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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Paul G. Dembling

DEPUTY GENERAL COUNSEL

Milton J. Socolar

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

John J. Higgins

Richard R. Pierson

Paul Shnitzer*

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*Retired September 22, 1978.

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[B–191264]

Energy—Department of Energy—Contracts—Subcontracts—Applicability of Federal Procurement Rules

Where Department of Energy (DOE) contract with prime management contractor for operation and management of DOE facilities requires contractor to award subcontracts on basis of fair and equal treatment of all competitors, the "Federal norm" provides an appropriate frame of reference for determining if fair and equal treatment has been provided in specific situations.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Equal Opportunity to Compete

Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach.

Contracts—Termination—Convenience of Government—Subcontracts—"Best Interest" Consideration—Criteria

Although protest is sustained, requested relief that contract be terminated at midpoint and award for balance of supplies be made to protestor is inappropriate since protestor has not shown entitlement to award. Also, recompetition would not be in the best interest of Government at stage of contract where 50 percent or more of performance had been completed.

In the matter of Cohu, Inc., September 6, 1978:

Cohu, Inc. (Cohu) protests the award to RCA Corporation (RCA) of a contract for 319 "off the shelf" security monitoring television cameras by Sandia Corporation (Sandia) under Sandia Request for Quotation (RFQ) No. CRB/07–1360. Sandia is the operating contractor for the Department of Energy's (DOE) Sandia Laboratories. The cameras were being purchased for the Air Force under agreements between DOE's predecessor agencies (the Atomic Energy Commission and the Energy Research and Development Administration [ERDA]) and the Air Force pursuant to the Economy Act, 31 U.S.C. 686 (1970).

Cohu complains that, contrary to Federal procurement practices, Sandia reopened negotiations with RCA after receipt of best and final offers, without affording Cohu the same opportunity to negotiate further, with the result that RCA became the low offeror.

Sandia (a subsidiary of Western Electric) operates Sandia Laboratories under a cost type, no profit, no fee contract with DOE. The contract provides that Sandia's procurement policies and practices will be 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 Producement Regulations (FPR), although it does require Sandia to include specific clauses in its contracts "as are required by statute, and Executive Order."

The material facts in this case are not in dispute, and are chronologically set forth below:

August 16, 1977	Sandia issued Request for Quotation No. CRB/07-1360 to Cohu and RCA.
September 2, 1977	RCA submitted an offer of $659,188 and Cohu submitted an offer of $743,104.
September 1977—January 1978	The procurement was held in abeyance pending resolution of a protest involving this procurement raising issues unrelated to those now under consideration. *See General Electrodynamics Corporation*, B-190020, January 31, 1978, 78-1 CPD 78.
February 1, 1978	RCA and Cohu were requested to reconfirm and extend their offers (no request for price changes were made) because both had expired during the pendency of the protest.
February 2-3, 1978	The Sandia Contracting Representative informed both RCA and Cohu by telephone that the cutoff date for final offers would be noon, Albuquerque time, February 6, 1978.
February 3, 1978	By identical TWXs to both RCA and Cohu, the Contracting Representative confirmed that the cutoff date was noon, Albuquerque time, February 6, 1978.
February 6, 1978	By letters, RCA lowered its offer to $623,779, and Cohu lowered its offer to $622,451.
February 7, 1978	The contracting representative telephonically requested RCA to furnish a price for its proposed alternate for item 10, which had not been priced in RCA's offer. Item 10 called for the delivery of a theoretical reliability analysis. RCA's alternative offer was for an analysis based on actual test data.
February 8, 1978	By telephone and letter, RCA offered a price of $7,200, on the basis of which RCA's total offer was $599,479.
February 10, 1978	The contract in the amount of $599,479 was awarded to RCA.

DOE's regulatory provisions applicable to subcontracting by DOE's operating contractors are set forth in 41 C.F.R. Part 9-50 (1977). Pertinent portions of these regulations provide as follows:

9-50.302 *Subcontracting policies and procedures.*
9-50.302-1 *General*

Procurement activities of operating and other onsite contractors are governed by contract provisions. Federal Procurement regulations generally are not directly applicable. *There are, however, requirements of certain Federal laws, executive orders, and regulations, including Federal Procurement Regulations, which pertain to procurements by these contractors.* These requirements, together with implementing ERDA procurement regulations which apply to contractor procurement, are identified in this section. [Italic supplied.]

* * * * * * *

9-50.302-3 *Policies*

The following policies apply to contractor procurement. Within these policies it is expected that procurement systems and methods will vary according to the types and kinds of procurement to be made, the needs of the particular programs, and the experience, methods and practices of the particular contractor.

* * * * * * *

(b) Procurement should be effected in the manner most advantageous to the Government—price, quality, and other factors considered. In order to assure this objective and the award of business on an impartial basis, procurement (from other than Government sources) shall be effected by methods calculated to assure such full and free competition as is consistent with securing the required supplies and services. Generally, procurement actions are carried out through one of the following methods:

(1) Competitive offers or quotations and award. The competitive offer or quotation and award method of procurement, which normally assures the greatest degree of full and free competition, generally involves the following basic steps and objectives:

* * * * * * *

(iii) Handling solicitations in a manner which provides fair and equal treatment to all prospective contractors.

(iv) Making an award to the prospective contractor whose offer, in response to the solicitation, will be most advantageous to the Government, price and other factors considered. However, if upon evaluation it is determined to be in the best interests of the Government to enter into negotiations with prospective contractors before award, such negotiations should be conducted in accordance with (2) below with respect to according fair and equal treatment to prospective contractors.

(2) Negotiation. Procurement by this method normally should be conducted by competitive negotiations through the solicitation and evaluation of proposals, from an adequate number of qualified sources to assure effective competition, consistent with securing the required supplies or services. * * * Requests for proposals should describe the property or services required as completely as possible; allow sufficient time for the submission of proposals; and establish a closing date for receipt of proposals. Proposals should be handled in a manner which provides fair and equal treatment to all prospective offerors. Selection of offerors for negotiation and award shall be consistent with FPR 1-3.805 and ERDA-PR 9-3.805.

ERDA (now DOE) PR 9-3.805 is not germane to this case. FPR 1-3.805-1 provides in pertinent part that:

(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered * * *.

* * * * * * *

(5) * * * [W]hen the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal: *Provided*, that this can be done without revealing to the other firms any information to offeror does not want disclosed to the public (*see* § 1-3.103(b)).

(b) * * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (*see* § 1-3.805-1(a)) shall be offered an equitable opportunity to submit such price, technical or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date. In addition, all such offerors shall be informed that after the specified date for the closing of negotiations, no information (other than pre-award notice of unacceptable proposals or offers) will be furnished to any offeror until award has been made. * * *

* * * * * * *

(d) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be * * * furnished to each prospective contractor.

Although DOE's regulatory provisions distinguish between the "competitive" procurement (a method somewhat akin to the Federal procurement concept of formal advertising) and methods to be used by DOE operating contractors, we find that the Sandia procedures approved by DOE do not define "competitive" or "negotiated" procurement and do not clearly distinguish the two. For example, Sandia Procurement Instruction (P.I.) 8.01 ¶ 7.01 states:

* * * the award decision, whether based on *competitive or negotiated pricing*, shall in addition to other considerations, be based on fair and equitable treatment of all quoters * * *. [Italic supplied.]

While P.I. 8.01 ¶ 7.02 states:

In competitive situations, if discussions are conducted with or changes granted to one quoter, the other responsive quoters must be afforded equal treatment. * * *

In addition, P.I. 8.15 ¶ 2.1 describes competitive purchases as follows:

A purchase is categorized "competitive" when the award is based on *adequate price competition*, i.e., two or more *responsive* quotations from responsible quoters. * * *

A purchase will also be categorized "competitive" when more than one proposal is received and the primary basis of selection is best proposal/approach submitted and the price/cost arrangement is the secondary basis of selection. [Italic in the original.]

It seems apparent that the "competitive situations" mentioned in ¶ 7.02 are not intended to be the same as the competitive pricing mentioned in ¶ 7.01 or in the DOE definition of "competitive offers" and the term "competitive" as it is used in P.I. 8.14 ¶ 2.1, clearly has two meanings –one consistent with the DOE regulatory definition of "competitive offers" and the other meeting the DOE definition of competitive negotiations.

The DOE/Sandia position is simply that the procurement was proper because it was conducted in accordance with Sandia's approved procedures and that the complained of action—requesting a price from RCA for an alternative approach proposed by RCA for a small portion of the contract—was not prejudicial to Cohu.

We do not agree. Both the DOE regulations and the Sandia P.I. require that Sandia's practices foster the "fair and equal" treatment of all competitors. That term is not defined, so that what constitutes fair and equal treatment in a given case obviously must be determined on the basis of the facts and circumstances involved. In determining whether a particular course of action results in fair and equal treatment, we of course recognize that the 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), and have stated that therefore the propriety of a prime contractor award "must be considered in light of relevant prime contract provisions" rather than those statutory and regulatory provisions. *Tennecomp Systems, Inc.*, B–180907, April 22, 1975, 75–1 CPD 244. However, since the subcontract awards are regarded as "for" the Government, we have also stated that the award actions should be measured against the "Federal norm," that is, the general basic principles which govern the award of contracts by the Federal Government, *see Fiber Materials, Inc.*, B–191318, June 8, 1978, 57 Comp. Gen. 527, 78–1 CPD 422, so that the prime contractor's procurements will be consistent with the policy objectives of the Federal statutes and regulations. *See Piasecki Aircraft Corporation*, B–190178, July 6, 1978, 78–2 CPD 10; *General Electrodynamics Corporation—Reconsideration*, B–190020, August 16, 1978, 78–2 CPD 121. Thus, in defining for a specific situation, the fair and equal treatment requirement inherent in Sandia's approved procurement procedures, we believe the "Federal norm" provides the appropriate frame of reference.

In this case it is not clear whether Sandia was conducting a "competitive" type procurement or a "negotiation" type procurement, since elements of both appear to be present. In either event, we are unable to conclude that fair and equal treatment was afforded to Cohu because it is clear that RCA was provided an opportunity to revise its offer while Cohu was not.

In this regard, we point out that a fundamental precept of any competitive procurement system is that all competitors must be given the opportunity to submit offers on a common basis. *Computek Inc., et al.*, 54 Comp. Gen. 1080 (1975), 75–1 CPD 384; 53 Comp. Gen. 32 (1973); 51 *id.* 518 (1972); 39 *id.* 570 (1960); *Homemaker Health Aide Service*, B–188914, September 27, 1977, 77–2 CPD 230. Thus, when formal advertising type procedures are utilized and one bidder offers a product which varies from the advertised requirements, the bid may not be accepted even though it would in fact meet the procuring activity's actual needs. Instead, the activity is required to re-

advertise so that all bidders are afforded an equal opportunity to compete on the same basis—that of the activity's actual needs. 43 Comp. Gen. 209 (1963); 52 *id.* 815 (1973). Similarly, when negotiation type procedures are used, and

> * * * there is a change in an agency's stated needs or * * * an agency decides that it is willing to accept a proposal that deviates from those stated needs, all offerors must be informed of the revised needs, usually through amendment of the solicitation, and furnished an opportunity to submit a proposal on the basis of the revised requirements. *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975) 75-2 CPD 144; *Computek Incorporated, et al., supra; Unidynamics/St. Louis, Inc.*, B-181130, August 19, 1974, 74-2 CPD 107; *Annandale Service Company, et al.*, B-181806, December 5, 1974; 48 Comp. Gen. 663 (1969).

Union Carbide Corporation, 55 Comp. Gen. 802, 807 (1976), 76-1 CPD 134.

In this case, Sandia sought competition on the basis of, *inter alia*, a theoretical reliability analysis. One competitor, RCA, offered an alternative approach. Sandia's willingness to consider that approach was not communicated to the other offeror, (there is no suggestion here that "technical transfusion" would have resulted, such as in *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74-2 CPD 137), and as a result of Sandia's seeking a price from RCA for the alternate approach, RCA was given an opportunity to revise its price quotation while the other offeror was not. As a result, RCA and Cohu neither competed on an equal basis (in connection with the reliability analysis) nor had the same opportunity to submit final pricing.

DOE and Sandia maintain that no prejudice accrued to Cohu because Cohu could not have lowered its price sufficiently on the basis of a change in the item 10 reliability analysis requirement to overcome the RCA price change. (Cohu's price for item 10 was $2,300, so that even if Cohu reduced its price to zero, RCA's alternate proposal price could "still be $20,622" lower than Cohu's overall price). Cohu doesn't dispute those figures. It does, however, disagree with the DOE/Sandia position, which Sandia states as follows:

> It is Sandia's position that "equal treatment" does not require Sandia to permit Cohu to requote all 10 items of the RFQ when RCA was only given an opportunity to price the RCA alternate proposal with respect to Item 10.
>
> It would have been unequal treatment of RCA to have permitted Cohu to reprice its quote after having only permitted RCA to price its alternate proposal for Item 10. It should be pointed out that RCA did not know whether Sandia would award the contract based upon original Item 10 or the RCA alternate proposal for Item 10, an option that remained open to Sandia up until the time the contract was finally awarded. It should also be pointed out that RCA did not know whether Cohu was being asked to price the RCA alternate proposal. In fact, RCA did not know at any time whether Cohu was the low quoter or the high quoter nor was Cohu ever advised prior to contract award whether RCA was the low quoter or the high quoter. All RCA knew was that Sandia was interested in their alternate proposal for Item 10 and desired to have the price for that alternate proposal.
>
> Inasmuch as any quote by Cohu on the RCA alternate proposal for Item 10 could not possibly result in Cohu being the low quoter, it was not "unequal treat-

ment" for Sandia to award the contract to RCA without requesting Cohu to price the RCA alternate proposal.

Cohu maintains that Sandia was required to request revised pricing from it just as Sandia requested pricing from RCA, and that Sandia could not properly have limited Cohu to a price revision for item 10 only.

It is the general rule in Federal procurements that offerors have the right to change their proposals in any manner they see fit so long as negotiations remain open, *University of New Orleans*, 56 Comp. Gen. 958 (1977), 77-2 CPD 201; *PRC Information Sciences Company*, 56 Comp. Gen. 768 (1977), 77-2 CPD 11; 49 Comp. Gen. 402 (1969), and it has been recognized that when an opportunity for further discussion is provided, offerors may offer substantial price reductions that are unrelated to any changes made in the Government's stated requirements or may otherwise completely restructure their pricing. See *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168, and cases cited therein. This aspect of Federal negotiated procurement is based in part on a recognition that offerors initially may structure their price proposals in myriad ways. For example, where several line items are involved, some offerors may propose very realistic prices for each line item, while others may assign a large portion of overall costs to a particular line item and propose a very low price on other line items. Other offerors may propose high prices on all or most line items, thereby retaining the option of significantly reducing their individual item and/or overall pricing should the opportunity arise. Contracting officers, of course, generally are not in a position to know precisely how each offeror has structured its pricing in such situations.

This case provides a good example of the disparate pricing approaches competitors may take. RCA's original quotation was $659,188, while Cohu quoted a significantly higher $743,104. However, when some months later RCA and Cohu were asked to confirm those prices, RCA lowered its price approximately 5 percent, to $623,779, while Cohu lowered its price approximately 16 percent to $622,451. For item 10, RCA originally proposed a price of $31,500 while Cohu's price for the item was $2,700. It may be that Cohu's item 10 price was unrealistically low, that the RCA price was reasonable, and that RCA's drastic reduction for the item 10 alternate approach was also realistic. On the other hand, it may also be that Cohu's item 10 price was the realistic one, and that RCA's price was realistically unrelated to the actual cost for the item 10 work. In that case, RCA, merely by being asked to quote a price for the alternate approach, would have been given an opportunity to substantially revise its overall price proposal under the guise of modifying only its item 10 price.

In light of the wide variety of pricing approaches which competing offerors may take, we do not think contracting officials properly can limit proposal revisions to individual aspects of the proposals. Rather, we believe basic fairness requires that if some change is made in the procuring activity's requirements, offerors generally must be permitted to modify their proposals however they wish since only they know how the change will impact on their overall proposal as submitted. In this case, RCA may well have had that opportunity as a result of its high item 10 price. It would be manifestly unfair to Cohu, we think, for it to be denied an opportunity to revise its proposal merely because it structured its individual item pricing differently.

We appreciate Sandia's statement that RCA had merely been asked to quote on the alternate approach without being told that Sandia would procure on that basis. However, in view of Sandia's expressed interest in the alternative approach, RCA could have reasonably believed that the approach was acceptable to Sandia and that a price reduction could only help its competitive position.

In short, we believe that Sandia could not provide the fair and equal treatment called for by its procedures without providing both RCA and Cohu the opportunity to revise their proposals on the basis of the item 10 alternative approach.

Cohu originally requested that Sandia terminate its contract with RCA and award the contract to it. Subsequently, "because the interests of many parties must be considered in this matter," Cohu recognized that this Office "may be unable to grant the requested relief" and suggested instead that RCA be permitted to deliver "approximately the first half of the cameras and Cohu then commence delivery, without interruption, of the balance." Cohu maintains that while this result would satisfy neither RCA nor Cohu, it would, in view of the circumstances, offer a measure of fairness and equal treatment. Cohu also contends that this would result in only "slight additional cost," because the companies were to provide off-the-shelf models, and RCA could sell the undelivered cameras to its commercial customers without sustaining a loss. Finally, Cohu asserts that this proposal would permit both companies to compete for follow-on procurements.

Sandia, however, asserting that its "experience" indicates that such a termination would result in RCA being paid substantially the full contract price and claiming that 80 percent of the contract price would be a "conservative estimate" for termination at the midpoint of performance, avers that such a termination would result in more than "slight additional cost." Sandia also states that the introduction of a second camera into the system would cost "at least $100,000," and consequently says that it is "presently evaluating whether follow-on purchases should be on a sole source or a competitive basis." RCA con-

tends that the termination costs would be $70,000 higher than estimated by Sandia if its contract were terminated midway.

In our view, none of the information offered by the parties is of any particular value in our consideration of the relief, if any, to be accorded Cohu. Clearly Cohu has no basis to conclude that termination costs would be minimal, save for its assumption that RCA could sell all of the undelivered cameras in the commercial market-place. On the other hand, neither Sandia nor RCA has documented its estimates nor considered the commercial value of the undelivered cameras in those estimates. However, cost to the Government is but one aspect of our consideration of whether it is in the best interest of the Government to take corrective actions which might entail termination of an improperly awarded contract. Other considerations would include the seriousness of the procurement deficiency, the degree of prejudice to Cohu, the good faith of the parties or the extent of performance. *Honeywell Information Systems, Inc.*, 56 Comp. Gen. 505 (1977), 77-1 CPD 256.

At this point, of course, Cohu has not shown that it was entitled to the award—only that it was improperly denied the right to compete for the contract under the modified specifications, hence a partial termination of RCA's contract would not be proper. It may well be that the requirement to furnish actual test data rather than the theoretical data upon which Cohu's quotation was based would be more costly to Cohu. Thus Cohu may have raised rather than reduced its price if it were unaware of RCA's quotation. Whether Cohu would ultimately have been the low offeror had it been originally accorded the opportunity to revise its quotation is mere speculation. Recompetition would be the more appropriate remedy, but we do not believe that it would be in the best interest of the Government to recompete the contract or any portion thereof at this time. There is, for example, no evidence to suggest, nor do we have any reason to believe, that the Sandia contracting representative acted in bad faith. Also, 50 percent or more of the contract has been performed, and costs in excess of that are likely to have already been incurred. In addition, the award was delayed several months because of the earlier protest, and any recompetition would necessarily entail even further delay. We thus do not believe there is any practical way we can afford any meaningful relief in this case.

We are bringing this matter to the attention of the Secretary of Energy.

[B-183086]

Details—Compensation—Higher Grade Duties Assignment

Department of Health, Education, and Welfare detailed employees to higher grade positions, but finds it difficult or impossible to show that vacancies existed. Claims

of employees for backpay under *Turner-Caldwell*, 56 Comp. Gen. 427 (1977), may be considered without any finding of vacancies. It is not a condition for entitlement to a retroactive temporary promotion with backpay that there must have existed, at the time a detail was ordered, a vacant position to which the claimant was detailed. However, the position must be established and classified.

In the matter of retroactive temporary promotion for extended details to higher grades, September 7, 1978:

This action is in response to a letter dated June 5, 1978, from the Assistant Secretary for Personnel Administration, Department of Health, Education, and Welfare, requesting an interpretation of our *Turner-Caldwell* decision B–183086, dated March 23, 1977, 56 Comp. Gen. 427, with respect to Identical-Additional (IA) positions. The Assistant Secretary states that IA positions exist where large bodies of employees are appointed to do the same work under one common position description and classification. The letter states that it is the understanding of the Department of Health, Education, and Welfare that a condition for entitlement to retroactive temporary promotion with backpay is that there must have existed, at the time the detail was ordered, a vacant, officially classified position to which the claimant was detailed. However, it appears that a number of employees have been detailed to higher grade duties, but it may be difficult or impossible in some cases to show that vacancies existed. Therefore, we have been asked whether the position to which an employee is detailed must be vacant before he can acquire entitlement to a retroactive temporary position with backpay.

Our recent decision B–191266, dated June 12, 1978, 57 Comp. Gen. 536, concerned a request by the Federal Labor Relations Council for an advance decision as to the legality of implementing a backpay award granted by an arbitrator because the Internal Revenue Service (IRS) failed to temporarily promote two grievants during their assignments to higher grade duties. The IRS argued there were no vacant, funded positions to which the grievants could have been assigned. We stated that we were unaware of any requirement that a position be vacant in order for an employee to be detailed to that position, and we pointed out that the definition of a detail as set forth in the Federal Personnel Manual (FPM), 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.

The Federal Personnel Manual, chapter 300, subchapter 8, further states that details may be made to meet emergencies occasioned by abnormal workload, change in mission or organization, or unanticipated absences. The FPM also states that a detail may be made pending official assignment, pending description and classification of new

position, pending security clearance, and for training purposes. Thus, there is no FPM requirement that an employee must be detailed to a vacant position; rather, the FPM merely authorizes an agency to detail an employee to higher grade duties for a short period under the circumstances stated above.

In addition, FPM chapter 335, subchapter 4, lists some uses of a temporary promotion. Included are situations where an employee has to perform the duties of a position during the extended absence of an incumbent, to fill a position which has become vacant until a permanent appointment is made, to assume responsibility for an increased workload for a limited period, or to participate in a special project which will last for a limited period. In this connection we point out that there is only one example cited which requires a vacant position. Moreover, it is apparent that there is no vacant position when an employee is temporarily promoted to perform the duties of a position during the extended absence of the incumbent.

Finally, the United States Civil Service Commission (CSC) has promulgated implementing guidance concerning our *Turner-Caldwell* decision in CSC Bulletin No. 300–40 dated May 25, 1977, subject: GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs (B–183086). Paragraph 4 of that bulletin states: "For purposes of this decision, *the position must be an established one, classified under an occupational standard to a grade or pay level.*" [Italic in original.] If the position must be vacant, besides established and classified, the CSC would have so stated when it forcefully set forth the requirements for the implementation of the decision. It is clear from the statement in the bulletin that the crucial aspect in the *Turner-Caldwell* line of cases is that the position be established and classified. Vacancy is not a mandatory condition.

Two additional points made in our earlier decisions should be noted. In 56 Comp. Gen. 427, we emphasized the necessity of an employee satisfying the existing statutory and regulatory requirements before acquiring entitlement to a retroactive temporary promotion with backpay. Examples given include the time-in-grade requirements of the "Whitten Amendment," 5 U.S.C. § 3101 note, and requirements governing appointments to supergrade positions under 5 U.S.C. § 3324. Secondly, 57 Comp. Gen. 536, *supra*, concludes with the caveat that the decision does not change the general rule that the mere accretion of duties in a position does not entitle the occupant to a promotion.

Accordingly, there is no necessity that a personnel office find there was a vacant position as a condition for considering retroactive action under *Turner-Caldwell* with respect to IA positions.

[B-190547]

Officers and Employees—Tranfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions—Contract Date as Settlement Date—"Contract for Deed"

Employee, incident to transfer of official station effective August 18, 1975, sold residence through "contract for deed" on February 27, 1976, and was reimbursed for expenses incident to transaction. His claim for additional expenses incurred incident to legal title transfer upon purchaser's payment of loan may be paid. Extension of time limit for settlement is not required since "contract for deed" date, which was within 1 year of employee's transfer, is settlement date under FTR para. 2-6.1e. Additional expenses were made "within a reasonable amount of time" since they were incurred within 2-year maximum time limitation of FTR para. 2-6.1e. However, payment for title search may not be made if it duplicates expenses for title insurance. B-188300, August 29, 1977, amplified.

In the matter of Larry W. Day—real estate expenses—time limitation:

This decision responds to a request dated October 17, 1977, from H. Larry Jordon, an authorized certifying officer of the U.S. Department of Agriculture. Mr. Jordan asks whether reimbursement may be made for certain expenses incurred by Mr. Larry W. Day, an employee of the Animal and Plant Health Inspection Service, in connection with the sale of his residence at his old official station incident to his transfer from Williamston, Michigan, to Fremont, Michigan, effective August 18, 1975.

On February 27, 1976, Mr. Day signed a contract for the sale of his residence at his old official station, with the purchase price to be " * * * paid in full within three (3) years from the date hereof." He was reimbursed for the $2,716.50 real estate expenses he incurred in this transaction. His expenses were as follows:

Legal fees forland contract	$15.00
Closing fee—½	17.50
Title insurance	101.00
Real estate commission	2,583.00
Total	$2,716.50

On August 11, 1977, the purchaser paid off the land contract executed on February 27, 1976, and assumed the existing mortgage on the real estate. Mr. Day seeks reimbursement for the expenses he incurred related to this portion of the transaction. The expenses claimed are as follows:

Abstract or title search	$101.00
Document preparation--deed	25.00
State tax/stamps—deed	40.70
Total	$166.70

Mr. Jordan first inquires whether Mr. Day's claim for reimbursement is valid in the absence of an extension for the settlement date of the real estate transaction as required by the Federal Travel Regulations. Paragraph 2–6.1e of the FTR provides in part that a Government employee shall be reimbursed for expenses required to be paid by him in connection with the sale by him of one residence at his old station, provided that:

> The settlement dates for the sale and purchase * * * for which reimbursement is requested are not later than 1 (initial) year after the date on which the employee reported for duty at the new official station. Upon an employee's written request this time limit for completion of the sale and purchase * * * may be extended by the head of the agency or his designee for an additional period of time, not to exceed 1 year, regardless of the reasons therefor so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station.

Our decision in *Larry J. Light*, B–188300, August 29, 1977, cited by Mr. Jordan, is a case similar to the instant one. In that case the employee claimed reimbursement of expenses incurred subsequent to the date on which the sale contract was executed. The decision states in part:

> The authority for reimbursement of real estate expenses incurred by an employee pursuant to a transfer of official duty station is contained in 5 U.S.C. § 5724a (1970) and the implementing travel regulations * * *. Our Office has held that under the statute (and prior regulations) an employee may be reimbursed for real estate expenses incurred in a transaction such as in the present case which is known as a "contract for deed." 46 Comp. Gen. 677, *supra*, and B–165146, September 16, 1968. Although legal title to the property was retained by the seller, the effect of the contract was to transfer equitable ownership of the property to the buyer and, for the purposes of meeting the 1-year "settlement date" time limitation contained in FTR para. 2–6.1e, we would conclude that the "settlement date" involved in this transaction was the date the contract was executed. 46 Comp. Gen. 677, *supra*, and B–165146, *supra*.

The instant case falls squarely within this ruling. A "contract for deed" is a "land installment contract" under which the purchaser pays the purchase price in installments, and obtains equitable title upon the execution of the contract but does not obtain legal title to the premises until the contract is fully paid. B–185095, August 13, 1976, citing B–165146, September 16, 1968. This is the nature of the contract in the present case.

Under the terms of the contract in the present case, title to the property remained in Mr. Day until the purchaser paid the full purchase price or, pursuant to the terms of the contract, Mr. Day executed and delivered a warranty deed to the purchaser subject to any mortgages assumed by the purchaser. Also, the purchaser had the right to immediate possession of the premises. Such provisions clearly meet the transfer of equitable ownership test set forth in 46 Comp. Gen. 677, *supra*, and B–165146, September 16, 1968.

In view of this and since the real estate agent's commission and various other closing costs were charged to Mr. Day on February 27,

1976, the date the contract was executed is considered the settlement date. Since settlement was effected within 1 year of Mr. Day's transfer, it was not necessary for him to obtain an extension under FTR para. 2–6.1e for his claim for additional expenses incident to the settlement to be considered.

Mr. Jordan next inquires whether Mr. Day's expenses may be considered as being "within a reasonable amount of time" and "reasonably foreseeable as to amount when contract was executed" as required by B–188300, *supra*. That decision cites the barring act, 31 U.S.C. § 71a (1976), which requires that all claims cognizable by the General Accounting Office be received within 6 years of the date of first accrual. Such citation does not indicate that real estate expenses incurred by a transferred employee during the 6 years following his transfer may be reimbursed; it merely states the time within which a claim must be submitted in order to be considered. The maximum time limitations for settlement of real estate transactions of transferred employees is 2 years (when an extension is granted). The vast majority of transferred employees enter into real estate transactions which involve conventional settlements transferring legal title and, thus, are limited to reimbursement of expenses incurred within a maximum period of 2 years. Since all employees should be treated uniformly, we hereby hold that an employee who enters into a "contract for deed" transaction may only be reimbursed for real estate expenses incurred within 2 years of the date of his transfer. We are also of the view that additional expenses incurred within the maximum period of 2 years in accordance with a "contract for deed" may be considered as incurred within a reasonable period of time. B–188300, August 29, 1977, is amplified accordingly.

The costs of the abstract or title search and preparation of the deed are reimbursable under FTR para. 2–6.2c as legal and related expenses. The costs of the state tax and stamps are reimbursable, under FTR para. 2–6.2d, as miscellaneous expenses. In the instant case the expenses for which reimbursement is claimed were incurred within 2 years of Mr. Day's transfer and, therefore, were made within a reasonable time. Moreover, if the amounts paid by Mr. Day were within the customary range for such items at his old official station, the expenses were reasonably foreseeable as to amount when the contract was executed. However, on the basis of the present record it appears that the $101 payment for title insurance on February 27, 1976, duplicates the item of $101 for title search paid on August 11, 1977. See FTR para. 2–6.2c. If this is so, only one of the two items is allowable.

Accordingly, the travel voucher submitted by Mr. Day may be certified for payment as indicated above if otherwise proper.

[B-114829]

National Railroad Passenger Corporation—Applicability of Freedom of Information, Privacy and Sunshine Acts

The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak.

Federal Register—Publication—Required

Government Printing Office is required by 44 U.S.C. 1504(a)(3) to publish information in Federal Register that Amtrak is required to publish under Freedom of Information, Privacy, and Sunshine Acts. Furthermore, Amtrak may be billed for such publication in accordance with 44 U.S.C. 1509, as amended by Pub. L. No. 95-94, since Amtrak is an "agency" within the context of that provision.

In the matter of printing by Government Printing Office for National Railroad Passenger Corporation, September 8, 1978:

This decision to the Public Printer is in response to an inquiry from the General Counsel, Government Printing Office (GPO), asking whether the GPO is authorized to open an account for the National Railroad Passenger Corporation (Amtrak) for printing notices submitted by Amtrak pursuant to section 3(a) of the Government in the Sunshine Act, 5 U.S.C. § 552b (1976) (Sunshine Act).

Specifically, we have been asked:

> * * * whether Amtrak is an agency or establishment of the United States Government and, therefore, whether an Amtrak printing account can be opened at GPO for printing Sunshine Act notices, etc., in the Federal Register. Is there an implied authority to the GPO to print by virtue of Amtrak being placed under the Sunshine Act? Can GPO print Amtrak's material in the Federal Register and bill Amtrak for such printing?

In order to respond to these questions, an analysis of the relevant legislative provisions is necessary.

The GPO is authorized and required to do all the Government's printing by 44 U.S.C. § 501 (1970), which provides in pertinent part (with exceptions not relevant here) that:

> All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office, * * *.
>
> * * * * * * *
>
> Printing or binding may be done at the Government Printing Office only when authorized by law.

The GPO's publication of the Federal Register is authorized by 44 U.S.C. § 1504 (1970). Further, the law requires publication in the Federal Register of, *inter alia*, "documents or classes of documents that that may be required so to be published by Act of Congress." 44 U.S.C.

§ 1505(a) (3) (1970). "Document," as used in section 1505, is defined in 44 U.S.C. § 1501 (quoted *infra*).

The documents in question are submitted by Amtrak pursuant to section 3(a) of the Sunshine Act, Public Law 94 409 (September 13, 1976), 90 Stat. 1241, which requires that every meeting of an agency be announced in advance and opened to the public unless otherwise excepted, and also provides in pertinent part that:

> Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register. 5 U.S.C. § 552b(e)(3).

The Act further provides:

> Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsection (b) through (f) of this section * * *. 5 U.S.C. § 552b(g).

Thus, if Amtrak is an "agency" for purposes of the Sunshine Act, then GPO is authorized and required to publish this information in the Federal Register. Furthermore, since a finding that Amtrak is an "agency" for purposes of 5 U.S.C. § 552b would, as discussed below, require a finding that it is also an agency as defined in 5 U.S.C. § 552(e), then GPO would similarly be required to publish certain material required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a which both apply to agencies as defined in 5 U.S.C. § 552(e).

"Agency" is defined by 5 U.S.C. § 552b(a) (1) to mean:

> * * * any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

while 5 U.S.C. § 552(e) (1976) provides that:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

5 U.S.C. § 551(1) defines an "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency * * *" with certain exceptions not relevant here. See also 5 U.S.C. § 103 concerning the terms "Government corporation" and "Government controlled corporation." Thus whether Amtrak is an "agency" for purposes of the Sunshine Act

depends upon whether it is an "agency" as defined by 5 U.S.C. § 552(e) and is headed by a "collegial body" as required by 5 U.S.C. § 552b(a)(1).

Section 301 of the Rail Passenger Service Act of 1970, 45 U.S.C. § 541 (1970), established Amtrak as a "for profit corporation" whose purpose is to "provide intercity rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity passenger transportation requirements." It is a mixed-ownership Government corporation for purposes of the Government Corporation Control Act, 31 U.S.C. § 856. Pursuant to 45 U.S.C. § 545(a), Amtrak possesses all the usual powers conferred upon a stock corporation by the District of Columbia Business Corporation Act, D.C. Code §§ 29–901 *et seq.* (1973), which places the authority for managing corporate business affairs in the board of directors. D.C. Code § 29–916.

Amtrak is governed by a board of directors who are citizens of the United States and which is comprised as follows:

> (A) The Secretary of Transportation, ex officio, and the President of the Corporation, ex officio.
> (B) Eight members appointed by the President, by and with the advice and consent of the Senate, to serve for terms of four years or until their successors have been appointed and qualified, of whom not more than five shall be appointed from the same political party.
> (C) Three members elected annually by the common stockholders of the Corporation.
> (D) Four members elected annually by the preferred stockholders of the Corporation, which members shall be elected as soon as practicable after the first issuance of preferred stock by the Corporation. 45 U.S.C. § 543(a)(1) (Supp. V, 1975).

Thus, there are potentially 17 members of the Amtrak Board of Directors. It is clear that the 8 members specified in 45 U.S.C. § 543(a)(1)(B) qualify to be counted toward the majority of the "collegial body" under 5 U.S.C. § 552b(a)(1). It is equally clear that the 3 members in subsection (C), the 4 members in subsection (D), and the President of the Corporation do not so qualify. It may be argued that the Secretary of Transportation, although appointed by the President with the advice and consent of the Senate, is not appointed "to such position" *vis-a-vis* Amtrak. However, since the Secretary's membership on the Amtrak Board is a statutory *ex officio* position, it automatically and necessarily accompanies the appointment as Secretary and should therefore, in our opinion, be viewed as an appointment "to such position" for purposes of 5 U.S.C. § 552b(a)(1). Therefore, we believe a majority of the Amtrak Board of Directors qualifies under 5 U.S.C. § 552b(a)(1) and the Board is thus a "collegial body" as the term is used in that subsection. We would also note that it has been indicated that there are presently no preferred stockholders, reducing the Board's *de facto* membership by four, the number that the preferred stockholders are

authorized to elect. While the day-by-day business of Amtrak might be carried on by officers selected by the Board of Directors, it is clear that the ultimate decision-making authority is the Board and thus Amtrak is "headed by a collegial body" for purposes of the Sunshine Act.

The applicability of 5 U.S.C. § 552b(a)(1) to Amtrak is confirmed by reference to the legislative history of the Sunshine Act, where, in the Conference Committee Report, it is stated that:

> The conference substitute is subsection (a) of new section 552b. It is the same as the House amendment, except as follows:
>
> * * * * * * *
>
> 2. Although the language of the House amendment referring to a covered agency as "headed by a collegial body" is used in the substitute instead of the reference in the Senate bill to "the collegial body comprising the agency," the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual (such as the United States Postal Service and the *National Railroad Passenger Corporation (Amtrak)*) are included within the definition of agency. H.R. Rep. No. 94-1441, 10 (1976). [Italic supplied.]

That Amtrak is also an "agency" for purposes of 5 U.S.C. § 552(e) is equally clear.

Section 301 of the Rail Passenger Service Act of 1970, *supra*, 45 U.S.C. § 541, which established Amtrak, also provided that it would "not be an agency or establishment of the United States Government." Standing alone, this provision could generally be construed to exempt Amtrak from the coverage of laws applicable to such agencies or establishments. Notwithstanding this provision, however, Amtrak is of course subject to laws expressly made applicable to it or to mixed-ownership Government corporations generally. Furthermore, where there is conflict between the effects of a new provision and prior statutes, the new provision, as a later expression of the will of the legislature, is controlling, 55 Comp. Gen. 117 (1975).

It should be noted that prior to 1974 the FOIA did not set forth a definition of "agency." Also the uncertainty of whether the definition of "agency" in 5 U.S.C. § 551(1) applied to Government-controlled corporations, in conjunction with the statement in 45 U.S.C. § 541, seemed to indicate that the FOIA did not apply to Amtrak. Congress resolved the doubt by enacting Public Law 92-316 (June 22, 1972), § 3(b), 86 Stat. 228, specifically subjecting Amtrak to the FOIA. 45 U.S.C. § 545(g) (Supp. V, 1975). Subsequently, the Congress addressed the more general problem of the application of the FOIA by enacting Public Law 93-502 (November 21, 1974), § 3, 88 Stat. 1564, which added subsection (e) to 5 U.S.C. § 552 (quoted *supra*), defining "agency" for purposes of the FOIA. Thus Government-controlled corporations were specifically brought under the FOIA's coverage.

The legislative history of the 1974 FOIA amendments clearly establishes that Congress intended the term "Government controlled corporation" to include Amtrak. For example, in explaining the definition of "agency" in the House bill, the report of the House Committee on Government Operations states:

> For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of "agency" for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.
>
> * * * * * * *
>
> The term "Government controlled corporation," as used in this subsection, would include a corporation which is not owned by the Federal Government, such as the *National Railroad Passenger Corporation* (Amtrak) * * *. [Italic supplied.] H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 8 (1974).

Similarly, the Senate Judiciary Committee reported as follows:

> To assure FOIA application to the Postal Service and also to include publicly funded corporations established under the authority of the United States, like the National Railroad Passenger Corporation (45 U.S.C. § 541), section 3 incorporates an expanded definition of agency to apply under the FOIA. S. Rep. No. 93-854, 93d Cong., 2d Sess. 33 (1974).

See also *Rocap* v. *Indiek*, 539 F. 2d 174, 177–178 (D.C. Cir. 1976), in which the Court discussed this legislative history in concluding that FOIA applied to the Federal Home Loan Mortgage Corporation.

Thus notwithstanding 45 U.S.C. § 541 which provides that Amtrak is not an agency or establishment of the Government, the Congress has through subsequent legislation made Amtrak an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts. Thus Amtrak must publish the information required by these acts in the Federal Register, and the GPO is required to publish this information by virtue of 44 U.S.C. § 1505(a)(3).

Regarding payments for printing, the Legislative Branch Appropriation Act, 1978, Public Law 95-94 (August 5, 1977), § 408, 91 Stat. 683, amended 44 U.S.C. § 1509(a) to provide, as follows:

> The cost of printing, reprinting, wrapping, binding, and distributing the Federal Register and the Code of Federal Regulations, and, except as provided in subsection (b), other expenses incurred by the Government Printing Office in carrying out the duties placed upon it by this chapter shall be charged to the revolving fund provided in section 309. Reimbursements for such costs and expenses shall be made by the Federal agencies and credited, together with all receipts, as provided in section 309(b).

We note that 44 U.S.C. § 1501 provides in pertinent part that:

> As used in this chapter, unless the context otherwise requires—
> "document" means a Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competiton, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency;
> "Federal agency" or "agency" means the President of the United States, or an executive department, independent board, establishment, bureau, agency, in-

stitution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government;

The purpose of the amendment to 44 U.S.C. § 1509 was to shift the burden of bearing the cost of publishing the Federal Register and the Code of Federal Regulations from the legislative branch appropriation acts (where GPO funds for printing and binding were provided) to the agencies that most directly benefit from their use, thereby better relating the cost of the activity to the program or function that benefits from it. See S. Rep. No. 95-338, 62-63 (1977). Since Amtrak is required to publish certain information in the Federal Register, consistent with the purposes of 44 U.S.C. § 1509 as amended by Public Law 95-94, Amtrak is an agency for purposes of that section and thus should be billed for the printing done on its behalf in the Federal Register. Furthermore, there would be no basis for objecting to GPO's opening an account directly in favor of Amtrak other than billing it through the Department of Transportation as is now the case.

[B-178759]

Intergovernmental Personnel Act—Per Diem—Temporary Duty at More Than One Location

Employee assigned under Intergovernmental Personnel Act (IPA) and receiving per diem at his IPA duty station, may receive an additional per diem allowance for temporary duty (TDY) at another location since 5 U.S.C. 3375(a)(1) permits such payment. The amount of additional per diem should reflect only the increased expenses resulting from the TDY assignment.

Intergovernmental Personnel Act—Per Diem—Headquarters

When employees are assigned under the Intergovernmental Personnel Act and authorized per diem, their IPA duty stations are considered temporary duty stations since per diem may not be authorized at headquarters. Therefore, employee stationed in San Francisco, California, who is authorized per diem while on IPA assignment in Washington, D.C., would not be entitled to per diem under 5 U.S.C. 3375(a)(1)(C) while performing temporary duty at San Francisco, since Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, regardless of any unusual conditions involved. However, the employee is entitled to travel allowance under 5 U.S.C. 3375(a)(1)(C).

In the Matter of Environmental Protection Agency—Per Diem Under the Intergovernmental Personnel Act of 1970, September 11, 1978:

Is it allowable to pay an Intergovernmental Personnel Act (IPA) assignee per diem at the IPA assignment duty station and also to pay him for temporary duty (TDY) travel performed to another location on the same day?

This is the question posed by Paul J. Elston, Deputy Assistant Administrator for Resources Management, Environmetal Protection Agency. He also asks us to identify an IPA assignee's permanent duty

station and the effect of such a determination on the assignee's entitlement to per diem when he performs TDY at his original place of domicile.

Regarding the first question, title IV of the IPA provides for the assignment of personnel between the Federal Government and state and local governments and institutions of higher learning for periods which should generally not exceed 2 years. Section 3375 of title 5, United States Code, provides in pertinent part:

> (a) Appropriations of an executive agency are available to pay, or reimburse, a Federal or State or local government employee in accordance with—
> (1) subchapter I of chapter 57 of this title, for the expenses of—
> (A) travel, including a per diem allowance, to and from the assignment location;
> (B) a per diem allowance at the assignment location during the period of the assignment; and
> (C) travel, including a per diem allowance, while traveling on official business away from his designated post of duty during the assignment when the head of the executive agency considers the travel in the interest of the United States * * *.

