition in manner not inconsistent with decision. Case is also called to attention of General Services Administration for possible revision of Federal Procurement Regulations 434
"Cardinal change doctrine"
Mutual agreement between contractor and Government modifying original contract was in effect improper award of new agreement, which went substantially beyond the scope of competition initially conducted. 567

WORDS AND PHRASES—Continued Page

"Federal norm"

Prime contractor's failure to restrict solicitation to sole source does not rise to level of arbitrary or capricious action entitling protester to bid and proposal costs. Costs of preparing and filing protest are in any event unallowable 527

"Locality"

Agency's improper designation of 5-state area on Standard Form 98, Notice of Intention to Make a Service Contract, as place of performance is not prejudicial to protester who points out that performance would not be limited to 5-state area, since under current Department of Labor approach same wage determination, reflecting 5-state area as locality of performance, would have been issued 549

"Quasi-military armed forces for hire"

Fifth Circuit Court of Appeals, in *United States ex rel. Weinberger v. Equifax*, construed 5 U.S.C. 3108, the Anti-Pinkerton Act, as applying only to organizations which offer "quasi-military armed forces for hire." Although the Court did not define "quasi-military armed force," we do not believe term covers companies which provide guard or protective services. General Accounting Office will follow Court's interpretation in the future. Prior decisions inconsistent with *Equifax* interpretation will no longer be followed. See 57 Comp. Gen. 480 524

"Service employees"

Where Department of Labor (DOL) notifies agency that it has determined Service Contract Act (SCA) is applicable to proposed contract, agency must comply with regulations implementing SCA unless DOL's view is clearly contrary to law. Since determination that SCA applies to contract for overhaul of aircraft engines is not clearly contrary to law, solicitation which does not include required SCA provisions is defective and should be canceled. Contention that applicability of SCA should be determined by Office of Federal Procurement Policy (OFPP) does not justify agency's failure to comply with SCA under circumstances where OFPP has not taken substantive position on issue 501

"Similar organization"

Protest against proposed award to second low bidder on ground that award would violate Anti-Pinkerton Act, 5 U.S.C. 3108 (1970), and implementing procurement regulation is denied. GAO will hereafter interpret act in accord with judicial interpretation in *United States ex rel. Weinberger* v. *Equifax, Inc.*, 557 F. 2d 456, 463 (5th Cir. 1977), providing that "an organization is not 'similar' to the * * * Pinkerton Detective Agency unless it offers quasi-military armed forces for hire." Where record does not show that bidder offers such a force, it is not a "similar organization" within the meaning of the act, and award may properly be made to bidder. 55 Comp. Gen. 1472, 56 *id.* 225, and other cases, overruled or modified 480

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