The use of the word "and" following subsection (B) suggests that an IPA assignee would receive per diem at the IPA assignment duty station while also receiving a travel and per diem allowance for temporary duty at another location. However, the use of the word "and" is not, in itself, necessarily determinative. There has been some laxity in the use of conjunctive and disjunctive terms such that the courts have treated these words in whatever manner is necessary so as to be consistent with the legislative intent. 1A Sutherland Statutory Construction 90–91 (1972).

The IPA was designed to improve the quality of American Government, with particular emphasis given to strengthening state and local governments. The Act focuses on three basic problems in the public manpower area: the interchange of Federal, state, and local employees; training programs; and personnel management. In carrying out the program of temporarily exchanging personnel between the various governments, the Congress recognized that the employees would encounter additional expenses. Hence, section 3375 authorizes the payment of travel, including a per diem allowance for state and local government employees assigned to Federal agencies and Federal employees assigned to state and local governments. This section is intended to be broad enough to *provide for the needs* of Federal, state, and local employees en route to, from, and during their assignments in either the Federal Government, or state and local governments. See H.R. Rep. No. 91–1733, 91st Cong., 2d Sess. 20, reprinted in [1970] U.S. Code Cong. & Ad. News 5898.

In 53 Comp. Gen. 81 (1973) we held that IPA assignees are not entitled to both per diem and change-of-station allowances for the

same assignment even though 5 U.S.C. 3375 permits the payment of both the benefits associated with a permanent change of station and those normally associated with a temporary duty status since nothing in the statute or its legislative history suggests that both types of benefits may be paid incident to the same assignment. In that decision we also noted that the needs of the IPA assignees could be met without the necessity of applying a different rule for employees traveling on IPA assignments from that which applies to employees traveling on training assignments or on official business generally.

Also, we have held that, when an employee travels on a temporary duty assignment, he is entitled to only one per diem allowance during each day under 5 U.S.C. 5702. However, situations have arisen when it was necessary for an employee on temporary duty to incur two lodging costs on the same day. An example of such a situation is given in B-158882, April 27, 1966. In that case an employee assigned to temporary duty in Saigon, Vietnam, was required to retain his lodging there while he incurred additional lodging expenses incident to temporary duty at other locations in Vietnam. In that case we held that, if an appropriate agency official authorized actual expenses not to exceed the statutory limitation, we would not object to lodging costs at both locations included as a part of the daily subsistence expenses. Also, see B-164228, October 9, 1975, and B-182600, August 13, 1975.

However, the payment of two per diem allowances under the instant statute would not be inconsistent with those decisions by our Office that denied two per diem payments. In those cases, there was no statute authorizing the payment of two per diem allowances as in the situation here. Furthermore, those cases either dealt with one set of expenses or involved the election by the employee of receiving allowances for temporary duty versus those for permanent duty but not both.

In connection with IPA assignments, it appears that there will be instances where it would be beneficial to the Government and equitable toward the employee to permit two per diem payments. If an employee is assigned to an IPA duty location for an extended period of time, it is assumed that the agency will authorize a per diem rate based on the employee obtaining housing on a long-term basis to take advantage of available lower rates than those charged on a daily basis. See Federal Travel Regulations (FTR) (FPMR 101–7) para. 1–7.3ac (May 1973). Also, when an employee obtains housing on a long-term basis at his IPA duty location, it appears that he would have to retain it and incur additional expenses, at least for lodging, when he is required to perform temporary duty away from his usual IPA duty location. As indicated above, we have recognized that when a Government employee on an ordinary temporary duty assignment must pay

for two lodgings on the same day, he may be reimbursed to the extent that the governing statute permits. Therefore, it is our view that an IPA employee may be reimbursed for additional expenses necessarily incurred by him at a temporary duty point away from his usual IPA duty station. In view of this and since the legislative history of the IPA shows an intent to provide for the needs of IPA assignees, we hold that the word "and" in 5 U.S.C. 3375(a)(1) is a conjunctive term and that an IPA assignee may be authorized a second per diem when he incurs additional expenses because of a temporary duty assignment away from his usual IPA duty station. Of course the second per diem should not cover more than the expenses necessarily incurred by the IPA assignee as a result of the temporary duty assignment. Any portion of the per diem allowances that would amount to a double payment as determined by the agency should not be paid.

We are also asked to identify an IPA assignee's permanent duty station and the effect of such duty station identity on the employee's entitlement to per diem.

Per diem may not be authorized at headquarters under 5 U.S.C. 5702; it is only authorized incident to temporary duty assignments away from employees' headquarters. Therefore, when employees on IPA assignments are authorized per diem their permanent duty stations are not changed and their IPA duty stations are temporary duty stations. For example, should an employee stationed in San Francisco, California, be given an IPA assignment in Washington, D.C., San Francisco would remain his headquarters. Consequently, if that employee was sent to San Francisco on TDY, he would be entitled to a travel allowance under 5 U.S.C. 3375(a)(1)(C). However, due to the fact that San Francisco is his permanent duty station, he would not receive per diem. In this connection, we have consistently held that in the absence of specific statutory authority, the Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, official duty station, or place of abode, regardless of any unusual conditions involved. See FTR para. 1–7.6a; 42 Comp. Gen. 149 (1962); B–180806, August 21, 1974; B–169235, April 6, 1970; B–169163, September 11, 1970; and B–182586, December 17, 1974.

[B–191395]

Leaves of Absence—Administrative Leave—Injury or Illness in Line of Duty—Insurance Proceeds

Since neither the Federal Medical Care Recovery Act, 42 U.S.C. 2651, nor other authority gave the U.S. the right to collect from the liability insurer of a negligent driver the value of administrative leave granted an injured officer of Secret Service Uniformed Division under 5 U.S.C. 6324, the amount mistakenly collected may be paid to the officer.

Torts—Third-Party Liability—Recovery by Government

Without legislative authority, the U.S. has no legal claim against third-party tort feasors or their liability insurers for benefits the U.S. provides persons because of injuries caused by tort feasors. Under Supreme Court decisions, such claims involve fiscal policy for Congress to decide. However, in a proper case, the U.S. can have a valid claim as a third-party beneficiary under insurance contract terms such as for no-fault, medical payment, and uninsured motorist coverages.

In the matter of Andrew L. Kulp—insurance proceeds for administrative leave, September 12, 1978:

This action responds to a request from the Director of the Secret Service for an opinion whether Officer Andrew L. Kulp is entitled to insurance proceeds paid by the insurance company to the United States for administrative leave granted to Officer Kulp under 5 U.S.C. § 6324 because of injury sustained in the line of duty.

During a routine scooter patrol for the Executive Protective Service (now the Secret Service Uniformed Division) on October 27, 1975, Officer Kulp suffered a knee injury in the District of Columbia when an automobile backed into the scooter he was operating. His administrative leave, authorized for 112 hours because of his injury, was valued at $644, based on an hourly wage of $5.75. In addition, the Government's expense for Officer Kulp's medical treatment was $151.74.

Officer Kulp retained a private attorney who proceeded to settle with the liability insurer of the driver causing the injury. On December 22, 1975, the Executive Protective Service requested the insurer in writing to pay the Government's expenses of $795.74 incurred as a result of the accident, separately itemizing the $644 for administrative leave, as well as the Government's cost for medical treatment. By letter of January 5, 1976, the insurer requested the Executive Protective Service to furnish, among other information, the statute or other legal authority permitting the Government's recovery from the insurer. On January 12, 1976, an officer of the Executive Protective Service responded, evidently informing the insurer by telephone that the Government's claim upon the insurer for the administrative leave, as well as the Government's medical expense, was authorized by the Federal Medical Care Recovery Act, Public Law 87-693, September 25, 1962, 76 Stat. 593, as amended, 42 U.S.C. §§ 2651-2653.

Complying with Executive Protective Service's request for payment, the insurer paid the United States $795.74 on September 3, 1976, representing a portion of the $1,600 settlement the insurer had granted Officer Kulp. However, he questioned the legality of this payment to the United States rather than himself. Subsequently, it was administratively determined that the Uniformed Division's policy of collect-

ing such payments for administrative leave was without legal authority. Since then, the Uniformed Service has ceased efforts to collect these payments, although it continues to pursue collections for medical expenses against third-party tort feasors and their insurers under the Federal Medical Care Recovery Act.

The Federal Medical Care Recovery Act states in pertinent part, at 42 U.S.C. § 2651:

> * * * In any case in which the United States is authorized or required by law *to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances)* to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person * * * to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of *the care and treatment so furnished or to be furnished* * * *. [Italic supplied.]

The italicized portion clearly means that the care and treatment furnished by the United States for which it may recover against liable third parties are limited to those items specifically mentioned, i.e., "hospital, medical, surgical, or dental care and treatment" the United States is authorized or required by law to furnish. Administrative leave, although intended for absence with pay because of injury or sickness resulting from the performance of duty, is not within the meaning of "hospital, medical, surgical, or dental care and treatment." Accordingly, we share the view expressed by Secret Service staff that the Federal Medical Care Recovery Act did not authorize collection against the liability insurer for the value of administrative leave granted Officer Kulp under 5 U.S.C. § 6324.

The Secret Service asks that the following issues be addressed:

1. Assuming that the Federal Medical Care Recovery Act does not authorize the recovery of administrative leave granted under 5 U.S.C. § 6324, is there any other authority permitting recovery based on any Government obligation to furnish the leave?

2. If the Government is authorized to recover but fails to assert its claim under the proper authority, must it return the funds it has obtained?

3. If the Government cannot support a valid legal claim over the funds by any theory, must the funds be returned to the employee (officer Kulp in the present case)?

Concerning the first issue, we are not aware of any legal authority permitting the Government's recovery against tort feasors or their insurers for administrative leave granted to officers of the Secret Service Uniformed Division, even though there may be an obligation to furnish the leave under 5 U.S.C. § 6324. Subsection (a) of this provision states:

> (a) Sick leave may not be charged to the account of a member of the Metropolitan Police force or the Fire Department of the District of Columbia, the

United States Park Police force, or the *United States Secret Service Uniformed Division* for an absence due to injury or illness resulting from the performance of duty. [Italic supplied.]

The purpose of 5 U.S.C. § 6324 is to permit absence from duty for job-related sickness or injury without using up accumulated sick leave. H. Rept. No. 1220, 88th Cong., 2d Sess., March 6, 1964, and S. Rept. No. 1347, 88th Cong., 2d Sess., August 7, 1964. It provides a statutory benefit similar to sick leave. The Supreme Court in *United States* v. *Standard Oil Co. of California*, 332 U.S. 301 (1947), ruled that the United States in the absence of legislative authorization has no right to recover from a third party liable in tort for injuring a military member who received Government benefits because of his injuries. The Court said the question involved Federal fiscal policy to be determined by the Congress, not the courts. This principle was extended in *United States* v. *Gilman*, 347 U.S. 507 (1954), denying the Government's claim for indemnity against a Federal employee whose negligence required the United States to pay an injured third party under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (1970).

It is to be noted, however, that the Government's inability to recover against tort feasors and their insurers under a liability policy in no way detracts from any valid claim the Government may have as a third-party beneficiary under certain insurance contract provisions, for example, no fault, uninsured motorist, and medical payments coverages. *United States* v. *Government Employees Ins. Co.*, 440 F. 2d 1338 (5th Cir. 1971) (uninsured motorist provisions); *United States* v. *Government Employees Ins. Co.*, 461 F. 2d 58 (4th Cir. 1972) (medical payments clause); *United States Automobile Assoc.* v. *Holland*, 283 So. 2d 381, 385–386 (Fla. App. 1973) (no fault). The Secret Service Legal Counsel informally advised that in Officer Kulp's case, no policy provision of this kind exists.

Since the answer to the first issue is in the negative, it is unnecessary to address the second issue.

As to the third issue, we would have no objection if the Secret Service paid Officer Kulp the $644 for administrative leave mistakenly collected from the insurer of the negligent driver.

[B–192149]

Contracts—Specifications—Deviations—Informal *v.* Substantive—Negotiated Procurement—Utilization Factor Requirement

Request for proposals (RFP) contemplated (1) that offerors would submit one rate for 2-year contract term and rate was to be computed on "100 percent basis" and (2) that award would be made based on low evaluated price. General Accounting Office would not object to agency's acceptance of price proposal

with separate rates for each year where rate was computed on "80 percent basis" because those deviations relate only to form and are not material.

Contracts—Negotiation—Prices—Cost and Pricing Data Evaluation

Agency and one offeror contend that proposal, which deviates from RFP's contemplated pricing structure, may not be accepted because (1) all offerors were not advised that such deviations would be permitted, and (2) deviation may have exposed other offeror to less risk. Contention is without merit because deviation relates to form only and record indicates that offerors had sufficient information to make business judgment regarding actual risk involved.

Contracts—Negotiation—Evaluation Factors—Delivery Provisions, Freight Rates, etc.

Contention that one offeror failed to propose acceptable service regarding 21-day delivery requirement is without merit. Agency explains and record shows that both offerors proposed acceptable and substantially similar service.

Contracts—Protests—Timeliness—Solicitation Improprieties—Apparent Prior to Closing Date for Receipt of Proposals

Contention, first made after closing date for receipt of initial proposals, that cost factor should have been added to offeror's prices to represent greater risk of loss and damage is untimely under 4 C.F.R. 20.2(b)(1) (1977) and will not be considered on merits since alleged solicitation defect was not protested prior to closing date for receipt of initial proposals.

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Date Basis of Protest Made Known to Protester

Contention—that Government-stuffed-container factor of 10 percent instead of 24 percent should have been used to evaluate price proposals—was not raised within 10 working days after basis of protest was known; therefore, it is untimely under 4 C.F.R. 20.2(b)(2) (1977) and will not be considered on merits.

Contracts—Negotiation—Changes, etc.—Reopening Negotiations—Not Justified—Minor Deviations in Otherwise Acceptable Proposal

Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror.

In the matter of Foss Alaska Line, September 12, 1978:

The United States District Court for the District of New Jersey has requested our opinion in connection with civil action No. 78–1223, entitled *Sea-Land Service, Inc.* v. *Brown, et al.* That civil action concerns the same subject matter involved in a bid protest filed with our Office by Foss Alaska Line (FAL) regarding request for proposals (RFP) No. N0003378R1301 issued by the Department of the Navy, Military Sealift Command (MSC), for the furnishing of ocean transportation services between Seattle, Washington, and Adak, Alaska, on a contract carriage basis (less than shipload lots) by United States flag vessels for a minimum period of 2 years. In response to the RFP,

two offers were received, one from FAL and one from Sea-Land Service, Inc. (Sea-Land). The problem here concerns the proper method of evaluating FAL's offer; in FAL's view, it should be awarded the contract without further procurement action; in Sea-Land's view, it should be awarded the contract without further procurement action; and MSC believes that another round of best and final offers is required before award can be made. To assist in resolving the problem, the court has ordered, with the consent of the parties, that FAL, MSC, and Sea-Land provide our Office with detailed reports. Those thorough and well-documented reports and comments form the basis for our views.

BACKGROUND

The RFP solicited rates for three categories of containerized and breakbulk cargo (i.e., vehicles; refrigerated or "reefer" cargo; and general cargo, not otherwise specified, or "NOS") to be stated on a per measurement ton, or 40 cubic feet (MT) basis, to be effective for the 2-year period. Estimated quantities for each category were provided in the RFP. The RFP further provided for a minimum charge per container for cargo NOS and reefer cargo loaded or "stuffed" into the carrier's container by the Government, equal to the offered rate per MT times 100 percent of the agreed average interior capacity of the container—the "100 percent basis." A container can seldom, if ever, be utilized to 100 percent of the interior capacity of the container because of such factors as cargo shape, weight, packaging, and securing. Most military cargo moving from Seattle to Alaska "free flows" to the ocean carrier's commercial terminal and is stuffed by the ocean carrier. Since the Government has no control over the amount of cargo placed in a container, the RFP specified there would be no minimum charge for a container stuffed by the carrier. The RFP did not specify what proportions of those cargoes would be stuffed by the carrier and Government but for evaluation purposes MSC used a factor of 24 percent. The RFP also provided that in evaluating offers "[a]nticipated annual cost for use in determining the cost favorable carrier will be determined by pricing out the categories and volumes of cargo shown in paragraph 5(f) at the applicable rates set forth by each offeror in the appropriate statement of rates."

Sea-Land's offer contained one rate for each category of cargo for the 2-year period and was predicated on the "100 percent basis" when stuffed by the Government. FAL, on the other hand, submitted an offer which varied from the RFP in two respects: (1) it offered one set of rates for the first year and another, higher set of rates for the second year; and (2) it provided that, with respect to cargo NOS and reefer cargo to be stuffed by the Government, the minimum charge per

container would be calculated by multiplying the offered rate per MT by 80 percent of the stated interior capacity of the container—"80 percent basis."

MSC initially decided that FAL's offer was acceptable and should be evaluated on the 100-percent basis. Subsequently, during discussions, FAL was again advised that its offer was acceptable. Later best and final offers were received; evaluated prices follow:

Sea-Land	FAL
$6,393,964 (100-percent basis)	$6,741,264 (100-percent basis)*
$6,393,964 (100-percent basis)	$6,287,326 (80-percent basis).

*Obtained by increasing Foss' Government-stuffed rate by 25 percent.

Based on the 100-percent basis price evaluation, award was made to Sea-Land as the low-priced offeror and FAL was so advised. Foss immediately protested to MSC's contracting officer. After due consideration the contracting officer determined that the award to Sea-Land was null and void and that negotiations should be reopened.

MSC's Position

MSC believes that upon receipt of FAL's offer, the contracting officer should have (1) informed FAL that its offer was not in compliance with the RFP and requested FAL to revise its offer so as to be fully responsive to the RFP, pursuant to the Defense Acquisition Regulation (DAR) § 3–805.3(a) (1976 ed.), or (2) if there was merit to the changes FAL proposed, the RFP should have been modified to allow both offerors an opportunity to submit offers on the same basis, as required by DAR § 3–805.4(a) or (c). The error was magnified in MSC's view because FAL was advised its offer was acceptable, after it had raised the point in negotiations. The error was further compounded in MSC's view when FAL's price was compared with Sea-Land's by MSC's erroneously increasing FAL's price by a 25-percent increase on certain rates.

MSC contends that since DAR requirements were not followed by the contracting officer, the award to Sea-Land was a nullity and was not binding on the Government. MSC's rationale is (1) a contracting officer's authority is limited to the actual authority conferred by statute or regulation (*The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 675–676 (1868); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947)); (2) private parties are charged with notice of all limitations upon the contracting officer's authority (*United States* v. *Zenith-Godley Co.*, 180 F. Supp. 611 (S.D.N.Y. 1960)); and (3) a contracting officer is an agent of the Government and as such may bind the United

States only in accordance with the authority granted him by statute or regulation (*Condec Corp.* v. *United States*, 369 F.2d 753 (Ct. Cl. 1966)).

MSC also contends that it was equally clear that an award could not be made to FAL because Sea-Land was not given an opportunity to compete on the same basis as FAL, as required by DAR § 3-805.4(c).

Next MSC believes that reopening the negotiations is the only appropriate and fair remedy for past errors in the procurement process and is lawful even though both offerors now know each other's prices. In support MSC refers to several of our decisions; for example in *Silent Hoist & Crane Co., Inc.*, B-186006, June 17, 1976, 76-1 CPD 392, where bids were solicited three times—the first solicitation was canceled following receipt of bids because the contracting officer determined the requirement could be met at a substantially lower price than that bid by the only bidder; thereafter, two bids were received in response to a second solicitation but before award could be made, the assets of the low bidder were purchased by another firm and it was determined award could not be made to either the low bidder or its successor, and that the other bidder's price was unreasonably high; in response to a third solicitation the successor firm bid a substantially lower price than the only other bidder, Silent Hoist. Silent Hoist argued that the third solicitation constituted an "auction" but our Office concluded the agency's action was proper in the circumstances.

MSC also argues that a situation similar to the instant one was involved in *Computer Network Corporation; Tymshare, Inc.*, 56 Comp. Gen. 245 (1977), 77-1 CPD 31. There, after receipt and evaluation of proposals, the Navy awarded a contract to Tymshare. An unsuccessful offeror, Computer Network Corporation (CNC), contended that Tymshare's offer had been improperly evaluated and that under a proper evaluation CNC's offer was low. The contracting officer agreed and terminated the contract with Tymshare and awarded the contract to CNC. Tymshare then protested, contending that CNC's offer did not comply with a mandatory technical requirement of the RFP. Our Office determined that Tymshare's offer had been improperly evaluated initially and that CNC's offer should not have been accepted because it did not comply with a mandatory requirement. Under the circumstances, we recommended that the Navy "reopen negotiations," even though the initial offers had been revealed to the competing parties.

MSC further contends that our decision in *E. Walters & Company, Inc.; Dynamit Nobel A G; Nico Pyrotechnik K G*, B-180381, May 3, 1974, 74-1 CPD 226, contains a factual situation virtually identical to the instant situation. There, following receipt and evaluation of proposals, the Army awarded a contract to Dynamit Nobel. The other

offerors contended that the evaluation was improper; the Army terminated the contract for convenience and issued a new RFP with revised requirements and evaluation factors. E. Walters & Company contended that the resolicitation was improper because it should have been awarded the contract as low-priced offeror under the original solicitation and because Dynamit's price had been disclosed. We noted that the revised needs of the Army might affect the prices offered and we concluded that the resolicitation did not constitute an auction.

FAL's Position

In sum, FAL submits that (1) the separate rates for each contract year and an 80-percent utilization factor for determining the minimum charge for source-stuffed containers represented a valid and acceptable means of calculating the relative cost to the Government over the term of the contract; (2) even if the use of separate rates for each year and an 80-percent utilization factor could be said to be deviations from the RFP, they were not substantive in nature and did not prejudice Sea-Land's ability to compete for the contract; (3) MSC's initial erroneous decision to evaluate FAL's price by using a 100-percent utilization factor to determine the charge for source-stuffed containers can be corrected now, without reopening, merely by proper calculation of the prices in FAL's offer, and (4) there is simply no compelling reason to reopen negotiations.

With regard to FAL's first contention, FAL argues that the RFP does not require offerors to utilize and charge the same rates in each year of the contract; indeed, the RFP's evaluation of offers section refers to "[a]nticipated annual cost." FAL also argues that the total contract cost is readily found by adding the two cost figures for years 1 and 2.

With respect to the use of an 80-percent utilization factor, FAL notes that the utilization factor and the rate per MT are essential in calculating the minimum charge per container, and that using a 100-percent utilization factor and a lower rate could result in the same minimum charge per container as would result from an 80-percent utilization factor and a higher rate. FAL also notes that the RFP calls for MT rates and provides that MSC will calculate the minimum charge for source-stuffed containers by multiplying the rate by the container utilization factor; thus, the actual calculation was to be made by MSC and was not a part of the offer. The total estimated minimum cost to the Government for source-stuffed containers would then equal the MSC-calculated minimum charge per container multiplied by the number of containers estimated to be moved under the contract.

FAL believes that its approach to the instant RFP was acceptable and similar to the situation in the Court of Claims' decision in *Tide-*

water Management Services v. *United States*, Ct. Cl. No. 103-74 (March 22, 1978). There, the low offeror's proposal was based on an innovative analysis of underlying costs associated with Navy mess hall services and proposed significantly fewer hours than the number estimated by the Navy. That RFP contemplated only two manning schemes but the low offeror, Integrity Management, proposed six different manning schemes. The Navy's selection of Integrity Management was challenged and rejected by the Court of Claims because although Integrity's offer did not comply with the assumptions of the RFP and although the RFP did not contemplate new techniques, it did not bar them. Therefore, the court concluded that:

> When proposals in the best interests of a Government procurement do not violate the terms of the solicitation, they are not to be disregarded because they are innovative in a way not foreseen and not forbidden by the RFP.

With regard to FAL's second contention, FAL states that the use of separate rates for each year and an 80-percent utilization factor only represent another method to calculate total estimated cost and the basic economics of contract performance remain the same. In FAL's view, Sea-Land would not have arrived at any lower total estimated cost to the Government using FAL's methods of calculation than it did using its own methods of calculation because each carrier has certain revenue as a goal no matter how rates are calculated. FAL argues that here, as in the *Tidewater* case, the use of a novel approach by an offeror did not reflect a change in the scope of work or the Government's requirements as set forth in the RFP.

Concerning FAL's third contention, FAL states that MSC erred in its evaluation of FAL's offer by applying FAL's rate per MT to a 100-percent utilization factor because FAL's rate MT ton on an 80-percent basis was necessarily higher than it would have been had Foss submitted its rate on a 100-percent basis. FAL argues that the error can by corrected by proper calculation based on existing information without reopening negotiations.

With regard to FAL's fourth contention, FAL argues that reopening negotiations would produce an impermissible "auction" atmosphere since the offerors know the details of each other's rates. In FAL's view, the proper remedy is to correct the evaluation of FAL's offer, making FAL the low responsible offeror, and to award the contract under the initial RFP to FAL. FAL states that MSC has made no substantive changes in the RFP to be used in reopened negotiations and the circumstances do not justify resolicitation. Further, FAL contends that the decisions cited by MSC are inapplicable because: resolicitation was approved in *Silent Hoist & Crane Co., Inc.*, *supra*, solely because the bids under the two previous solicitations were unreasonably high; resolicitation was approved in *Alco Metal Stamp-*

ing Corp., B–181071, September 4, 1974, 74–2 CPD 141, solely because the only bid under the initial IFB was held to be unreasonably high; resolicitation was approved in *New England Engineering Co., Inc.*, B–184119, September 26, 1975, 75–2 CPD 197, solely because there was an ambiguity in the IFB which made it impossible to tell whether project completion was required within 90 or 180 days; and resolicitation was approved in *Santa Fe Engineers, Inc.*, B–184284, September 26, 1975, 75–2 CPD 198, solely because there was an ambiguity in the phasing of work provision of the IFB which was confusing to the bidders. FAL believes that MSC's reliance on the *E. Walters & Company, Inc.*, and *Computer Network Corporation* decisions is also misplaced.

FAL concludes that reopening negotiations here—where each offeror has the other's offer, where the only error in the procurement process was one of mathematical evaluation, and where there has been no substantive change in the RFP—would seriously undermine the integrity of the competitive procurement system.

Sea-Land's Position

In sum, Sea-Land contends that (1) the award was made in accordance with the RFP and applicable statutes and regulations and, therefore, constitutes a binding contract which should be honored, (2) negotiations should not be reopened, and (3) FAL's offer should have been rejected for not complying with the 21-day delivery time requirement and the 100-percent rate basis requirement.

With regard to Sea-Land's first contention, Sea-Land states that its offer was in accordance with the RFP and was the cost favorable offer; therefore, the award constituted a binding and enforceable 2-year requirements contract. Sea-Land also notes that the contract contains no "termination for the convenience of the Government" clause and no other provision for declaring the contract "null and void." In Sea-Land's view the controlling case is *John Reiner & Co.* v. *United States*, 325 F. 2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964), in which the court stated:

> Where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain. 325 F. 2d at 440.

There, the court ruled that the bid was responsive to the invitation and the invitation was sufficiently clear and, thus, the initial award was valid. Sea–Land also refers to the other cases, including *Warren Bros. Roads Co.* v. *United States*, 355 F. 2d 612, 615 (Ct. Cl. 1965), in which a similar standard was pronounced:

> If the contracting officer acts in good faith and his award of the contract is reasonably under the law and regulations, his action should be upheld. In other words, a determination should not be made that a contract is invalid unless its illegality is palpable.

Citing *Lanier Business Products*, B–187969, May 11, 1977, 77-1 CPD 336, Sea-Land contends that our Office's decisions have held that once a contract comes into existence, even if improperly awarded, it should not be canceled, that is, regarded as void *ab initio* unless the illegality of the award is "plain." The test of a plainly illegal award is whether the award was made contrary to statute or regulation because of some action or statement by the contractor or whether the contractor was on direct notice that the procedures being followed were inconsistent with statutory or regulatory requirements; if the test is not met a contract may not be canceled, but can only be terminated for the convenience of the Government.

In Sea-Land's view, FAL could have submitted an offer based on one price for both years and a rate based on the 100-percent basis as required by the RFP; instead, FAL elected -without notice or any consultation— to submit an offer which constituted a departure from the RFP; therefore, FAL is "at fault" in causing this controversy.

With regard to Sea-Land's second contention, Sea-Land and FAL oppose any reopening of negotiations and Sea-Land argues that the same cases cited by FAL prohibit reopening negotiations under these circumstances. Both parties believe that a proper award can be or has been made without reopening negotiations. Sea-Land also argues that MSC's possible unilateral mistake concerning FAL's offer is not grounds for canceling Sea-Land's contract.

Regarding Sea-Land's final contention, Sea-Land states that (1) an analysis of the sailing schedule in FAL's offer shows that the delivery time FAL proposed was in excess of the 21-day delivery requirement in the RFP, (2) MSC should have increased FAL's evaluated total price by $378,000 due to the greater risk of loss and damage associated with FAL's tug and barge operation relative to Sea-Land's service; and (3) if MSC had used the more realistic factor of 10 percent versus 24 percent as the expected Government-stuffing percentage, Sea-Land would have been the low-price evaluated offeror no matter how FAL's price proposal was evaluated.

ANALYSIS—Evaluation of FAL's Offer

First, we must consider the effect of FAL's offer which was submitted on the 80-percent basis. The RFP contained an evaluation scheme simply designed to permit the multiplication of disclosed estimated quantities by rates (in dollars per MT) supplied by offerors for each of nine separate categories so that the summation of the products would represent an offeror's relative estimated total price over the life of the contract. The procuring agency contemplated that (1) rates for certain Government-stuffed containers would be proposed on the basis that the Government would pay for shipping 100 percent

of the container's capacity no matter how much was in the container, (2) MSC used a factor of 70 percent to represent average container fill for evaluation purposes, and (3) award would be made to the responsible, low-total-priced offeror which proposed otherwise acceptable service.

FAL's offer was not calculated on the 100-percent basis because FAL believed that for the Government-stuffed containers a realistic average container fill would be about 80 percent. Therefore, under FAL's proposal the Government would pay for shipping only 80 percent of a container's capacity when the fill was less than 80 percent and the Government would pay for the actual amount shipped when the fill was above 80 percent. For evaluation purposes it is noteworthy that the Government used a factor of 70 percent to represent the average actual utilization of capacity.

When properly evaluated, FAL's total estimated price for the required service was lower than Sea-Land's. FAL's proposal did not change any term or condition of the RFP's service requirements. It is argued by MSC that FAL's 80-percent basis price proposal had the effect of reducing some of the risk to which it would have otherwise been exposed on the 100-percent basis. The risk referred to by MSC is that fewer than the estimated number of containers would be stuffed by the Government. In this regard, we note that MSC's detailed example shows that rates proposed on the 100-percent basis versus the 80-percent basis are lower to project the same total revenue; MSC concludes that the amount FAL would have reduced its rates had it proposed based on the 100-percent basis is unknown because of the risk factor. We do not believe that the reduced risk argument had any impact on Sea-Land's offered price because the Government apparently disclosed that for evaluation purposes it would be assumed that the Government would stuff 24 percent of the containers by Sea-Land, the incumbent contractor, believed that over the term of the contract the 24-percent estimate was unrealistic and the Government would only stuff 10 percent of the containers. Thus, we have no basis to conclude that Sea-Land, in structuring its proposed rates, did not fully consider the risk associated with the Government's stuffing fewer than 24 percent of the containers.

Each offeror knew from the RFP that the bottom line—relative estimated total price—was the basis for selecting the otherwise acceptable offeror. Each offeror also knew from the RFP that the quantities estimated for each category were not guarantees that such amounts would be shipped. Risks were inherent in any selection of rates for each category but both offerors knew how the selection was to be made. Both offerors structured their rates based on their own circumstances—fixed costs, overhead, variable costs, profit, etc.—and their

best business judgments with the intent of offering the lowest total estimated cost to the Government. From the Government's standpoint, a price proposal structured either way would be acceptable as evidenced by the initial and revised RFP's. In any event, no matter how efficiently the Government stuffs the containers, FAL's bid prices will result in a lower total cost to the Government.

Accordingly, while the structure of FAL's price proposal—the 80-percent basis—differed from the RFP's scheme, the difference was one of form and not of substance and was not a material deviation because FAL would have been obligated to perform the required service at the firm fixed rates stated in its proposal.

Secondly, FAL's price proposal contained one rate for the first year and a higher rate for the second year. For purposes of evaluation, it is our view that the two separate rates present no material problem; MSC had no difficulty in obtaining a firm estimated total price over the term of the contract. For that reason, Sea-Land's contention—that FAL's two-rate price proposal was unacceptable—is without merit. Further, Sea-Land's concern—that an extension beyond the 2-year term would create a serious problem in deciding what price rate should apply—is without basis since article I:17 of the RFP specifically provided for amending the rates after the initial 2-year period.

The above conclusions are supported by our recent decision in *I.T.S. Corporation*, B-190562, January 24, 1978, 78-1 CPD 64, where the solicitation requested firm fixed rates for a single line of display type, as follows:

(a) Lines up to 7" in length _____ per line _____ $
(b) Lines over 7" in length _____ per line _____ $

I.T.S. proposed one price for each category, while a competitor proposed a price for category (a) and a variable price ($1.50 for 7 inches plus 25 cents for each additional inch) for category (b). The agency knew that the maximum line length is 16 inches and, therefore, evaluated the competitor's bid based on the maximum price, which was lower than the protester's. Since the competitor's bid was otherwise responsive, the specific price for each order can be determined and while it might be less, it could not exceed the price used for evaluation; thus, we concluded that although the structure of the competitor's bid price deviated from the solicitation's contemplated scheme, it could nevertheless be evaluated essentially on the same basis as the protester's by using the competitor's maximum price. See also *Shamrock Fire Construction Company*, B-191749, August 16, 1978; *Tidewater Management Services* v. *United States*, *supra*. We believe that the same rationale is applicable in the instant case.

Thirdly, Sea-Land's belief that FAL failed to propose acceptable service regarding the RFP's vessel sailings and delivery time require-

ment of 21 days is incorrect. MSC thoroughly explains that the service Sea-Land presently provides and proposes to continue is not significantly different from FAL's proposal and that both offerors' proposals satisfied the RFP's requirements. After careful review, we must agree with MSC analysis that both proposals were acceptable.

Finally, Sea-Land's contentions—that (1) FAL's operation would subject the Government to greater risk of loss and damage and, therefore, a cost factor should have been added to FAL's price for evaluation purposes, and (2) that for purposes of evaluation a factor of 10 percent should have been used instead of 24 percent—are untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1977). Section 20.2(b)(1) requires offerors to protest any alleged solicitation defect before the closing date for receipt of initial proposals. Here, as MSC notes, the RFP's evaluation scheme did not include any factor for relative risk to the Government of loss and damage; if Sea-Land believed that one was required or would have been appropriate, the time to protest was not after fully participating in the procurement. Section 20.2(b)(2) requires protests based on alleged improprieties other than solicitation defects to be filed within 10 working days after the basis of protest is known. Here, Sea-Land did not protest MSC's use of the 24-percent factor within the required time. Accordingly, we will not consider the merits of these two contentions.

CONCLUSION AND RECOMMENDATION

We note that MSC has canceled the award to Sea-Land and moreover the record does not reflect that Sea-Land undertook any work under the award. While the court has not requested our views concerning the propriety of the cancellation, we point out the Court of Claims has read a "termination for convenience of the Government" clause into an executed contract. *G. L. Christian and Associates* v. *United States*, 312 F. 2d 418, *reh. denied*, 320 F. 2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963), *reh. denied*, 376 U.S. 929, 377 U.S. 1010 (1964). For a discussion on the impact of the Christian doctrine on public contract law see Shedd, *The Christian Doctrine, Force and Effect of Law, and Effect of Illegality on Government Contracts*, 9 Public Contract L. J. 1 (1977). Further, we note that even in cases where the Court of Claims ruled that the Government had wrongfully canceled contracts (*John Reiner & Co.* v. *United States*, *supra*, and *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Ct. Cl. 1963)), recovery of anticipated profits was not allowed.

The final matter for our consideration is whether the proper course of action would be to make award to FAL under the initial RFP or to reopen negotiations based on the revised RFP as MSC suggests.

The revised RFP, in MSC's view, removes uncertainty by stating: (1) expected containers utilization factors for three categories (as 65 percent, 67 percent, and 68 percent as compared with 70 percent for each category used in evaluation under the initial RFP); (2) the estimated volume of cargo for evaluation purposes has been revised as follows:

	Container Required			
	North Bound		South Bound	
Cargo NOS	[1] 13,500	[2] [13,500]	2,000	[2,986]
Vehicles	6,500	[6,500]	2,500	[2,500]
Refrigerated	2,500	[2,455]	0	[0]

[1] Initial amount.
[2] Revised amount is in brackets.

and (3) the percentage of estimated weight to be stuffed by the Government was revised to 22.8 percent as compared with 24 percent used in the initial RFP.

Both competitors believe that MSC's revisions to the RFP are not substantial and both contend that reopening under the revised RFP would be like reopening under the initial RFP, thus creating an auction atmosphere in violation of sound procurement practice. As we noted above, FAL proposed to satisfy the Government's requirements as they were stated in the initial RFP and those requirements reportedly have not changed; both offerors had all the information necessary to properly price their proposals; and Sea-Land already was given the opportunity to submit its best evaluated total price. Accordingly, we conclude that Sea-Land was not prejudiced by FAL's proposal. Sea-Land would not be prejudiced by not reopening negotiations, and the Government's needs would be satisfied under the initial RFP.

Our decision in *Square Deal Trucking Co., Inc.*, B-183695, October 2, 1975, 75-2 CPD 206, supports our instant views. There, the solicitation contemplated that award would be based on the lowest aggregate monthly charge for two services; the two low bids received were as follows:

	CLIN	Quantity	Unit Price	Total
Bidder A	1	12 mo	$125	$1,500
	2	300	68	20,400
			$193	$21,900
Bidder B	1	12 mo	$120	$1,440
	2	300	70	21,000
			$190	$22,440

There, the agency recommended resolicitation to clarify that award was to be made based on total evaluated price and not low total unit price. We concluded that it was not shown that competition would be adversely affected by the solicitation's award provisions; therefore, award could properly be made to the low properly evaluated bidder, thus avoiding an "auction" atmosphere incident to a resolicitation.

Our position is also supported by the rationale of *Tennessee Valley Service Company—Reconsideration*, B–188771, September 29, 1977, 77–1 CPD 241, which involved a solicitation that provided that award would be made based on the lowest aggregate bid for all items specified; estimated quantities were provided in one section and unit prices were requested in another section of the solicitation. In response, some bidders provided only unit prices and others provided extended prices. The protester submitted the low total extended price and another bidder submitted the low total unit price; the agency recommended resolicitation. Again, we found that enough information was in the solicitation for bidders to exercise their best business judgment in structuring their prices and all bidders should have known that award of such Government contracts must be made based on the low evaluated costs for the total work to be performed. We recommended that award be made under the solicitation because bidders could not be prejudiced by a proper evaluation of submitted bids.

The underlying rationale for both decisions is our view that (1) rejection of bids after opening tends to discourage competition (see 52 Comp. Gen. 285 (1972)), and (2) cancellation after bid opening is generally inappropriate if award under the solicitation would serve the actual needs of the Government (see *GAF Corporation*; *Minnesota Mining and Manufacturing Company*, 53 Comp. Gen. 586, 591 (1974), 74–1 CPD 68; 49 Comp. Gen. 211 (1969)). In sum, we believe that the same rationale is applicable in the instant negotiated procurement. Therefore, award may properly be made to FAL under the initial RFP.

By letter of today, we are advising the court and the Secretary of the Navy of our views.

[B–192448]

Medical Treatment—Dependents of Military Personnel—Parents—Adoptive

Bona fide adoptive parents of members of the uniformed services should be included, similarly to natural parents, as eligible dependents to receive medical benefits pursuant to 10 U.S.C. 1071–1088 (1976), despite the fact that the statute does not expressly include adoptive parents within the term "parents" in authorizing such benefits. Decisions to the contrary should no longer be followed

In the matter of medical benefits for dependent adoptive parents, September 19, 1978:

It has come to our attention that dependent adoptive parents of members of the uniformed services are not eligible to receive medical benefits pursuant to 10 U.S.C. 1071–1088 (1976) under the current interpretation of the term "parent" as used in 10 U.S.C. 1072 and applicable regulations. After reviewing this situation we conclude that this interpretation should be changed to construe "parent" as used in 10 U.S.C. 1072 as including bona fide adoptive parents.

Chapter 55, sections 1071–1088, title 10, United States Code, provides for a uniform program of medical and dental care for members of the uniformed services, and for "their dependents." In subsection 1072(2)(F), "dependent" is defined to include "a parent or parent-in-law" who is, or was at the time of the member's death, dependent upon him for over one-half of his support and residing in his household.

The joint regulations (Medical Services, Uniformed Services Health Benefits Program, September 15, 1970) issued by the Department of Defense and Department of Health, Education, and Welfare, implementing 10 U.S.C. 1071–1088, provide at paragraph 1-2 in pertinent part as follows:

> f. *Dependent.* A person who bears any of the following relationships to an active duty or retired member of a uniformed service, or to a person who at the time of his death was an active duty or retired member of a uniformed service:
>
> * * * * * * *
>
> (3) *Parent or parent-in-law* who is, or was at the time of death of the active duty or retired member, dependent on the member for over one-half of his support and residing in a dwelling place provided or maintained by the member. (Does not include an adoptive parent, step-parent, or person who stood in loco parentis.)

One recent case involved an active duty Air Force officer who was adopted when she was 8 years old and was contributing one-half of her adoptive mother's support. She applied for hospitalization benefits for her mother under the assumption she would be eligible for such benefits as her parent was dependent upon her for support. She was issued the dependent's identification card qualifying her for receipt of the benefits. However, several months later she was informed by the Air Force that pursuant to decisions of the Comptroller General her mother's entitlement to medical benefits was being revoked, as she was an adoptive parent and therefore ineligible. In view of the provisions of the regulations quoted above, we assume the other services are applying similar rules.

Our previous decisions which were referred to by the Air Force in disentitling the officer's mother to medical benefits have been premised on the principle that unless otherwise defined by the pertinent statute, the term "parent" refers to the natural father or mother and does not include adoptive parents. We have held that where the Congress

intends that allowances be authorized in the case of a dependent parent other than a natural parent, it has expressly so provided. See 22 Comp. Gen. 1139 (1943); 26 *id.* 211 (1946); B–175578, April 21, 1972.

The express purpose of the legislation, stated in 10 U.S.C. 1071, is "to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents." In our review of the legislative history we have found no specific intent to distinguish between adoptive and natural parents.

During the past decade, the judicial trend has been to invalidate statutory classifications requiring dissimilar treatment for those similarly situated. For example, the dependency provisions of 10 U.S.C. 1072 were held invalid as they related to the exclusion of illegitimate children from the category of dependents eligible to receive medical benefits by the District Court of the District of Columbia in 1972. *Miller* v. *Laird*, 349 F. Supp. 1034 (1972). The court found the critical issue to be whether the elimination of illegitimate children from the category of eligible dependents bore any rational relationship to the goals of the statute. The court concluded that the denial of benefits to illegitimate children was so lacking in rational justification as to be violative of the Due Process Clause of the Fifth Amendment.

Concerning the status of adoptive parents, generally an adoption effects a legal as well as a practical substitution of parents. The natural parents lose and the adoptive parents receive or assume the right to the child's custody, services, and earnings, the right to control the child, and the obligations of maintenance, education, etc. The child owes the duties arising out of the relationship to his adoptive parents and not to his natural parents. The purpose of the statutory adoption schemes of the various states is to transplant the adopted person into the family of the adopter, the person thus bearing the same legal relationships to the adoptive parents as does their natural child. See 34 Comp. Gen. 601, 604 (1955), and authorities cited therein.

We have held that in certain unusual cases such as where a member adopted her brother and sister, no bona fide parental relationship was established. 42 Comp. Gen. 578 (1963). However, generally for most purposes bona fide adoptive parents, such as the mother of the officer discussed above, are treated similarly to natural parents.

Accordingly, after reviewing the legislative history and in view of recent judicial decisions, it is now our view that bona fide adoptive parents should be included, similarly to natural parents, as eligible dependents to receive medical benefits pursuant to 10 U.S.C. 1071–1088. To the extent that prior decisions of our Office conflict with this view, they should no longer be followed regarding medical benefits authorized under these statutes.

[B-191731]

Contracts—Negotiation—Cut-Off Date—Notice Sufficiency

Contrary to protester's contention, record reveals that agency advised protester ahead of time of established common cutoff date for submission of second best and final offers (BAFO). Protester submitted timely BAFO and initial protest letter asserted that pre-cutoff date advice was given. Based on above, and contradictory statements by protester and agency, protester has failed to meet burden of proof.

Contracts—Specifications—Conformability of Equipment, etc., Offered—Administrative Determination—Negotiated Procurement

Technical acceptability of proposals is within discretion of agency and such determination will not be disturbed absent clear showing that determination was unreasonable. Protester did not directly challenge or offer any evidence to show unreasonableness of agency determination that its proposal was technically unacceptable.

Contracts—Negotiation—Competition—Competitive Range Formula—Technical Acceptability—Not Established From Inclusion in Competitive Range

Protester's contention that, by requesting it to submit second best and final offer, agency admitted that proposal was technically acceptable is without merit. Determination that proposal is in competitive range does not imply that proposal is acceptable but may indicate only that it can be improved without major revisions to point where it becomes acceptable. Agency never advised protester that proposal was technically acceptable and states that advice to the contrary was given. Negotiations were reopened, in part, to resolve matter of proposal's acceptability.

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Proposal Exclusion From Competitive Range Effect

Agency included protester's first best and final offer (BAFO) in competitive range as one reason for reopening negotiations because doubts as to BAFO's acceptability were resolved in protester's favor. Reliance on prior GAO decision and tight timeframe apparently resulted in request for and submission of second BAFO from protester. However, because prior GAO decision was modified, agency need not have requested second BAFO where discussions made it clear that proposal was effectively no longer in competitive range. Failure to award to protester, which submitted the lowest-priced second BAFO, was proper.

In the matter of Proprietary Computer Systems, Inc., September 20, 1978:

Proprietary Computer Systems, Inc. (PCS), protests the Department of Commerce's (Commerce) award of a contract to another offeror under request for quotations (RFQ) No. 78-0078. The RFQ, issued on February 21, 1978, was for a correspondence tracking system to assist Commerce's Executive Secretariat in monitoring, controlling, and composing correspondence throughout the Office of the Secretary of Commerce. It was issued pursuant to the General Services Administration (GSA) Teleprocessing Services Program. GSA's Basic Agreement was incorporated into the RFQ.

Commerce states that 10 timely offers were received and that discussions were conducted with all offerors. By letters dated March 27, 1978, all offerors were advised of their technical and contractual deficiencies and provided the opportunity to clarify, amplify and/or modify their proposals by the common cutoff date for the submission of a best and final offer (BAFO), March 28, 1978. Among other things, PCS was informed that the existence of a turnkey correspondence tracking system in place was not evident from its proposal and that PCS's system appeared to be a general text editing system only.

After reviewing the BAFO's submitted on March 28, 1978, Commerce determined that six of these were technically unacceptable and that three were technically acceptable. Commerce states that PCS's BAFO was borderline. While some members of Commerce's technical evaluation party felt that PCS should be eliminated along with the other six technically unacceptable offerors, other members felt that a live demonstration might show that PCS had the type of correspondence tracking system called for by the RFQ even though on paper PCS's system appeared to be unacceptable. Furthermore, one of the three technically acceptable offerors had made an apparent pricing error on its "online storage charges." This error was such that a correction could not be permitted without reopening negotiations. Therefore, discussions were reopened with PCS and the three technically acceptable offerors. The six offerors who were technically unacceptable were so advised by letters dated April 7, 1978, and no further discussions were held with them.

PCS performed a live test demonstration for Commerce on the afternoon of Friday, April 7, 1978. The protester was the last of the offerors with whom negotiations had been reopened to have a demonstration. Commerce states that the last-minute scheduling of PCS was caused by the company's inability to have a demonstration at an earlier date.

Commerce relates the following circumstances surrounding the submission of PCS's second BAFO. During the time arrangements were being made with PCS for the live demonstration, Commerce advised PCS that time was of the essence and that a BAFO would have to be submitted shortly after the demonstration. At the demonstration on April 7, 1978, PCS was verbally advised of its system's technical deficiences and of the Monday, April 10, 1978, closing date for the submission of a BAFO. A letter setting forth these deficiencies was prepared that afternoon. The next working day, April 10, 1978, Commerce telephoned PCS that this letter was ready for pickup at Commerce. The letter was also read in its entirety to PCS over the telephone and contained a word-for-word restatement of the two matters mentioned above in the March 27, 1978 letter.

A three-page BAFO from PCS was timely received by Commerce on April 10, 1978. PCS's price was low. However, Commerce found as a result of the live demonstration that PCS's system was technically deficient. Commerce indicates that the technical deficiencies in PCS's system were of such a magnitude and nature that they could not readily be corrected without a complete system redesign. The other three offerors with whom negotiations were reopened were found by Commerce to be technically acceptable as the result of their live demonstrations and revisions to their proposals. Award was made on April 11, 1978, to the lowest priced of the three technically acceptable offerors.

In a letter dated April 18, 1978, and received by us on April 19, 1978, PCS protested the award on the following grounds:

(1) No common cutoff date was established for best and final offers which were submitted by various bidders on various dates.

(2) By requesting that PCS submit a best and final offer, the United States Department of Commerce thereby acknowledged that the PCS proposal was technically acceptable and within a competitive range; consequently, PCS, being the low-price offeror, should have received the award.

(3) Although PCS was notified verbally on April 10, 1978, to submit a best and final offer, PCS did not receive the written confirmation of the Government request for best and final offer until April 13, 1978, 2 days after the contract award was made on April 11, 1978. The letter request for a best and final offer contained an attachment requesting comment on the Government technical evaluation, which, of course, could not be made in time for consideration by the United States Department of Commerce prior to award.

Commerce responds to PCS's protest allegations by stating that common cutoff dates for BAFO's were established March 28, 1978, initially, and April 10, 1978, after negotiations had been reopened, and that all offerors were treated the same in this regard. As to all requests for PCS to submit a BAFO, Commerce indicates that such requests do not imply that a proposal is technically acceptable. A request for a BAFO also advises offerors of their technical and contractual deficiencies. Commerce states that PCS was verbally advised of the April 10, 1978, closing date for second BAFO's, on both April 7, 1978, and the morning of April 10, 1978. On both these occasions, PCS was also advised of its system's technical deficiencies.

In a letter to us dated June 29, 1978, PCS denied that at any time prior to April 13, 1978, was it advised either of its system's technical deficiencies or that BAFO's were due on April 10, 1978. In addition, PCS argued that on March 28, 1978, PCS's first BAFO was accepted by Commerce without any indication to it that this BAFO was tech-

nically unacceptable. If it was technically unacceptable, PCS contended that it should have been notified of this on April 7, 1978, along with the other six technically unacceptable offerors. Finally, PCS argued that even if it was notified early on the morning of April 10, 1978, of its technical deficiencies, there was little it could do at that time to correct these deficiencies. PCS's June 29, 1978, letter requested memoranda from Commerce's files as to whether the three offerors who were technically acceptable were notified of the April 10, 1978, BAFO date in the same manner as PCS. PCS also requested memoranda from Commerce supporting the assertions that PCS was advised prior to April 13, 1978, of its technical deficiencies and the April 10, 1978, second BAFO cutoff date.

Commerce commented on these matters in a letter dated July 14, 1978, with several enclosures. We forwarded these comments and enclosures to PCS in a letter dated July 21, 1978. Our July 21, 1978, letter informed PCS that if it was not satisfied with the information contained in the enclosures to Commerce's letter, any requests for further information should be sought directly from Commerce under the Freedom of Information Act, 5 U.S.C. § 552 (1976). We indicated that we would delay rendering a decision on the protest pending whatever action Commerce took on the request. In a letter dated August 4, 1978, and received by us on August 8, 1978, PCS requested a decision from us on all issues raised by the protest.

Our Office has consistently held that to properly terminate negotiations, all offerors must be advised that any revisions to their proposals *must* be submitted by a common cutoff date. *University of New Orleans*, 56 Comp. Gen. 958 (1977), 77-2 CPD 201. Moreover, the Federal Procurement Regulations (FPR) specifically provide that all offerors shall be informed of the specified date of the closing of negotiations and that any revisions to their proposals should be submitted by that date. FPR § 1-3.805-1(b) (1964 ed. FPR circ. 1).

From the record, we believe that Commerce did notify PCS ahead of time of the April 10, 1978, common cutoff date for submission of BAFO's. Of particular significance, we note that PCS submitted a timely second BAFO. Also, PCS contradicts itself concerning when it was notified that BAFO's were due on April 10, 1978. As mentioned above, PCS stated in the April 18, 1978, protest letter that it was notified verbally on April 10, 1978, to submit a BAFO, but did not receive written confirmation of the Government's request for a BAFO until April 13, 1978. In a later submission, PCS categorically denied that it was advised prior to April 13, 1978, that a BAFO would be due on April 10, 1978. Based on the above, as well as the contradictory statements by the protester and the contracting agency, with respect to this disputed question of fact, we find that the protester has failed

to meet its burden of proof. See *The Public Research Institute of the Center for Naval Analyses of the University of Rochester*, B-187639, August 15, 1977, 77-2 CPD 116, and the cases cited therein.

With regard to the technical acceptability of the system that PCS offered, the determination of technical acceptability of proposals is within the discretion of the procuring agency and the agency's determination will not be disturbed absent a clear showing that the determination was unreasonable. *AAA Engineering and Drafting, Inc.*, B-188851, November 16, 1977, 77-2 CPD 377. We will not regard a technical evaluation as unreasonable merely because there is a substantial disagreement between the contracting agency and the offeror. See *Joanell Laboratories, Incorporated*, 56 Comp. Gen. 291 (1977), 77-1 CPD 51, and the cases cited therein.

The RFQ issued by Commerce asked for a system with two separate and distinct capabilities: (1) a word-processing capability, and (2) a correspondence tracking capability. Commerce's letter of March 27, 1978, requesting first BAFO's by March 28, 1978, informed PCS that its system appeared to be only a general editing system and not a correspondence tracking system. Commerce's doubts as to whether PCS had a viable correspondence tracking system were not dispelled after the submission of PCS's first BAFO. Not until after negotiations had been reopened and PCS had given a live demonstration of its system did it become apparent to Commerce that PCS's system was so technically deficient that it could not be readily corrected to meet RFQ requirements.

PCS does not directly challenge Commerce's determination that its system was not compliant with the RFQ. Instead, PCS argues that, by requesting that PCS submit a second BAFO, Commerce, in effect, admitted that PCS's system was technically acceptable. PCS cited FPR § 1-3.805-1(a) (1964 ed. amend. 52), which requires that written or oral discussions be conducted with all responsible offerors submitting proposals within a competitive range, price and other factors considered. From this, PCS contends that it must have been within the competitive range, price and technically, if it was invited to submit a BAFO.

A determination that a proposal is in the competitive range for discussion does not necessarily mean that the proposal is acceptable as initially submitted, but may indicate only that there is a real possibility that it can be improved without major revisions to the point where it becomes most acceptable. *Baden & Co.*, B-190386, December 21, 1977, 77-2 CPD 493. Commerce never considered PCS's initial proposal and first BAFO technically acceptable. Since it was not clear that what PCS was offering was susceptible of being made

technically acceptable, Commerce resolved all doubts in PCS's favor and reopened negotiations, in part, to resolve this matter. Moreover, the record shows that Commerce never advised PCS that its system was technically acceptable. Rather, Commerce informed PCS on several occasions of the inadequacy of the PCS system, which PCS disputes, but has provided no objective evidence to the contrary. See *The Public Research Institute of the Center for Naval Analyses of the University of Rochester*, *supra*.

PCS also raises the inconsistency between Commerce's determination after PCS's demonstration that PCS's system had major deficiencies that could not be readily corrected and Commerce's request for a second BAFO from PCS. If Commerce found major deficiencies in its system on April 7, 1978, PCS questions Commerce's request that it submit a BAFO by the close of business on April 10, 1978. In this regard, PCS points out that if PCS's deficiencies could not be readily corrected without a complete redesign of its system, it would have been impossible to do this in the few short hours following the time PCS was notified on April 10, 1978, to submit a BAFO.

Citing our decision *Operations Research, Inc.*, 53 Comp. Gen. 593 (1974), 74–1 CPD 70, Commerce states that a proposal once determined to be in the competitive range may not subsequently be excluded from the competitive range on the basis of discussions without giving the offeror an opportunity to submit a revised proposal. Since it had determined that PCS was in the competitive range and had held discussions with PCS after negotiations were reopened, apparently Commerce in good faith believed that it was required to give PCS the opportunity to submit a second BAFO.

The record shows that Commerce included PCS's first BAFO in the competitive range for purposes of discussions after the reopening of negotiations because all doubts as to its acceptability were resolved in PCS's favor. Commerce was not, however, required to proceed with PCS up to and through the receipt of a second BAFO from PCS. Concerning proposals such as PCS's first BAFO, we modified the above decision on reconsideration, *Operations Research, Inc.* (*Reconsideration*), 53 Comp. Gen. 860 (1974), 74–1 CPD 252, as follows:

> * * * Accordingly, in those situations where discussions relating to an ambiguity or omission make clear that a proposal should not have been in the competitive range initially, we believe it would be proper to drop the proposal from the competitive range without allowing the submission of a revised proposal.

Therefore, we conclude that, after the April 7, 1978, demonstration, PCS was effectively no longer in the competitive range technically. Although it is unfortunate that reliance on our decision and the tight timeframe apparently resulted in the request for and submission of

the second BAFO from PCS, the failure of Commerce to make an award to that firm was proper under the circumstances.

Accordingly, the protest is denied.

[B-192323]

Courts—Jurors—Refreshments

Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future.

In the matter of refreshments for jurors, September 20, 1978:

At the behest of the Judicial Conference of the United States, Mr. William E. Foley, Director of the Administrative Office of the United States Courts, has requested our determination regarding the legality of the expenditure of funds appropriated to the judiciary for jury expenses for the purpose of providing refreshments for jurors ordered at the direction of a district court judge during recesses in trial proceedings. Mr. Foley's request was supported by a separate letter from a judge in the United States District Court for the Eastern District of Virginia.

The Director points out that pursuant to 28 U.S.C. § 1871, authority exists for the payment of actual subsistence expenses incurred by jurors who are sequestered by the district courts, in which the jurors are kept in virtual isolation for the duration of a trial. Sequestration, usually ordered to protect the safety of the jurors or to insulate them from publicity, is a relatively rare occurrence.

Mr. Foley, however, requests our opinion concerning the more typical situation where jurors remain free, except during the business day when they may be required to be in attendance at the court house, often for several hours at a time. He notes that 28 U.S.C. § 1871 does not provide for the payment of subsistence allowances unless an overnight stay is required of the jurors and they thus are entitled to a $16 per diem subsistence allowance. Mr. Foley states that many judges believe that providing snacks to jurors at Government expense "is essential to maintain their morale and attention during the trial and is therefore well worth the minimal monetary expenditure involved." He enclosed with his letter vouchers for expenditures to provide jurors with coffee, soft drinks, pastries, and other sorts of light refreshment

which were ordered by the district courts and submitted to his office for payment.

The Director calls our attention to a resolution adopted by the Jury Committee of the Judicial Conference of the United States at its most recent meeting in January 1978, which supports the need for this expense and which provides:

> Resolved that it is the sense of the Judicial Conference Committee on the Operation of the Jury System that there is an extraordinary need for coffee and snack services, equipment, and supplies to be used to provide jurors with sustenance during the long hours that they are commonly held in session, and particularly where trials are held over until evening hours or where the sessions are otherwise prolonged.
>
> The Committee finds that on many occasions jurors, even when they are not formally sequestered, must be held together during the trial day in a virtual condition of civil arrest in order to avoid their mingling with members of the public, the press, and representatives of the parties, as well as for the security of the jurors themselves. For this reason it is frequently difficult or impossible to release them at meal or break times to go to commercial eating facilities. From the court's point of view such a practice would protract the proceedings, unnecessarily tax the time of the judge and other court personnel who would have to wait upon the return of the last juror before the trial could continue, and increase the costs of a trial and the expenses of the litigants to a substantial extent.
>
> Furthermore it is the belief of the Committee that a coffee break, particularly between meal periods and in the evening hours, increases the efficiency and improves the morale and concentration of jurors, who must of necessity be held in close confinement for long periods of time. The condition of jurors, the Committee believes, is far different from that of federal employees who work only during normal business hours and who, in any event, have access to commercial facilities.
>
> The Committee therefore finds that the public interest favors the existence of some discretion in the district judges to direct the provision of beverage or snack services to jurors at appropriate points in the court proceedings. The Administrative Office of the U.S. Courts is authorized to seek an opinion from the Comptroller General of the United States as to whether expenditures for such services would constitute an "expense" of jury service for the purposes of the appropriation to the federal judiciary for fees of jurors.

The District Court judge who wrote us that after jurors are chosen to try a particular case, they are segregated in the courtroom or jury room and are not free to move about the building or to neighboring coffee shops. He states that he perceives a difference in a jury thus segregated, as opposed to ordinary Government employees or other people in Government buildings on business who can at their own leisure attend building canteens or leave the buildings for a coffee shop. He notes that jurors serve their public duty at little pay and often for long hours and urges that their morale and continued interest demand some extra considerations.

As the Director points out, we have a long established rule that the expenditure of appropriated funds to procure food, beverages, or meals or snacks is in the nature of an entertainment expense and is thus prohibited unless funds are specifically provided therefor in the relevant appropriation act. See, for example, 43 Comp. Gen. 305 (1963) and 47 *id.* 657 (1968). See also B–167820, October 7, 1969; B–185826,

May 28, 1976 and B–188708, May 5, 1977 (relating to a conference held under the Speedy Trial Act). The Director notes, however, that we have made limited exceptions to this general rule, particularly in situations involving unique and arduous working conditions or other circumstances where some advantage to the Government would result for the payment of such expenses. See, for example, 39 Comp. Gen. 119 (1959) and 50 *id.* 610 (1971).

In particular, the Director refers to our decision of August 10, 1971, B–173149, in which we held that appropriated funds could be used to provide cooking facilities for Federal employees at air traffic control facilities. Those facilities were frequently located at remote locations without readily accessible commercial restaurants or snack bars. Also, we were advised that at most of the facilities the employees had to eat their lunches and take their coffee breaks at or near their operating places of duty.

Mr. Foley suggests that there is a relationship between the situations of the controllers and that of the jurors and that a benefit to the Government can be found from the payment of minor food and beverage items for jurors. He states: "Like the controllers, jurors are frequently required to work continuously for longer than the regular business day and to remain during such time in or near the courtroom."

We believe, however, that the jurors' situation is more analgous to that of Government employees who cannot leave their posts because they are needed for guard duty or to maintain surveillance or have other unusual working conditions on a temporary basis. See B–186090, November 8, 1976; B–182586, December 17, 1974; B–185159, December 10, 1975; and B–180806, August 21, 1974. In those situations when employees could not go to cafeterias or snack bars, food and drink were provided to these employees at their expense on a "carry out" basis by other employees. Similarly, if they make themselves available for this purpose, the jurors have access to snack bar facilities via the marshals. If members of the marshals' staffs must take orders from individual jurors, we see no reason why they cannot also collect sufficient money from each juror to cover the cost of the items each may wish to consume.

Accordingly, it is our view that the funds provided for jurors' fees and expenses in the Judiciary Appropriation Act, 1978, Public Law 95–86, August 2, 1977, 91 Stat. 419, 434, not being specifically available for the purchase of snacks for jurors, may not be expended for this purpose. In our view, specific statutory authority is necessary.

With regard to payments already made by marshals, we are aware of the provisions of 28 U.S.C. § 572(b) (1976) which provide:

The marshal's accounts of fees and costs paid to a witness or juror on certificate of attendance issued as provided by sections 1825 and 1871 of this title may not be reexamined to charge him for an erroneous payment of the fees or costs.

On a form entitled "Public Voucher For Meals And Lodgings For Jurors, United States Courts" covering the expenses involved, the clerk of the District Court affirms:

I Certify that the Court committed the jury in the above-mentioned case to the custody of the Marshal with orders to furnish said jury meals and lodging at the expense of the United States.

In one example enclosed by the Director, a United States District Court judge for the Northern District of Indiana signed an order providing:

It is the order of the Court that the United States Marshal purchase and pay for coffee for the jurors in the above-entitled cause at the expense of the United States.

In view of these factors, we have no authority to object to the certification and payment of vouchers incurred to date. The Director of the Administrative Office of the United States Courts and the Director of the United States Marshals Service should advise the judges and marshals of the respective courts that incurring expenses to provide jurors with coffee or other refreshments is improper.

[B-190247]

Contracts—Awards—Small Business Concerns—Set-Asides—Competition Sufficiency—Protest Timeliness

Protest by large business concern against solicitation restricting procurement as total small business set-aside, on basis that there were insufficient small business competitors, filed after closing date for receipt of step-one technical proposals is untimely filed under General Accounting Office Bid Protest Procedures, 4 C.F.R. 20.2(b) (1977 ed.).

Contracts—Protests—Timeliness—Solicitation Improprieties—Apparent Prior to Closing Date for Step-One Proposals—Two-Step Procurement

Protest by Federal Supply Service (FSS) contractor, alleging procurement should have been effected under FSS, filed after closing date for receipt of step-one proposals is untimely filed and not for consideration on merits. Fact that procuring activity's requirements were not being purchased from FSS was apparent from Commerce Business Daily Notice and from face of step-one solicitation.

Contracts—Negotiation—Evaluation Factors—Propriety of Evaluation—Two-Step Procurement—Protest Timeliness

Large business concern's protest against agency's evaluation of its equipment (on basis of which small business offers were rejected as unacceptable) filed after closing date for receipt of step-one proposals is timely filed where evaluation was not publicly disclosed and record does not controvert protester's statement that it became aware of unfavorable evaluation only at time of issuance of step-two solicitation.

Contracts—Protests—Timeliness—Solicitation Improprieties—Not Apparent Prior to Closing Date for Step-One Proposals—Two-Step Procurement

Protest questioning propriety of retaining set-aside restriction after evaluation of step-one technical proposals, filed after closing date for receipt of proposals is timely filed because price reasonableness in two-step formally advertised procurement cannot be determined until after bid opening under step-two solicitation.

Contracts—Negotiation—Two-Step Procurement—Competition Sufficiency—Small Business Set-Asides

Award under two-step formally advertised procurement restricted as total small business set-aside may be made where there are only two small business offerors whose step-one technical proposals were found acceptable and were eligible to compete on step-two invitation for bids.

Contracts—Specifications—Samples—Not Solicitation Requirement—Evaluation Propriety

Technical evaluations are based on degree to which offerors' written proposals adequately address evaluation factors specified in solicitation. Request for technical proposals (RFTP) which does not require samples or include sample testing and evaluation criteria does not authorize procuring activity to acquire and test proffered equipment to determine acceptability of technical proposals.

Contracts—Awards—Small Business Concerns—Set-Asides—Notice of Set-Aside in Solicitation—Requirement in ASPR

Requests for technical proposals statement: "THIS PURCHASE IS RESTRICTED TO SMALL BUSINESS" does not suffice to restrict procurement as total small business set-aside where RFTP does not also include clauses required for total set-aside by Armed Services Procurement Regulation (ASPR) 1-706.5(c) and 7-2003.2 (1976 ed.).

Contracts—Negotiation—Two-Step Procurement—Technical Proposal Acceptability—Evaluation Criteria—Failure to Apply

Agency's acquisition and evaluation of equipment furnished by firm deemed ineligible to compete on step-one RFTP and rejection of six proposals on basis of such evaluation constitute complete departure from RFTP evaluation criteria. Improper evaluation precluded 60 percent of offerors from competing on step-two solicitation to their prejudice. However, remedial action is not possible because of termination costs and urgency and gravity of program for which cameras are being purchased.

Contracts—Negotiation—Offers or Proposals—Rejection—Notification of Unsuccessful Offerors

ASPR 2-503.1(f) requires prompt notice to unsuccessful offerors; reasons for rejection may be given in general terms, notice requirement is procedural, and failure to comply is not legal basis for disturbing otherwise valid award. Notice merely stating offeror's item does not meet specification requirements is inconsistent with spirit and purpose of regulation, particularly where Agency furnishes more detailed reasons for rejection in denying offeror's protest shortly after issuing notice of rejection.

In the matter of RCA Corporation; Norman R. Selinger & Associates, Inc., September 21, 1978:

RCA Corporation (RCA) and Norman R. Selinger & Associates Inc. (Selinger), have protested against the award of a contract by the

Department of the Navy (Navy), Naval Air Development Center, Warminster, Pennsylvania, to General Electrodynamics Corporation (GEC) for closed circuit television cameras for alarm assessment in physical security systems, under request for technical proposals (RFTP) No. 62269–77–R–0448.

A Pre-Invitation Notice concerning the proposed procurement, published in the Commerce Business Daily (CBD) on June 15, 1977, advised that "[t]he TV cameras must be commercially available, off-the-shelf equipment," that the procurement would be conducted by two-step formal advertising, and that the step-one solicitation would be issued approximately July 15, 1977. Twenty-nine firms responded, requesting copies of the solicitation.

At some time during the early stages of the procurement the Navy purchased or received from manufacturers 10 cameras for inspection. RCA, for example, furnished a camera to the Navy on July 22, 1977. The parties offer conflicting accounts of this transaction which will be discussed below; it is mentioned at this juncture in order to establish the chronology of events in the procurement process.

On July 25, 1977, the Navy's Small Business Specialist recommended that the procurement be set aside for exclusive small business participation. The contracting officer concurred, and an RFTP for 100 cameras, 100 manuals and an option quantity of an additional 100 cameras was issued on July 26, 1977, with the following legend atop the first page:

"THIS PURCHASE IS RESTRICTED TO SMALL BUSINESS."

By letter dated July 28, 1977, the Navy informed RCA, a large business concern, that the procurement was to be a total small business set-aside. RCA responded by letter of August 3, 1977, asking whether there was a sufficient number of small business competitors for a set-aside. The Navy replied in the affirmative 2 days later, and did not treat RCA's August 3 letter as a protest against the solicitation.

The Technical Proposals clause of the RFTP provided for the submission and evaluation of proposals as follows:

Offerors are required to furnish a detailed technical proposal with sufficient information to show compliance with the requirements of the solicitation.

Offerors are advised to submit proposals which are fully and clearly acceptable without additional explanation or information, since the Government may make a final determination as to whether a proposal is acceptable or unacceptable solely on the basis of the proposal as submitted and proceed with the second step without requesting further information from any offeror. However, if it is deemed necessary in order to obtain sufficient acceptable proposals to assure adequate price competition in the second step or if it is otherwise in its best interest; the Government may; at its sole discretion, request additional information from offerors of proposals which are considered reasonably susceptible of being made acceptable by additional information clarifying or supplementing but not basically changing any proposal as submitted. For this purpose, the Government may discuss any such proposal with the offeror.

In the second step (STEP TWO) of the procurement, only bids based upon technical proposals determined to be acceptable, either initially, or as a result of discussions, will be considered for award; EACH BID IN THE SECOND STEP SHALL BE BASED ON THE BIDDER'S OWN TECHNICAL PROPOSAL. Prospective Contractors submitting unacceptable technical proposals will be so notified upon completion of the technical evaluation as to the reasons why their proposal is considered unacceptable.

* * * * * * *

Ten technical proposals, including those of GEC and Selinger, were received on August 17, 1977, the closing date for receipt of proposals. RCA, however, did not submit a proposal.

Between August 26 and September 1, 1977, the Navy sent GEC a list of questions concerning the camera specifications and the firm's proposal. GEC supplied the requested information by telegram on September 6, 1977, which the Navy received on September 8, 1977.

The Navy states that technical evaluation of the proposals was completed on September 6, 1977, as a result of which only the GEC and Cohu, Inc. (Cohu) proposals were determined to be acceptable. The remaining 8 proposals were deemed unacceptable and *not* reasonably susceptible of being made acceptable by further clarifying information. Three days later the Navy sought additional information from GEC, which the firm furnished by telegram dated September 12, 1977.

The step-two invitation for bids (IFB) was issued to GEC and Cohu on September 14, 1977. On September 19, 1977, Selinger personnel telephonically ascertained from the Navy that the firm's proposal had been found unacceptable, that it would not be permitted to compete on step two, and that a letter so notifying Selinger had been prepared. (Letters notifying the unsuccessful offerors, pursuant to Armed Services Procurement Regulation (ASPR) § 3–508.4 (1976 ed.), were mailed on September 20, 1977.) During a second telephone conversation that day the Navy asserts that Selinger was told the reasons why its proposal was rejected. Selinger submitted written protests to the Navy on September 19 and 26, 1977, which the Navy denied by telegram dated September 27, 1977.

At the bid opening on September 26, 1977, GEC was the low bidder at a unit price of $1,786.75 per camera for the base quantity and $1,751 each for the option quantity. Unit prices reported by the Navy are actually average unit prices for each group of 100 cameras, which are supplied with one of four types of lens, quoted at four different prices, for quantities per-lens-type of 60, 20, 15 and 5 units.

RCA and Selinger filed their protests with our Office on September 28, 1977. On September 29, 1977, the Navy made a Determination and Findings (D&F) of urgency, pursuant to ASPR § 2–407.8(b)(3) (1977 ed.), under which contract No. N62269–77–C–0448 was awarded to GEC on the same day.

By April 14, 1978, GEC had delivered 8 cameras to the Navy. During evaluation of the firm's production items, however, the Navy noted a lack of contrast under certain low light conditions, which GEC has proposed to solve by modifying the camera's configuration. The Navy has, therefore, suspended further delivery under the contract pending evaluation of GEC's modification proposal.

RCA Protest

RCA essentially contends that the procurement was inappropriately set aside for small business and should have been resolicited without the small-business restriction, that the Navy improperly evaluated an RCA preproduction model camera on the basis of which it wrongfully rejected technical proposals by Selinger and 5 other offerors which offered RCA cameras, and that the Navy should have purchased its requirements from RCA's Federal Supply Schedule (FSS) Contract No. GS09S-38172.

Timeliness

The Navy takes the position that RCA's protest is untimely filed and not entitled to consideration on the merits, citing § 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R., part 20 (1977 ed.), which provides as follows:

> Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals. * * *

In this regard, the Navy asserts that the fact that the procurement was to be a total set-aside was apparent from the RFTP and that RCA was expressly so advised by the Navy's July 28 letter. Because RCA's protest was filed with our office 29 working days *after* the August 17 closing date for receipt of technical proposals, the Navy therefore contends that it was not timely filed.

RCA, however, states that it relied on the Navy's August 5 assurances concerning the sufficiency of small business competitors, that it had no indication to the contrary until the IFB was issued to only two bidders, and that its protest was therefore timely filed within 10 working days of the issuance of the IFB. See 4 C.F.R. § 20.2(b)(2) (1977 ed.)

A total small business set-aside is prohibited absent a determination that there is a reasonable expectation of offers from a sufficient number of small busines concerns to assure that award will be made at a reasonable price. ASPR § 1-706.5 (1976 ed.). The contracting officer's decision to set aside a particular procurement exclusively for small business should be made on the basis of the circumstances which exist at the time the decision is made. B-172165, September 3, 1971; *DeWitt Trans-*

fer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180. These decisions are basically business judgments which require the exercise of broad discretion by the contracting officer. *Hawthorne Mellody, Inc.*, B-190211, November 23, 1977, 77-2 CPD 406. Thus, the actual reasonableness of the expectation will not be reevaluated in retrospect, and our Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of discretion. *Allied Maintenance Corporation*, B-188522, October 4, 1977, 77-2 CPD 259.

Because the alleged defect, the small business restrictive method of procurement chosen, was apparent from the RFTP and unequivocal from the Navy's July 28 letter, and RCA did not protest this alleged impropriety until after the August 17 closing date, its protest on this ground is untimely. See *Jaybil Industries, Inc.*, B-188230, February 25, 1977, 77-1 CPD 143.

With regard to RCA's reliance on the Navy's assurances, the Government cannot guarantee the number of proposals that will be received in response to a solicitation, let alone the number of acceptable proposals, nor does RCA's reliance make a timely protest against allegedly unduly restrictive specifications which prevent the firm from competing unnecessary. *Mobility Systems, Inc.*, B-191074, March 7, 1978, 78-1 CPD 179. More specifically, we have held that a protest against such a set aside on the basis that there was not a sufficient number of small business competitors, filed *after* the closing date for receipt of initial proposals, is untimely filed according to the above-quoted provision of our Bid Protest Procedures. *CDI Marine Company*, B-188905, November 15, 1977, 77-2 CPD 367; see *Berlitz School of Languages*, B-184296, November 28, 1975, 75-2 CPD 350.

Even assuming *arguendo* that RCA's August 3 letter constituted a protest to the Navy, the Navy's August 5 reply constituted "adverse agency action" requiring a timely protest to our Office within 10 working days. 4 C.F.R. § 20.2(a) (1977 ed.). Furthermore, the Navy's receipt of proposals, as scheduled, on August 17, 1977, without amending the RFTP in response to RCA's inquiry must be considered adverse agency action. See *Documentation Associates*, B-190238, March 23, 1978, 78-1 CPD 228. Because RCA's protest concerning the propriety of the set-aside was not filed with our Office within the requisite period subsequent to either adverse action, characterization of the protester's August 3 inquiry as a protest to the procuring activity would not have otherwise affected the untimeliness of the protest on this ground. See *International Harvester Company*, B-189794, February 9, 1978, 78-1 CPD 110.

RCA has asserted, in the alternative, that the procuring activity should have effected the procurement under the firm's Federal Supply

Schedule contract. The fact that the Navy's requirements were not being purchased from the FSS was readily ascertainable from the CBD Pre-Invitation Notice and from the face of the RFTP. The appropriate time to protest against this aspect of the procurement was, therefore, at least prior to the closing date for receipt of technical proposals. See *Byron Motion Pictures Incoporated*, B-190186, April 20, 1978, 78-1 CPD 308. This ground of the protest, filed with our Office after the August 17 closing date, is untimely filed and will not be considered on the merits. 4 C.F.R. § 20.2(b) (1) (1977 ed.).

Timely Grounds of Protest

We cannot, however, agree that RCA's protest is untimely in its entirety. The purpose of the "reasonable expectation" determination is to ensure that awards to small business concerns will be made at reasonable prices. For this reason the contracting officer is permitted to reassess the propriety of and to withdraw a set-aside determination prior to award of a contract if he considers that the procurement would be detrimental to the public interest (e.g., because of unreasonable price). ASPR § 1-706.3(a) (1976 ed.); see *Swedlow, Inc.*, B-189751, December 21, 1977, 77-2 CPD 489. Because the instant procurement was conducted by two-step formal advertising, the number of vendors eligible to submit bid prices was not ascertainable until proposal evaluation was completed; hence, a price reasonableness determination could not be made until bids were opened under the step-two IFB. To the extent that RCA's protest questions the propriety of retaining the set-aside restriction subsequent to evaluation of technical proposals, it is timely. See *DeWitt Transfer and Storage Company*, *supra*. Our Office has, however, recognized the right of a procuring activity to make an award under a total small business set-aside where there are as few as two acceptable offers, *CDI Marine Company*, *supra*, and even where there is only one responsive bid. B-173371, December 17, 1971; *Berlitz School of Languages*, *supra*. Moreover, RCA has not presented any evidence to refute the Navy's apparent determination of price reasonableness. *Kinnett Dairies, Inc.*, B-187501, March 24, 1977, 77-1 CPD 209; *Hawthorn Mellody, Inc.*, *supra*. We are, therefore, unable to conclude from the record that these administrative determinations lacked a reasonable basis in fact or constituted an abuse of discretion.

The protester contends that the Navy evaluated an RCA camera on the basis of which the technical proposals of six offerors were improperly rejected. RCA states that it had no information concerning the suitability of its camera until the time of the step-two IFB (issued September 14, 1977) and that Company personnel telephonically verified the Navy's evaluation on September 27, 1977.

The conduct of the evaluation was not publicly disclosed and the record is devoid of any objective evidence contrary to the protester's

statement as to when it became aware of the Navy's unfavorable evaluation. See *Burroughs Corporation*, 56 Comp. Gen. 142, 147 (1976), 76-2 CPD 472, *aff'd sub nom. Honeywell Information Systems, Inc.*, 56 Comp. Gen. 505 (1977), 77-1 CPD 256. Consequently, this issue of the protest is timely filed and will be considered on the merits 4 C.F.R. § 20.2(2) (1977 ed.).

As mentioned above, the parties offer conflicting accounts of the camera and the circumstances under which it was provided to the Navy. RCA avers that the camera was furnished in response to the Navy's July 21, 1977, request for a "hands on" look at an RCA model TC 1006 camera, without indicating any intention to evaluate the camera. As that model was not available at the time of the request, RCA sent a preproduction engineering model of the TC 1006 with a list of anticipated modifications, and so advised the Navy. The camera, furnished "as is," did not contain all the design and performance features of the production model, and had not been finally tested and adjusted prior to delivery to the Navy. RCA further states that the camera furnished was, therefore, not appropriate for technical evaluation, and would not have been provided if the Navy had disclosed its intention to use that model to evaluate the firm's TC 1006 camera against the specifications of the RFTP or of any other solicitation.

The Navy states that on July 22, 1977, RCA submitted its TC 1006 camera "for test and evaluation * * *." According to the Navy's September 6, 1977, technical evaluation report, the proposals of 3 companies, including Selinger, offering the RCA TC 1006 camera (which the Navy describes as a TC 1005 camera in an RCA fabricated housing were unacceptable due to discrepancies in focus stability and lack of lens support. The Navy further advises that the list of proposed modifications furnished with the camera by RCA failed to address the backlash problem previously experienced with the RCA TC 1005 model.

The Navy concedes that the RFTP clearly did not require bid samples and, we think fairly, frames the issues thus raised by the protesters as an evaluation of proposed cameras constituted a departure from the evaluation procedure stated in the RFTP and whether such evaluation or prior knowledge was improper.

Initially, an RFTP is required to contain "the criteria for evaluating the technical proposal," ASPR § 2-503.1(a)(iv) (1976 ed.), and "[t]echnical evaluation of the proposal *shall* be based upon the criteria contained in the request for technical proposals * * *" *Id.* (e) [Italic supplied.] Bid samples are samples required by the IFB to be furnished as a part of the bid and are to be used only to determine the responsiveness of the bid. ASPR § 2-202.4(a) (1976 ed.). If an IFB does not require samples, but samples are furnished with a bid (i.e., unsolicited samples), they are not to be considered as qualifying the bid and are to be disregarded unless the bid or supporting documents

clearly indicate that the bidder intended to so qualify the bid. *Id.* at (g).

The Navy, however, offers the following explanation concerning its camera evaluations:

> * * * Prior to the instance procurment [the procuring activity] purchased an RCA model TC 1005 camera and * * * also obtained on a loan basis from RCA a TC 1006/H camera for evaluation. Additionally, cameras had been obtained previously from other potential sources for this procurement. The purpose of the evaluation of the actual cameras to confirm a determination that the camera was a commercial off-the-shelf model as required by the solicitation and to confirm the technical evaluation of the written proposals that the camera proposed met all the requirements of the solicitation.

Because the protester's contentions and the Navy's response regarding the camera evaluations are interrelated, we will address the issue as it applies to both protesters. The Navy states that unlike the lengthy, detailed technical proposal submitted by GEC, Selinger's proposal was 5 pages long, merely reiterated the Government's specifications, and included a 2-page brochure about the RCA TC 1006/H camera. The procuring activity notes that our Office has recognized the propriety of rejecting technical proposals because they lack sufficiently detailed information concerning how work will be performed or solicitation requirements will be satisfied, citing *Servrite International Limited*, B–187197, October 8, 1976, 76–2 CPD 325; *General Exhibits, Inc.*, B–182669, March 10, 1975, 75–1 CPD 143; *Phelps Protection Systems Inc.*, B–181148, November 7, 1974, 74–2 CPD 244. The Navy contends that it was clear from the terms of the RFTP that offerors were required to furnish detailed proposals with sufficient information to show compliance with the RFTP requirements, that offerors submitting incomplete or otherwise deficient written proposals did so at the risk of being found unacceptable, that Selinger's proposal was "superficial and totally lacking in every detail" as to how the proposed camera was to comply with the specifications, and that Selinger's proposal was, therefore, properly rejected.

Under these circumstances, the Navy states that it could not determine from the face of Selinger's proposal whether the camera offered was technically acceptable.

> Rather than rely on a determination that a written technical proposal submitted by * * * Selinger was technically unacceptable, * * * Selinger and all other offerors proposing the RCA cameras, were given the benefit of an additional and separate evaluation of the actual cameras proposed by those firms to determine whether, notwithstanding the technical unacceptability of the written proposal, the camera proposed satisfied the requirements of the specifications. The only way the written proposal of * * * Selinger could be evaluated was to rely on the personal knowledge of the technical evaluators and the evaluation of the camera itself.

The first step of a two-step formally advertised procurement is a negotiation process whereby through discussions, changes, etc., technical proposals are found acceptable for the second-step bidding pro-

cess. 50 Comp. Gen. 346, 352 (1970); 51 *id.* 85, 88 (1971). Technical evaluations are based upon the degree to which the offeror's *written proposals* adequately address the evaluation factors *specified* in the solicitation. *Servrite International Ltd., supra; Didactic Systems, Inc.*, B-190507, June 7, 1978, 78-1 CPD 418. We find the Navy's proposal evaluation procedures singularly inappropriate to an RFTP which neither required samples nor included sample evaluation or testing criteria. For the reasons discussed below, we agree with the protesters that an evaluation of proposed equipment was not authorized by the RFTP and that it did not constitute an evaluation factor determinative of the acceptability of the technical proposals. 45 Comp. Gen. 357, 360 (1965).

The acceptability of the written technical proposals was to be determined from their content alone. According to the terms of the RFTP, additional information was to be requested only for proposals deemed susceptible of being made acceptable by the submission of clarifying information; none of the proposals, however, was so characterized by the Navy. See *Smoke Detectors*, B-191459, August 1, 1978. If, as the Navy suggests, the proposals could not be evaluated without recourse to the actual equipment, the RFTP should either have been amended to require samples and include evaluation criteria, or canceled and the requirements resolicited under a solicitation requiring samples.

Where the procuring activity determines that preaward sampling is necessary, samples should be required from each offeror. 55 Comp. Gen. 648, 651 (1976). The fact that the Navy, instead, requested cameras from a manufacturer which it considered ineligible to compete on even the step-one solicitation, is inconsistent with the rationale for requiring samples, as well as the purported set-aside character of the procurement. Moreover, both protestors assert that the camera which the Navy evaluated was not, in fact, the camera which Selinger offered in its proposal.

We find the Navy's inability to determine the acceptability of Selinger's technical proposal from the face of the proposal largely a problem of the Navy's own creation and one inappropriate for resolution by technical evaluation of equipment furnished by a firm other than the offeror. We have long recognized that the flexibility of two-step advertising does not obviate the necessity for adherence to stated evaluation criteria and basic specification requirements. 53 Comp. Gen. 47, 51 (1973). The Navy improperly intended to and did rely on its examination of proposed equipment rather than on an evaluation of the technical proposals or on step-one negotiation procedures to determine the acceptability of what was being offered. *Fechheimer Brothers, Inc.*, B-184751, June 24, 1976, 76-1 CPD 404. Acquisition, testing and evaluation of cameras under a solicition devoid

of sample requirement and evaluation provisions therefore constitutes a total departure from the evaluation criteria stated in the RFTP. The evaluation and "prior knowledge" so acquired by the Navy were improper bases upon which to determine the acceptability of technical proposals, proposals evaluated in this manner were evaluated contrary to the requirements of ASPR § 2–503.1 (1976 ed.), and the Navy's rejection of proposals on these grounds was without a reasonable basis. Moreover, the Navy's camera evaluation and resultant technical proposal evaluation precluded six of the step-one offerors from competing for the procurement under the step-two IFB on the basis of evaluation factors not included in the RFTP. See *Smoke Detectors*, *supra*. Effective competition, however, requires that all prospective contractors have the opportunity to prepare their offers on the basis of the evaluation factors to be used in making the award.

The Navy's acquisition and evaluation of cameras was tantamount to prequalifying cameras without providing potential suppliers an opportunity to qualify their equipment, placed offerors on an unequal competitive footing, and was contrary to the Government procurement policy to promote full and free competition. *General Electrodynamics Corporation—Reconsideration*, B–190020, August 16, 1978.

We believe that the Navy's evaluation process failed to preserve the required equality of competition among the offerors, and that under these circumstances the award to GEC was improper. Although the effect of competition conducted in a manner consistent with the foregoing discussion can be ascertained only by recompeting the Navy's requirements, we must determine whether it is in the Government's best interests to resolicit the existing requirements and, if necessary, terminate GEC's contract for the convenience of the Government. In so doing, we must consider certain factors, such as the seriousness of the procurement deficiencies, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and the impact on the Navy's mission. 51 Comp. Gen. 423, 425 (1972); *Honeywell Information Systems, Inc.*, 56 Comp. Gen. 505, 510 (1977), 77–1 CPD 256.

In light of the costs which would be involved (an estimated $250,000 in relation to a total contract price of $353,776), the continuing urgency of the procurement and the gravity of the program for which the cameras are being procured, we cannot conclude that recommending recompetition of the Navy's requirements would be in the best interests of the Government.

We note, however, several additional deficiencies which should be corrected in future procurements. Initially, any difficulties the Navy experienced in evaluating the acceptability of the technical proposals

was compounded by its failure to include in the RFTP the Notice of Small Business Set-Aside clause, ASPR § 7-2003.2 (1976 ed.), required in each solicitation in total small business set-aside procurements by ASPR § 1-706.5(c) (1976 ed.). The clause defines "small business concern" for the purposes of the procurement and advises bidders or offerors that "* * * a manufacturer or a regular dealer submitting offers in his own name must agree to furnish * * * end items manufactured or produced by small business concerns * * *." ASPR § 7-2003.2(b) (1976 ed.). If the RFTP was intended to be a small business set-aside, notice of that fact, pursuant to ASPR §§ 1-706.5(c) and 7-2003.2(b) (1976 ed.), should have been included in the RFTP. *W. O. H. Enterprises, Inc.*, B-190272, November 23, 1977, 77-2 CPD 408; *UCE Incorporated*, B-186668, September 16, 1976, 76-2 CPD 249. The Navy states that doubt existed as to Selinger's status as a small business manufacturer because the firm was ostensibly offering RCA equipment, a concern also expressed by GEC. Although the step-one set aside was effected in contravention of the aforementioned regulatory provisions, we find it unnecessary to pursue this issue because Selinger's proposal was not rejected on this basis and the step-two IFB included the required clause.

Finally, the Navy exercised an option for 100 percent of the base quantity simultaneously with the award of the contract. The IFB notified bidders, pursuant to ASPR § 1-1504(b), of that possibility by incorporating by reference the clause required by ASPR § 7-2003.11 (a), Defense Procurement Circular No. 76-6, January 31, 1977. The IFB Option Quantity provision, however, reserved the right to award the option quantity within 120 days from the effective date of the contract. Where, as here, a protest was filed with and denied by the procuring activity and the agency's urgency D & F and award were made after protests were filed with our Office, we believe the more prudent course of action was to exercise the option during the 120-day period provided rather than at the time of the award of the base quantity.

Selinger Protest

Selinger, in addition to asserting that its technical proposal was improperly evaluated and rejected, also contends that the Navy failed to timely advise the firm of the reasons why its proposal was unacceptable. For the reasons stated above, we agree that the firm's technical proposal was evaluated contrary to the terms of the RFTP and applicable procurement regulations and was improperly rejected as unacceptable on the basis of the Navy's camera evaluations.

When two-step formal advertising is used, unsuccessful offerors shall be so advised in the following manner:

Upon final determination that a technical proposal is unacceptable, the contracting officer shall promptly notify the source submitting the proposal of that

fact. The notice shall state that revision of his proposal will not be considered, and shall indicate, *in general terms*, the basis for the determination for example, that rejection was based on failure to furnish sufficient information or on an unacceptable engineering approach. Upon written request, and at the earliest feasible time after contract award, such source(s) shall be debriefed in accordance with 3-508.4. ASPR § 2-503.1(f) (1976 ed.). [Italic supplied.]

While we feel that the Navy's September 20 letter advising Selinger merely that a review of its proposal indicated that the camera offered did not meet the Government's specification requirements was overly general in comparison to the findings available in the Navy's September 6 evaluation memorandum and the reasons given for denying Selinger's protest in the Navy's September 27, 1977, telegram, we cannot conclude that Selinger was prejudiced by notice which the Navy provided.

We have held that similar regulatory notice requirements are procedural in nature and a procuring activity's failure to comply with such a requirement does not provide a legal basis for disturbing an otherwise valid award. See, e.g., *Wakeman Watch Company, Inc.*, B-187335, January 28, 1977, 77-1 CPD 72; *Century Brass Products, Inc.*, B-190313, April 17, 1978, 78-1 CPD 291.

Accordingly, Selinger's protest is sustained and RCA's protest is sustained to the extent it pertains to the Navy's camera evaluation. Also, the above-mentioned deficiencies are being called to the attention of the Secretary of the Navy by letter of today.

[B-180910]

Subsistence—Per Diem—Temporary Duty—Return to Headquarters for Weekends—Payment Basis

When an employee on TDY rents lodgings by the week or month rather than by the day but actually occupies them for a lesser period because he voluntarily returns home on weekends, the average cost of lodging may be derived by prorating the rental cost over the number of nights the accommodations are actually occupied, rather than over the entire rental period, provided that the employee acts prudently in renting by the week or month, and that the cost to Government does not exceed the cost of renting a suitable motel or hotel room at a daily rate. 54 Comp. Gen. 299; B-180910, July 18, 1978, and July 6, 1976, overruled in part.

In the matter of James K. Gibbs—per diem—lodgings-plus method—monthly or weekly rental—weekend return home travel, September 22, 1978:

This decision is the result of further consideration of one of the issues involved in 54 Comp. Gen. 299 (1974), affirmed in *Matter of James K. Gibbs*, B-180910, July 6, 1976, and B-180910, July 18, 1978. That issue is how to determine the average cost of lodgings in computing per diem by the lodgings-plus method when an employee on temporary duty (TDY) rents an apartment by the week or month but actually occupies the accommodations for a lesser number of nights because he voluntarily returns home on weekends.

The relevant regulation is found in paragraph 1-7.3c of the Federal Travel Regulations, FPMR 101-7, May 1973, as amended by FPMR Temporary Regulation A-11, Supplement 4, Attachment A, April 29, 1977, and reads in pertinent part as follows:

(1) For travel in the conterminous United States when lodging away from the official duty station is required, the per diem rate shall be established on the basis of the average amount the traveler pays for lodging, plus an allowance of $16 for meals and miscellaneous subsistence expenses. Calculation shall be as follows:

(a) To determine the average cost of lodging, divide the total amount paid for lodgings during the period covered by the voucher by the number of nights for which lodgings were or would have been required while away from the official station.

(b) To the average cost of lodging add the allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, subject to the maximum prescribed in 107.2a, is the rate to be applied to the traveler's reimbursement voucher.

In the prior *Gibbs* cases as well as other cases where an employee on TDY has rented lodging by the week or the month, rather than by the day, but has actually occupied the lodging for a lesser number of nights, we have generally adopted the rule that the average daily cost is derived by dividing the weekly or monthly amount paid for lodging by the number of days in the rental period, i.e., 7 or 30, rather than by the number of nights the lodging was actually occupied. *Matter of Nicholas G. Economy*, B-188515, August 18, 1977; B-185467, May 5, 1976; *Matter of Dr. Curtis W. Tarr*, B-181294, March 16, 1976; B-168225, February 25, 1970.

Exceptions to the general rule have been permitted where the employee acted reasonably or prudently in renting lodging by the week or month and either (1) the temporary duty assignment was unexpectedly ended short of its anticipated duration through no fault of the employee, *Matter of Robert L. Davis*, B-188346, August 9, 1977; *Matter of Texas C. Ching*, B-188924, June 15, 1977; *Matter of George Avery*, B-184006, November 16, 1976; B-138032, January 2, 1959; or (2) the monthly or weekly rental was less than the amount the employee would have been required to pay based on the daily rental rate. *Ching, supra; Matter of Willard R. Gillette*, B-183341, May 13, 1975. In these situations prorating the monthly or weekly rental cost over the nights of actual occupancy, rather than the rental period, has been permitted, provided of course that the maximum authorized rate for per diem or actual subsistence expenses is not exceeded. None of these cases, however, involved voluntary weekend return home travel.

Nevertheless, upon further consideration of the issue at hand in the light of these exceptions, we are of the opinion that where an employee on TDY has rented lodgings by the week or month, rather than by the day, but actually occupies the lodgings for a lesser number of nights because he voluntarily returns home on weekends, the average daily cost may be derived by dividing the weekly or monthly

rental cost by the number of nights the lodgings are actually occupied, rather than the number of days in the rental period, *provided* (1) that the employee acted prudently in obtaining lodgings by the week or month rather than by the day, and (2) that the cost to the Government does not exceed that which would have been incurred had the employee obtained suitable lodgings at a daily rate.

To the extent inconsistent with the foregoing, the prior *Gibbs* decisions, 54 Comp. Gen. 299 (1974), B–180910, July 6, 1976, and B–180910, July 18, 1978, are hereby overruled. Within the limits permitted by 31 U.S.C. 71a, this decision may be given retroactive effect since it is predicated primarily on a modification in the interpretation of an existing regulation rather than an amendment of that regulation. 55 Comp. Gen. 785 (1976).

[B–190509]

Federal Property and Administrative Services Act—Disposal Provisions—Negotiated Property Disposal—To States, Territories, etc.—Competition Consideration

Under negotiated sale by General Services Administration of surplus real property to a local government pursuant to section 203(e)(3)(H) of Federal Property and Administrative Services Act of 1949 (Act), 40 U.S.C. 484(e)(3)(H), offers from a source other than local government units described by 40 U.S.C. 484(e)(3)(H) need not be considered.

Federal Property and Administrative Services Act—Compliance—Competition Requirements

Requirement of Act that such competition as is feasible be obtained for 40 U.S.C. 484(e)(3)(H) sale is met when required notices are posted and offers from qualified public entities considered.

Real Property—Surplus Government Property—Sale—Price Sufficiency

General Accounting Office will not question appraisal of property's fair market value unless it can be shown to have been conducted improperly or to be lacking in credibility.

In the matter of Fort Holabird and Casil Corporation, September 22, 1978:

Fort Holabird and Casil Corporation (Casil) objects to the sale of approximately 179 acres of surplus land to the City of Baltimore, Maryland (City), by the General Services Administration (GSA).

The sale, which occurred October 19, 1977, was for $4,600,000. Casil argues that the sale is illegal because GSA ignored Casil's $7,200,000 offer to buy the land, made on October 18, 1977. Further, Casil points out that the sale to Baltimore is flawed, as the Government did not receive a fair return for the land and because of various improprieties in GSA's handling of the matter.

The conveyance was preceded by the Department of Defense's closing of Fort Holabird in 1970. The land was determined to be surplus on September 17, 1974, under section 203(a) of the Federal Property and Administrative Services Act of 1949 (Act), as amended, 40 U.S.C. 484(a) (1970). The Administrator of GSA is granted supervision and direction over disposition of surplus property. Section 203 (c) of the Act, 40 U.S.C. 484(c) (1970), provides authority to dispose of surplus property by sale, exchange, lease, permit or transfer, for cash, credit, or other property, and upon such terms and conditions as the Administrator deems proper. Disposals and contracts for disposals of surplus property may be negotiated pursuant to section 203 (e)(3)(H) of the Act, 40 U.S.C. 484(e)(3)(H) (1970), if the disposal will be to states, territories, possessions, political subdivisions thereof or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation. In negotiated property disposals of over $1,000, section 203(e)(6) of the Act, 40 U.S.C. 484(e)(6) (1970), requires that GSA submit an explanatory statement justifying the transaction to appropriate Congressional committees.

In accordance with Federal Property Management Regulations (FPMR) 101–47.303–2(b), notices of the availability of the property were forwarded to various public agencies. On October 9, 1974, Baltimore made a formal request to negotiate for purchase of the land. Subsequently, on December 17, 1975, a suit was filed in the United States District Court for the District of Maryland, *Lucas* vs. *The General Services Administration, et al.*, Civil Action No. Y-75-1736, to enjoin the sale of the property until the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, were met. On June 10, 1977, GSA reported the proposed disposal to appropriate Congressional committees. Soon thereafter, the suit was dismissed. During the period following October 9, 1974, negotiations were conducted with the City which resulted in the October 19 sale. The City plans to use the property for development as an industrial park.

Casil, which proposes to use the land as a military retirement community and historical monument, primarily objects to the sale because of GSA's failure to consider its offer of $7,200,000. Casil argues that GSA was required to consider its offer and that its failure to do so was not in accordance with the mandate of the Act, which at section 203 (e), 40 U.S.C. 484(e) (1970) requires that all property sales be by public bidding except for certain exceptions, all of which are subject to the condition that "such competition as is feasible under the circumstances" be obtained. Casil reasons that its offer constituted "feasible competition" and should have been evaluated along with the City's lower offer.

GSA takes the position that under section 203(e)(3)(H) of the Act, 40 U.S.C. 484(e)(3)(H) (1970), once the determination to negotiate for the sale to a public purchaser is made, competition is limited to other public agencies. Accordingly, GSA maintains that it was under no obligation to consider offers from non-public sources such as Casil. In any event, GSA insists that Casil's October 18, 1977 letter did not constitute a valid offer, as it contained no deposit nor did it purport to conform with the terms of the notice. In addition, GSA doubted the *bona fides* of Casil's offer because of what the agency believes was the rather nebulous nature of Casil's plans and its view that Casil did not possess the financial resources to purchase the land.

We agree that GSA was not required to consider Casil's offer. Section 203(e)(3)(H) of the Act, 40 U.S.C. 484(e)(3)(H) (1970), gives the GSA Administrator discretion as to the procedure to be used in negotiating when the disposal sale will be to a local governmental unit. When the sale falls within section 203(e)(3)(H) of the Act, as does the instant transaction, then the statute clearly provides that the Administrator is not bound to follow the specific procedures called for in sections (1) and (2) of 203(c), 40 U.S.C. 484(e) (1) and (2) (1970), pertaining to advertised public bids. The only limitations placed upon the Administrator in a 203(e)(3)(H) situation, is that of following its own regulations and "obtaining such competition as is feasible under the circumstances." *Cf. Dover Sand & Gravel, Inc.* vs. *Jones*, 227 F. Supp. 88 (D. New Hampshire 1963). It is clear that the Act only requires that bids from all sources be considered in an advertised sale.

In this instance, where GSA has determined that it is appropriate to negotiate a sale to a local governmental unit in accordance with 40 U.S.C. 484(e)(3)(H) (1970), it has received a valid offer from at least one such unit, and it is ultimately determined that the sale price equals the fair market value as measured by a proper appraisal, we do not believe that the Act or the applicable regulations require the agency to consider offers from nonpublic sources. In such cases, all that is needed to fulfill the requirement that such competition as is feasible be obtained, is that notice of the proposed sale be given and valid offers from public entities within the description set forth in 40 U.S.C. 484(e)(3)(H) be considered.

Casil further argues that it was improper for GSA to confer a preferred status on Baltimore by negotiating with it when no showing has been made that Baltimore could not participate in an advertised sale. The Act contains no provision requiring that such a showing be made a prerequisite to entering into a negotiated sale.

Since we have determined that GSA was under no obligation in this instance to consider an offer from a non-public source such as Casil,

there is no need to determine whether Casil's letter constituted a valid offer. It is worthy of note, however, that Casil had been advised several times before the sale that its offer could not be accepted.

Casil questions whether the sale, at $4,600,000, meets the requirement contained in section 203(e)(3)(II) of the Act, 40 U.S.C. 484(e)(3)(II) (1970), that the fair market value of the property be recovered. Casil maintains that this seems unlikely in view of the $13,658,878 acquisition cost and an earlier GSA appraisal of $11,000,000.

Casil also points out that, contrary to the general upward trend in real estate prices, GSA's 1975 appraisal was reaffirmed, without change, 2 years later in 1977. Finally, Casil challenges the propriety of the appraisal on the ground that the firm responsible for it is located in Baltimore and therefore had an interest in the sale. In this connection, Casil notes that the record does not contain a certification from the appraiser that it has no interest in the property as required by FPMR 101–47.303–4(c).

GSA maintains that it has satisfied the Act by obtaining the fair market value for the land. The agency explains the apparent discrepancy between the acquisition cost, including buildings, of $13,658,878 and the appraised value of $4,600,000 by noting that the acquisition cost includes improvements, many of which have value only for special governmental uses, made over a period of 38 years. According to the agency, the sale price reflects present market conditions, including an assessment of the burdens which will be experienced by the purchaser in developing the property. Further, GSA states that the nature of the property is such that it simply did not appreciate to a significant degree in the period between 1975 and the 1977 sale.

The development of an estimate of the fair market value of surplus real property is, like the development of a cost estimate in a procurement, a matter of judgment which will not be questioned by our Office except where it can be clearly shown that the appraisal methods were improper or lacking in credibility. See, generally, *Teledyne Ryan Aeronautical*, 56 Comp. Gen. 635 (1977), 77–1 CPD 352.

Although Casil attempts to cast doubt on GSA's procedures by alleging that the firm conducting the appraisal may have an interest in the transaction, GSA has supplied a copy of the required certification which was filed by that firm. We are aware of no prohibition against a firm located in the city where the land is situated conducting the appraisal. Further, there is no evidence in the record of an earlier appraisal of $11,000,000, as Casil has contended. Accordingly, we have no basis to question GSA's determination that they have received the fair market value of the land. In this connection, we note that both the Senate Committee on Governmental Affairs and the House Committee

on Government Operations were fully informed concerning the sale and voiced no objection.

Casil contends that the procedures followed by GSA in this sale contain several irregularities. First, Casil notes that the Baltimore offer was incomplete in that it did not contain a nondiscrimination covenant as required by FPMR 101-47.307-2, or a statement of proposed use of the property as specified by the GSA manual for disposal of surplus real property (PBS P 4000.1, April 19, 1977). Casil also notes that negotiations were commenced with the City on or about October 9, 1974, prior to the completion of the appraisal in October 1975, in violation of the GSA manual, *supra*, which specifies that no negotiations are to be conducted prior to receipt of the appraisal.

The record indicates that at the time negotiations with the City began, GSA did have an appraisal of the property. This initial appraisal, which was superseded by the 1975 appraisal, was dated April 17, 1973. Although the City's formal offer did not contain a statement of the proposed use of the property, the City had earlier filed a detailed plan of its proposed use of the land with its initial offer to negotiate, filed in 1974. The nondiscrimination clause was not included. However, we do not believe that this oversight affects the validity of the sale.

Finally, Casil complains that the GSA sale should have been postponed until the resolution of its protest in accordance with section 20.4 of our Bid Protest Procedures, 4 C.F.R. 20.4 (1977). In support of this point, Casil indicates that it protested to GSA several times before the sale. Although Casil did write the agency several times before the sale, the agency repeatedly informed Casil that it would not consider its offer. In any event, since Casil did not protest to our Office until after the sale was made, it is clear that section 20.4, which deals with protests filed with our Office before award, is not applicable.

The protest is denied.

[B-189884]

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

Protest concerning requests for proposals' (RFP) price evaluation formula and application thereof is untimely since formula was clearly set forth in detail in RFP, alleged problems with application were reasonably discernible from formula, and protest was not filed before closing date for initial proposals as required by 4 C.F.R. 20.2(b) (1) (1977).

Contracts—Protests—Merits—Consideration of Untimely Protest—Impact on Timely Issues

Untimely issue of whether price evaluation formula eliminated price as evaluation factor will be considered only to extent that it impacts on timely issue relat-

ing to adequacy of price competition to invoke exemption to cost or pricing data requirements.

Contracts—Protests—Timeliness—Negotiated Contracts—Negotiation Procedure Improprieties—Apparent Prior to Closing Date for Best and Final Offers

Protest that oral negotiations should have been held due to size, complexity, and potential 5-year duration of procurement is untimely since it was not filed, at latest, within 10 days of closing date for best and final offers.

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Date Basis of Protest Made Known to Protester

Argument that discussions were not meaningful is timely since it was not known until protester received certain documents pursuant to Freedom of Information Act request, and argument was raised within 10 days of that time.

Contracts—Protests—Timeliness—Effect of Request for Debriefing

Argument that Government should have held oral negotiations on price when it discovered that both offerors proposed prices lower than Government estimate is timely, since protestor could not have known of basis until debriefing, and issue was raised within 10 days of debriefing.

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

Contention that evaluation criteria concerning experience restricted competition and favored incumbent contractor is untimely because criteria were listed in RFP, and protest should have been, but was not, filed before closing date for initial proposals.

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Significant Procurement Issue Exception—Applicability

None of issues found to be untimely are significant issues which could be considered notwithstanding their untimeliness.

Contracts—Negotiation—Prices—Cost and Pricing Data Evaluation

Price evaluation which scored proposals nearly equally did not eliminate price as evaluation factor, since price proposals were close and only varied by approximately 5 percent.

Contracts—Negotiation—Cost, etc. Data—"Truth-In-Negotiation"

Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Written or Oral Negotiations

Failure to hold oral price discussions was not improper where prices were within 9 percent of Government estimate, price evaluation was in accordance with criteria set forth in RFP, and there was adequate price competition.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—"Meaningful" Discussions—Written

Allegation that agency had "unannounced preferences" for specific manner of performing work, which incumbent knew and protester did not, is not supported by record. Meaningful written discussions concerning technical proposals were held, even though written discussions could have more specifically pointed out deficiencies in some areas. Agency presented protester with large number of questions and comments which led protester to deficient areas of proposal, and protester was given opportunity to and did substantially revise proposal, resulting in significant increase in scores. Oral discussions were not required, since written negotiations were meaningful.

Reports—Administrative—Contract Protest—Timeliness of Report

Agency delay in filing response to protest is procedural matter, not affecting merits of protest. Response to protest cannot be disregarded on this basis.

Contracts—Protests—Authority to Consider—Agency Records Not Released to Protester

General Accounting Office will consider all documents filed by agency in deciding protest, even though agency withheld certain documents from protester pursuant to Freedom of Information Act.

Contracts—Protests—Allegations—Agency Destruction of Workpapers, etc.—Not Prejudicial

Documents destroyed by agency appear to have been workpapers of technical panel which were incorporated into formal comments of technical panel that were provided to protester. Therefore, protester was not prejudiced by this action.

In the matter of Serv-Air, Inc., September 25, 1978:

Serv-Air, Inc. (Serv-Air) has protested the award of a contract for the operation and maintenance of Vance Air Force Base, Oklahoma (Vance), to Northrop Worldwide Aircraft Services, Inc. (Northrop), under request for proposals (RFP) F41689–77–0016, issued by the Air Training Command (ATC), Randolph Air Force Base, Texas.

I. Background

The RFP was issued on March 29, 1977. The RFP sought proposals for a fixed-price-incentive contract with a firm target price to provide management, equipment, personnel, and services for the operation of Government-owned facilities and the maintenance of Government-owned training aircraft in support of the Undergraduate Pilot Training Mission at Vance. The RFP contemplated an initial 1-year contract (October 1, 1977, to September 30, 1978), with the possibility that the incumbent contractor could be retained for up to 4 additional 1-year periods, under an Extended Contractual Coverage Policy.

Fifty-three prospective contractors were solicited, and two proposals were received—Serv-Air's and Northrop's. Northrop is the incumbent under a contract awarded for the 1-year period, 1972–1973,

and continued for 4 successive 1-year periods. Serv-Air was the contractor at Vance from 1960-1972.

In evaluating proposals, the technical evaluation was weighted 70 percent and price 30 percent, with 700 total points possible for the technical evaluation and 300 for price. Price points were broken down into two categories: 150 points for cost realism and 150 for assumption of risk. The weighting and point system was not disclosed in the RFP, although it stated that technical capability would be weighted more heavily. The initial proposals received the following point scores from the evaluation panels:

	Serv-Air	Northrop
Price:		
Risk	150	119.9
Realism	78	150.0
Technical	450	657.3
Total	678	927.2

Both proposals were included in the competitive range. After initial evaluations, the contracting officer (C.O.) furnished each offeror a list of comments and questions, requesting replies by June 20, 1977. The revised proposals were received and were given the following scores:

	Serv-Air	Northrop
Price:		
Risk	150.0	119.9
Realism	90.0	150.0
Technical	561.4	687.2
Total	801.4	957.1

Requests for best and final offers were made on June 30, 1977, with July 15, 1977, as the deadline for submitting them. Both offerors submitted best and final offers, which received the following scores:

Price:	Serv-Air	Northrop
Risk	150.0	126.6
Realism	120.0	150.0
Technical	570.1	687.2
Total	840.1	963.8

By letter dated August 1, 1977, and received August 4, 1977, the C.O. notified Serv-Air that the contract had been awarded to Northrop. By letter received in our Office on August 12, 1977, Serv-Air protested the award. In a debriefing conducted August 16, 1977, Serv-Air was told that its low price had resulted in a reduced point score for cost realism.

Serv-Air then, by letter dated and received at our Office on August 25, 1977, amplified its protest.

II. Serv-Air's Allegations

Serv-Air, in the letter of August 12, 1977, made two general allegations:

1. That it should be awarded the contract because its proposal was found technically acceptable and also offers the lowest cost, fee, and ceiling price.

2. That the incumbent, Northrop, had access to more detailed information concerning a new element of work than was made available to Serv-Air, thus unfairly allowing Northrop to receive a higher score on that part of its proposal.

Serv-Air's August 25, 1977, letter raised several new grounds of protest, as follows:

1. The technical evaluation criteria were designed to give special weight to recent experience rather than the quality of services offered.

2. The system of price evaluation is inherently defective because it penalizes offerors for cost-saving techniques, regardless of the soundness of the techniques, by subtracting points from proposals whose target cost falls outside a predetermined range from the Government estimate.

3. Oral discussions concerning both technical and price proposals should have been held.

After release of certain information by the Department of the Air Force (Air Force) pursuant to a request filed in accordance with the Freedom of Information Act (FOIA), 5 U.S. Code 552 (1976), Serv-Air, by letter dated February 24, 1978, amplified the August 25 grounds of protest and raised additional objections to the procurement, as follows:

1. Serv-Air modified the allegation concerning the price evaluation by objecting to the manner in which the formula was applied and to the effect of the application in these circumstances. Specifically, Serv-Air alleged that the application of the price evaluation formula had the effect of eliminating price as an evaluation factor.

2. Serv-Air alleged that the Air Force failed to satisfy mandatory statutory and regulatory requirements to obtain and analyze certified cost or pricing data.

3. Serv-Air alleged that the Air Force failed to disclose in the RFP or during negotiations preferences for specific methods employed by the incumbent to accomplish certain tasks, thus making equal technical competition impossible.

4. Serv-Air expanded its allegations relating to negotiations by arguing that even if oral negotiations were not required, the written

negotiations were so inadequate as to not constitute "meaningful discussions."

III. Timeliness

The Air Force has argued that several of Serv-Air's allegations are untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1977). First, the Air Force argues that all of the allegations contained in Serv-Air's August 25, 1977 letter are untimely because they should have been known on August 4, 1977, when Serv-Air was notified of the award to Northrop, and that letter was not filed within 10 working days, as required by 4 C.F.R. § 20.2(b)(2) (1977). Additionally, the Air Force argues that even if some of the arguments are considered timely, the allegations concerning the evaluation procedure are untimely pursuant to 4 C.F.R. § 20.2(b)(1), which requires that protests based on patent solicitation improprieties be filed prior to the closing date for receipt of initial proposals. The Air Force also argues that Serv-Air's argument concerning the lack of oral negotiations is untimely, presumably because it was not raised until approximately 1 month after the Air Force's request for best and final offers.

Serv-Air responded to these arguments in a submission of February 24, 1978. Serv-Air stated it first learned that its low price had resulted in a reduced price realism score at the August 16, 1977, debriefing, and that the price evaluation criteria had been irrationally implemented. Also, Serv-Air argues that "* * * the debriefing provided the first evidence that the negotiation process had failed in its essential purposes." Regarding the Air Force's arguments that Serv-Air should have protested any problems with evaluation criteria before the due date for initial proposals, Serv-Air states:

> * * * this protest could not have been made on the basis of the RFP itself. The RFP did not disclose that the analysis of "price realism" would ignore the differences between proposals, that no audit or cost analysis would be conducted, that the scoring formulae would eliminate cost as a factor, that negotiations would be curtailed regardless of obvious misunderstandings or that penalties would be imposed for deviation from unannounced preferences. The debriefing, in turn, only hinted at these defects and suggested where to look. Serv-Air's development of the facts now permits a greater particularization of improprieties that could only be inferences drawn from anomalous results before.

Certain grounds of Serv-Air's protest have been untimely raised. It is our opinion that the arguments concerning the price evaluation are untimely (August 25 letter No. 2; February 24 letter No. 1). The price evaluation method is set out in detail in the RFP. For example, the method to be used to evaluate cost realism is stated, as follows:

> (2) Realism will be evaluated by comparison of the proposed target cost to a government estimate of target cost. Any price falling within a predetermined range from the government estimate will receive the maximum number of points. A target cost that falls above or below this range will receive fewer points the farther away it is from the range.

Serv-Air's August 25 allegation that this formula penalizes rather than rewards cost-saving innovation directly takes issue with the above provision of the RFP and should have been raised prior to the closing date for initial proposals. We note that Serv-Air does not argue that the Air Force conducted the price evaluation in a manner inconsistent with that set out in the RFP. As for Serv-Air's February 24 argument that it could not have known the effect that this formula would have until it learned of the point scoring system, the Government estimate, and the range, we think that the formula was sufficiently detailed to put Serv-Air on notice that the price evaluation could have been conducted in the manner that it in fact was. Therefore, this argument, raised after the closing date, is untimely. See, e.g., *Design Concepts, Inc.*, B-186125, October 27, 1976, 76-2 CPD 365.

According to Serv-Air the fact that the price evaluation had the effect of eliminating price even though the RFP stated that it would be weighted 30 percent resulted in the absence of price competition. In the absence of price competition the C.O. must meet certain statutory and regulatory requirements to ensure that the awardee's price is reasonable (February 24 letter No. 2). Since the Air Force did not meet those requirements in this case, Serv-Air argues that the contract is void.

No question has been raised concerning the timeliness of this issue. In order to decide whether the Air Force should have met the applicable cost or pricing data requirements, we must determine whether there was adequate price competition. Therefore, we will examine the price evaluation in this case, but only to ascertain whether the formula did produce adequate price competition for purposes of cost or pricing requirements.

Serv-Air's allegations (August 25 letter No. 3; February 24 letter No. 4) concerning the lack of oral negotiations and the inadequacy of written negotiations are partially untimely. Serv-Air knew that oral negotiations were necessary due to the size and complexity of the procurement, and the possible long duration of any resulting contract award by the request date for best and final offers, at the latest. Since these arguments were raised more than 10 working days later, they are untimely and will not be considered.

After receiving certain evaluation documents pursuant to its FOIA request, Serv-Air alleged that, during written negotiations, the Air Force had not understood aspects of Serv-Air's technical proposal and should have realized that Serv-Air might be confused concerning several requirements. Serv-Air argues that, at that point, the Air Force should have instituted oral negotiations to clear up these problems. Serv-Air also alleges that, whether or not oral negotiations were

warranted, the results of the technical evaluation showed that the written negotiations were superficial and inadequate. Since these grounds could not be known by Serv-Air until it received the evaluation documents, they were timely raised.

Serv-Air also argues that price negotiations should have been held, instead of a continued mechanical application of the price evaluation formula, when the Air Force discovered that both prices were substantially lower than the Government estimate. This argument is also timely, as it could not have been raised until after the debriefing when Serv-Air first learned of the relative prices and the Government estimate, and it was raised within 10 days of the debriefing in Serv-Air's letter of August 25, 1977.

Finally, Serv-Air's contention (August 25, 1977, letter No. 1) that the technical evaluation criteria unduly restricted competition and favored the incumbent contractor is clearly untimely. The evaluation criteria were listed in the RFP and should have been but were not protested prior to the closing date for initial proposals.

Serv-Air has argued that even if some of its allegations are untimely, "* * * the critical nature of the issues raised necessitates review." 4 C.F.R. § 20.2(c) permits consideration of untimely protests that raise issues significant to procurement practices or procedures. This exception to the general timeliness requirements is limited to issues which are of widespread interest to the procurement community and is "exercised sparingly" so that the timeliness standards do not become meaningless. *R. A. Miller Industries, Inc. (Reconsideration)*, B-187183, January 14, 1977, 77-1 CPD 32. We see nothing in the untimely issues here that warrants invoking this exception.

IV. Adequate Price Competition

Price was evaluated using a predetermined Government estimate of target cost, fee, and ceiling price as a baseline and giving equal weight up to 150 points to "cost realism" and "assumption of risk." The Air Force estimate and the Serv-Air and Northrop proposals with the following differences were:

	Serv-Air	Northrop	Difference	Air Force Estimate
Total target cost	$16, 395, 424	$17, 100, 785	$705, 361	$18, 040, 944
Total target fee	819, 386	891, 963	72, 577	902, 048
Total target price	17, 214, 810	17, 992, 748	777, 938	18, 942, 992
Ceiling price	17, 707, 058	18, 810, 864	1, 103, 806	19, 845, 039
Over target sharing (percent)	60/40	60/40		
Under target sharing (percent)	80/20	70/30		

Cost realism, which is at the heart of the dispute, was evaluated in the following manner. A Government estimate of target cost (shown above) was developed by a certified public accountant on the Headquarters ATC Pricing Staff. The estimate was based on Department of Labor Service Contract Act Wage Rates, manning estimates, and data from prior contracts for the same and similar services. The predetermined range, within which proposed target costs would receive the maximum cost realism score, was set at 7.5 percent. According to the Air Force, this represented the Government's range of confidence in the accuracy of the estimate. Target costs falling outside this range, either above or below, received fewer points the farther they were from the range. The zero point mark was at 15 percent above or below the estimate.

Assumption of risk was evaluated by comparing each proposal's target price, ceiling price, 5-percent cost overrun, and 5-percent cost underrun to the Government estimate. A 70/30-percent sharing formula was used to calculate the Government's cost overrun and underrun figures. Basically, 75 points were to be awarded to any proposal matching the Government estimate, and prices below the estimate received more points up to 150 at 7.5 percent below the estimate.

Serv-Air's best and final price proposal received 150 points for assumption of risk and 120 points for cost realism, for a total of 270. Northrop's higher-priced proposal received 126.6 points for assumption of risk and 150 points for cost realism, for a total of 276.6, or a 6.6-point advantage.

Serv-Air argues that there was not "adequate price competition" in this procurement, as defined by Armed Services Procurement Regulation (ASPR) § 3–807.1(b)(1) (1976 ed.). Serv-Air bases this argument on its contention that the price evaluation eliminated price as an evaluation factor and on the fact that the RFP states that "* * * lowest price will not necessarily receive the award." Serv-Air argues that because there was not adequate price competition, the Truth in Negotiations Act, 10 U.S.C. § 2306(f) (1976), required the Air Force to obtain certified cost or pricing data prior to the award of the contract, ASPR § 3–807.2(a) (1976 ed.) required a cost analysis, and ASPR § 3–801.5(b) (1976 ed.) required an audit. Since the Air Force admittedly failed to meet these requirements, Serv-Air argues that the contract is invalid and that any follow-on contracts would also be invalid.

The Truth in Negotiations Act requires that contractors submit certified cost or pricing data prior to the award of any negotiated contract where the price is expected to exceed $100,000. The act provides that this requirement need not be met "* * * where the price negotiated is based on adequate price competition." ASPR § 3–807.3

(a) also requires such data, and has the same adequate price competition exemption. The requirements of ASPR §§ 3-807.2(a) and 3-801.5(b), as stated above, must be met whenever the contract price is based on certified cost or pricing data.

"Adequate price competition" is defined, in ASPR § 3-807.1(b)(1), in the following manner:

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

Serv-Air contends, for the above-enumerated reasons, that subsection (iii) was not met, since the contract was not required to be, and was not, in fact, awarded to the offeror with the lowest evaluated price.

While we have not specifically addressed the issue of what constitutes adequate competition for the purposes of invoking the exemption in the Truth in Negotiations Act, we have interpreted ASPR § 3-807.1(b)(1) in the context of 10 U.S.C. § 2304(g) (1976). That statute and the implementing regulation, ASPR § 3-805.1, require that written or oral discussions be held in all negotiated procurements over $10,000, unless it can be clearly demonstrated from the existence of adequate competition that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. In *Shapell Government Housing, Inc. and Goldrich and Kest, Inc.*, 55 Comp. Gen. 839, 848 (1976), 76-1 CPD 161, in finding an award to a higher-priced, higher technically rated offeror to be the result of adequate price competition, we stated that "* * * we believe the language 'lowest *evaluated* price' should be defined to include all of the factors in the award evaluation." [Italic supplied.] Generally, then, adequate price competition exists and certified cost or pricing data need not be submitted where more than one offeror is considered to be within the competitive range and price is a substantial, though not necessarily determinative, factor in the prescribed evaluation criteria.

As for the impact of the elimination of price as a factor in this issue, Serv-Air argues that the two price proposals here were "widely divergent," and were leveled by the price evaluation, and that both proposals were scored so near the maximum that "differences between them were lost." Serv-Air cites *Group Operations, Inc.*, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79; *W. S. Gookin & Associates*, B-

188474, August 25, 1977, 77-2 CPD 146; and *Design Concepts, Inc.*, B-184658, January 23, 1976, 76-1 CPD 39, as cases in which our Office condemned price or cost evaluation schemes which leveled divergent proposals. There are, however, significant differences between these cases and the instant case.

In *Group Operations, Inc., supra*, a low proposal of $10,810 and a high proposal of $23,216 received nearly identical scores. The high proposal was over 100 percent above the low proposal. We determined that even though the cost evaluation was improper, there was not sufficient prejudice to disturb the award, since the technical evaluation was substantially more important and the awardee had a significant edge in the technical evaluation.

In *W. S. Gookin & Associates, supra*, the high proposal was over 100 percent higher than the low proposal, but scored the same. Again, even though we found the evaluation improper, we found no basis to disturb the award because of the importance of technical excellence and the significant technical superiority of the higher-price proposal.

In *Design Concepts, Inc.* (B-184658), *supra*, the evaluation formula penalized offers to the degree that they deviated from the arithmetic mean of all offers. This resulted in low offers receiving no advantage whatsoever from being low. This evaluation scheme was not revealed in the RFP, and, in fact, the RFP clearly indicated that low offers would be scored higher. The result was that award was made to an offeror whose technical proposal was only about 5 percent higher than the protester's, but whose price was approximately 4½ times that of the protester's.

The above cases involve extreme circumstances, especially as compared to the present case. While Serv-Air characterizes the proposals as "widely divergent," the largest difference in price or cost is the approximately 5.5-percent difference in ceiling price. In addition, there was no surprise in the instant case, as there was in *Design Concepts, Inc.* (B-184658), because the evaluation followed the criteria explicitly detailed in the RFP, including the admonition that the lowest price would not necessarily receive the highest score. In short, while we realize that the approximately 5-percent lower Serv-Air proposal did not receive a 5-percent price evaluation advantage, we cannot say that price was eliminated as an evaluation factor. We see nothing improper in two closely priced proposals being scored closely in a price evaluation.

In the present case, both offerors were within the competitive range, and award was made to the offeror whose price was approximately 5 percent higher, but whose technical rating was substantially higher. Since we have determined that the price evaluation did not elimi-

nate price as an evaluation factor and price was a substantial factor in the evaluation scheme (30 percent) we feel that there was adequate price competition. Therefore, the Air Force properly did not require the submission of cost or pricing data.

Serv-Air argues that oral price negotiations should have been held once the Air Force discovered that both offerors' proposed prices were below the Government estimate, to ensure that the Government received the best price. The Air Force points out that both offerors were within 9 percent of the Government estimate. In light of our finding that the price evaluation was proper and in accordance with the RFP and that there was adequate price competition, we do not feel that the fact that both offerors were slightly lower than the Government's estimate requires the Government to hold price discussions in order to ensure that it received the best price. See *Vinnell Corporation*, B-180557, October 8, 1974, 74-2 CPD 190.

V. Technical Evaluation and Negotiations

The RFP listed the following factors to be considered in the technical evaluation:

a. Overall experience in simulator and jet aircraft maintenance functions on aircraft of equal or greater complexity than those assigned to Vance AFB.
b. Overall experience in other base support functions for a pilot training facility and/or operation of the same or similar facilities contemplated by this Request for Proposal.
c. Understanding of the requirement and proposed method of operation.
d. Operation and management policies and procedures.
e. Manpower resources and utilization of key personnel.
f. Mobilization (phase-in) plan.

The RFP further stated that:

* * * Most weight will be given to factor a. A lesser weight will be given to factor b. Factors c, d, e and f will be given equal weights but less than either factor a or b.

Serv-Air has made two basic allegations concerning the technical evaluation and related negotiations:

(1) That the Air Force had preferences for specific methods of performing certain tasks based on the incumbent's performance, and these preferences were known by the incumbent, but were never communicated to Serv-Air.

(2) That the Air Force's written negotiations were insufficient to resolve uncertainties relating to work requirements, and misunderstandings concerning the Serv-Air proposal, thus violating the requirement for meaningful negotiations and resulting in an improper technical evaluation.

Serv-Air has presented 27 examples, grouped into five categories, which it argues are illustrative of the Air Force's failure to conduct meaningful negotiations which resulted in unfair penalties assessed against the firm in the technical evaluation. Among the 27 examples

of deficiencies in the technical evaluation and negotiations, five allegedly illustrate the Air Force's preconceived and unannounced preferences; the others allegedly illustrate other categories of improprieties. While we have carefully reviewed all of the examples, we do not feel that it is necessary to address each one in this decision, as they are only meant to be illustrative examples of the lack of meaningful negotiations. Rather, we will discuss one example in each category of deficiency noted by Serv-Air.

Generally, it is not the function of this Office to reevaluate technical proposals, or resolve disputes over the scoring of technical proposals. *Decision Sciences Corporation*, B–182558, March 24, 1975, 75–1 CPD 175; *Techplan Corporation*, B–180795, September 16, 1974, 74–2 CPD 169; 52 Comp. Gen. 382 (1972). The determination of the needs of the Government and the method of accommodating such needs is primarily the responsibility of the procuring agency, 46 Comp. Gen. 606 (1967), which, therefore, is responsible for the overall determination of the relative desirability of proposals. In making such determinations, contracting officers enjoy "a reasonable range of discretion" in determining which offer should be accepted for award, and their determinations will not be questioned by our Office unless there is "a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations." *METIS Corp.*, 54 Comp. Gen. 612 (1975), 75–1 CPD 44. While Serv-Air states that it is not asking us to reallocate the points awarded in the technical evaluation, but only to determine the sufficiency of the negotiations, many of the examples presented by Serv-Air go to the question of whether points should have been deducted in the technical evaluation. Consequently, we feel that the above standard of review is appropriate in this case.

Concerning the issue of when and to what extent negotiations are required, 10 U.S.C. § 2304(g) (1976) requires that oral or written discussions be held with all offerors in the competitive range. The statutory mandate can be satisfied only by discussions that are meaningful. *Houston Films, Inc.*, B–184402, December 22, 1975, 75–2 CPD 404; 51 Comp. Gen. 431 (1972). Generally, to be meaningful, discussions must include the pointing out of deficiencies or weaknesses in an offeror's proposal. *Austin Electronics*, 54 Comp. Gen. 60 (1974), 74–2 CPD 61; 50 Comp. Gen. 117 (1970). We have stated, however, that:

> * * * It is * * * unfair, we think to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal. 51 Comp. Gen. 621, 622 (1972).

Additionally, we have held that the "* * * extent and content of meaningful discussions * * * are not subject to any fixed, inflexible rule,"

Decision Sciences Corporation, *supra*, and that what will constitute such discussion "* * * is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for competitive negotiations * * *." 53 Comp. Gen. 240, 247 (1973).

Further, it is a fundamental principle of competitive negotiation that offerors must be treated equally, and that they must be provided with identical statements of the agency's requirements to provide a common basis for the submission of proposals. *Computek Incorporated, et al.*, 54 Comp. Gen. 1080 (1975), 75-1 CPD 384. Also, if an agency changes stated needs during the course of a procurement, all offerors must be informed of the changes and permitted to revise their proposals. *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76-1 CPD 134; *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144.

1. Alleged Air Force Preferences

Basically, Serv-Air argues that the Air Force preferred specific methods of performing tasks based on Northrop's performance as the incumbent, and that Serv-Air's proposal was penalized to the extent that it deviated from these unannounced preferences. The Air Force insists that these preferences were not preconceived or developed during the procurement, but rather were opinions of the Air Force technical experts concerning which proposal offered the best method of performing the required work. That is, the RFP told the contractor what to do, but not how to do it, and the so-called "preferences" were nothing more than the technical panel's judgment as to which proposal provided the best means of accomplishing the work.

The following example allegedly illustrates the Air Force's failure to reveal preferred techniques:

Example No. 2

Original Question No. 1 (May 31, 1977):

"In view of emphasis upon energy and fuel conservation, why do you propose the 'hot line' procedure for de-icing aircraft during extreme ice and snow conditions?"

Serv-Air's Response (June 20, 1977):

"The reference to the 'hot line' procedure Paragraph 3.1.5.3 [of Serv-Air's proposal], for removal of ice from aircraft surfaces, was intended to reflect a capability that could be utilized if considered necessary. The necessity to utilize this expensive method will be a joint Air Force/Serv-Air decision based on student program status and other mission factors. * * * "

Evaluation Panel Final Comment No. 12 (July 21, 1977):

Reference Question 1: Although the "Hot Line" procedure used to de-ice aircraft was acceptable during Serv-Air's previous tenure at Vance AFB, it has since been discontinued [in favor of chemical deicing] because of factors affecting aircrew and aircraft safety and, more recently, fuel conservation efforts.

Apparently, this example is intended to show that while the Air Force preferred chemical deicing, it did not convey this preference to Serv-Air. Serv-Air states that there is no suggestion that it could

not or would not use the preferred method, and that the penalty stems from the statement that Serv-Air was capable of using hot-line deicing if the Air Force desired, in addition to chemical deicing.

The Air Force responded that the RFP clearly indicated that the Air Force Technical Order System (T.O.) must be strictly complied with. Hot-line deicing is not permitted by T.O. 42C-1-2 and T.O. IT-38A-2-2, which specify required deicing procedures. Therefore, the Air Force argues, the only "preference" it had was for the required procedure, which was available to Serv-Air, in which Serv-Air should have researched. The Air Force states that it asked the question to be sure that Serv-Air understood the requirement.

Serv-Air's response does not dispute the fact that hot-line deicing is not permitted, but rather states that it was merely offering the capability if desired. Serv-Air also notes that the Air Force failed to indicate that this was a deficiency.

It is our opinion that the Air Force action in penalizing Serv-Air for proposing hot-line deicing was not unreasonable or arbitrary. This "unannounced preference" was, in fact, clearly indicated in the RFP. Since the T.O. did not permit hot-line deicing, then offering it, even as an auxiliary capability, indicates a lack of understanding of the current permitted procedure and a lack of diligence in proposal preparation. The Air Force question, while it did not label the area as a deficiency, should have been sufficient to put Serv-Air on notice that there was a problem with proposing the procedure. See, e.g., *Systems Consultants, Inc.*, B-187745, August 29, 1977, 77-2 CPD 153.

2. Other Alleged Failures to Conduct Meaningful Negotiations

Examples of other alleged improprieties have been grouped into the following groups by Serv-Air:

a. Failure to Reveal Needed Factual Information.
b. Failure to Reveal Alleged Inadequate or Excessive Service Levels.
c. Failure to Understand the Serv-Air Proposal.
d. Failure to Aid Serv-Air's Understanding of Government Requirement.

a. Failure to Reveal Needed Factual Information.

Example No. 1

Original Question No. 50 (May 31, 1977):

"Do you have any training requirements for Fire Protection personnel which will require quotas in USAF schools prior to 1 October 77? See Amendment/Modification No. F41689-77-R-0016-0002 for qualification requirements."

Serv-Air Response (June 20, 1977):

"We do not anticipate any training requirements (quotas in USAF schools) prior to 1 October 77 for Fire Protection personnel. Our Fire Chief will be scheduled to attend the advanced Fire Department Technology Course at Chanute AFB within 6 months of 1 October 77. It is assumed that all existing fire department personnel will meet physical, experience and training requirements as of 1 October 77. Newly assigned personnel will be scheduled for training as necessary after 1 October 77."

Evaluation Panel Final Comment No. 37 (July 21, 1977):
"Reference Question 50: Serv-Air assumed that all of the present fire protection personnel working at Vance are trained to meet the RFP. All personnel are not trained as evidenced by Northrop scheduling 8 Rescue personnel for training prior to 1 Oct. 77. This significant requirement was not adequately researched by Serv-Air."

Serv-Air argues that in this instance the Air Force should have told Serv-Air that the existing fire protection staff did not meet the training requirements for the upcoming contract and, therefore, needed to be scheduled for training. Serv-Air also contends that this is an instance in which the Air Force should have, but did not, point out the specific deficiency in Serv-Air's proposal.

The Air Force response is that the requirement for training of Fire Protection personnel was clearly stated in amendment/modification No. F41689–77–R–0016–002. Additionally, the Air Force argues that Serv-Air should have been aware, with reasonably diligent research, that the present personnel did not meet this training requirement because it did not exist under the previous contract. Therefore, the Air Force maintains, Serv-Air's assumption that all existing personnel would meet the new requirements indicated a lack of research of RFP requirements.

Serv-Air, in rebutting the Air Force comments, points out that the technical panel penalized it for failure to provide trained personnel or failure to schedule them for training, although the panel admits that it had no knowledge of the qualifications of the personnel proposed by Serv-Air.

It appears to us that Serv-Air was penalized for proposing untrained fire protection personnel and the failure to fully understand the RFP requirements. We agree with the Air Force analysis. Serv-Air should have been aware of the change in training requirements from the previous contract, since the new requirement was stated clearly in the cited amendment to the RFP.

b. Failure to Reveal Allegedly Inadequate or Excessive Service Levels.

Example No. 7

Original Question No. 8 (May 31, 1977):
"The ACE Program method of operation section [in the RFP] reflects both the Mission Support Kit (MSK) concept and forward supply concept. Which method will be used? Please explain the supply procedures to be used to support the ACE Operating Locations (OL). Also expand on the need for two material control clerks at the OLS."

Serv-Air Response (June 20, 1977):
"The ACE Program will be supported by a Mission Support Kit (MSK) * * *
"The utilization of the two Material Control Clerks at SAW and PSM will be in support of the increased load in the area support portion of the MSKs assigned to each of the respective bases * * * "

Evaluation Panel Final Comment No. 19 (July 21, 1977):
"Reference Question 8: Method of ACE Program supply support is clarified to some extent in contractors reply. However, method of operation prescribed in response to question does not properly justify need for two material control clerks at specified locations."

Serv-Air's argument concerning the alleged impropriety in the above example is basically that it was penalized for providing too much service, even though it was the low-priced offeror. According to Serv-Air, the Government should have matched the Serv-Air technical and price proposals to determine what service it was getting for the price. Serv-Air contends that its proposal could not properly be penalized for providing excessive manpower levels unless doing so raised the cost to the Government. Serv-Air also argues that the Air Force didn't notify it that providing two clerks was a deficiency.

The Air Force response point out that the RFP clearly states that the Price Evaluation Panel will not have access to technical proposals and the Technical Evaluation Panel will not have access to price proposals. Therefore, in evaluating manpower levels, the Technical Panel properly had no knowledge of the offeror's price. Additionally, the Technical Evaluation Panel was concerned with *efficiency* in the evaluation of proposed manpower levels.

We feel that the Air Force level of negotiation and the determination to downgrade Serv-Air for failure to justify the need for two clerks were not unreasonable or arbitrary. The question certainly implies that the proposal as originally written did not sufficiently justify the use of two clerks. The deficiency was pointed out and Serv-Air was given an opportunity to correct the deficiency.

c. Failure to Understand the Serv-Air Proposal.

Example No. 13

Original Comment No. 9 (May 31, 1977):

"Para 5.1.7.1, page 5–15, Volume 1, Management Procedures Branch [of the Serv-Air proposal], indicates the training section will provide initial training on the U–1050–II computer. Statement of work specifies successful completion of formal training at AF Tech School before personnel are allowed to operate U–1050–II Computer."

Serv-Air Response (June 20, 1977):

"Specific references to formal training of equipment operations stated in the basic RFP were not addressed, nor was AFR 50–55 referenced. This paragraph has been revised to explain the training to be provided on the U–1050–II Computer."

Evaluation Panel Final Comment No. 9 (July 21, 1977):

"Reference Comment 9: Reply to specifically stated comment failed completely to address or recognize the statement of work requirement for successful completion of formal computer training at AF Tech School prior to personnel being allowed to operate the UNIVAC 1050–II Computer."

According to Serv-Air, it did not mean that the proposed Training Section would conduct the required training, but that it would assure that the required Air Force Technical School training was completed. The Air Force response is basically that the training requirement can only be met by training at the Air Force Technical School, and that Serv-Air's response did not make this clear, even though the question clearly noted this deficiency.

It is our opinion that Serv-Air's June 20 response did not make it clear that formal training requirements would be met in the mandatory manner by attendance at the Air Force Technical School, since

the revision of the applicable section of its proposal still stated that the Training Section "* * * will provide initial and refresher training * * * to include formal basic training on the U-1050-II * * *." We think that the Air Force did not act unreasonably here. The deficiency was initially pointed out in specific terms, and Serv-Air's response reasonably indicated that it was not aware that training at the Air Force Technical School was mandatory and that contractor training could not substitute.

d. Failure to Aid Serv-Air's Understanding of Government Requirements.

Example No. 26

Original Question No. 12 (May 31, 1977):

"The UPT-IFS has no component or series of components identified as either an Automated Flight Control System (AFCS) or a Central Air Data Computer. Please define these areas more clearly and skills required to maintain. (Ref Vol 1, pg 3.1-70, Paragraph 3.1.11.1)"

Serv-Air Response (June 20, 1977):

"The skill requirements defined in Paragraph 3.1.11.1 [of the Serv-Air proposal] define homogeneous skills directly related to maintaining the UPT-IFS. These skill requirements are further defined in Paragraph 3.1.11.1 of our revised proposal."

Evaluation Panel Final Comment No. 22 (July 21, 1977):

"Reference Question 12: Response to this question is totally inadequate. The contractor still does not understand the technical requirements for the UPT-IFS. The skills he believes are required to maintain the simulator are totally unacceptable."

Serv-Air states that there was no indication that it was deficient until the final comment, and that if "* * * a broadly experienced, fully competent contractor in this area did not understand the Air Force requirement negotiations should have been conducted to make the requirement known."

The Air Force response to this example follows:

Example #26. The comment of the panel for this question was not directed toward Serv-Air's competency in Flight Simulator maintenance. It was directed toward their failure to adequately express what skills would be utilized to maintain the UPT-IFS. Serv-Air identified two USAF AFSC skills homogeneous to the skills they identify as needed to adequately maintain the UPT-IFS. These skills (325X0-32591 and 326XX) although related are not specifically homogeneous. The homogeneous skills required are AFSC 341X4, Digital Flight Simulator Technician and 341X5 Analog Tactics Landmass Technician. The basic skills required to maintain the UPT-IFS are a knowledge of general purpose core memory computer systems maintenance and standard peripheral units, digital linkage and interface circuits, hydraulics, closed circuit T.V. systems (camera/monitor), analog servo-systems and optics. Serv-Air did not understand the requirement in that core memory repair is not authorized at base level, computer programmer skills are not required and no camera projection equipment is included in the UPT-IFS. Here, once again, the protester has apparently expected the Technical Evaluation Panel to tell the offeror how to perform a given task. That responsibility was clearly levied on the offerors throughout the preproposal conference, solicitation phase and ensuing evaluations.

Serv-Air's rebuttal argues that since the above-quoted Air Force response admits that Serv-Air is qualified to maintain simulators, the statement of analogous skills should not be penalized. If it is considered a deficiency, Serv-Air contends that the Air Force should have specifically pointed it out.

Apparently, the Air Force Technical Panel feels that Serv-Air does not understand the requirement for Flight Simulator maintenance. It is not our function to perform a second technical evaluation, but only to determine whether negotiations in this area were meaningful. The original question asked by the Technical panel clearly indicated a deficiency in Serv-Air's proposal in this area. Serv-Air's response was apparently clearly deficient again. We do not think that the Air Force's determination here was unreasonable or arbitrary.

3. Summary

It appears that Serv-Air's complaints about the conduct of negotiations and the resulting technical evaluation involved situations in which several portions of Serv-Air's proposal were initially considered to be deficient, the Air Force pointed out the deficiencies with varying degrees of specificity, Serv-Air's responses did not cure the defficiencies, and the Air Force did not conduct further negotiations. The Air Force believes that either Serv-Air would not have been deficient if it had adequately researched clearly specified requirements, or that Serv-Air was given an adequate opportunity to correct the deficiency as pointed out by the negotiations conducted. The Air Force determined that to continue to point out specific deficiencies for successive rounds of negotiations until Serv-Air finally responded correctly would be unfair to Northrop, as it would be tantamount to writing Serv-Air's proposal by providing Air Force technical expertise. Our review of the record has disclosed some areas where the written discussions could have more specifically pointed out the deficiencies found and other areas where the deficiencies were elucidated.

Based on our review including all examples of improprieties cited by Serv-Air, it is our opinion that the discussions held were meaningful in the context of our standard of review. After the receipt of initial proposals, 53 questions were asked Serv-Air by the technical panel, and 14 additional comments were made. Serv-Air was then given the opportunity to and did substantially revise its proposal in response to the questions and comments. See *Operations Research, Incorporated*, 53 Comp. Gen. 593 (1974), 74-1 CPD 70. As a result of this revision, Serv-Air's technical score increased from 450 points to 570 points, and Serv-Air's price points increased from 228 points to 270. While the Air Force may not have labeled all of Serv-Air's deficiencies as deficiencies, the questions asked led Serv-Air to the deficient areas of its proposal and we have held that questions which lead offerors into areas of their proposals that are unclear are sufficient to put them on notice that their proposals may be deficient in those areas. See, e.g., *Systems Consultants, Inc., supra; ASC Systems Corporation*, B-186865, January 26, 1977, 77-1 CPD 60; *DOT System, Inc.*, B-186192, July 1, 1976, 76-2 CPD 3; *Rantec Division, Emerson Electric Co.*, B-185764, June 4, 1976, 76-1 CPD 360. Also, while successive rounds of

discussions might have allowed Serv-Air to increase its scores, we cannot say that the Air Force's decision to not conduct further discussions, even though some deficiencies remained, was arbitrary or unreasonable. Since the written discussions were meaningful, there was no requirement to hold oral discussions. See, e.g., *Genesee Computer Center, Inc.*, B–188797, September 28, 1977, 77–2 CPD 234; *Austin Electronics*, 54 Comp. Gen. 60, *supra;* 51 Comp. Gen. 621, *supra.*

VI. Alleged Procedural Deficiencies

Serv-Air has recently complained that the Air Force has delayed in filing responses to this protest, and that this delay has impaired Serv-Air's chances for an effective remedy in the event the protest is sustained. Serv-Air also alleges that the Air Force destroyed documents relevant to this protest and has submitted other documents to us that have not been released to Serv-Air. Serv-Air contends that these alleged improprieties have compromised the integrity of our Bid Protest Procedures.

The Air Force admits to the delays, stating that they have not been intentional, but are the result of the complexity of the protest and the loss of personnel involved in the review of the protest. Regarding the allegation of destruction of documents, the Air Force states that while the evaluator's individual workpapers were destroyed, the substance of their contents was incorporated into the score sheets and formal comments of the panel, which were provided to Serv-Air. Concerning the documents provided only to GAO, the Air Force states that only cost and technical elements of the Northrop proposal and an internal ATC legal opinion were not provided to Serv-Air. The Air Force argues that the elements of the Northrop proposal were properly withheld, as they contained sensitive data that could harm Northrop's competitive position, and the internal legal opinion was properly withheld under FOIA. The Air Force also states that it considers all possible remedial action options still available to GAO, including a recommendation of termination of the contract for the convenience of the Government.

Regarding Serv-Air's complaint that we should not consider documents not released to Serv-Air, we have held that documents which are not furnished to protesters because they contain information considered by the agency to be properly withheld under the FOIA will be considered and accorded full weight by our Office in deciding bid protests. See, e.g., *S.J. Groves & Sons Company*, B–189544, October 25, 1977, 77–2 CPD 324. Therefore, we have considered all documents in the record in this protest, whether or not they have been released to Serv-Air. Concerning the allegations of destruction of documents, we see no prejudice to Serv-Air since the Air Force has sufficiently justified the destruction of the technical panel worksheets, which apparently were incorporated into the summary technical panel comments,

which were provided to Serv-Air. Finally, regarding Serv-Air's complaint that the Air Force was untimely in submitting its reports, we have held that this is a purely procedural matter and does not provide a basis to disregard the report. *Systems Consultants, Inc., supra; VBM Corporation*, B–182225, March 5, 1975, 75–1 CPD 130.

We do feel, however, that the delays in this case were excessive and potentially prejudicial in terms of feasible remedies.

Accordingly, the protest is denied to the extent it has been considered on the merits.

[B–192127]

Pay—Retired—Survivor Benefit Plan—Spouse—Coverage—Termination

Under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, as amended by section 1(5)(A)(ii) of Public Law 94–496, effective October 1, 1976, where a member had elected spouse coverage but reduction of retired pay for spouse coverage is terminated because the member no longer has an eligible spouse beneficiary, so long as he had an eligible spouse beneficiary on the first day of the month, full reduction of retired pay for spouse coverage is required since charges are made on an indivisible monthly bases.

Pay—Retired—Survivor Benefit Plan—Children

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where the member had elected both spouse and children coverage and there is termination of reduction of retired pay for spouse coverage because of loss of an eligible spouse beneficiary, the previously elected child coverage is to be recomputed since the law governing the SBP requires such coverage to be determined on an actuarial basis and the loss of the eligible spouse beneficiary has increased the probability that an annuity would be payable to an elected dependent child.

Pay—Retired—Survivor Benefit Plan—Children—No Eligible Spouse

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, since dependent children coverage, either alone or in combination with spouse coverage is to be determined on an actuarial basis in order to maintain such basis, recomputation of children coverage is to be based on the member's age and that of the youngest child effective the day after loss of the eligible spouse beneficiary.

Pay—Retired—Survivor Benefit Plan—Spouse—Eligible Beneficiary

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, after spouse coverage is terminated due to loss of eligible spouse beneficiary and the member remarries, since reduction in retired pay for spouse coverage purposes is charged on an indivisible monthly basis, such reduction in retired pay would not resume until the first month following the date such spouse attains eligible spouse beneficiary status, unless such date is on the first of a month, then appropriate charges are to be made for that month.

Pay—Retired—Survivor Benefit Plan—Children—Eligible Spouse Effect

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where the cost of children coverage had been recomputed and charged following the loss of eligible spouse beneficiary, then upon the reacquisition of an eligible spouse beneficiary, since children coverage is to remain on an

Pay—Retired—Survivor Benefit Plan—Children—Eligible Spouse Effect

actuarial basis, and since the gain of an eligible spouse beneficiary has reduced the probability that an annuity would be payable to an elected dependent child, the cost of such coverage should be further recomputed.
Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, since dependent children coverage, either alone or in combination with spouse coverage, is to be determined on an actuarial basis, in order to maintain such basis upon the gain of an eligible spouse beneficiary, further recomputation of children coverage is to be based on the age of the youngest child and the ages of the member and remarriage spouse on the date the spouse qualified as an eligible spouse beneficiary.

Pay—Retired—Survivor Benefit Plan—Cost Deductions and Coverage—Effective Date

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where a member reacquires an eligible spouse beneficiary, and there is further recomputation of the cost of coverage because of the existence of previously elected dependent children beneficiaries, since reduction in retired pay for coverage purposes is charged on an indivisible monthly basis, such further recomputed coverage charges would not resume until the first day of the month following change of coverage status, unless such status change occurred on the first day of the month, then appropriate charges are to be made for that month.

In the matter of Sergeant Edwin T. Peniston, USMC, Retired, and Gunnery Sergeant Frederick Burrough, USMC, Retired, September 25, 1978:

This action is in response to a letter dated April 27, 1978, from Lieutenant Colonel W. S. Moriarty, USMC, Disbursing Officer, Centralized Pay Division, Marine Corps Finance Center, requesting an advance decision on a series of questions concerning the proper method of computing and effecting reduction in retired pay for coverage purposes under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, as amended by section 1(5)(A)(ii) of Public Law 94–496, October 14, 1976, 90 Stat. 2375. Particular references are made to the cases of Master Sergeant Edwin T. Peniston, USMC, Retired, and Gunnery Sergeant Frederick Burrough, USMC, Retired. The request was forwarded to this Office by letter from the Office of the Commandant of the Marine Corps (FDD), dated June 6, 1978, and has been assigned Control No. DO–MC–1293 by the Department of Defense Military Pay and Allowance Committee.

The submission states that Sergeant Peniston was tranferred to the retired list on December 1, 1966. On March 10, 1973, he elected to participate in the SBP under the provisions of subsection 3(b) of Public Law 92–425, 86 Stat. 706, 711, 10 U.S. Code 1448 note, to provide an annuity on a reduced base amount of $375 for his spouse, Florence, and dependent child, Teresa. As a result of that election, his retired pay was reduced in the amount of $15 for spouse coverage and $3.32 for child coverage effective June 1, 1973.

On July 25, 1977, Sergeant Peniston informed the Finance Center that he received a divorce from his spouse, Florence, on July 7, 1976,

and that he married a new spouse, Helen, on August 6, 1976. He requested that Helen be substituted for Florence on his SBP election form.

Based on that notice and request, the Finance Center retroactively refunded the cost of spouse coverage from October 1, 1976, the effective date of Public Law 94–496, *supra*, and the charge against his retired pay for the monthly SBP cost for coverage of the new spouse, Helen, was begun on August 1, 1977, since she was not a parent of issue of that marriage prior to that time. In addition to that action, and while no costs for child coverage were recomputed on the basis of "child only" coverage during the interim period, the cost of child coverage was thereafter recomputed on the basis of "spouse and child" coverage from August 1, 1977, using dates of birth for the member, his new spouse and child as of that date.

The facts in the case of Gunnery Sergeant Burrough are that, following a period in which he was in the Fleet Marine Corps Reserve, he was transferred to the retired list on July 1, 1968. On March 17, 1974, he elected to participate in the SBP under the provisions of subsection 3(b) of Public Law 92–425, *supra*, to provide an annuity based on his full monthly retired pay for his spouse, Eva, and 3 dependent children. As a result of that election, his retired pay was reduced in the amount of $8.27 for spouse coverage and $3.11 for children coverage effective April 1, 1974.

By correspondence received at the Finance Center on October 11, 1977, Sergeant Burrough advised that he had received a divorce from his wife, Eva, on December 3, 1976, and requested that his SBP coverage be adjusted in accordance with Public Law 94–496, *supra*.

Based on that notice and request, the monthly SBP cost of coverage for his former spouse was retroactively refunded from December 1, 1976. Unlike the Peniston case, however, the SBP cost for children coverage was recomputed on the basis of "children only" coverage, with the increased monthly cost of $15.50 being deducted from his retired pay effective December 1, 1976.

The actions taken in those cases seem to be inconsistent. It is indicated that, on further analysis, it is doubtful whether the dates used for effecting changes in retired pay reductions in the cases described are correct, in view of the amendment to 10 U.S.C. 1452(a) by Public Law 94-496, *supra*, and our decision B–189037, September 30, 1977 (56 Comp. Gen. 1022).

Question a. asks in effect:

When there is no longer an eligible spouse beneficiary because of death or divorce of the spouse, what is the correct effective date for terminating the reduction in retired pay for spouse coverage?

As it relates to this question, 10 U.S.C. 1452(a), as amended by Public Law 94–496, *supra*, provides in pertinent part:

(a) * * * the retired or retainer pay of a person to whom section 1448 of this title applies who has a spouse * * * shall be reduced each month by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount * * *. *The reduction in retired or retainer pay prescribed by the first sentence of this subsection shall not be applicable during any month in which there is no eligible spouse beneficiary.* [Italic supplied.]

Prior to the insertion of the italic sentence by Public Law 94–496, *supra*, the basic concept of reducing retired pay for SBP coverage other than for children coverage was, "once in, always in," since the law did not provide for termination of such reduction in pay in the event an elected beneficiary predeceased the member. The italic sentence of subsection 1452(a) removed that restriction by permitting such termination for "any month in which there is no eligible spouse beneficiary."

Charges for SBP coverage are assessed on a monthly basis and for the whole month, there being no legal authority for subdividing a month. It is our view that the existence of an elected beneficiary on the first day of that month governs the coverage costs to be charged for the whole month. Thus, if a member had initially elected spouse coverage, so long as he had an eligible spouse beneficiary on the first day of a month, then for SBP coverage charge purposes, the full reduction in retired pay for that coverage would be required for that month.

As the foregoing relates to the Peniston case, he received a divorce in July 1976, prior to the October 1, 1976, effective date of Public Law 94-496, *supra*. See H.R. Rep. No. 94–1458 Part 1, 94th Cong., 2d Sess. 9(1976). Thus, October 1, 1976, became the first day of the earliest month in which he had no "eligible spouse beneficiary" for the purposes of the last sentence of 10 U.S.C. 1452(a), *supra*, and the Finance Center's action to refund monthly SBP costs of spouse coverage beginning with that month was correct. In the Burrough case, the divorce became effective on December 3, 1976. Since the member had an eligible spouse beneficiary on December 1, 1976, such month remained a month for which his retired pay was to be reduced for spouse coverage purposes. Therefore, January 1977 became the first month in which he had no "eligible spouse beneficiary" and the Finance Center's action to refund his SBP costs for spouse coverage for December 1977 was improper and is to be recovered.

Question b. asks in effect:

When there is no longer an eligible spouse beneficiary because of death or divorce of the spouse, should the additional cost for child coverage be recomputed on the basis of "children only" coverage? If the answer is in the affirmative, should that cost be recomputed based on the age of the member and youngest child as of the date of initial entry into the Plan, or based on their ages at some other date?

As it relates to this question, 10 U.S.C. 1452 provides in part:

(a) Except as provided in subsection (b), the retired or retainer pay of a person to whom section 1448 of this title applies * * * who has a spouse and a dependent child shall be reduced each month by an amount equal to 2½ percent of the first $300 of the base amount plus 10 percent of the remainder of the base amount. As long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense. * * *

(b) The retired or retainer pay of a person to whom section 1448 of this title applies who has a dependent child but does not have an eligible spouse, shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations of the Secretary of Defense.

The legislative history of these provisions recognized the existence of greater statistical variables in the dependent children aspect of a member's family regarding possible receipt of survivor benefits, than would be experienced with a spouse beneficiary. The idea was expressed generally that because of the multiplicity of factors which would govern the prospect of annuities being paid to individuals in this class of dependents, costs for such coverage were to be actuarially determined. The Secertary of Defense was vested with the authority to determine the costs and, under regulations, assess an appropriate charge.

Those regulations are contained in DOD Directive 1332.27, January 4, 1974. The actuarially determined charge is based on the cost factors applicable to the Retired Serviceman Family Protection Plan (RSFPP), as is stated in part in Chapter 5 of the Directive:

501. *Reduction in Retired Pay*

* * * * * * *

b. Spouse and eligible children. The cost for providing an annuity when there is a spouse and eligible children shall be 2½% of the first $300 of the base amount, plus 10% of the remaining base amount, plus an actuarial charge based on the difference between cost factors under RSFPP, Option 1 and 3, in effect September 20, 1972. * * *

c. Children only (no eligible spouse). The cost for providing an annuity when there are eligble children, but no eligible spouse, shall be based on the cost factors under RSFPP, Option 2, in effect September 20, 1972. * * *

When, pursuant to the 1976 amendment to the law, reduction of a member's retired pay is terminated because there no longer is an eligible spouse beneficiary, spouse coverage also terminates upon the occurrence of the event. Thus, where spouse and children coverage had been elected, upon the loss of an eligible spouse beneficiary, "children only" coverage would remain. In order to maintain the actuarial basis of the charge for that coverage, in view of the fact that the cost of such such coverage is significantly higher due to the increased probability that an annuity would be payable to this class of dependents, recomputation of such coverage would be required. Therefore, the first part of question b. is answered in the affirmative.

As to the second part of question b., it was previously noted that the concept of children coverage, either alone or a combination with spouse coverage, was to be made on an actuarial basis. The basis upon which the cost of such coverage is established is in part the relationship

of the ages of the member and his children at the time such coverage was initially established. We see no basis for not applying the same rule here. It is our view, therefore, that the cost should be recomputed based on the age of the member and the youngest child as of the first date following the date of the loss of the previously covered eligible spouse beneficiary, or October 1, 1976, whichever is later, using the age of the member and the youngest child as of that date.

As question b. relates to the Peniston case, the date to be used for "children only" coverage recomputation would be October 1, 1976, since that is the earliest first date recognizable under the law for this purpose. Regarding the Burrough case, since the divorce was granted on December 3, 1976, the following day, December 4, 1976, became the first day of "children only" coverage; therefore, that date is to be used for recomputation purposes.

Question c. asks in effects:

After the reduction in retired pay for spouse coverage is terminated because of death or divorce of the spouse and the member remarries, what is the correct effective date for effecting the new reduction in retired pay for spouse coverage where no child is born prior to the first anniversary date of the remarriage?

In 56 Comp. Gen. 1022, *supra*, we considered the question of resumption of reduction in retired pay for spouse coverage in post-election remariages. After analyzing section 1(5)(A)(ii) of Public Law 94–496, *supra*, 10 U.S.C. 1452(a)(ii), we expressed the view that since that amendatory language focused squarely on the concept of eligible spouse beneficiary for termination purposes, until a spouse on remarriage qualified as an eligible spouse by satisfying the earlier of the conditions stipulated in 10 U.S.C. 1447, retired pay reductions for spouse coverage would not resume.

As previously stated, all elected coverages are paid for on a monthly basis. We do not believe that the law, as amended, intended or contemplated that a participating member would have to pay for coverage for the month where on the first day of a month there is no one in a class of potential beneficiaries who could receive the benefit. We believe that the propriety of charging for a particular coverage must be based on the beneficiary status in being on the first of any month, for that month. Therefore, in answer to question c., it is our view that reduction in retired pay for spouse coverage is not to be resumed until the first of the month following the date that the spouse upon remarriage attains eligible spouse beneficiary status, unless, of course, such date is on the first of a month, in which case appropriate charges are to be made for that month.

In the Peniston case, the first anniversary date of his remarriage was August 6, 1977, and, thus, became the date his spouse first quali-

fied as his eligible spouse beneficiary. Since he did not have an "eligible spouse beneficiary" on August 1, 1977, spouse coverage charges were not to be assessed that month. Therefore, resumption of reduction of his retired pay for spouse coverage should have been made effective on September 1, 1977, rather than on August 1, 1977, as was done. Appropriate refund adjustment should be made in the member's account.

Question d. asks in effect:

If the member remarries and no additional child is acquired by that marriage, should the recomputed cost of child coverage be further recomputed? If the answer is in the affirmative, what is the correct combination of ages for recomputing the SBP cost?

As was stated in connection with question b., children coverage was congressionally mandated to be actuarially determined. Thus, in view of the multiplicity of variable factors which would govern receipt of benefits by members of this class and in view of the fact that the cost of "children only" coverage is significantly higher than it otherwise would be with the interposition of an eligible spouse beneficiary, then it is our view that there should be further recomputation at that time.

With respect to the second part of question d., it is our view that in order to maintain the actuarial basis, the cost should be recomputed based on the age of the youngest child and the ages of the member and new spouse on the date that such spouse qualified as an eligible spouse beneficiary since that is the date of the change of status discussed in question c. above.

In the Peniston case, that recomputation date would be August 6, 1977.

Question e. asks in effect:

If a member subsequently remarries and no additional child is acquired by the remarriage, what is the date for effecting the reduction in retired pay for the further recomputed cost for "spouse and child" coverage?

Since SBP costs are charged for the month of coverage based upon a member's beneficiary status on the first of a month, unless the first anniversary of the remarriage happened to occur on the first day of a month, such further recomputed costs are to be charged effective the first day of the month following such change of coverage status. In the Peniston case, that would be September 1, 1977.

[B-192242]

Contracts—Federal Supply Schedule—Requirements Contracts—Breach of Contract Allegation

Nonmandatory user of Federal Supply Service (FSS) schedule contract cannot be held to have breached FSS schedule contract solely because it purchases more of item from one contractor than another contractor which has lower price.

Contracts—Federal Suppy Schedule—Requirements Contracts—Administrative Discretion

General Services Administration provides FSS schedule contracts as primary source of supply for all agencies, with certain exceptions. However, it is using agency that is responsible for making determination of which product will satisfy minimum needs at lowest cost. Contracts do not contain promises or guarantees as to volume of sales and, therefore, there cannot be breach of contract on part of GSA.

In the matter of McClane Enterprises, September 25, 1978:

McClane Enterprises (McClane) has complained to our Office with respect to an alleged breach of contract by both the Department of Agriculture, Forest Service (Agriculture), and the General Services Administration, Federal Supply Service (GSA).

This apparent claim for breach of contract concerns contract No. GS-10S-40749 (-40749), issued by GSA, for tree-marking paint for the period of July 1, 1977, to June 31, 1978.

On May 25, 1977, McClane was awarded multiple-award contract -40749 to sell tree-marking paint to "all departments and independent establishments, including wholly owned Government corporations in the executive branch of the Federal Government (except the U.S. Postal Service, *Department of Agriculture* and Veterans Administration) * * * *in such quantities as may be needed to fill any requirement* determined in accordance with currently applicable procurement and supply procedures." [Italic supplied.] It must be noted that the specific exclusion of Agriculture did not preclude McClane from soliciting orders from Agriculture. Rather, such exclusion only meant that Agriculture was not a mandatory user of the Federal Supply Service (FSS) schedule contract.

McClane states that its bid was based on the 1976-1977 volume of tree-marking paint purchases amounting to approximately $1,800,000. Additionally, McClane advises that it expended large sums of money to establish its quoted price, to advertise and send catalogues and price lists to the various Government agencies and in preparation of its anticipation of a large volume of orders. McClane asks how approximately $434,000 of the tree-marking paint produced by The Nelson Paint Co. (Nelson), which is priced higher than McClane's, can be ordered disregarding McClane's contract. McClane's position appears to be that since it only received orders amounting to approximately $1,000, for the period of July 1, 1977, to February 2, 1978, well below the 1976-1977 volume figures upon which its quote was based and the amount of Nelson's orders, both GSA and Agriculture breached contract -40749.

It is our view that there was no breach of contract by Agriculture. McClane's contract, as stated above, specifically excludes Agriculture

as a mandatory user under contract –40749. Consequently, Agriculture cannot be held to have breached the instant contract solely because it purchased more tree-marking paint from Nelson while, essentially, excluding McClane's product, which has a lower price. Additionally, the record discloses that Agriculture uses the Nelson paint in areas where timber trespass (tree stealing) is a problem. Agriculture advises that the Nelson paint contains a tracer element which is exclusively identified to Agriculture and, therefore, is the significant element in any timber trespass prosecution.

Agriculture has informally advised our Office that it does not have procurement regulations applicable to the instant situation since all of the orders are being placed pursuant to the authority of a GSA contract. Also, we note that a majority of the orders placed for Nelson paint are under $500. However, Agriculture does admit that some orders greater than $500 are placed, but they come under its agency-wide justification permitting payment of a higher price for tree-marking paint which contains a tracer element that satisfies Agriculture's minimum need (admissibility in a court of law). Accordingly, Agriculture's procedures in this instance are consistent with the Federal Property Management Regulations (FPMR) § 101–26.408–2 (1977) which was incorporated in the contract by reference and provides:

> Each purchase of more than $500 per line item made from a multiple-award schedule by agencies required to use these schedules shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item. Purchases costing $500 or less per line item should also be made at the lowest delivered price under the schedule; however, justification for the purchase of higher priced items is not required. Agencies not required to use schedules, but which choose to do so, are apprised of the advisability of fully justifying purchases costing more than $500 per line item when the items are not the lowest priced available on the schedule.

With respect to the alleged breach of contract by GSA, we are of the opinion that no breach has been committed. GSA annually enters into a multitude of FSS schedule contracts. See 41 C.F.R. § 101–26.401, *et seq.* (1977). These contracts provide for the contractor to furnish the item called for upon the issuance of a purchase order by a Federal agency against the contract. Many of these schedule contracts are mandatory for use by Federal agencies. 41 C.F.R. § 101–26.401–1 (1977). Others are optional for use. 41 C.F.R. § 101–26.401–5 (1977). Under the FSS program, term multiple-award contracts, usually 1 year in duration, for an indefinite quantity of a specific item are awarded to all offerors with whom satisfactory terms and discounts can be negotiated. Once the contract is awarded, it is listed in the Federal Supply Schedule. Then, each agency receives the schedule which enables it to order directly from the contractor. GSA advises that, under the multiple-award program, it awards a number of contracts

for tree-marking paint, each covering a different line of products. Therefore, GSA emphasizes that performance capability of the products is important in addition to the price. Also, GSA adds that the volume of sales of any product is dependent on the needs of the using agencies and the effectiveness of the product in satisfying those needs.

In the instant case, contract -40749 was mandatory except for certain agencies which are set forth above. The contract was one of a number of tree-marking paint FSS contracts. While GSA provided the contracts as the primary source for tree-marking paint for all agencies, each agency was responsible for determining which among the listed products will satisfy its minimum needs at the lowest cost. Agriculture, without any input from GSA, made a determination with respect to the Nelson paint and proceeded to purchase the product. In addition, a review of the contract reveals that GSA made no promise or guarantee to McClane with respect to what volume of sales could be expected by McClane. Accordingly, we must conclude that there was no breach of contract on the part of GSA.

As a final note, we should point out that, under this type of situation, it is conceivable that an offeror could enter into the FSS program, be awarded a contract and properly receive no sales for the full term of the contract. The "Estimated Requirements" clause in the solicitation upon which the immediate contract was based stated specifically:

* * * *No guarantee is given that any quantities* will be purchased. * * * [Italic in solicitation.]

Based on the foregoing, McClane's claim for breach of contract is denied.

[B-164378]

Compensation—Rates—Overseas Dependents School System—Public Law 86-91—Implementation

Individuals who "opted out" of plaintiff-class in *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974), may be paid backpay in accordance with the court's interpretation of Public Law 89-391. However, since these claims are being allowed administratively, and not under *March*, the statute of limitations contained in 31 U.S.C. 71a applies to limit recovery where applicable.

Claims—Attorneys' Fees—Authority

Counsel for plaintiff-class in *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974), is not entitled to be paid the 2 percent counsel fee awarded to him in *March*, when the claims of individuals who "opted out" of *March* are paid administratively. The rule that a party who creates or protects a "common fund" is entitled to counsel fees is not controlling here since the claimants herein are barred from recovery from the fund that counsel created in *March*.

In the matter of Llewellyn Lieber, *et al.*—backpay, September 26, 1978:

This decision is in response to claims for backpay filed by Dr. Llewellyn Lieber, Ms. Elizabeth Dozier Filosa, and Ms. Aida M. Guevarra,

all of whom elected not to be members of the plaintiff-class in *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974). In our decision *Matter of Llewellyn Lieber*, B–164378, April 28, 1976, we decided several other claims asserted by Dr. Lieber and stated that her claim for backpay would be decided at a future date when all of the necessary reports had been received. It was also necessary for various other issues that arose during the implementation of the *March* judgment to be resolved before we could finally decide the claims presented herein.

The specific issue presented is the same issue as was presented in *March*, *supra*, i.e., whether the salaries and benefits of teachers in the Department of Defense (DOD) Overseas Dependents Schools were being correctly computed. This controversy began with the passage of the Defense Department Overseas Teachers Pay and Personnel Practices Act, Public Law 86–91, July 17, 1959, 73 Stat. 213, 20 U.S. Code 901 note. Section 5(c) of the Act (20 U.S.C. 903(c)) established the manner in which teachers' salaries were to be calculated, by providing that:

> The Secretary of each military department shall fix the rates of basic compensation of teachers and teaching positions in his military department *in relation to the rates of basic compensation for similar positions* in the United States but no such rate of basic compensation so fixed shall exceed the highest rate of basic compensation for similar positions of a comparable level of duties and responsibilities under the municipal government of the District of Columbia. [Italic supplied.]

The manner in which the DOD was implementing this section was challenged in the courts. In the leading case on the point, *Crawford* v. *United States*, 376 F.2d 266 (Ct. Cl. 1967), *cert. denied* 389 U.S. 1041 (1968), the procedures established by the DOD were upheld. On that basis, in our decision of April 28, 1976, to Dr. Lieber, we sustained the denial of her claim for backpay to April 14, 1966.

The provisions establishing the pay-setting procedures were amended by Public Law 89–391, April 14, 1966, 80 Stat. 117, so that in its present form, 20 U.S.C. § 903(c) (1970), it provides that:

> The Secretary of each military department shall fix the basic compensation for teachers and teaching positions in his military department *at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties and responsibilities in urban school jurisdictions in the United States of 100,000 or more population.* [Italic supplied.]

The policies and procedures established under this amended section were also challenged in the courts.

The Court of Claims in an action brought by Mr. Rocco A. Trecosta, appearing *pro se*, again upheld the procedures being used by the DOD. *Trecosta* v. *United States*, 194 Ct. Cl. 1025 (1971). The court decided that case on cross-motions for summary judgment, issuing a brief order which provided, in pertinent part, that:

> Plaintiff contends that the express terms of Public Law No. 89–391(i.e., "compensation * * * at rates equal to * * * ") proscribe the use of "last years" salary rates as a basis for computation of current year salary requirements for overseas

teachers. *The legislative history of Public Law No. 89-391 clearly establishes that Congress intended no modification of the compensation formula which had been previously adopted by the Department of Defense regulation to implement Public Law No. 86-91. To the contrary, the amendment by Public Law No. 89-391 embraced this basic design and sought to make its implementation mandatory rather than discretionary.* The ultimate purpose of the new law was to eliminate the restrictive effects of the per pupil limitation, and thereby insure that teachers in the Department of Defense overseas program would receive salary increases comparable to those paid teachers in specified urban jurisdictions, whenever circumstances so warranted. Although Congress was fully cognizant of past Department procedure with respect to the salary year upon which the comparative standard was based, no action was taken and no change contemplated. In any event, recognizing the complex budgetary considerations for which the Department of Defense is held strictly accountable, it cannot be said that this standard is arbitrary or clearly wrong. Therefore, plaintiff is not entitled to recover * * *. [Italic supplied.]

The DOD pay-setting procedures were next considered in *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974). The Court of Appeals held that the procedures used by the DOD in implementing Public Law 89-391 were not proper in several respects and further, reversing the District Court, held that the Overseas Teachers were entitled to money damages. The case was remanded to the United States District Court for the District of Columbia, where a judgment was entered on June 30, 1975. That judgment provided, in paragraph 1(D), that:

"Plaintiffs" shall mean all ODS teachers with the exception of Rocco A. Trecosta, Aida M. Guevarra, Llewellyn Lieber and Elizabeth B. Dozier.

In the "Notice of Pendency of Class Action" that was ordered published in *March*, paragraph 1 provides, in pertinent part, that:

The Court will exclude you from the class if you request exclusion in writing on or before the 1st day of April, 1972. Persons who request exclusion will not be entitled to share in the benefits of the judgment if it is favorable to the plaintiffs, and will not be bound by the judgment rendered in this case if it is adverse to the plaintiffs.

Dr. Lieber, Ms. Guevarra, and Ms. Dozier Filosa all "opted out"—they elected not to be members of the plaintiff-class.

We note that in her claim Ms. Dozier Filosa stated that she did not know the basis for exempting her from the plaintiff-class. In light of that statement we requested that the Department of Justice provide us with a copy of Ms. Dozier Filosa's request for exclusion from the plaintiff-class. We were given a certified copy of a letter dated March 17, 1972, on the stationery of the Joshua Barney Elementary School (Gaeta), U.S. Naval Support Activity Detachment, addressed to Clerk, U.S. District Court for the District of Columbia, stating:

1. Elizabeth B. Dozier wishes exclusion from the case of VIRGINIA J. MARCH, et al., v. UNITED STATES.

The letter was signed Elizabeth B. Dozier, Principal. Based upon the terms of the judgment entered in *March* and this letter, we hold that on the record Elizabeth Dozier Filosa requested exclusion and was excluded from membership in the plaintiff-class in *March* v. *United States*, *supra*.

By the terms of the judgment and the "Notice of Pendency of Class Action," none of the three claimants herein may share in the recovery granted in *March*. The general rule is stated in *Sarasota Oil Co.* v. *Greyhound Leasing & Financial Corp.*, 483 F.2d 450 (10 Cir. 1973), that potential class members who "opt out" may not share in the class recovery. Therefore, if Dr. Lieber, Ms. Guevarra, and Ms. Dozier Filosa are to recover, an independent basis for that recovery must be found.

In determining whether there is an independent basis for allowing the claims presented here, it must be remembered that it has long been the position of our Office that decisions of the Court of Claims, Courts of Appeal, and other courts inferior to the United States Supreme Court, are persuasive but not binding upon this Office except in cases involving the same claimants as in the court decisions. See B–165571, June 1, 1972, and cases cited therein.

We have reviewed both *Trecosta* and *March*, and have examined the statutory provisions themselves. We believe that the change in the pay setting mandate from salaries computed "* * * in relation to the rates of basic compensation for similar positions," under Public Law 86–91, to salaries computed "* * * at rates equal to the average of the range of rates of basic compensation for similar positions," under Public Law 89–391, demonstrates a substantial change in congressional intent. The opinion of the Court of Appeals in *March* is very complete in its analysis of the statute itself and the legislative history. Because the analysis of the Court of Appeals is so complete, we will not repeat it here. However, we find the *March* decision persuasive and hereby adopt the conclusions reached by the Court of Appeals on all points. Consequently, we find that Dr. Lieber, Ms. Guevarra, and Ms. Dozier Filosa are entitled to recover the same salaries and benefits awarded to the members of the plaintiff-class in *March*, with the limitations set forth below.

The statute of limitations applicable to claims such as the *March* claims brought against the United States in the district courts is found in 28 U.S.C. § 2401 (1970) and is 6 years. Since *March* was filed in 1970 and Public Law 89–391 was effective on April 14, 1966, no member of the plaintiff-class has had his or her claim truncated by the statute of limitations. For claims that are administratively determined by this Office, the applicable time limitation is found in 31 U.S.C. § 71a (Supp. V, 1975), and is also 6 years. That limitation may be tolled only by filing a claim with this Office and filing with the agency concerned is not sufficient. Since the three claims that are under consideration herein are all being decided administratively, separate and apart from *March*, we must determine when each of the three claims for backpay was first received in this Office.

In our prior decision on Dr. Lieber's various claims, *Matter of Llewellyn Lieber*, B–164378, April 28, 1976, we detailed the history of her claims for backpay. She first asserted her claim to the General Accounting Office under Public Law 86–91 in 1965, and reasserted her claim under both applicable statutes in March 1971. Therefore, Dr. Lieber's claim is allowed for the period from the effective date of Public Law 89–391, April 14, 1966, until the end of the 1974–1975 school year, as it is our understanding that the DOD implemented *March* on a current basis beginning in the fall of 1975.

The first record we have of an assertion of a backpay claim by Ms. Guevarra is in a letter received here on September 4, 1975. Applying our 6-year statute of limitations means that Ms. Guevarra's claim may be paid from September 4, 1969, to the end of the 1974–1975 school year. Ms. Dozier Filosa's claim was received here on April 21, 1976, therefore her claim may be paid from April 21, 1970, to the end of the 1974–1975 school year. However, even though the amounts that these two claimants may recover are so limited, the backpay computation should be done for the entire period so that each claimant will be placed in the proper step on the salary tables, which is necessary to compute the proper amount of backpay for the allowable period.

While these claims were pending, counsel for the plaintiff-class in *March*, Isaac N. Groner, Esq., of Cole and Groner, asserted a claim on his own behalf for the assessment of the same 2 percent counsel fee he was allowed in the *March* judgment against any claims we might allow administratively. Mr. Groner's argument in support of his claim is set out below:

> Well established is the legal principle that one who has created or even preserved a fund for the benefit of a group may recover attorney fees from that fund. That principle has recently been reiterated by the Supreme Court. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 1621–1622 (1975); and cases cited therein. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375, 392 (1970). "Having been benefited by appellee's [the attorney's] pioneering work, the appellants [who had no relationship with him or other than as beneficiaries of his professional labors] should bear part of the burden of compensating him therefore." *Fiske* v. *Wallace*, 117 F. 2d 149, 151 (8th Cir. 1941).

Although no identifiable fund was created in *March*, in a similar situation the right to attorney's fees was sustained. *National Treasury Employees Union* v. *Nixon*, 521 F. 2d 317 (D.C. Cir. 1975). However, as we have already held above, none of the claimants herein have any entitlement under *March*, and thus they can receive no benefit from the common fund that Mr. Groner's efforts helped to create. The decision in *March* v. *United States*, *supra*, has, at best, benefited these

claimants through *stare decisis*, which is not sufficient to support an award of counsel fees. *Schleit* v. *British Overseas Airways Corporation*, 410 F. 2d 261 (D.C. Cir. 1969). The limited nature of the applicability of *March* to the three claimants herein is emphasized by the fact that two of the three will lose approximately half of their entitlement because of the application of our statute of limitations. Therefore, Mr. Groner is not entitled to receive counsel fees from these claimants because of his efforts to create a common fund.

We know of no other legal basis for allowing Mr. Groner's claim for attorney's fees, and, although Mr. Groner cites principles of fairness and decency, such principles are not sufficient to overcome the general rule that the employment and compensation of an attorney is a matter between the client and the attorney, absent some statutory provision or agreement based upon a statutory provision. 49 Comp. Gen. 44 (1969). Accordingly, we must disallow Mr. Groner's claim for attorney's fees, and no deduction for such fees shall be made from the amounts to be paid to Dr. Lieber, Ms. Guevarra, and Ms. Dozier Filosa.

In summary, settlement will be made in the amount found due to Dr. Llewellyn Lieber, Ms. Aida M. Guevarra, and Ms. Elizabeth Dozier Filosa. In determining the amount due, these claimants shall be given all of the applicable benefits granted to the members of the plaintiff-class in *March* v. *United States*, *supra*, and the amounts shall be calculated in accordance with 5 U.S.C. § 5596 (1976) and 5 C.F.R. Part 550, Subpart H. Additionally, the applicable period of limitation discussed above should be applied.

[B-191590]

Bids—Discarding All Bids—Cost Factors—Data, Rights, etc. Acquisition—Not Provided for in Invitation

Failure of a solicitation to provide for specific acquisition of unlimited rights in technical data is a "compelling reason" to cancel an invitation for bids after bids are opened where record supports procuring activity's determination that award thereunder to low bidder would not serve actual needs of Government because all cost factors to Government were not provided for in original solicitation.

Contracts—Data, Rights, etc.—Acquisition by Government—Unlimited Rights—Justification Requirements—Military Procurement

Where Navy met requirements for specific acquisition of unlimited data rights (DAR 9-202.2(f)(1)) but was unable to determine whether anticipated net savings would exceed acquisition cost of unlimited data rights until after bids were received Navy had adequate justification to solicit for unlimited data rights. Moreover, provision in solicitation for acquisition of unlimited data rights as separate bid item was not objectionable and was consistent with procurement regulation.

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Solicitation Improprieties

Protester's contention that second solicitation's specific acquisition of data clause did not meet Government's actual needs involves an alleged impropriety in the solicitation which was apparent prior to bid opening and since protester first raised issue with agency after bid opening it is untimely raised under 4 C.F.R. 20.2(b)(1) (1977).

Contracts—Awards—Protest Pending—Agency Protest Procedure Requirements—Agency's Noncompliance—Effect on Award Propriety

Neither Naval Regional Procurement Office Instruction 4200.30B nor DAR 2-407.8(a)(1) requires that a written protest be responded to in writing prior to award and since protest has been decided on its merits protester has not been prejudiced by absence of written agency response to its protest concerning the second solicitation prior to award.

Bids—Responsiveness—Discount Information

Insertion of the term "NET 10 PROXIMO" under the prompt payment discount section of successful bidder's offer means "payment due 10th of next month" and is construed merely as an indication that a discount is not offered rather than as an exception to the IFB.

In the matter of Creative Electric, Inc., September 26, 1978:

Creative Electric, Inc. (Creative) protests the cancellation of invitation for bids (IFB) N00123-77-B-0626 issued by the Naval Regional Procurement Office (NRPO) at Long Beach, California and the subsequent award under a second solicitation, IFB N00123-78-B-0663, to the Bendix Corporation (Bendix).

This protest arises out of a two-step formally advertised procurement for automatic anemometer selection switches, a newly-developed item which did not exist in the Navy inventory prior to this procurement. Following technical evaluation of proposals submitted under step one, an invitation was issued to six acceptable firms, including the protester. Creative was the apparent low bidder.

In the course of the preaward survey, Creative's president informed the preaward survey team that he planned to complete production of all associated data prior to award of the contract and consequently would deliver substantially all of the data with only limited rights. This position was based on the provision in the solicitation concerning data rights, entitled, "Rights in Technical Data and Computer Software (1974 NOV)" (Defense Acquisition Regulation (DAR) § 7-104.9(a)).

All parties agree that under this clause the Government would acquire unlimited rights only to data developed during the contract period as part of performance under the contract. Based on this interpretation, the requiring activity concluded that the solicitation

did not reflect the Government's minimum needs because in the circumstances it failed to provide for the necessary reprocurement data package (i.e., unlimited rights in technical data).

Thereafter the solicitation was canceled and a new one was issued reflecting increased quantities required and providing for the specific acquisition of unlimited data rights. Pursuant to DAR § 902.2(f)(1) specific acquisition of unlimited data rights may not be effected unless there is a clear need for reprocurement of the item, an alternative design is unavailable, the data as acquired would enable other competent manufacturers to produce the item without the need for any additional technical data (unless such additional data can be purchased reasonably or is available through other economic means), and the anticipated net savings in reprocurements would exceed the cost of acquisition.

In this case, the Navy determined that automatic anemometer selection switches would be reprocured, that because of their function all switches must be identical (alternate design unsuitable), and that by purchasing unlimited data rights the switches could be competitively reprocured from other competent manufacturers without the need for additional technical data. Navy determined that unlimited data rights were necessary to facilitate logistic support of the item and to obtain maximum competition for anticipated follow-on procurements. The Navy could not determine at the time it decided to solicit for unlimited data rights whether the anticipated net savings would exceed the acquisition cost of unlimited data rights but proposed to make that determination after bids were received. Subsequently, Navy determined that a savings would result if unlimited technical data rights were acquired in the initial procurement. Although the protester disagrees with the agency's projected savings it does not contend that the savings would be less than the acquisition cost of the data. In our opinion the Navy had adequate justification for desiring to solicit for unlimited data rights. Moreover, we see no basis to object to the Navy's determination after receipt of bids for the specific acquisition of unlimited data rights that acquisition of such rights would result in a net savings to the Government.

As to the method of acquiring unlimited rights in any limited rights technical data the cited regulation allows acquisition either by negotiation with an individual firm or by competition among several. In our opinion, Navy's decision to acquire the data through a competitive process in the initial procurement for the item rather than by negotiation only with the contractor to be selected was appropriate in the circumstances because, when feasible, the competitive process more likely insures that the acquisition is made at a reasonable price.

The question then is whether an existing solicitation properly could be canceled after opening to acquire the data in a competitive manner. In this connection DAR § 2–404.1 generally requires that there be a compelling reason to reject all bids and cancel an invitation after bids are opened. Cancellation is permitted if the invitation does not provide for consideration of all factors of cost to the Government. DAR § 2–404.1(b)(iv). Inasmuch as the specific acquisition of data is justified we believe it is obvious that all cost factors to the Government were not provided for in the original solicitation and that the cancellation was permissible for that reason.

Creative further argues that while the Navy justified cancellation and resolicitation on the ground that the first solicitation did not meet the Government's minimum needs for full data disclosure, the Navy, in fact, does not view the acquisition of unlimited data rights as a requirement but rather as an "added item that will be procured only if economically justifiable." In this connection we note that under DAR § 9–202.2(f)(1) the acquisition of unlimited rights in technical data is required to be stated in the contract schedule as a separate item and must be separately priced. This methodology does not, in our opinion, lessen the perceived need for the data.

The protester also questions whether the solicitation's specific acquisition of data clause would effect "full data disclosure." However, this question involves an alleged impropriety in the solicitation which was apparent prior to bid opening and therefore should have been protested to the agency or to this Office prior to bid opening, as provided in our bid protest procedures. *See* 4 C.F.R. § 20.2(b)(1) (1977). The protester first raised this issue with the agency after bid opening and we therefore consider it untimely raised.

In its protest Creative also alleges that the award to Bendix was illegal because it was made before the agency responded in writing to its protest to the agency concerning the second solicitation. In support of its position the protester refers to Naval Regional Procurement Office Instruction 4200.30B, an internal Navy instruction for handling protests. This instruction and DAR § 2–407.8(a)(1) require that a written protest be responded to in writing. However, neither the above instruction nor the cited regulation requires that a written response be made prior to award. Moreover, we have denied the protest on its merits and the protester, therefore, was not prejudiced by the absence of a written agency response prior to award.

Finally, the protester questions the responsiveness of Bendix's bid under the second solicitation. Creative suggests that Bendix took exception to the invitation by inserting the term "NET 10 PROXIMO"

under the prompt payment discount section of its offer. The Navy has responded as follows:

> The term NET 10 PROXIMO means payment due 10th of the next month. This was interpreted by NRPO as meaning "No prompt payment discount." No prompt payment discount is noted on the contract award. The inclusion or exclusion of a prompt payment discount has no impact on the responsiveness of a bid. Solicitation Instruction and Conditions (SF 33A), paragraph 9 merely advises bidders that prompt payment discounts of less than 20 calendar days will not be considered in evaluation of the bid but that said discounts will be taken if payment is made within the discount period.

We agree with the Navy that the insertion of words to the effect that payment is due by the 10th of the next month in the space provided on the Government's Standard Form 33 for indicating any prompt payment discount should be construed merely as an indication that a discount is not offered.

Accordingly, we find no basis to object to the Navy's determination to cancel and readvertise under a revised solicitation.

[B-191037]

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

Protest against sole-source procurements is timely since doubt as to date on which protester knew or should have known protest basis is resolved in favor of protester in absence of objective evidence to contrary.

Government Printing Office—Revolving Fund—Automatic Data Processing Equipment, etc. Procurement

Rule that contracts executed and supported by fiscal year appropriations may only be made within period of obligation availability and must concern bona fide need arising within the period of that availability is not applicable to procurement by Government Printing Office from revolving fund specifically exempted from fiscal year limitation.

Contracts—Negotiation—Minimum Needs—Selection Process—Not Prejudicial—Market Survey Utilization

Protester was not prejudiced by agency's failure to contact protester directly during conduct of market survey since protestor's equipment did not meet agency's mandatory requirements.

Contracts—Negotiation—Competition—Prior Delivery Requirement

Requirement for prior delivery of disc system is not unreasonable method of ascertaining reliability where time for procurement is short and information provided is used to contact current users of system and establish viability based on their comments.

Contracts—Negotiation—Competition—Source Selection—Exclusion of Other Firms—Market Survey, etc. Adequacy

Failure in market survey to provide details of requirements to potential vendor is not unreasonable in view of time constraints, primary reliance on technical

literature and agency contacts, and contacts with General Services Administration which should have been able to provide expert advice on both market place and equipment.

Contracts—Negotiation—Sole-Source Basis—Determination and Findings—One Known Source—Propriety of Determination

Protest against sole-source awards is denied where agency performed adequate market survey and record establishes that awardees were only known firms with equipment capable of meeting agency's requirements.

In the matter of Memorex Corporation, September 27, 1978:

By letter of January 5, 1978, Memorex Corporation protests the award by the Government Printing Office (GPO) of two contracts negotiated on a sole-source basis. Memorex protests the award to Storage Technology Corporation (STC) of a purchase order for a 2-year lease of disc drives and related equipment and the award to COMTEN for rental of a communications control unit for a period of at least 11 months.

GPO challenges this protest as untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1978), which require that protests be filed with either GAO or the awarding agency within 10 days after the basis for protest is known or should have been known, whichever is earlier. GPO contends that Memorex was informed by telephone on October 20, 1977, of the award to STC, and informed by letter dated November 15, 1977, that its then-installed control unit had been replaced by a COMTEN unit, yet did not file a protest with that agency until January 4, 1978. GPO further contends that Memorex did not request documents relating to the procurements until December 15, 1977, subsequent to inquiring how to obtain such documentation at a meeting held on December 1.

Memorex alleges that it did not learn of either award until around November 17, and that all earlier telephone conversations with GPO were simply discussions of whether GPO had a requirement for equipment. Memorex claims that its representatives met with representatives of GPO within 1 week of the November 17 notice and questioned the awards. Memorex further alleges that at this meeting it requested GPO to provide it with copies of the contracts and sole-source determinations, which GPO promised to provide but did not provide until December 16, following a written request filed by Memorex under the Freedom of Information Act. Memorex contends that it had no basis for protest until it received these documents and became aware of the alleged improprieties they reveal. Memorex then lodged an oral protest with GPO less than 1 week after receipt of the requested documents on December 16.

As stated in *Ampex Corporation*, B-190529, March 16, 1978, 78-1 CPD 212, "* * * We have held that any doubt as to the date on which knowledge was or should have been obtained as to a protest basis should be resolved in favor of the protester, absent objective evidence refuting its assertions." While there has been considerable dispute between Memorex and GPO concerning this issue, we believe the Memorex protest is timely. Memorex has protested the sole-source awards on the basis that it believes Memorex is capable of fulfilling the requirements set forth by GPO in its Determinations and Findings. The protester could not have known the contents of these documents, and consequently the bases of its protest, prior to receiving them on December 16. Since Memorex protested to GPO within 10 days of this date and protested to GAO within 10 days of GPO's denial of its protest, we consider the protest timely filed. See 4 C.F.R. § 20.2(a), *supra*.

The GPO advises that these two procurements were the result of an effort to satisfy GPO's growing electronic data processing (EDP) needs through the acquisition of expanded disc storage capacity and an enhanced telecommunications capability. The GPO determined to procure a communications control unit (CCU) capable both of supporting its then-current system configuration, serviced by a Memorex 1270, and of meeting its projected telecommunications needs for the next 5 years. Mandatory requirements for the CCU were established on the basis of fulfilling both of these needs. Mandatory requirements for the additional disc storage were established on the basis of current needs. We will concern ourselves here only with those requirements to which Memorex has taken objection or which otherwise are necessary for our decision.

Furthermore, it is incumbent upon us in examining this matter to weigh the competitive effects of GPO's actions in its conduct of these procurements. Competition is the required norm for Federal procurements and we require that interested firms be provided a fair opportunity to participate where circumstances permit. We consider the failure to provide such an opportunity to be an improper prequalification. *General Electrodynamics Corporation—Reconsideration*, B-190020, August 16, 1978, 78-2 CPD 121. Consequently, in our review we must also consider whether in the circumstances present here the GPO reasonably endeavored to promote competition and to afford interested vendors an opportunity to participate.

We will first consider certain aspects peculiar to the CCU procurement.

In evaluating its projected telecommunications needs, the GPO established a mandatory requirement for the CCU to support both

the IBM–SDLC protocol, to which GPO anticipates conversion within 5 years, and partitioned emulation processing (PEP) to support the current system while allowing simultaneous testing of new software. (PEP basically allows a new or replacement processor or device to operate on software and controls tailored to another machine as that machine would have done while also operating on new or converted software tailored to the new machine.) In addition, GPO required a turnkey system deliverable within 60 days to accommodate a software development contract then underway and to utilize idle installed equipment awaiting completion of that contract. The CCU was also required to possess compatibility and a backup capability with the COMTEN CCU's installed in other legislative branch EDP systems.

After identifying its needs, the GPO states that it surveyed the market for CCU's through a "review of technical periodicals published within the last year, review of technical literature of vendors, conversations with communication equipment vendors currently on GSA schedule and two vendors not on the schedule." Four systems, including the Memorex 1380, were identified as meeting GPO's requirements for support of the current system configuration; of these, COMTEN's 3670–II was identified as the only CCU capable of also meeting all of GPO's projected needs. It was GPO's assessment that the Memorex 1380 system under consideration would not support PEP, did not meet GPO's requirements for IBM–SDLC protocol handling, and that Memorex could not presently provide a turnkey system. In addition, GPO determined that Memorex's 1380 could not presently provide the backup support and redundancy required of GPO with other legislative agencies utilizing the COMTEN CCU.

Memorex objects to the fact that it was never contacted during GPO's survey of CCU vendors and contends that GPO's use of projected needs in the establishment of its mandatory requirements for a CCU renders the sole-source procurement from COMTEN fatally defective and illegal. In support of this latter contention, Memorex cites a prior decision of this Office, 37 Comp. Gen. 155 (1957), for the proposition that absent special statutory authority, an agency may not make a contract for continuing needs beyond the bona fide needs of the current fiscal year.

We note first that Memorex has misinterpreted our decision. A correct summary of our holding in 37 Comp. Gen. 155, *supra*, would be that an agency cannot by contract utilize funds authorized for expenditure in one fiscal year to pay for needs occurring in other fiscal years, or, as we stated: "Contracts executed and supported under authority of fiscal year appropriations * * * can only be made within the period

of their obligation availability and must concern a *bona fide* need arising within such fiscal availability." *Burroughs Corporation*, 56 Comp. Gen. 142, 153 (1976), 76–2 CPD 472, p. 17; see also *Honeywell Information Systems*, 56 Comp. Gen. 167 (1976), 76–2 CPD 475; 44 Comp. Gen. 399 (1965). The applicability of these decisions depends on the nature of the funds supporting the contracts in question.

We note in this connection that GPO conducted this procurement utilizing funds in the Government Printing Office Revolving Fund authorized under the provisions of 44 U.S.C. § 309 (1970), which provide in part that the fund is available *without fiscal year limitation* for specified purposes. Title X of the Legislative Branch Appropriation Act, 1977, Public Law 94–440, 90 Stat. 1459, authorized the GPO to purchase, lease, maintain and otherwise acquire automatic data processing equipment from these funds. We therefore believe that the GPO could accomplish these particular procurements without regard to fiscal year limitations and that the decision cited by Memorex is inapplicable.

Secondly, we fail to see that Memorex was damaged by GPO's failure to contact Memorex directly regarding the CCU procurement. We previously have upheld sole-source awards based on market surveys where the purpose of the survey was not to determine the existence of a company capable of developing equipment responsive to an agency's minimum needs, but to determine whether such equipment is already in existence and, if so, which companies can supply it. See *Maremont Corp.*, 55 Comp Gen. 1362 (1976), 76–2 CPD 181; *Control Data Corp.*, 55 Comp. Gen. 1019 (1976), 76–1 CPD 276. We think it clear that this was GPO's purpose here, particularly in view of GPO's stated objective to replace its then-current CCU as soon as possible. In this connection, we note that Memorex has conceded that it could not meet all of GPO's mandatory requirements without additional software development, and we fail to see the advantage to Memorex to be gained by communicating this directly to GPO.

The procurement of additional disc drives and the related control unit was undertaken to add 2.5 billion bytes of storage to GPO's system to support applications being added during the 1978 fiscal year. GPO's mandatory requirements for the disc system included a requirement for a system which had been delivered previously and which could be delivered within 90 days from receipt of purchase order or to coincide with the installation of GPO's new on-line systems. GPO's requirement for prior delivery was premised on a need for proven reliability. GPO surveyed the market through investigation of "the DATAPRO Reports on computer equipment, numerous ADP technical periodicals, and personal contacts at other agencies, including

GSA." Four vendors, including Memorex, were identified as having satisfactory equipment, but only STC was identified as capable of meeting the delivery schedule and the requirement for prior delivery. In this regard, GPO noted that Memorex had never delivered a disc system with its own model 3674 controller and that although the Memorex disc drives were deliverable with an IBM control unit, IBM was quoting a 1-year delivery time. The GPO concluded, therefore, that Memorex would be unable to meet its delivery requirements.

Memorex disputes the propriety of the prior delivery requirement, contending that it bears no rational relationship to reliability or any other quality. The GPO requirements underlying the D&F associated with this procurement stress reliability as the justification for requiring an "off-the-shelf" system.

While we agree with Memorex that a bare requirement for prior delivery is not the best means for determining that a system's reliability has been established, we do not think that this reading reflects the actual intent and use of the requirement by GPO. The STC sole-source justification states that current users were contacted and that the disc system's viability was established through these contacts rather than being implied from the mere fact of prior delivery. We would find it difficult to suggest a better method of ascertaining a system's operational reliability than by inquiry to users and, given GPO's time constraints for this procurement, we cannot regard this to be an unreasonable method of identifying users.

Memorex also contends that the market survey performed by GPO on this procurement was both deficient and conducted in such a manner as to be misleading. Regarding this latter point, Memorex states that in response to its inquiries, the GPO denied that it was contemplating an imminent purchase of the disc drives and controller and that Memorex therefore provided only general information on its disc system rather than responding to a specific requirement with detailed information. Memorex argues that had it been advised of GPO's actual requirements, it could have demonstrated both its compliance with the prior delivery requirement and its ability to deliver a disc system within the required time constraints by combining the Memorex disc drives with an IBM 3830–2 control unit available through an independent leasing company. Memorex has demonstrated to our satisfaction that its disc drive has been delivered in this configuration and that an IBM controller could have been obtained within the time specified. We note also that Memorex advised the GPO that the Memorex disc drive and the IBM controller were compatible in its written response to GPO's inquiry. However, as we noted above, the GPO had been quoted a 1-year delivery time by IBM.

Memorex contends that the only valid way to "survey" a market is to issue a solicitation and in support of this proposition cites our decision in 52 Comp. Gen. 987 (1973), in which we rejected sole-source awards based on market surveys where we found "a proclivity to sole-source awards under selection methods where 'unique' capabilities are pointed to in justification for departures from the regulatory requirements for competitive negotiation." 52 Comp. Gen. 987, *supra*, at 992. We concluded in that case that the contracting agency had not endeavored to demonstrate that the awardee possessed unique capabilities to the exclusion of all other interested firms, and we determined that there were in fact other interested companies that could have bid for the contract.

We think that the decision cited by Memorex is distinguishable from the present case. We note at the outset that the subject matter of our decision in 52 Comp. Gen. 987, *supra*, was a contract for the performance of a long-term study involving for the purposes of competitive evaluation what was essentially a subjective assessment of an offeror's future ability to perform, whereas the procurement here involves an assessment of present technical capability more susceptible to objective evaluation. We note also that in the cited case the procuring agency prequalified the awardee without making an effort to identify possible competitors, while in the present matter the GPO undertook to survey the market and to identify the equipment able to meet its needs.

While a close question, we do not believe that the market surveys undertaken by the GPO in connection with these procurements were unreasonably restrictive of competition. Although we are troubled by GPO's apparent reluctance to furnish more details of its requirements to Memorex, we previously have considered as sufficient a market survey based on a literature search and agency contacts not unlike that conducted here. See *Del Norte Technology, Inc.*, B–183528, August 5, 1975, 75–2 CPD 82. GPO's survey not only included an extensive review of the literature, but, with regard to the disc system, also involved contacts with vendors and with the General Services Administration, the agency granted the authority under the Brooks Act, 40 U.S.C. § 759 (1970), to coordinate and provide for the efficient purchase, lease and maintenance of ADP equipment by Federal agencies and which Memorex concedes should be familiar with its equipment and the marketplace. We think it significant that GPO contacted the GSA even though GPO was exempted under Public Law 94–440, *supra*, from the requirements of the Brooks Act, *supra*, for these procurements and must weigh this effort to obtain information against what appear to have been less than comprehensive inquiries to ven-

dors. On balance, we are not prepared to state that GPO's failure to furnish all of the details of its requirements to Memorex was unreasonable in view of the time constraints involved, GPO's primary reliance on technical literature and agency contacts, and its contacts with the GSA which should have been able to provide expert advice regarding both equipment and the marketplace. We think the GPO was entitled to rely on the results of this survey.

As a general rule, we will not disturb a decision to procure on a sole-source basis where the Determination and Finding to negotiate on a sole-source basis is supported by a record sufficiently establishing that the awardee was the only known source with the capability to satisfy the procuring activity's requirements. See *Hayden Electric Motors, Inc.*, B–186769, August 10, 1977, 77–2 CPD 106; *Triple A Machine Shop, Inc.*, B–185644, March 25, 1976, 76–1 CPD 197; B–175953, July 21, 1972. We believe that this is the case here.

The protest is denied.

[B–191708]

General Accounting Office—Jurisdiction—Grants-In-Aid—Grant Procurements—Housing and Urban Development Department Grants

General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development block grant.

In the matter of RAJ Construction, Inc., September 28, 1978:

RAJ Construction, Inc. has filed a complaint against the award of a contract by the Town of Riverside, Washington under a Department of Housing and Urban Development (HUD) block grant. Funding for this project was provided through a Community Development Block Grant (block grant) authorized by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (Supp. V, 1975) (hereinafter "the Act").

It is HUD's contention that GAO should decline to take jurisdiction because our review would be inconsistent with the authorizing legislation of the Block Grant Program and its method of operation. HUD points out that it was the intent of Congress, through the consolidation of several categorical grant programs, to reduce the Federal involvement and supervision which had existed under the prior programs. Relying on legislative history the agency states that the block grant program was designed to ensure that "local elected officials, rather than special-purpose agencies, would have principal responsibility for determining community development needs, establishing priorities,

and allocating resources." H.R. Rep. No. 1114, 93 Cong. 2d Sess. 3 (1974). HUD has noted that this Congressional Report further states at page 10:

> Since Federal application review requirements are being simplified to such a great extent, the post-audit and review requirements will serve as the basic assurance that block grant funds are being used properly to achieve the bill's objectives.

Consistent with this purpose HUD reduced Federal agency monitoring of activities under the new grant program so that decision-making responsibilities would rest in local government officials. Moreover, HUD notes that the Act provides GAO with the following authority:

> Insofar as they relate to funds provided under this title, the financial transactions of recipients of such funds *may be audited* by the General Accounting Office under such rules and regulations as may be prescribed by the Comptroller General of the United States. The representatives of the General Accounting Office shall have access to all books, accounts, records, reports, files, and other papers, things or property belonging to or in use by such recipients pertaining to such financial transactions and necessary to facilitate the audit. [Italic supplied.].

HUD argues that "[this] authority is of the same character as the authority given the grantor agency—authority under which Congress clearly intended that post-performance review rather than grant monitoring during performance be emphasized." This limited review, in its opinion, would not include adjudication of complaints concerning the award of contracts under block grants.

HUD regulations require grantees of block grants to comply with the provisions of Federal Management Circular (FMC) 74–7. 24 C.F.R. § 570.507 (1977). Attachment '0' of FMC 74–7 sets procurement standards for grantees and provides:

> * * * * * * *
>
> 2. * * * The grantee is the responsible authority, without recourse to the grantor agency regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of a grant. This includes * * * protests of award * * *.
>
> * * * * * * *
>
> 3. Grantees may use their own procurement regulations which reflect applicable State and local law, rules and regulations provided that procurements made with Federal grant funds adhere to the standards set forth as follows:
>
> * * * * * * *
>
> b. All procurement transactions * * * shall be conducted in a manner so as to provide maximum open and free competition.

Consistent with FMC 74–7 HUD maintains no review jurisdiction of contractual disputes or precontractual protests arising out of procurements with block grant program funds, but leaves the settlement of such issues wholly within the province of the grantee. HUD urges that GAO exercise the same restraint.

As noted above, HUD regulations require block grant grantees to comply with the provisions of FMC 74–7. In addition, the Grant

Agreement states that Federal grant assistance will be provided "subject to * * * applicable law, regulations and all other requirements of HUD * * *." Where, as here, the grant agreement stipulates that the grantee will comply with all pertinent rules and regulations of the grantor agency, it is the duty of the agency to ensure that the grantee is enforcing the application of such policies pursuant to the grant agreement, including a requirement for competitive bidding. *Thomas Construction Company, Incorporated, et al.*, 55 Comp. Gen. 139 (1975), 75-2 CPD 101; *Trinity Services, Inc.*, B-184899, December 23, 1976, 76-2 CPD 527. Consequently, HUD should ensure that proper procurement practices are followed by its grantees in this area.

HUD's review of contract awards under grants would not be contrary to the Act and we believe that a review at the time of an alleged erroneous award action will complement HUD's review function. A complainant will present its best case at an early stage of the procurement process. A complaint which is filed timely will permit the grantee and the cognizant Federal agency to review the case when the salient facts of the matter are clear. It would be difficult in a post-performance audit review to discover procurement irregularities, because interested parties would not be inclined to actively participate. There is no incentive to potential complainants possessing first hand knowledge of procurement irregularities for bringing their grievances before the appropriate authority in a post-performance audit review.

For the same reasons it is appropriate for GAO to review a complaint at an early stage of the procurement process. Furthermore, we have undertaken reviews concerning the propriety of contract awards made by grantees "consistent with [GAO's] statutory obligation * * * to investigate the receipt, disbursement, and application of public funds * * *." 40 Fed. Reg. 42406 (1975); 31 U.S.C. § 53 (1970). The fact that GAO's role under the Act is an audit function is not an impediment to our review of this matter. See *Thomas Construction Company, Incorporated, et al., supra.* Moreover, HUD regulations through the application of FMC-74-7 require that the grantee adhere to the principles of competitive bidding. As we stated in *Thomas Construction Company, et al., supra:*

> We recognize that under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. It is the responsibility, however, of the cognizant Federal agency, * * * to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. *In such cases, we have assumed jurisdiction in order to advise the agency whether the requirements for competitive bidding have been met* * * *. [Italic supplied.]

For these reasons, we believe the better course is to exercise our jurisdiction in this matter.

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AIRCRAFT
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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

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Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

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Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future 806

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The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located 357

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Generally, when an original grantee cannot cmplete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application 205

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

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Claims. (*See* **CLAIMS, Attorneys' fees**)

Employee litigation

Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility 270

Employee transfer expense. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Attorney fees**)

Judgment award

Counsel for plaintiff-class in *March* v. *United States*, 506 F. 2d 1306 (D.C. Cir. 1974), is not entitled to be paid the 2 percent counsel fee awarded to him in *March*, when the claims of individuals who "opted out" of *March* are paid administratively. The rule that a party who creates or protects a "common fund" is entitled to counsel fees is not controlling here since the claimants herein are barred from recovery from the fund that counsel created in *March* 856

Suits against officers and employees

Official capacity

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

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

BIDDERS

Anticipated profits

Unsuccessful bidders. (*See* **BIDDERS, Unsuccessful, Anticipated profits**)

Collusion

Collusive bidding. (*See* **BIDS, Collusive bidding**)

Generally, (*See* **BIDS, Collusive bidding**)

Multiple bidding. (*See* **BIDS, Multiple**)

Post-bid-opening agreements

Effect on bid

Mere fact that bidder enters into post-bid-opening agreement to obtain needed resources is not reason in itself to reject bid, unless effect of agreement is to cause bidding entity to "no longer exist" and to cause effective transfer of bid to nonbidding entity 67

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Labor Department review
Ground of protest alleging that bidder is not "regular dealer or manufacturer" will not be considered since responsibility for deciding "regular dealer or manufacturer" status is vested in contracting officer and Department of Labor 67
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Responsibility
Conclusive determination
Vested in SBA
Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration 31
Responsibility *v.* bid responsiveness
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Purpose
Competency of bidder to perform
Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive 17
Unsuccessful
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Claim for anticipated profits and for cost of pursuing bid protest is rejected 125

BIDS
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Procuring activity is not precluded from making multiple awards where solicitation expressly reserves Government's right to do so and bidder does not qualify its bid for consideration only on "all-or-none" basis. Agency's requests for extensions of bid acceptance period were not inconsistent with provision to make multiple awards, and extensions granted, without limiting language to the contrary, preserve Government's right to so award intact 468
After expiration
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Effect on competitive system
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Initial refusal and delay in reviving low bid
Award to second low bidder *v.* solicitation cancellation
Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency 228
Reinstatement of canceled IFB
Bidder's option to accept award
Invitation for bids (IFB) provided that performance period was from March 15, 1977, or 5 days after award, if later, until March 14, 1978. Bidder confirmed bid on August 15, 1977, after General Accounting Office (GAO) decision upholding its preaward bid protest and during GAO review of another firm's request for reconsideration of that decision, on condition that award be for performance period of 1 year from award. Bid was thereby rendered ineligible for acceptance, since award of contract pursuant to advertising statutes must be on same terms offered all bidders, and various IFB clauses cited by bidder concern post-award situations 125
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Bidders
Generally. (*See* **BIDDERS**)
Cancellation. (*See* **BIDS, Discarding all bids**)
Collusive bidding
Allegations unsupported by evidence
Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations 277

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Equal bidding basis for all bidders
Bidders' superior advantages Page
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
Prior producer's competitive advantage
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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Bid responsiveness
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Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74-7, attachment O and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs 85
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
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Conformance of bids
Requirement in Federal procurements
While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid *conforms* to the solicitation. 41 U.S.C. 253(b) (1970) 686
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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
Waiver of descriptive data requirement. (*See* **CONTRACTS, Specifications, Descriptive data, Waiver of requirement**)
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Discarding all bids
Compelling reasons only
An invitation for bids which solicits bids on four alternate methods of performance, without indicating method of selecting among alternates, should not be resolicited where bid selected by grantee for award is low under any one of the four 73
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Not provided for in invitation
Failure of a solicitation to provide for specific acquisition of unlimited rights in technical data is a "compelling reason" to cancel an invitation for bids after bids are opened where record supports procuring activity's determination that award thereunder to low bidder would not serve actual needs of Government because all cost factors to Government were not provided for in original solicitation 861

BIDS—Continued
Discarding all bids—Continued
Prices excessive Page
Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here 234
Reinstatement
General Accounting Office direction
Bidder's option to accept award
Although bids under canceled IFB expired during GAO consideration of protest against cancellation, where GAO decision recommends reinstatement of IFB, successful bidder may still, at its option, accept award thereunder 125
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Auction atmosphere not created
Cancellation of solicitation after bid opening and subsequent resolic tation do not create "auction" atmosphere where solicitation was properly canceled due to unreasonable prices and lack of adequate competition 234
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Evaluation
Aggregate *v.* separable items, prices, etc.
Subitems
Invitation for bids provided spaces to insert prices for extended price, unit price and subunit price. Although award was based only on evaluation of extended and unit price, subunit price may not be ignored, since it cannot be determined from bid which price is correct 410
Bidders' superior advantages
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
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Cost estimates
The fact that invitation for bids (IFB) pricing structure places risk on the bidder does not render IFB improper, since bidders are expected to take risks into account in formulating their bids 271
Costs
Storage-time related costs
Not for consideration
Not listed in IFB
Contrary to protester's insistence, storage-time related costs could not be considered as evaluation standards because they were not listed in IFB 103

BIDS—Continued
Evaluation—Continued
Delivery provisions
Information
Failure to furnish Page
Failure of selected bidder to quote early delivery dates under "storage credits" pricing option is not significant since blanks provided for insertion of dates applied only to "non-storage credits" bidders and procuring agency did not need early delivery dates to evaluate bids. Further, IFB contained no indication of relative preference of bid depending on date of early delivery. Moreover, in absence of dates bidder is obligated to deliver at an indefinite date prior to required delivery dates which is still most advantageous to the Government 103
Determinable factors requirement
Failure to list in solicitation
Not prejudicial to protester
While solicitation failed to set forth objectively determinable evaluation factors, protester was not prejudiced thereby 89
Disclosure of evaluation factors
Failure
Not prejudicial to protester
Protester was not prejudiced by Air Force's failure to disclose that award under "storage credits" pricing option might be decided, in part, by results of "storage credits" bids under other solicitations. Moreover, since Government could not disclose Government's cost estimate of construction of storage facility to be built by use of offered storage credits, and given clear right of Government to determine reasonableness of submitted bids by appropriate information, use of separate bidding results to determine award is not objectionable. Analogy is made to "stepladder" bidding procedure 103
Discount provisions
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Illegal award. (*See* **CONTRACTS, Awards, Erroneous**)
Estimates
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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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Failure to consider present value of money factors or residual values in determining low bidder under lease/purchase alternatives is proper where invitation for bids (IFB) does not include such factors for evaluation. In advertised procurements, if any factors other than bid price are to be considered in determining low bidder, IFB must advise of such factors 89

BIDS—Continued
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Point system
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Bid samples furnished without interior graining, not listed as subcharacteristic of prescribed "interior appearance" criterion, could not be evaluated as required by solicitation for neatness and smoothness of interior appearance because samples could not demonstrate that with addition of graining bidder's product would retain requisite appearance. Procuring activity lacked reasonable basis to conclude samples complied with solicitation's subjective characteristics and was required to reject bid as nonresponsive to solicitation---------- 686
Assertion that protester previously furnished acceptable bid samples to procuring activity does not determine acceptability of samples submitted in response to instant solicitation, nor does acceptance of items on a prior contract bind agency to accept nonconforming items under a subsequent contract---------- 686
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Invitation for bids
Cancellation
Erroneous
Reinstatement recommended
An invitation for bids which solicits bids on four alternate methods of performance, without indicating method of selecting among alternates, should not be resolicited where bid selected by grantee for award is low under any one of the four---------- 73
Resolicitation
Two-step procurement
Failure of a solicitation to provide for specific acquisition of unlimited rights in technical data is a "compelling reason" to cancel an invitation for bids after bids are opened where record supports procuring activity's determination that award thereunder to low bidder would not serve actual needs of Government because all cost factors to Government were not provided for in original solicitation---------- 861

BIDS—Continued
Invitation for bids—Continued
Clauses
Bid Equalization Factor
Two-step procurement
Step-one application propriety Page

Bid evaluation factors normally should be set forth only in Invitation for Bids (IFB) issued under step two. Here, however, Bid Equalization Factor Clause so related to technical requirement in step one for benchmarking that it was necessary for VA to set it out in step one 653

Pricing structure
Risk

The fact that invitation for bids (IFB) pricing structure places risk on the bidder does not render IFB improper, since bidders are expected to take risks into account in formulating their bids 271

Requirements
Submission of test data

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

Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)
Late
Mishandling determination
Telegraphic modifications. (*See* **BIDS, Late, Telegraphic modifications, Mishandling by Government**)
Telegraphic modifications
Delay due to Western Union
Failure to use tie-in line to installation

Erroneous information provided by agency and agency's acceptance of telegraph company's delivery by telephone did not constitute Government mishandling solely responsible for or the paramount reason for untimely receipt of telegraphic bid modification where telegram was qualified on its face as official Government business and telegraph company should have been aware of existence of its own tie-in line to Government installation 127

Delivered subsequent to bid opening
Telephone notification received prior to bid opening

Bid modification was untimely where telegram was received after bid opening, notwithstanding fact that agency had received telephone call from telegraph company prior to bid opening indicating that bidder was modifying its bid 127

Transmission by other than mail
Improper Government action

Commercial carrier attempted to deliver protester's bid to office designated in invitation for bids for receipt of hand-delivered bids. Government personnel directed carrier to deliver bid to Central Receiving Warehouse instead and, consequently, bid was "late." Since bid was late due to improper Government action, and protester's bid was in Government hands before bid opening, protester's bid was properly for consideration 119

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Mistakes
Contracting officer's error detection duty
Error alleged after award. (*See* **CONTRACTS, Mistakes, Contracting officer's error detection duty**)
Correction
After bid opening
Rule Page

Erroneous bid should not have been corrected, since cost proposal for items omitted from bid price was prepared after bid opening and correction would be recalculation of bid to include factors not originally considered ---- 257

Denial
Waiver of correction

Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency ---- 228

Intended bid price
Established in bid

Correction of mistake in bid will be permitted where bidder's worksheets clearly show that bidder made a mathematical error in transferring subtotal for equipment and miscellaneous work from bid worksheet to final summary sheet. Questions raised concerning portions of bidder's worksheets which have no relation to type of error alleged do not preclude correction where clear and convincing evidence establishes mistake and actual bid intended ---- 438

Price
Subitems

Invitation for bids provided spaces to insert prices for extended price, unit price and subunit price. Although award was based only on evaluation of extended and unit price, subunit price may not be ignored, since it cannot be determined from bid which price is correct ---- 410

Recalculation of bid
"Rounding off" corrected price

Upon correction of mistake in bid, where bidder initially "rounded off" total bid price in submitting its bid, corrected total bid price is also subject to adjustment to reflect "rounding off" ---- 438

Responsiveness determination

Mistake in bid rules may be applied only when bid is responsive and otherwise for acceptance, not to correct price omission ---- 597

Multiple
Propriety

Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations ---- 277

BIDS—Continued

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

Prices

Cost, etc., data Page

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

Item omission

When contracting officer cannot determine, from pattern of pricing in bid as submitted, what price bidder intended for omitted item, price may not be supplied after opening 597

Reasonableness

Administrative determination

Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here 234

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

Rejection

Nonresponsive

Information requirements

Descriptive data

Invitation for bids contained brand name or equal clause providing that if bidder proposed furnishing equal product bid must contain sufficient descriptive data to evaluate it. Where bidder furnished no descriptive data, furnishing similar product to agency under previous solicitation is not acceptable substitute for descriptive data requirement, and bid was properly rejected as nonresponsive 234

Sample requirements

Nonconformance

Agency's favorable consideration of bid samples furnished with note stating that although samples' interior did not comply with solicitation production items would conform to specification, is tantamount to allowing bidder to submit additional samples after bid opening and violates rule that bid may not be altered after bid opening to make it responsive to solicitation 686

Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

Responsiveness

Discount information

Insertion of the term "NET 10 PROXIMO" under the prompt payment discount section of successful bidder's offer means "payment due 10th of next month" and is construed merely as an indication that a discount is not offered rather than as an exception to the IFB 861

Responsiveness *v.* bidder responsibility

General Accounting Office finds that questioned bid contains unconditional commitment to furnish that which procuring agency requires contrary to assertion that bid is nonresponsive 67

BIDS—Continued
Small business concerns
Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole-source basis**)
Specifications. (*See* **CONTRACTS, Specifications**)
Two-step procurement
First step
Testing requirements. (*See* **CONTRACTS, Negotiation, Two-step procurement, First step, Benchmark testing**)
Second step
Advertising *v.* negotiation Page
Record indicates only one step-one offeror was benchmarked. Since FPR provides for discontinuance of two-step method of procurement after evaluation of step-one technical proposals, VA should consider cancellation of IFB issued under step two and instead negotiate price with only offeror ---------- 653
Unbalanced
Responsiveness of bid
Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for that fiscal year; however, had bidder unbalanced its bid by including the capital cost of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. 529 ------ 89

BOARDS, COMMITTEES AND COMMISSIONS
Members
Holding over beyond expiration of term
Commissioner was appointed to serve for 2-year period on newly created Commodity Futures Trading Commission. Upon expiration of that period no successor was nominated. Commission asks whether holdover provision of 7 U.S.C. 4a(a)(B) applies to commissioners first appointed to serve immediately following creation of Commission. Purpose of holdover provision is to avoid vacancies which may prove disruptive of Commission work. Thus, holdover provision does apply to those commissioners first appointed to the Commission ---------- 213
Commissioner of Commodity Futures Trading Commission continued to serve beyond expiration of fixed period of appointment on April 14, 1977, pursuant to holdover provision of 7 U.S.C. 4a(a)(B). Commissioner's entitlement to compensation after expiration of first session of 95th Congress is questioned since statute provides that a commissioner may not continue to serve "beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." The word "next" before "session" refers to the adjournment of a subsequent session of Congress. Therefore, the Commissioner may be compensated until expiration of the 2d session of the 95th Congress, or appointment and qualification of successor, whichever event occurs first ---------- 213
National Commission on Observance of International Women's Year. (*See* **NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR**)

BONDS
Performance
Miller Act coverage
Unauthorized bond submitted
Government liability Page

Even if Government negligently fails to insure that Miller Act bonds are filed with construction contract, unpaid supplier's remedy lies against prime contractor and not the Government 176

Premium payment
Inclusion in first progress payment

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

BUY AMERICAN ACT
Contracts
Provisions of Act not applicable to grantee contracts

The Buy American Act (41 U.S.C. 10 (1970)) provisions do not apply to contracts made by grantees 85

Small business concerns
Effect of appropriation prohibition
Price differential prohibition *v.* preference for domestic products

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

Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations 34

CLAIMS
Attorneys' fees
Authority

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

Counsel for plaintiff-class in *March* v. *United States*, 506 F. 2d 1306 (D.C. Cir. 1974), is not entitled to be paid the 2 percent counsel fee awarded to him in *March*, when the claims of individuals who "opted out" of *March* are paid administratively. The rule that a party who creates or protects a "common fund" is entitled to counsel fees is not controlling here since the claimants herein are barred from recovery from the fund that counsel created in *March* 856

CLAIMS—Continued
By Government
Collection. (*See* **DEBT COLLECTIONS**)
Correction
Limitation
Travel voucher errors
Administrative correction Page
Agencies may administratively correct travel vouchers with underclaims not exceeding $30. Overclaims in any amount may be administratively reduced. 36 Comp. Gen. 769 and B–131105, May 23, 1973, modified 298
Doubtful
Submission to GAO
Department of the Air Force asks whether an employee who submits a fraudulent claim may be refused access to the General Accounting Office (GAO) for purpose of settling his claim. Since GAO has authority to settle and adjust claims by the Government or against it, employee may submit claim to GAO even though it is considered fraudulent by his agency. Agency should expedite adjudication by using agency channels to send claim to GAO with its report 664
False. (*See* **FRAUD, False claims**)
Statute of limitations. (*See* **STATUTE OF LIMITATIONS, Claims**)
Transportation
Claim simultaneous with court action
Res judicata **doctrine applied after court adjudication**
When GAO makes no representations that it will consider a claim simultaneously submitted to it and a court of competent jurisdiction after the court has adjudicated the claim, GAO is not estopped from applying the doctrine of *res judicata* to the claim 14
Household goods forwarders
Shipment under a Government Bill of Lading (GBL) is a single cause of action, and when a court judgment pertains to a particular GBL, the General Accounting Office (GAO) is precluded from considering a subsequent claim on the same GBL under the doctrine of *res judicata* 14
Loss and damage claims
Liability determination
Prima facie case of liability of common carrier is established when shipper shows delivery to carrier at origin in good condition and delivery by carrier at destination in damaged condition. Once prima facie case is established, burden of proof shifts to the carrier and remains there. To escape liability, carrier must show that loss or damage was due to one of the excepted causes and that it was free of negligence 170
Settlement
Review
Carrier allegations *v.* record
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case 155

CLASSIFICATION
Back pay
Applicability Page

Employee of Smithsonian Institution occupied position which the Civil Service Commission determined was erroneously included in the General Schedule and Commission instructed agency to classify position under Federal Wage System. Employee seeks backpay for period of erroneous classification. Claim may not be allowed as civil service regulations provide for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay 404

CLOTHING AND PERSONAL FURNISHINGS
Special clothing and equipment
Protective clothing
Cooler coats and gloves
Meat grader employees
Agriculture Department

Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination 379

COMMISSARIES (*See* **POST EXCHANGES, SHIP STORES, ETC.**)
COMMISSIONS (*See* **BOARDS, COMMITTEES AND COMMISSIONS**)
COMMODITY FUTURES TRADING COMMISSION
Commissioners
Holding over beyond expiration of term
Compensation

Commissioner of Commodity Futures Trading Commission continued to serve beyond expiration of fixed period of appointment on April 14, 1977, pursuant to holdover provision of 7 U.S.C. 4a(a)(B). Commissioner's entitlement to compensation after expiration of first session of 95th Congress is questioned since statute provides that a commissioner may not continue to serve "beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office." The word "next" before "session" refers to the adjournment of a subsequent session of Congress. Therefore, the Commissioner may be compensated until expiration of the 2d session of the 95th Congress, or appointment and qualification of successor, whichever event occurs first. 213

COMPENSATION
Additional
Supervision of wage board employees
Conditions

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

COMPENSATION—Continued
Aggregate limitation
Post differential payments Page
Agency for International Development properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552 299
Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)
De facto **status of employees.** (*See* **OFFICERS AND EMPLOYEES,** *De facto*)
Differentials
Post. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES, Post differentials**)
Duty performance
Salary only of position to which appointed
Employee of Smithsoinian Institution occupied position which the Civil Service Commission determined was erroneously included in the General Schedule and Commission instructed agency to classify position under Federal Wage System. Employee seeks backpay for period of erroneous classification. Claim may not be allowed as civil service regulations provide for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay 404
First-forty-hour employees. (*See* **OFFICERS AND EMPLOYEES, Hours of work, Forty-hour week, First forty-hour basis**)
Increases. (*See* **COMPENSATION, Promotions**)
Night work
Regularly scheduled night duty
Leaves of absence
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
Overpayments
Waiver. (*See* **DEBT COLLECTIONS, Waiver**)
Overtime
Day and week definitions
In 42 Comp. Gen. 195 at 200 it was held, in regard to overtime of wage board employee under 5 U.S.C. 673c (now 5 U.S.C. 5544), that agency could regard any 24-hour period as "day." That holding is applicable to General Schedule employees since provisions of 5 U.S.C. 5544 and 5 U.S.C. 5542 are comparable 101

COMPENSATION—Continued
Overtime—Continued
Fair Labor Standards Act
Claims
Settlement authority Page

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

Statute of limitations

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

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

Standby, etc., time
Work requirement

Federal Aviation Administration employee assigned to 3-day workweek at remote radar site and required to remain at facility overnight for nonduty hours spanning workweek is not entitled to overtime compensation for standby duty for nonduty hours. Radar site was manned 24 hours per day by on-duty personnel and there is no showing that employees were required to hold themselves in readiness to perform work outside of duty hours or that they were required to remain at the facility for reasons other than practical considerations of the facility's geographic isolation and inaccessibility in terms of daily commuting 496

Traveltime
Administratively controllable

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

Arduous conditions

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

COMPENSATION—Continued
Overtime—Continued
Work in excess of daily and/or weekly limitations Page
In 32 Comp. Gen. 191 it was held that employees who worked two shifts which began within same 24-hour period in basic workweek could be paid for 2 days' work at basic rate. That decision is no longer to be followed since 5 U.S.C. 5542 provides that hours in excess of 8 in day are overtime work. Therefore, Department of Agriculture employees whose workweek includes two shifts on Monday, 0001 to 0830, and 2000 to 0430, are entitled to overtime compensation for hours worked in excess of 8 hours in 24-hour period agency treats as day---------- 101
Periodic step-increases
Equivalent increases
What constitutes
Where an increase in pay on promotion constitutes an equivalent increase under 5 U.S.C. 5335(a)(3)(A) and Subchapter S4–8(b), FPM 990–1, the effective date of such promotion would be the inception date for a new waiting period, and the fact that employee was demoted and returned to his former grade and step would not negate the promotion date as the inception date of that new waiting period for a periodic step-increase in the lower grade---------- 646
Waiting period commencement
Promotion and demotion
The rules governing waiting periods for step increases on resumption of former grade and step following a temporary promotion are not for application where an employee is demoted under an adverse action from a permanent promotion position and returned to his former grade and step in which he performed satisfactorily---------- 646
Premium pay
Night work. (*See* **COMPENSATION, Night work**)
Sunday work regularly scheduled
Couriers
The workweek of diplomatic couriers consists of the first 40 hours of employment or work in an administrative workweek beginning on Sunday. Therefore, work performed by them on Sunday falls within their basic workweek and although not regularly scheduled in the usual sense, may be compensated at Sunday premium rates up to 8 hours on and after the first day of the first pay period beginning after July 18, 1966, the effective date of the law authorizing such premium pay---------- 43
"Eight-hour period of service"
Effect of change to daylight saving time
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
Prevailing rate employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)

COMPENSATION—Continued
Promotions
Retroactive
Administrative error
Failure to carry out agency policy Page

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

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

Department of Health, Education, and Welfare detailed employees to higher grade positions, but finds it difficult or impossible to show that vacancies existed. Claims of employees for backpay under *Turner-Caldwell*, 56 Comp. Gen. 427 (1977), may be considered without any finding of vacancies. It is not a condition for entitlement to a retroactive temporary promotion with backpay that there must have existed, at the time a detail was ordered, a vacant position to which the claimant was detailed. However, the position must be established and classified .. 767

Retroactive application

Employee, who was successively detailed to two higher grade positions, can only be awarded retroactive temporary promotion and backpay for details extending more than 120 days, each detail being treated as a separate and distinct personnel action 605

Rates
Overseas Dependents School System
Pub. L. 86–91
Implementation

Individuals who "opted out" of plaintiff-class in *March* v. *United States*, 506 F.2d 1306 (D.C. Cir. 1974), may be paid backpay in accordance with the court's interpretation of Public Law 89-391. However since these claims are being allowed administratively, and not under *March*, the statute of limitations contained in 31 U.S.C. 71a applies to limit recovery where applicable 856

Removals, suspensions, etc.
Back pay
Entitlement

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 severence 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

COMPENSATION—Continued
Removals, suspensions, etc.—Continued
Back pay—Continued

Testan **case** Page

Employee of Smithsonian Institution occupied position which the Civil Service Commission determined was erroneously included in the General Schedule and Commission instructed agency to classify position under Federal Wage System. Employee seeks backpay for period of erroneous classification. Claim may not be allowed as civil service regulations provide for retroactive effective date for classification only when there is a timely appeal which results in the reversal, in whole or in part, of a downgrading or other classification action which had resulted in the reduction of pay 404

Supervision of wage board employees
Additional compensation. (*See* **COMPENSATION, Additional, Supervision of wage board employees**)
Traveltime
Entitlement
Couriers

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

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

Two work shifts beginning within same 24-hour period
Overtime. (*See* **COMPENSATION, Overtime, Work in excess of daily and/or weekly limitations**)
Wage board employees
Increases
Retroactive
Union agreements

Retroactive wage adjustments for Federal wage board employees which are not based upon a Government "wage survey," but rather on negotiations and arbitration under a 1959 basic bargaining agreement, are not governed by 5 U.S.C. 5344 as added by section 1(a) of Public Law 92–392, section 9(b) of that law preserving to such employees their bargained for and agreed to rights under that basic bargaining agreement 589

COMPENSATION—Continued
Wage board employees—Continued
Prevailing rate employees
Entitlement to negotiate wages
Compliance with law and regulations requirement Page

Section 9(b) of Public Law 92-392, August 19, 1972, 5 U.S. Code 5343 note, governing prevailing rate employees, exempts certain wage setting provisions of certain bargaining agreements from the operation of that law. However, 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 law. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. — (B-189782, Jan. 5, 1979) 259

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. Overruled in part by 58 Comp. Gen. — (B-189782, Jan. 5, 1979) 575

Overtime
Meal periods
Delayed or preempted

Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on on top of overtime" which is not authorized by 5 U.S.C. 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Hence, it may not be paid. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. — (B-189782, Jan. 5, 1979) 259

Work-free

Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. — (B-189782, Jan. 5, 1979) 259

Rate
One and one-half times basic hourly rate

Department of Interior questions whether it may pay prevailing rate employees, who negotiate their wages, overtime compensation at rates more than one and one-half of the basic hourly rate. Although computation provision (1) of 5 U.S.C. 5544(a) states that overtime pay is to be computed at "not less than" one and one-half the basic hourly rate, computation provisions (2) and (3) of 5 U.S.C. 5544(a) state that overtime pay is to be computed at one and one-half the basic hourly rate. Since provisions (2) and (3) were enacted by statute amending original statute enacting provision (1), 5 U.S.C. 5544 is construed

COMPENSATION—Continued

as establishing the overtime pay rate at one and one-half the basic rate and a greater figure may not be used. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. — (B–189782), Jan. 5, 1979) 259

Supervision by classified employees. (*See* **COMPENSATION, Additional, Supervision of wage board employees**)

Waivers

Prohibition Page

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) authorized 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

CONCESSIONS

Possessory interest

Encumbrance

Department of the Interior may revise National Park Service (NPS) standard concession contract language to allow new park concessioners to encumber the possessory interest in the concession operation in order to provide collateral for loan used to purchase the concession operation. This practice is authorized by 16 U.S.C. 20e (1976) and would not be contrary to 16 U.S.C. 3 (1976), which provides for encumbrance of concessioner's assets to finance expansion of existing facilities. Congress made it clear in enacting 16 U.S.C. 20e that possessory interest sanctioned by that section could be encumbered for any purpose 607

CONDEMNATION PROCEEDINGS (*See* **REAL PROPERTY, Acquisition, Condemnation proceedings**)

CONFERENCES

National Women's Conference

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

CONTRACTING OFFICERS

Subjective judgment

Supported by record

Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable 347

CONTRACTORS

Incumbent

Competitive advantage

Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3–805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3–805.1(v) (1976 ed.) 370

CONTRACTORS—Continued
Incumbent—Continued
Competitive advantage—Continued Page

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. 501

Selection justified
Delay and risk in training new contractor

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

Responsibility
Contracting officer's affirmative determination accepted

Allegation concerning bidder's capacity to perform involves question of responsibility. While General Accounting Office (GAO) will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or proposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials 361

Determination
Current information

Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application 347

Small business concerns

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

CONTRACTS
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Appropriation obligation. (*See* **APPROPRIATIONS, Obligation**)
Architect, engineering, etc., services
Competitive advantage
Unfair Government action

Where one of three competing A–E firms had possession and knowledge of Master Plan containing basic design concepts for development of cemetery to which agency intended selected A–E firm's design to conform, failure of agency to inform other two firms of existence of Master Plan prior to discussions resulted in unfair competitive advantage to firm possessing Master Plan 489

CONTRACTS—Continued
Architect, engineering, etc., services—Continued
Procurement practices
Brooks Bill applicability
Equality of competition requirement Page

Discussions required to be conducted by agency with three of most qualified firms in course of procurement of professional A–E services are part of statutory and regulatory procedures prescribing competitive selection process. It is fundamental to competitive A–E selection process that firms be afforded opportunity to compete on equal basis---------- 489

Automatic Data Processing Systems. (*See* **EQUIPMENT, Automatic Data Processing Systems**)

Awards
Erroneous
Evaluation improper

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

Agency's acquisition and evaluation of equipment furnished by firm deemed ineligible to compete on step-one RFTP and rejection of six proposals on basis of such evaluation constitute complete departure from RFTP evaluation criteria. Improper evaluation precluded 60 percent of offerors from competing on step-two solicitation to their prejudice. However, remedial action is not possible because of termination costs and urgency and gravity of program for which cameras are being purchased---------- 809

Federal aid, grants, etc.
Competitive bidding procedure

General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development block grant---------- 872

Labor surplus areas
Defense Department procurement
Set-aside restriction

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

Order of preference

Protest by bidder that as the only "certified eligible" firm under total set-aside for small business/labor surplus area concerns it is the only firm eligible for award is denied since solicitation, in accordance with recent statutory and regulatory changes, did not distinguish among categories of labor surplus area concerns---------- 595

CONTRACTS—Continued
Awards—Continued
Labor surplus areas—Continued
Price differentials
Prohibition
Effect of award under Buy American Act Page

Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations... 34

Set-asides
Order of preference

Where Small Business Act amendment sets forth order of preference for procurement set-asides, with first priority for labor surplus area set-asides, and where such labor surplus area set-asides are subsequently prohibited by appropriation act provision, remaining order of preference set forth in Small Business Act is in effect "repealed"..... 34

Multiple
Propriety

Procuring activity is not precluded from making multiple awards where solicitations expressly reserves Government's right to do so and bidder does not qualify its bid for consideration only on "all-or-none" basis. Agency's requests for extensions of bid acceptance period were not inconsistent with provision to make multiple awards, and extensions granted, without limiting language to the contrary, preserve Government's right to so award intact..... 468

Procedural defects

ASPR 2–503.1(f) requires prompt notice to unsuccessful offerors; reasons for rejection may be given in general terms, notice requirement is procedural, and failure to comply is not legal basis for disturbing otherwise valid award. Notice merely stating offeror's item does not meet specification requirements is inconsistent with spirit and purpose of regulation, particularly where Agency furnishes more detailed reasons for rejection in denying offeror's protest shortly after issuing notice of rejection..... 809

Propriety
Reversal of administrative determination

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

Sole-source solicitation

Contracting officer acted reasonably in awarding reprocurement contract to next low bidder on original procurement having equipment available to perform needed services at price not in excess of that bidder's original bid since agency had urgent requirement for immediate reprocurement and under circumstances prior bids could be considered acceptable measure of what competition would bring..... 703

CONTRACTS—Continued
Awards—Continued
Propriety—Continued
Status of bidder, offeror, etc. Page

Mere fact that bidder enters into post-bid-opening agreement to obtain needed resources is not reason in itself to reject bid, unless effect of agreement is to cause bidding entity to "no longer exist" and to cause effective transfer of bid to nonbidding entity ---- 67

Since bidding entity has no formal plans to dissolve and because entity may possibly do some business in its own name in the future so long as it does not compete with Bendix Corporation, infusion of resources from Bendix Corporation to bidding entity may be recognized in determining bidding entity's responsibility ---- 67

Testing requirements
Sample evaluation

While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid *conforms* to the solicitation. 41 U.S.C. 253(b) (1970) ---- 686

Protest pending

Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office (GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected ---- 361

Agency protest procedure requirements
Agency's noncompliance
Effect on award propriety

Neither Naval Regional Procurement Office Instruction 4200.30B nor DAR 2–407.8(a)(1) requires that a written protest be responded to in writing prior to award and since protest has been decided on its merits protester has not been prejudiced by absence of written agency response to its protest concerning the second solicitation prior to award. 861

Separable or aggregate
Single award
Propriety

Contention that required services for two air bases should have been reprocured separately instead of as one contract item is without merit in light of agency explanation that better pricing results from single procurement ---- 703

Small business concerns
Certifications
Applicability

Protest by bidder that as the only "certified eligible" firm under total set-aside for small business/labor surplus area concerns it is the only firm eligible for award is denied since solicitation, in accordance with recent statutory and regulatory changes, did not distinguish among categories of labor surplus area concerns ---- 595

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Certifications—Continued
Tenacity and perseverance Page

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

Negotiation

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

Price reasonableness

Protest questioning propriety of retaining set-aside restriction after evaluation of step-one technical proposals, filed after closing date for receipt of proposals is timely filed because price reasonableness in two-step formally advertised procurement cannot be determined until after bid opening under step-two solicitation 809

Self-certification
Status protests

GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business 277

Set-asides
Competition sufficiency

Award under two-step formally advertised procurement restricted as total small business set-aside may be made where there are only two small business offerors whose step-one technical proposals were found acceptable and were eligible to compete on step-two invitation for bids .. 809

Protest timeliness

Protest by large business concern against solicitation restricting procurement as total small business set-aside, on basis that there were insufficient small business competitors, filed after closing date for receipt of step-one technical proposals is untimely filed under General Accounting Office Bid Protest Procedures, 4 C.F.R. 20.2(b) (1977 ed.) 809

Eligibility

Protest by bidder that as the only "certified eligible" firm under total set-aside for small business/labor surplus area concerns it is the only firm eligible for award is denied since solicitation, in accordance with recent statutory and regulatory changes, did not distinguish among categories of labor surplus area concerns 595

Notice of set-aside in solicitation
Requirement in ASPR

Requests for technical proposals statement: "THIS PURCHASE IS RESTRICTED TO SMALL BUSINESS" does not suffice to restrict procurement as total small business set-aside where RFTP does not also include clauses required for total set-aside by Armed Services Procurement Regulation (ASPR) 1–706.5(c) and 7–2003.2 (1976 ed.) ... 809

CONTRACTS—Continued
Awards—Continued
Small business concerns—Continued
Set-asides—Continued
Priority of determinations Page

Where Small Business Act amendment sets forth order of preference for procurement set-asides, with first priority for labor surplus area set-asides, and where such labor surplus areas set-asides are subsequently prohibited by appropriation act provision, remaining order of preference set forth in Small Business Act is in effect "repealed."---------- 34

Withdrawal
Bid prices excessive

Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here---------- 243

Withdrawal of small business set-aside does not violate Government policy of setting aside percentage of procurements for small business where as here governing regulations were complied with---------- 234

Size
Eligibility determination date

Since Smzll Business Administration (SBA), as a matter of policy, now requires that to be eligible for award of small business set-asides, firm must be small business concern both at time for submission of bids or initial proposals and time for award, General Accounting Office will no longer review question of good faith of bidder or offeror self-certification as small business where SBA determines that firm was large on date for submission of initial proposals, even though firm might be small at date of award and might have self-certified in good faith at time for submission of initial proposals---------- 290

Split. (*See* **CONTRACTS, Awards, Multiple**)
Subcontracts. (*See* **CONTRACTS, Subcontracts**)
To other than lowest bidder
Other factors considered

Where experimental contract structure may result in award that does not represent lowest total cost to the Government, it is recommended that agency fully consider this aspect of "experiment" when evaluating results achieved---------- 271

Bid procedures. (*See* **BIDS**)
Bids
Generally. (*See* **BIDS**)
Buy American Act
Defense Department procurement
Award to labor surplus firm

Prohibition of payment of price differential for relieving economic dislocations does not conflict with Buy American Act preference for domestic over foreign made products. While an award to a labor surplus area firm in accordance with Buy American Act preference serves to relieve economic dislocations, the price differential is paid for the purpose of preferring domestic products and not to relieve economic dislocations---------- 34

CONTRACTS—Continued
Buy American Act—Continued
Inapplicable
Grantee contracts Page
The Buy American Act (41 U.S.C. 10 (1970)) provisions do not apply to contracts made by grantees 85
Competitive system
Price analysis
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Contracting officer acted reasonably in awarding reprocurement contract to next low bidder on original procurement having equipment available to perform needed services at price not in excess of that bidder's original bid since agency had urgent requirement for immediate reprocurement and under circumstances prior bids could be considered acceptable measure of what competition would bring 703
Cost accounting
Cost Accounting Standards Act application
Negotiated contracts
Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000 151
Cost comparisons
Cost comparisons required by Arsenal Statute for determination whether supplies can be obtained from Government-owned, contractor-operated (GOCO) factories on economical basis may be made by comparing fixed priced offers from contractor-owned and -operated plants with out-of-pocket cost estimates from GOCO plants and such comparisons are not prohibited by Cost Accounting Standards Act 209
Cost-plus
Cost-plus-fixed-fee
Negotiated contracts
As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable 239
Data, rights, etc.
Acquisition by Government
Unlimited rights
Justification requirements
Military procurement
Where Navy met requirements for specific acquisition of unlimited data rights (DAR 9–202.2(f)(1)) but was unable to determine whether anticipated net savings would exceed acquisition cost of unlimited data rights until after bids were received Navy had adequate justification to solicit for unlimited data rights. Moreover, provision in solicitation for acquisition of unlimited data rights as separate bid item was not objectionable and was consistent with procurement regulation 861

CONTRACTS—Continued
De minimis rule
Negotiated contracts Page
Protester's contention—that Air Force erred in making award on initial proposal basis because ASPR 3-805.4(a) (1976 ed.) required amendment to RFP due to change in requirements—is not sustained. Sole change (removal of 1 of 617 equipment items to be serviced) appears to be *de minimis* where Air Force maintains there was no significant change in service requirements, successful offeror had previously accepted requirement to service deleted item as no cost modification to prior contract, and even protester alleges only small reduction in its proposed price was due to change 370
Default
Indebtedness of contractor to supplier
Government liability
Even if Government negligently fails to insure that Miller Act bonds are filed with construction contract, unpaid supplier's remedy lies against prime contractor and not the Government 176
Monies owing contractor
Disposition
Where Government completes contract work after default of prime contractor, unpaid supplier of defaulted contractor is not entitled to contract balance remaining in hands of Government for work which Government rather than defaulted contractor completed. However, unpaid supplier may have equitable claim to contract money earned by defaulted contractor but which has been retained by Government 176
Reprocurement
Government procurement statutes
Applicability
Question concerning propriety of sole-source award of reprocurement contract is within General Accounting Office (GAO) bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals 703
Discounts
Impact on bid responsiveness
Insertion of the term "NET 10 PROXIMO" under the prompt payment discount section of successful bidder's offer means "payment due 10th of next month" and is construed merely as an indication that a discount is not offered rather than as an exception to the IFB 861
Disputes
Contract Appeals Board decision
Jurisdictional question
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

CONTRACTS—Continued
Experimental
Evaluation of results
Cost consideration Page

Where experimental contract structure may result in award that does not represent lowest total cost to the Government, it is recommended that agency fully consider this aspect of "experiment" when evaluating results achieved 271

Federal Supply Schedule
Failure to use

Protest by Federal Supply Service (FSS) contractor, alleging procurement should have been effected under FSS, filed after closing date for receipt of step-one proposals is untimely filed and not for consideration on merits. Fact that procuring activity's requirements were not being purchased from FSS was apparent from Commerce Business Daily Notice and from face of step-one solicitation 809

Requirements contracts
Administrative discretion

General Services Administration provides FSS schedule contracts as primary source of supply for all agencies, with certain exceptions. However, it is using agency that is responsible for making determination of which product will satisfy minimum needs at lowest cost. Contracts do not contain promises or guarantees as to volume of sales and, therefore, there cannot be breach of contract on part of GSA 853

Breach of contract allegation

Nonmandatory user of Federal Supply Service (FSS) schedule contract cannot be held to have breached FSS schedule contract solely because it purchases more of item from one contractor than another contractor which has lower price 853

Evaluation of bids, etc.
Propriety
Sample requirements

While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid *conforms* to the solicitation. 41 U.S.C. 253(b) (1970) 686

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 501

CONTRACTS—Continued
Labor stipulations—Continued
Service Contract Act of 1965—Continued
Minimum wage, etc., determinations
Locality basis for determination Page

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 549

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 549

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 549

Legality
Personal services
Use of military personnel. (*See* **PERSONAL SERVICES, Performance delay, etc., Use of military personnel, Legality**)
Mess attendant services
Status of contract

Contract for mess attendant services is not a personal services contract since there is no direct Federal supervision of contractor personnel. 271

Mistakes
Allegation after award
No basis for relief

Contracting officer cannot be charged with constructive notice of mistake in bid where nothing in record indicates that in light of all facts and circumstances he should have known of the possibility of error in the bids prior to the issuance of notices of award, Therefore, request for relief for mistake in bids made after award is denied 468

Rule

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

Contracting officer's error detection duty
Aggregate *v.* separable items, prices, etc.

Bidder's statement to preaward survey team, that partial award would would be unacceptable, did not serve as constructive notice of mistake to contracting officer; survey was conducted on basis of total quantity, survey report recommended total award, and bidder's statement was not included in report or otherwise communicated to contracting officer prior to issuance of notice of award 468

CONTRACTS—Continued
Mistakes—Continued
Contracting officer's error detection duty—Continued
Notice of error
Lacking Page

Contracting officer did not have actual notice of mistake in bid prior to award where bidder's statement to preaward survey team concerning unacceptability of partial award was neither included in survey report nor otherwise communicated to him before notice of award was issued and bidder did not assert mistake until after issuance of notice of award 468

Correction
Bid verification requirement
Specificity of verification

Request for modification of contract price due to alleged error in bid, claimed after award, is allowed because contracting officer, in discharging bid verification duty, failed to specifically point out discrepancy in contractor's bid 159

For errors prior to award. (*See* **BIDS, Mistakes**)
Unilateral
Specification misinterpretation

Bidder's assumption that award would be made in the aggregate, notwithstanding solicitation's provision for multiple awards, was error in judgment; bidder's misinterpretation, of which Agency was not aware before issuance of notice of award, is therefore unilateral, rather than mutual, mistake 468

Modification
Beyond scope of contract
Subject to General Accounting Office review

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

Change orders
Within scope of contract

Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirements, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters 285

Mistake in bid alleged after award. (*See* **CONTRACTS, Mistakes, Correction**)
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 .. 567

Multi-year procurements
Requirements contract. (*See* **CONTRACTS, Requirements, Multi-year procurement**)
Negotiated. (*See* **CONTRACTS, Negotiation**)

CONTRACTS—Continued
Negotiation
Administrative determination
Advertising *v.* negotiation Page
Statement and contentions raised in support of position that agency's determination to negotiate was proper do not constitute submission of facts or legal arguments demonstrating that earlier decision was erroneous; accordingly, GAO declines to reconsider this aspect of earlier decision 615
Finality
Contention that "final" determinations and decisions made by procuring agencies pursuant to 41 U.S.C. chapter 4 (1970) are not subject to review by courts or GAO is without merit because similar language in other final determination statutes has been interpreted to limit only scope of review. Such determinations will not be questioned where reasonable basis exists 615
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
After advertising
Grantee contracts
Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74–7, attachment O and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs 85
Auction technique prohibition
Disclosure of funds available for procurement
Agency did not utilize prohibited "auction technique" when it informed offerors of monetary amount available for the procurement 8
Awards
Administrative determination
Conclusiveness
Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable 347
Allegation of improper predetermination
Not supported by record
Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester 185
Basis
Lowest total cost
Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror 784

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Initial proposal basis
Competition sufficiency Page

Contract awarded on basis of initial proposals without discussions is proper where solicitation notified offerors of such possibility and agency determines that there was adequate competition resulting in fair and reasonable price 244

Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals where there is no showing that Armed Services Procurement Regulation (ASPR) 3-807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown 370

Propriety

Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RPF pursuant to ASPR 3-805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3-805.1(v) (1976 ed.) 370

Notice
To unsuccessful offerors

Postaward notice to unsuccessful offerors is a procedural requirement which does not affect the validity of an award and the failure of an agency to notify protester until the 11th working day after award is not an "unlawful concealment of the contract award." 151

Price determinative factor

Request for proposals (RFP) contemplated (1) that offerors would submit one rate for 2-year contract term and rate was to be computed on "100 percent basis" and (2) that award would be made based on low evaluated price. General Accounting Office would not object to agency's acceptance of price proposal with separate rates for each year where rate was computed on "80 percent basis" because those deviations relate only to form and are not material 784

Propriety
Report of Investigation contrary to protester's report

Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' *direct responses* formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract 217

Small business concerns

Size. (*See* **CONTRACTS, Awards, Small business concerns, Size**)

CONTRACTS—Continued
Negotiation—Continued
Basic ordering agreements
Propriety Page

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

Best advantage to Government
Lowest total price

Possibility that ceiling price on award under software solicitation will eliminate competition from software vendors, where purpose of ceiling price is to assure lowest total system cost to Government, does not outweigh requirement that Government obtain its needs at lowest total cost ---------- 109

Changes during negotiation
Notification
Failure to notify not prejudicial

Agency should not have informed one offeror that it had a good chance of award in one region and almost no chance in two other regions, at least not without providing similar assistance to other offerors. However, agency did not prejudice protester, in this case, because offeror who received information as to his relative chances between two regions did not use that information by significantly changing its proposal ---------- 8

Protester within competitive range

Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach ---------- 759

Changes, etc.
Reopening negotiations
Not justified
Minor deviations in otherwise acceptable proposal

Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror ---------- 784

Specifications
Estimated manning requirements reduced
Reduction of scope of work statement not required

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

CONTRACTS—Continued
Negotiation—Continued
Changes, etc.—Continued
Specifications—Continued
Level of effort changes
Not prejudicial Page

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

Written amendment requirement
Exceptions
***De minimis* rule applicability**

Protester's contention—that Air Force erred in making award on initial proposal basis because ASPR 3-805.4(a) (1976 ed.) required amendment to RFP due to change in requirements—is not sustained. Sole change (removal of 1 of 617 equipment items to be serviced) appears to be *de minimis* where Air Force maintains there was no significant change in service requirements, successful offeror had previously accepted requirement to service deleted item as no cost modification to prior contract, and even protester alleges only small reduction in its proposed price was due to change 370

Competition
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

Cost analysis requirement

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

Award under initial proposal

Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals where there is no showing that Armed Services Procurement Regulation (ASPR) 3-807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown 370

Changes susbsequent to negotiation
"Source selection" concept

No significant difference is seen between process (in non-four-step procurement) which permits cost adjustment of proposed costs after close of discussions for purposes of award selection—even though no formal adjustment of proposed contract price is made—and four-step process which, through cost adjustment process, permits changed contract price in line with Government-evaluated price 715

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Competitive range formula
Selection basis Page

Requirement in DOD procedures that selected proposal must meet Government's "minimum requirements" is noting more than requirement that—aside from being most advantageous proposal—proposal is to satisfy Government's core requirements to extent that proposal is in competitive range and not all requirements as protester insists..... 715

Technical acceptability
Not established from inclusion in competitive range

Protester's contention that, by requesting it to submit second best and final offer, agency admitted that proposal was technically acceptable is without merit. Determination that proposal is in competitive range does not imply that proposal is acceptable but may indicate only that it can be improved without major revisions to point where it becomes acceptable. Agency never advised protester that proposal was technically acceptable and states that advice to the contrary was given. Negotiations were reopened, in part, to resolve matter of proposal's acceptability.. 800

Discussion with all offerors requirement
Actions not requiring

Since it is fundamental that proposed costs of cost-reimbursement contract be analyzed by Government in terms of realism, approval has been granted to process of award selection based on Government-adjusted costs of proposals after close of negotiations even in non-four step procurements..... 715

Deficiencies in proposals

In both National Aeronautics and Space Administration (NASA) and Department of Defense (DOD) procedures there are statements of need to allow competitive-range offerors opportunity for discussions. Both procedures stress need, however, to restrict discussion of technical proposals to clarifying or substantiating proposal and specifically prohibit discussions of technical weaknesses (NASA's term) or deficiencies (DOD's term) relating to offeror's lack of competence, diligence, inventiveness, or lack of management abilities, engineering or scientific judgment. Both procedures also provide for independent cost projection of "most probable" cost of doing business with offeror..... 715

Equal opportunity to compete

Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach..... 759

"Meaningful" discussions

Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its costs acceptable..... 328

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
"Meaningful" discussions—Continued
Written Page

Allegation that agency had "unannounced preferences" for specific manner of performing work, which incumbent knew and protester did not, is not supported by record. Meaningful written discussions concerning technical proposals were held, even though written discussions could have more specifically pointed out deficiencies in some areas. Agency presented protester with large number of questions and comments which led protester to deficient areas of proposal, and protester was given opportunity to and did substantially revise proposal, resulting in significant increase in scores. Oral discussions were not required, since written negotiations were meaningful 827

Pricing or technical uncertainty

Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors 347

Request for final price

Agency included protester's first best and final offer (BAFO) in competitive range as one reason for reopening negotiations because doubts as to BAFO's acceptability were resolved in protester's favor. Reliance on prior GAO decision and tight timeframe apparently resulted in request for and submission of second BAFO from protester. However, because prior GAO decision was modified, agency need not have requested second BAFO where discussions made it clear that proposal was effectively no longer in competitive range. Failure to award to protester, which submitted the lowest-priced second BAFO, was proper 800

Technical transfusion or leveling

Since (1) selected proposal was rationally found to be in competitive range; (2) discussions could not have been held with selected offeror in contested areas without violating procedures; (3) appropriate discussions with selected offeror were otherwise conducted; (4) protester alleges lack of discussion with itself largely in the abstract; (5) post-selection discussions with highest-rated offeror did not result in "leveling," it cannot be concluded Air Force failed to comply with requirements of 10 U.S.C. 2304(g). Based on review of record, it is concluded that agency-evaluated cost and technical differences between proposals of protester and selected offeror are rationally founded 715

Written or oral negotiations

Failure to hold oral price discussions was not improper where prices were within 9 percent of Government estimate, price evaluation was in accordance with criteria set forth in RFP, and there was adequate price competition 827

Equality of competition

Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror 784

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Equality of competition—Continued
Incumbent contractor's advantage Page

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--- 501

Lacking
Evaluation of proposals improper

Agency's acquisition and evaluation of equipment furnished by firm deemed ineligible to compete on step-one RFTP and rejection of six proposals on basis of such evaluation constitute complete departure from RFTP evaluation criteria. Improper evaluation precluded 60 percent of offerors from competing on step-two solicitation to their prejudice. However, remedial action is not possible because of termination costs and urgency and gravity of program for which cameras are being purchased--- 809

Testing requirements

Protester's actual objection is to provision in request for technical proposals reserving to VA the right to perform benchmark in no less than 10 days and no more than 90 days from date set for submission of offeror's technical proposal. Protester's involvement in prior procurement with VA for UPS equipment should have made protester aware that VA would be flexible in setting dates for benchmarking. Protester has no basis to object to maximum time by which benchmarking was to be performed because request for technical proposals contained no restrictions relating to schedule for benchmarking that favored any one offeror over other--- 653

Exclusion of other firms
Source selection
Market survey, etc. adequacy

Failure in market survey to provide details of requirements to potential vendor is not unreasonable in view of time constraints, primary reliance on technical literature and agency contacts, and contacts with General Services Administration which should have been able to provide expert advice on both market place and equipment--- 865

Incumbent contractor
Competitive advantage

Competitive advantage of incumbent contractor need not be equalized where advantage does not result from Government preference or unfair action--- 109

Preservation of system's integrity
Reliance on significant misstatements

Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that *it determined* which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire"

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Preservation of system's integrity—Continued
Reliance on significant misstatements—Continued Page

of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning 217

Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. *Cf. The Franklin Institute*, 55 Comp. Gen. 280 (1975), 75-2 CPD 194. Thus, recommendation is made under Legislative Reorganization Act of 1970 that selected concern's proposal be excluded from cons deration for award 217

Prices

Protester's doubts that adequate competition existed furnish no basis for objection to award on basis of initial proposals where there is no showing that Armed Services Procurement Regulation (ASPR) 3-807.1(a) (1976 ed.) criteria for adequate price competition were not satisfied. Alleged advantage to Government as reason for opening discussions is not shown 370

Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor 827

Ceiling

Possibility that ceiling price on award under software solicitation will eliminate competition from software vendors, where purpose of ceiling price is to assure lowest total system cost to Government, does not outweigh requirement that Government obtain its needs at lowest total cost 109

Prior delivery requirement

Requirement for prior delivery of disc system is not unreasonable method of ascertaining reliability where time for procurement is short and information provided is used to contact current users of system and establish viability based on their comments 865

Restrictions

"Administrative convenience" insufficient basis

Agency's contention that geographic restriction based on areas of responsibility of local agency field offices is necessary for purposes of administrative control is not persuasive where record fails to show that close personal contact between local SBA offices and contractor is essential 454

Prequalification of offerors

Geographical location

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

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Restrictions—Continued
Testing requirements
Two-step procurement Page

Benchmark testing requirement under step one of two-step formally advertised procurement by Veterans Administration (VA) for uninterruptible power supply (UPS) equipment is not, in itself, unduly restrictive of competition. Record reveals that benchmark was reasonable method for VA to use to ensure contractor had technical ability to provide required equipment. Contention of protester that VA should rely solely on preshipment testing of contractor's equipment is without merit. Evidence shows Government would incur high costs if preshipment testing indicated for first time that contractor's equipment did not meet necessary specifications 653

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

Cost accounting standards requirements
Standard 402
Not applicable to negotiated contracts under $100,000

Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000 151

Cost, etc., data
As evaluation factor
Lowest probable cost to Government

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

Fact that Bid Equalization Factor Clause gives offeror significant monetary reduction for purposes of bid evaluation under step two does not mean clause is prohibited by applicable procurement law or statute. General Accounting Office has consistent'y interpreted language of Federal Procurement Regulations (FPR) that award be based on price and other factors to mean that award will be on basis of most favorable cost to Government. Dollar amounts computed under formula set forth in Bid Equalization clause represent foreseeable energy cost savings becausie of increased efficiency of offering UPS equipment 653

Fnal pricing actions

As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable 239

CONTRACTS—Continued
Negotiation—Continued
Cost, etc., data—Continued
Final pricing actions—Continued Page

Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach 759

Price analysis requirement

Comparison of proposed prices with each other and with independent Government estimate satisfies regulatory requirement that price analysis be conducted 244

Price negotiation techniques

No significant difference is seen between process (in non-four-step procurement) which permits cost adjustment of proposed costs after close of discussions for purposes of award selection—even though no formal adjustment of proposed contract price is made—and four-step process which, through cost adjustment process, permits changed contract price in line with Government-evaluated price 715

"Realism" of cost

Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts 185

Since it is fundamental that proposed costs of cost-reimbursement contract be analyzed by Government in terms of realism, approval has been granted to process of award selection based on Government-adjusted costs of proposals after close of negotiations even in non-four step procurements 715

Requirement to furnish

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

"Truth-in-Negotiation"

Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor 827

Cost-plus-fixed-fee. (*See* **CONTRACTS, Cost-plus, Cost-plus-fixed-fee**)

CONTRACTS—Continued
Negotiation—Continued
Cost-type
Technical/cost evaluations
Reasonableness Page

Since (1) selected proposal was rationally found to be in competitive range; (2) discussions could not have been held with selected offeror in contested areas without violating procedures; (3) appropriate discussions with selected offeror were otherwise conducted; (4) protester alleges lack of discussion with itself largely in the abstract; (5) post-selection discussions with highest-rated offeror did not result in "leveling," it cannot be concluded Air Force failed to comply with requirements of 10 U.S.C. 2304(g). Based on review of record, it is concluded that agency-evaluated cost and technical differences between proposals of protester and selected offeror are rationally founded 715

Technical/cost justification

Where instructions to offerors contained in request for proposals advises that "major consideration shall be given to technical proposals, as well as price," there is no basis to conclude that award of cost-type contract would be based solely on technical criteria 151

Cut-off date
Notice sufficiency

Contrary to protester's contention, record reveals that agency advised protester ahead of time of established common cutoff date for submission of second best and final offers (BAFO). Protester submitted timely BAFO and initial protest letter asserted that pre-cutoff date advice was given. Based on above, and contradictory statements by protester and agency, protester has failed to meet burden of proof 800

Reopening negotiations

Agency included protester's first best and final offer (BAFO) in competitive range as one reason for reopening negotiations because doubts as to BAFO's acceptability were resolved in protester's favor. Reliance on prior GAO decision and tight timeframe apparently resulted in request for and submission of second BAFO from protester. However, because prior GAO decision was modified, agency need not have requested second BAFO where discussions made it clear that proposal was effectively no longer in competitive range. Failure to award to protester, which submitted the lowest-priced second BAFO, was proper 800

Disclosure of price, etc.
Auction technique prohibition

Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror 784

Discussion requirement
Competition. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)

CONTRACTS—Continued
Negotiation—Continued
Discussion requirement—Continued
Reopening negotiation justification Page

Protester's contention that, by requesting it to submit second best and final offer, agency admitted that proposal was technically acceptable is without merit. Determination that proposal is in competitive range does not imply that proposal is acceptable but may indicate only that it can be improved without major revisions to point where it becomes acceptable. Agency never advised protester that proposal was technically acceptable and states that advice to the contrary was given. Negotiations were reopened, in part, to resolve matter of proposals acceptability 800

Evaluation factors
Cost analysis

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

Cost, etc., of changing contractors

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

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 501

Cost realism

Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor 827

Criteria
Acceptability of proposal

Given acceptance of Air Force's interpretation of "tried and true" provisions, fact that successful offeror proposed relatively new minicomputer—based on proven technology and use within IBM Corporation—should not have disqualified proposal. Similar conclusion applies to proposed use of preexisting compiler. "Tried and true" evaluation standard—never identified in request for proposals (RFP) as separate evaluation factor—is of an entirely subjective character. All offerors should have expected that Air Force would necessarily have had to exercise extremely broad discretion in evaluating offerors' efforts under standard. Record reveals, moreover, 'that proposals were evaluated under standard 715

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Criteria—Continued
Acceptability of proposal—Continued Page

Given that RFP provision on "programming languages" did not expressly require—or prohibit—use of "high order" programming language, that provisions of DOD Directive 5000.29 did not apply to procurement, and that Air Force has refuted by force of argument alleged automatic superiority of "high order" programming language, view of implicit procurement requirements for "high order" language is rejected. 715

Misleading, ambiguous and subjective
Allegation without merit

Contention that evaluation criteria are misleading, ambiguous and subjective is found to be without merit, because, upon review, criteria adequately advise offerors of manner in which proposals will be evaluated and evaluation of proposals is essentially a subjective judgment 109

Same for small and large business

In unrestricted procurement, it is improper to evaluate proposal submitted by small business differently from how proposals of large business are evaluated 244

Delivery provisions, freight rates, etc.

Contention that one offeror failed to propose acceptable service regarding 21-day delivery requirement is without merit. Agency explains and record shows that both offerors proposed acceptable and substantially similar service 784

Evaluators
Allegations of bias, unfairness, etc.
Not supported by record

Cost estimate in cost-type proposal may be properly compared, for evalution purposes, to fixed-price proposal so long as cost estimate is determined to be reasonable and realistic. Protester's contention that evaluators disregarded advantages of fixed-price proposal in making the comparison is not supported by record 185

Factors other than price
"Risk factors"

Agency and one offeror contend that proposal, which deviates from RFP's contemplated pricing structure, may not be accepted because (1) all offerors were not advised that such deviations would be permitted, and (2) deviation may have exposed other offeror to less risk. Contention is without merit because deviation relates to form only and record indicates that offerors had sufficient information to make business judgment regarding actual risk involved 784

Technical acceptability

Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations 627

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Factor other than price—Continued
Technical acceptability—Continued **Page**

Technical acceptability of proposals is within discretion of agency and such determination will not be disturbed absent clear showing that determination was unreasonable. Protester did not directly challenge or offer any evidence to show unreasonableness of agency determination that its proposal was technically unacceptable 800

Manning requirements
Reduction
Reduction of scope of work statement not required

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

Method of evaluation
Defective
Allegation not supported by record

Allegation that price was improperly evaluated must fail where such allegation is directly related to assertion that technical evaluation was also improper and it is found that technical evaluation was proper 347

Fixed-price *v.* cost-type offers

Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award 185

Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester 185

Technical proposals
Cost-type contracts

Where instructions to offerors contained in request for proposals advises that "major consideration shall be given to technical proposals, as well as price," there is no basis to conclude that award of cost-type contract would be based solely on technical criteria 151

Out-of-pocket costs
COCO *v.* GOCO plants

Cost comparisons required by Arsenal Statute for determination whether supplies can be obtained from Government-owned, contractor-operated (GOCO) factories on economical basis may be made by company fixed priced offers from contractor-owned and -operated plants with out-of-pocket cost estimates from GOCO plants and such comparisons are not prohibited by Cost Accounting Standards Act 209

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Point rating
Price consideration Page

Where agency evaluates proposals by numerically scoring proposals under each of four evaluation factors, it is not improper under circumstances of case for price to be scored on basis of entire "spread" of points available, so that total available points are awarded to lowest proposed price and less points, mathematically determined, are awarded to other proposed prices ... 244

Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determative criterion for award ... 251

Price evaluation which scored proposals nearly equally did not eliminate price as evaluation factor, since price proposals were close and only varied by approximately 5 percent ... 827

Recent experience information for consideration

Where agency evaluates company experience by means of point scoring, but such evaluation does not take into account most recent experience information which is in possession of agency, source selection official should consider such information along with results of point scoring, particularly where significantly less costly proposal is point-scored low in prior experience but nearly the same as competing offer in technical area, and most current information suggests that low offeror's prior performance problems have been cured. Since record does not indicate that recent experience was considered, General Accounting Office recommends that source selection official reconsider award selection ... 347

Price elements for consideration
Cost estimates

Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts ... 185

Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor ... 827

Most advantageous technical/cost relationship

Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors ... 328

Allegation that price was improperly evaluated must fail where such allegation is directly related to assertion that technical evaluation was also improper and it is found that technical evaluation was proper ... 347

CONTRACTS—Continued
Negotiation—Continued
Discussion requirements—Continued
Propriety of evaluation
Two-step procurement
Protest timeliness Page

Large business concern's protest against agency's evaluation of its equipment (on basis of which small business offers were rejected as unacceptable) filed after closing date for receipt of step-one proposals is timely filed where evaluation was not publicly disclosed and record does not controvert protester's statement that it became aware of unfavorable evaluation only at time of issuance of step-two solicitation..... 809

Technical acceptability. (*See* **CONTRACTS, Negotiation, Evaluation factors, Factors other than price, Technical acceptability**)
"Tried and true" standard
New *v.* preexisting equipment/technology

Given acceptance of Air Force's interpretation of "tried and true" provisions, fact that successful offeror proposed relatively new minicomputer—based on proven technology and use within IBM Corporation—should not have disqualified proposal. Similar conclusion applies to proposed use of preexisting compiler. "Tried and true" evaluation standard—never identified in request for proposals (RFP) as separate evaluation factor—is of an entirely subjective character. All offerors should have expected that Air Force would necessarily have had to exercise extremely broad discretion in evaluating offerors' efforts under standard. Record reveals, moreover, that proposals were evaluated under standard.... 715

Evaluators. (*See* **CONTRACTS, Negotiation, Evaluation factors, Evaluators**)
Four-step procurement
Procedures
National Aeronautics and Space Administration *v.* DOD

In both National Aeronautics and Space Administration (NASA) and Department of Defense (DOD) procedures there are statements of need to allow competitive-range offerors opportunity for discussions. Both procedures stress need, however, to restrict discussion of technical proposals to clarifying or substantiating proposal and specifically prohibit discussions of technical weaknesses (NASA's term) or deficiencies (DOD's term) relating to offeror's lack of competence, diligence, inventiveness, or lack of management abilities, engineering or scientific judgment. Both procedures also provide for independent cost projection of "most probable" cost of doing business of offeror..... 715

Fundamental principles
Departure from

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 pre-qualification 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

CONTRACTS—Continued
Negotiation—Continued
Justification
Lacking Page
Even though small business set-aside procurement is techincally 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
Late proposals and quotations
Best and final offer
Procedural deficiencies in communicating
Where schedule contractors were competing for award of orders and agency required that (1) relevant contract modifications be affected by September 19 and (2) copies of modifications be submitted to agency's ordering office by September 23, accepting late copy of modification or verifying modification was effective as of September 19 would not have amounted to acceptance of "late proposal," because there was no opportunity for offeror to materially change its offer and thereby gain unfair competitive advantage. Copy requirement was matter of form and waiver by Government would not have prejudiced other offerors---------- 627
Hand carried
Late proposal sent via commercial carrier may not be considered for award and was properly rejected---------- 708
No provision in FPR for agency return
Return to sender of unopened proposal *after award* recommended
In absence of any guidance in Federal Procurement Regulations, contracting officer immediately returned late proposal to offeror. General Accounting Office recommends that proposals be held by agency, unopened, until after award---------- 708
Limitation on negotiation
Propriety
No significant difference is seen between process (in non-four-step procurement) which permits cost adjustment of proposed costs after close of discussions for purposes of award selection—even though no formal adjustment of proposed contract price is made—and four-step process which, through cost adjustment process, permits changed contract price in line with Government-evaluated price---------- 715
Minimum needs
Selection process
Not prejudicial
Market survey utilization
Protester was not prejudiced by agency's failure to contact protester directly during conduct of market survey since protester's equipment did not meet agency's mandatory requirements---------- 865
Notice to offeror of disqualification
Protester's contention that, by requesting it to submit second best and final offer, agency admitted that proposal was technically acceptable is without merit. Determination that proposal is in competitive range does not imply that proposal is acceptable but may indicate only that it can be improved without major revisions to point where it becomes acceptable. Agency never advised protester that proposal was technically acceptable and states that advice to the contrary was given. Negotiations were reopened, in part, to resolve matter of proposal's acceptability---- 800

CONTRACTS—Continued
Negotiation—Continued
Off-the-shelf items, systems, etc.
Product reliability establishment
Current user contacts Page

Requirement for prior delivery of disc system is not unreasonable method of ascertaining reliability where time for procurement is short and information provided is used to contact current users of system and establish viability based on their comments..... 865

Offeror
Qualifications. (*See* **CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors**)
Offers or proposals
Best and final
Additional rounds
Proposal exclusion from competitive range effect

Agency included protester's first best and final offer (BAFO) in competitive range as one reason for reopening negotiations because doubts as to BAFO's acceptability were resolved in protester's favor. Reliance on prior GAO decision and tight timeframe apparently resulted in request for and submission of second BAFO from protester. However, because prior GAO decision was modified, agency need not have requested second BAFO where discussions made it clear that proposal was effectively no longer in competitive range. Failure to award to protester, which submitted the lowest-priced second BAFO, was proper..... 800

Discussions
All offerors requirement

Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors. 347

Prices. (*See* **CONTRACTS, Negotiation, Prices, Best and final offer**)
Essentially equal technically
Price determinative factor

Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determinative criterior for award..... 251

Evaluation
Improper
Based on significant misstatements in proposal

Selected concern's submission of significant misstatement to NASA about method, manner, and results of survey of incumbent employees' willingness to accept employment with concern if successful in competition was material in evaluation leading to selection..... 217

Method
Not prejudicial

Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied..... 328

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Evaluation—Continued
Reasonable Page

Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable 347

Expiration
Revival
Protest action

Disappointed offeror in negotiated procurement is interested party to file protest within meaning of section 20.1, General Accounting Office (GAO) Bid Protest Procedures, even though proposal had allegedly expired, since active pursuit of protest can revive proposal 627

Follow-on phase of research
Cost evaluation

Protester was not misled by agency when its proposal for follow-on phase of project was rejected because of high costs, because protester should have been aware that cost would be a factor in the agency's evaluation, even though agency failed to reveal its importance relative to the technical factors 328

Irregularities in survey report submitted

Representations to NASA about methods, manner, and results of questioning of incumbent contractor's employees are not "subject to differing opinions" and differing results of later survey cannot reasonably be attributed to employees' memory lapses or unwillingness to respond to inquiries 217

Preparation
Costs

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

In view of conclusions that agency did not err in making award on basis of initial proposals, that there was no requirement to amend RFP for *de minimis* change in requirements, and that incumbent contractor did not have unfair competitive advantage, there is no basis to find arbitrary and capricious action by agency necessary to support recovery of proposal preparation costs. Claim is accordingly denied 370

Recovery

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

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

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Prequalification of offerors
Basic ordering type agreements Page

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

Prices
Reasonableness

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

Qualifications of offerors
Allegation of improper predetermination
Not supported by record

Where both fixed-price and cost-type proposals were solicited, agency's determination to award cost-type contract was properly made after proposals were evaluated and not before proposals were solicited, as urged by protester 185

Experience

Agency reliance on offeror's historical costs and experience under one contract in evaluating realism of offeror's cost estimate for another contract is reasonable where record establishes similarity between fabrication and assembly processes of items required by both contracts 185

Current information

Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application 347

Rejection
Improper

Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations 627

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Rejection—Continued
Notification of unsuccessful offerors Page

ASPR 2-503.1(f) requires prompt notice to unsuccessful offerors; reasons for rejection may be given in general terms, notice requirement is procedural, and failure to comply is not legal basis for disturbing otherwise valid award. Notice merely stating offeror's item does not meet specification requirements is inconsistent with spirit and purpose of regulation, particularly where Agency furnishes more detailed reasons for rejection in denying offeror's protest shortly after issuing notice of rejection ---- 809

Technical proposals
Cost acceptability

Agency was not required to negotiate with protester so that it might propose lower costs where revamping of protester's technical proposal would have been required in order to make its cost acceptable ---- 328

Unbalanced
Determination
Criteria

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

Utilization of cost and pricing data

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

Options
Generally. (*See* **CONTRACTS, Options**)
Prices
Best and final offer
Hourly rates reduced
Offer rejected

As required, initial offer named three individuals to designated positions, and listed on cost or pricing data form their hourly wage rates. In best and final offer (BAFO), hourly rates were reduced without justification therefor. Contracting officer, concerned that unexplained price reductions meant different individuals would be used, or that substantial cost overruns were possible, rejected BAFO. Rejection was not improper since offeror must clearly demonstrate proposal's merits, and contracting officer's concerns were reasonable ---- 239

Contracting agency's allegation, disputed by protester, that oral request for best and final offers included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice ---- 239

CONTRACTS—Continued
Negotiation—Continued
Prices—Continued
Cost and pricing data evaluation Page

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

Agency and one offeror contend that proposal, which deviates from RFP's contemplated pricing structure, may not be accepted because (1) all offerors were not advised that such deviations would be permitted, and (2) deviation may have exposed other offeror to less risk. Contention is without merit because deviation relates to form only and record indicates that offerors had sufficient information to make business judgment regarding actual risk involved 784

Price evaluation which scored proposals nearly equally did not eliminate price as evaluation factor, since price proposals were close and only varied by approximately 5 percent 827

Lowest overall cost to Government

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

Proposals essentially equal technically

Where solicitation establishes price as substantially less important than technical factors in evaluation of proposals, award of negotiated fixed-price contract to lower priced, lower scored offeror is not improper where agency regards competing proposals as essentially equal technically, thereby making price the determative criterion for award 251

Pricing data. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Qualification of new sources
Qualifying data
Evaluation
Propriety

Nothing in NASA's "Report of Investigation" containing interviews of selected concern's employees supports November 23, 1976, representation of concern that incumbent employees' *direct responses* formed basis for numbers and categories of reported employee commitments in event selected concern should be awarded contract 217

Requests for proposals
Amendment
Required for changes in RFP
Exceptions

Protester fails to show that RFP as issued contained inaccurate information giving incumbent contractor unfair competitive advantage. Thrust of protest is that protester was unfairly disadvantaged by lack of opportunity to revise its proposal after initial proposals were submitted and it learned that 1 of 617 equipment items to be serviced had been removed. However, *de minimis* change did not require agency to amend RFP pursuant to ASPR 3-805.4(a) (1976 ed.), nor did agency err in making award on basis of initial proposals under ASPR 3-805.1(v) (1976 ed.) 370

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Cancellation
Not justified Page

Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror---- 784

Recommended by General Accounting Office

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

Ceiling price
Failure to disclose

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

Construction
Equipment verification provisions

Procurement documents in "four-step" procurement established goal for maximum use of "tried and true" computer equipment but did not necessarily rule out modified equipment based on preexisting technology or new equipment if based on preexisting equipment or technology. Documents were written broadly enough to permit use of tried technology or equipment. Under literal reading of provisions requiring equipment verification, preexisting technology—prototype related equipment—would qualify so long as technology had verified performance characteristics---- 715

Reasonable interpretation

Given that RFP provision on "programming languages" did not expressly require—or prohibit—use of "high order" programming language, that provisions of DOD Directive 5000.29 did not apply to procurement, and that Air Force has refuted by force or argument alleged automatic superiority of "high order" programming language, view of implicit procurement requirements for "high order" language is rejected---- 715

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."---- 501

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Omissions
Cost estimates
Spare parts furnished by contractor Page

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 501

Protests under
Closing date
Date for receipt of initial proposals

Protest concerning requests for proposals' (RFP) price evaluation formula and application thereof is untimely since formula was clearly set forth in detail in RFP, alleged problems with application were reasonably discernible from formula, and protest was not filed before closing date for initial proposals as required by 4 C.F.R. 20.2(b)(1) (1977) 827

Timeliness
Filed after closing date for receipt of proposals

Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, General Accounting Office does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination 244

Unsubstantiated allegations

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

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

Restrictive of competition

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

Specification adequacy

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 501

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Specification requirements
Information
Specificity Page

As practical matter, it would have been impossible to have obtained from competitive-range offerors detailed information needed to evaluate life-cycle costs down to module level since design of software to module level would not occur until after award ---- 715

Unbalanced proposal submission

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

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 ---- 527

Selection process *v.* procurement
Determination of minimum needs

Protester was not prejudiced by agency's failure to contact protester directly during conduct of market survey since protester's equipment did not meet agency's mandatory requirements ---- 865

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

Sole-source basis
Determination and findings
One known source
Propriety of determination

Protest against sole-source awards is denied where agency performed adequate market survey and record establishes that awardees were only known firms with equipment capable of meeting agency's requirements -- 865

Justification

Materials to be tested may be purchased sole-source from only approved producer ---- 527

Delay and technical risk involved

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

CONTRACTS—Continued
Negotiation—Continued
Sole-source basis—Continued
Reprocurement
Default termination of original contract Page

Question concerning propriety of sole-source award of reprocurement contract is within General Accounting Office (GAO) bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals 703

Source selection
Market survey utilization

Failure in market survey to provide details of requirements to potential vendor is not unreasonable in view of time constraints, primary reliance on technical literature and agency contacts, and contacts with General Services Administration which should have been able to provide expert advice on both market place and equipment 865

Specifications. (*See* **CONTRACTS, Specifications**)
Subcontracts
Propriety of negotiation

Fair and equal treatment of competing offerors is not provided when, after cutoff date for receipt of quotations, operating contractor permits one offeror to submit price based on offeror's suggested alternate approach but does not provide competitor with opportunity to furnish quote based on that approach 759

Termination. (*See* **CONTRACTS, Termination**)
Two-step procurement
Competition sufficiency
Small business set-asides

Award under two-step formally advertised procurement restricted as total small business set-aside may be made where there are only two small business offerors whose step-one technical proposals were found acceptable and were eligible to compete on step-two invitation for bids .. 809

First step
Benchmark testing
Time limitations

Language concerning minimum time in which to schedule benchmarking should be eliminated from future solicitations. Agency merely needs to state that it has right to perform benchmark within resonably practicable time not to exceed whatever time period required by circumstances of procurement 653

Technical approaches
Evaluation criteria

Fact that Bid Equalization Factor Clause gives offeror significant monetary reduction for purposes of bid evaluation under step two does not mean clause is prohibited by applicable procurement law or statute. General Accounting Office has consistently interpreted language of Federal Procurement Regulations (FPR) that award be based on price and other factors to mean that award will be on basis of most favorable cost to Government. Dollar amounts computed under formula set forth in Bid Equalization clause represent foreseeable energy costs savings because of increased efficiency of offering UPS equipment 653

CONTRACTS—Continued
Negotiation—Continued
Two-step procurement—Continued
One offer acceptable Page
Record indicates only one step-one offeror was benchmarked. Since FPR provides for discontinuance of two-step method of procurement after evaluation of step-one technical proposals, VA should consider cancellation of IFB issued under step two and instead negotiate price with only offeror ---- 653
Technical proposal acceptability
Benchmark, etc., requirements
Veterans Administration is allowed to set its own minimum needs for UPS equipment based on computer hardware to be supplied by such equipment, prevailing electrical environment at its computer site, and availability of back-up computer capacity. Consequently, VA can also conduct its own benchmarking to insure offeror has technical ability to fulfill VA's particular minimum needs. VA need not take into account fact that protester passed benchmark test for recent UPS procurement by General Services Administration ---- 653
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Failure to apply
Agency's acquisition and evaluation of equipment furnished by firm deemed ineligible to compete on step-one RFTP and rejection of six proposals on basis of such evaluation constitute complete departure from RFTP evaluation criteria. Improper evaluation precluded 60 percent of offerors from competing on step-two solicitation to their prejudice. However, remedial action is not possible because of termination costs and urgency and gravity of program for which cameras are being purchased ----
Offer and acceptance
Acceptance
Delays
Where low bidder initially refused to revive its expired bid, unless bid was corrected upward because of mistake, bid may not be accepted subsequently when bidder decides to waive its mistake. Award, if otherwise proper, may be made to second low bidder whose bid was promptly revived at request of agency ---- 228
Effect
Scope of contractor's obligation
Where solicitation language does not require submission of information concerning preventive maintenance prior to award, bidder's insertion of bid price in invitation for bids for such maintenance constitutes an offer to provide the required maintenance and acceptance of bid results in binding obligation to perform in accordance with Government's requirements ---- 395
What constitutes acceptance
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

CONTRACTS—Continued
Offer and acceptance—Continued
Communication of offer requirement
Compliance Page
In negotiated procurement where schedule contractors were competing for award of orders for particular project, circumstances indicate that protester adequately communicated its offer to perform work, though it did not timely submit copy of modification to its contract as required. Agency was obligated to exert reasonable efforts to verify existence and contents of contract modification 627
Options
Exercisable at sole discretion of Government
Review by GAO
Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, General Account ng Office (GAO) will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable 328
Payments
Advance
Lessor's capital cost at beginning of lease
Agency's annual appropriation is not available for payment of equipment lessor's entire capital cost at commencement of lease, and consequently low bid for lease of telephone equipment for 10 years which requires payment of bidder's capital costs at the outset of lease is properly rejected as requiring an advance payment contrary to law 89
Limitation
Advance payments authorized by statute and implementing regulations are financing tool used where no other means of contract financing are available; a bid conditioned upon the receipt of advance payments would be required to be rejected pursuant to Federal Procurement Regulations 1-30.407(b) 89
Prohibition
Applicability
Cost of special equipment acquired to perform major construction contract may be paid as incurred under mobilization and preparatory work clause without violating statute prohibiting advance payments. Moreover, Government's interests appear to be protected in case of termination for convenience 597
Service contracts
Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for that fiscal year; however, had bidder unbalanced its bid by including the capital cost of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. 529 89

CONTRACTS—Continued
Payments—Continued
Progress
First payment
Inclusion of total performance or payment bond premiums Page

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

Prompt payment discount. (*See* **CONTRACTS, Discounts**)
Releases
Effect

Contractor, having mistakenly failed to reserve claims against the Government in general release, may nevertheless have claims considered on merits since contracting officer knew of contractor's active interest in larger claims and prior to payment was informed of error by contractor .. 407

Personal services. (*See* **PERSONAL SERVICES, Contracts**)
Prices
"Best possible price"
Reprocurement
Default termination of original contract

Contracting officer acted reasonably in awarding reprocurement contract to next low bidder on original procurement having equipment available to perform needed services at price not in excess of that bidder's original bid since agency had urgent requirement for immediate reprocurement and under circumstances prior bids could be considered acceptable measure of what competition would bring 703

Cost, etc., data
Negotiated procurements. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)
Privity
Subcontractors
Award "for" Government

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 527

Where Department of Energy (DOE) contract with prime management contractor for operation and management of DOE facilities requires contractor to award subcontracts on basis of fair and equal treatment of all competitors, the "Federal norm" provides an appropriate frame of reference for determining if fair and equal treatment has been provided in specific situations 759

CONTRACTS—Continued

Protests

Abeyance pending contract appeals board action Page

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 contractor under identical contractual provisions as those protested and are currently pending before contract appeals board 431

Administrative actions

Filing protest

"Adverse agency action" conclusion

If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 constituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met 140

Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed 140

Administrative reports

Failure by GAO to request

Reconsideration request

Fact *v.* law basis

General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto 395

Timeliness

Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period 251

Agency delay in filing response to protest is procedural matter, not affecting merits of protest. Response to protest cannot be disregarded on this basis 827

Allegations

Agency destruction of workpapers, etc.

Not prejudicial

Documents destroyed by agency appear to have been workpapers of technical panel which were incorporated into formal comments of technical panel that were provided to protester. Therefore, protester was not prejudiced by this action 827

CONTRACTS—Continued
Protests—Continued
Allegations—Continued
Conflict in statements of contractor and contracting agency Page
Contrary to protester's contention, record reveals that agency advised protester ahead of time of established common cutoff date for submission of second best and final offers (BAFO). Protester submitted timely BAFO and initial protest letter asserted that pre-cutoff date advice was given. Based on above, and contradictory statements by protester and agency, protester has failed to meet burden of proof 800
Not supported by record
Protest based on allegations of statutory and regulatory violations, without meaningful explanation as to why or how the violations exist, is without merit 271
Contention that personnel exceeded budget limitation
Record does not support contention that agency suggested to protester an allocation of personnel which exceeded agency's known budgetary limitations 8
Improprieties allegation
Protester's allegation of improprieties occurring at the negotiation session are untimely because they were filed more than 10 days after they occurred 8
Authority to consider
General Accounting Office rendering decisions on bid protests does not violate separation of powers doctrine 615
Agency records not released to protester
General Accounting Office will consider all documents filed by agency in deciding protest, even though agency withheld certain documents from protester pursuant to Freedom of Information Act 827
Appeal before Contract Appeals Board
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 contractor under identical contractual provisions as those protested and are currently pending before contract appeals board 431
Grant procurements
General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development bloc grant 872
Reprocurement due to contract default
Question concerning propriety of sole-source award of reprocurement contract is within General Accounting Office (GAO) bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals 703

CONTRACTS—Continued
Protests—Continued
Award approved
Prior to resolution of protest Page

Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office (GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected 361

Conflict in statements of contractor and contracting agency

Contracting agency's allegation, disputed by protester, that oral request for best and final offers included requirement to justify price changes from those in initial offer is not conclusive against protester, since subsequent written request confirming oral request contained no such advice 239

Protest before or after award

It is concluded that protester was specifically informed on February 18, 1977, of Navy's intent to modify contract in ways which were later made subject of March 31 protest notwithstanding that, as of February 18, Navy contracting office had not received internal Navy document describing modification and that some details of intended modification unrelated to basic grounds of protest—were later changed 140

Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Fraud

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

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

To determine arbitrary rejection of bid

Allegation concerning bidder's capacity to perform involves question of responsibility. While General Accounting Office (GAO) will review protests involving agency determinations of nonresponsibility in order to provide assurance against arbitrary rejection of bids or proposals, affirmative determinations generally are not for review by GAO since such determinations are based in large measure on subjective judgments of agency officials 361

"Defensive protests"

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

CONTRACTS—Continued
Protests—Continued
"Four-step" source selection procedures
Negotiated procurements Page
Since (1) selected proposal was rationally found to be in competitive range; (2) discussions could not have been held with selected offeror in contested areas without violating procedures; (3) appropriate discussions with selected offeror were otherwise conducted; (4) protester alleges lack of discussion with itself largely in the abstract; (5) post-selection discussions with highest-rated offeror did not result in "leveling," it cannot be concluded Air Force failed to comply with requirements of 10 U.S.C. 2304(g). Based on review of record, it is concluded that agency-evaluated cost and technical differences between proposals of protester and selected offeror are rationally founded------ 715
General Accounting Office function
General Accounting Office rendering decisions on bid protests does not violate separation of powers doctrine---------- 615
Interested party requirement
Air carrier who was at all times eligible for contract to perform charter flights is interested party under bid protest procedures-------- 401
Disappointed offeror in negotiated procurement is interested party to file protest within meaning of section 20.1, General Accounting Office (GAO) Bid Protest Procedures, even though proposal had allegedly expired, since active pursuit of protest can revive proposal---------- 627
Merits
Consideration of untimely protest
Impact on timely issues
Untimely is ue of whether price evaluation formula eliminated price as evaluation factor will be considered only to extent that it impacts on timely issue relating to adequacy of price competition to invoke exemption to cost or pricing data requirements----------
Moot, academic, etc., questions
Protest against possible award to lowest bidder, which allegedly submitted unrealistically low bid under which performance in compliance with solicitation's manning requirements and applicable Department of Labor wage determination is not possible without sustaining huge losses, will not be addressed because procuring activity found low bid nonresponsive and ineligible for award because bidder failed to submit amendments to solicitation with its bid---------- 480
Negotiation
Requests for proposals
Protests under
Closing date
Date for receipt of initial proposals
Contention that evaluation criteria concering experience restricted competition and favored incumbent contractor is untimely because criteria were listed in RFP, and protest should have been, but was not, filed before closing date for initial proposals----------
Non-appropriated fund activities
Where statute autorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled----- 311

CONTRACTS—Continued
Protests—Continued
Notice
What constitutes
To contracting officers Page

Where contracting officer, through the regular course of mail, receives before award copy of protest transmitted to General Accounting Office (GAO), agency is on notice of protest and should comply with Federal Procurement Regulations (FPR) provision for award after notice of protest, notwithstanding absence of formal notification of protest from GAO. No consideration by GAO is required where agency failed to comply with procedural requirement of FPR in making award after notice of protest, since validity of award was not thereby affected 361

Options
Pricing
Not mentioned in IFB

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

"Storage credits"

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

Persons, etc., qualified to protest
Interested parties
Bidders/offerors on original procurement
Reprocurement on default termination

Bidder on original procurement is interested party under GAO Bid Protest Procedures so as to be able to protest sole-source negotiated reprocurement of original contract 703

Premature

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

Preparation
Costs
Noncompensable

Claim for anticipated profits and for cost of pursuing bid protest is rejected 125

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

CONTRACTS—Continued
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Procedures
Bid Protest Procedures
Administrative reports
Timeliness Page

Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period ---- 251

Furnishing information on protests
Rebuttal by interested parties

Contention by interested party (successful offeror) that its ability to respond to protest was hampered because protest correspondence was erroneously sent to branch office rather than company headquarters is without merit where different representatives of company gave conflicting instructions as to where correspondence should be sent, and in any event company had more than normal 10 working days in which to prepare its comments ---- 627

Improprieties and timeliness

Protest against alleged solicitation defect is untimely filed under General Accounting Office's Bid Protest Procedures notwithstanding protester's asserted lack of knowledge of defect, and issue is not considered under exception as "significant" because it does not affect class of procurements ---- 103

Reconsideration
Error of fact or law basis

General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto ---- 395

New contentions

Procuring agency untimely filed additional basis upon which reconsideration of merits of earlier decision is requested. Since additional basis was not filed timely as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider that aspect of earlier decision ---- 615

Standing to protest
"Interested" party

Air carrier who was at all times eligible for contract to perform charter flights is interested party under bid protest procedures ---- 401

Time for filing
Date basis of protest made known to protester

Contention—that Government-stuffed-container factor of 10 percent instead of 24 percent should have been used to evaluate price proposals—was not raised within 10 working days after basis of protest was known; therefore, it is untimely under 4 C.F.R. 20.2(b)(2) (1977) and will not be considered on merits ---- 784

Argument that discussions were not meaningful is timely since it was not known until protestor received certain documents pursuant to Freedom of Information Act request, and argument was raised within 10 days of that time ---- 827

CONTRACTS—Continued
Protests—Continued
Procedures—Continued
Bid Protests Procedures—Continued
Time for filing—Continued
Reconsideration request Page

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

Procuring agency filed timely request that General Accounting Office (GAO) reconsider prior decision but did not timely file required detailed statement concerning factual or legal basis to modify or overturn prior decision. Since detailed statement was not timely filed as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider earlier decision 615

Significant procurement issue exception—applicability

None of issues found to be untimely are significant issues which could be considered notwithstanding their untimeliness 827

Solicitation improprieties

Portion of protest concerning procuring activity's treatment of protester's bids in response to earlier solicitations which are not the subject of the protest here in question will not be addressed 686

Protester's contention that second solicitation's specific acquisition of data clause did not meet Government's actual needs involves an alleged impropriety in the solicitation which was apparent prior to bid opening and since protester first raised issue with agency after bid opening it is untimely raised under 4 C.F.R. 20.2(b)(1) (1977) 861

Two-step procurement

Protest by large business concern against solicitation restricting procurement as total small business set-aside, on basis that there were insufficient small business competitors, filed after closing date for receipt of step-one technical proposals is untimely filed under General Accounting Office Bid Protest Procedures, 4 C.F.R. 20.2(b) (1977 ed.) 809

Waiver

Interested party timely requested that GAO reconsider earlier decision and, before expiration of time for filing reconsideration request, such party was expressly granted extension to file required detailed statement. Although Bid Protest Procedures do not permit waiver of section 20.9's time limit for filing reconsideration, in circumstances GAO will consider merits of reconsideration request. For future, reconsideration requests must be filed within prescribed time limit and there will be no exceptions 615

Contracting agency requirements
Agency's noncompliance
Not prejudicial

Neither Naval Regional Procurement Office Instruction 4200.30B nor DAR 2-407.8(a)(1) requires that a written protest be responded to in writing prior to award and since protest has been decided on its merits protester has not been prejudiced by absence of written agency response to its protest concerning the second solicitation prior to award 861

CONTRACTS—Continued
Protests—Continued
Responsibility of small business concerns to perform contract
Conclusive determination vested in SBA Page
Protest by small business against contracting officer's determination of nonresponsibility because of lack of tenacity and perseverance is dismissed since, pursuant to recent amendment of Small Business Act, Public Law 95–89, section 501, 91 Stat. 553, the matter has been referred for final disposition by Small Business Administration---------- 31
Timeliness
Basis of protest
Constructive notice
Although protester hedges admission that it was aware—as of March 30—that "grounds of protest *would* exist" if Navy modified contract as it intended, fact that protester actually filed protest on March 31 goes against protester's argument that companies need not file "defensive protests." In any event, information conveyed by Navy on March 30 was no more than that which had been conveyed in February 18 conference about intended modification---------- 140
Date made known to protester
If protester's February 18 objections to intended Navy action, subsequent phone calls and conferences are not to be considered filing of protest, March 31 protest is untimely since filed more than 10 days after basis of protest about nonsolicitation irregularity was known. If February 18 objections are considered to be protest then it is clear Navy's simultaneous oral rejection of protests on February 18 or March 1 constituted initial adverse agency action from which protester had 10 days within which to file protest, which norm was not met---------- 140
Although protester apparently considered contracting officer's initial adverse action to be ill-founded or inadequately explained, leading protester to appeal to higher agency level, it was nevertheless obligatory that protest be filed within 10 days after initial adverse action. Related ground of protest against failure to obtain delegation of procurement authority is also untimely filed---------- 140
Doubtful
Protest against sole-source procurements is timely since doubt as to date on which protester knew or should have known protest basis is resolved in favor of protester in absence of objective evidence to contrary-- 865
Burden of proof
Evidence sufficiency
Large business concern's protest against agency's evaluation of its equipment (on basis of which small business offers were rejected as unacceptable) filed after closing date for receipt of step-one proposals is timely filed where evaluation was not publicly disclosed and record does not controvert protester's statement that it became aware of unfavorable evaluation only at time of issuance of step-two solicitation---------- 809
Effect of request for debriefing
Argument that Government should have held oral negotiations on price when it discovered that both offerors proposed prices lower than Government estimate is timely, since protester could not have known of basis until debriefing, and issue was raised within 10 days of debriefing-- 827

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Negotiated c ntracts
Date basis of protest made known Page

Where agency ordering office's unconventional negotiated solicitation document required schedule contractors to furnish copies of already effective contract modifications by specific time, but did not warn that failure to comply would eliminate contractor from consideration for award of orders, protest by contractor following its elimination from procurement is not "based upon" any apparent solicitation impropriety. Rather, protest was timely filed within 10 working days after protester knew basis for protest—elimination from procurement for failure to furnish copy of contract modification 627

Award on initial proposal basis

Protest after submission of initial proposals objecting to award on basis of initial proposals and agency's failure to amend request for proposals (RFP) is not untimely, because protest is not directed at any apparent impropriety in RFP, but at conduct of procurement after initial proposals were received 370

Where offeror received information on July 25 leading it to inquire whether agency would amend RFP, waited for promised response, and protested within 10 working days after it was told on August 25 that award was being made on basis of initial proposals, protest is not untimely. Basis for protest was not known until agency responded to July inquiry, and delay in agency response is not so great that agency inaction charged protester with knowledge of basis for protest prior to August 25 370

Evaluation method unknown

Where solicitation allows both fixed-price and cost-type proposals to be submitted, protester should have known prior to submitting its proposal that comparison between both types of proposals might be made as part of evaluation process. However, since protester was not aware, until after award, of how evaluation was made, its contentions as to propriety of evaluation are timely raised after award 185

Negotiation procedure improprieties
Apparent prior to closing date for best and final offers

Protest that oral negotiations should have been held due to size, complexity, and potential 5-year duration of procurement is untimely since it was not filed, at latest, within 10 days of closing date for best and final offers 827

Reconsideration
On merits

Interested party timely requested that GAO reconsider earlier decision and, before expiration of time for filing reconsideration request, such party was expressly granted extension to file required detailed statement. Although Bid Protest Procedures do not permit waiver of section 20.9's time limit for filing reconsideration, in circumstances GAO will consider merits of reconsideration request. For future, reconsideration requests must be filed within prescribed time limit and there will be no exceptions 615

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Significant issue exception
Lacking Page

Protest against alleged solicitation defect is untimely filed under General Accounting Office's Bid Protest Procedures notwithstanding protester's asserted lack of knowledge of defect, and issue is not considered under exception as "significant" because it does not affect class of procurements ---- 103

Small business set-aside
Administrative determination
Not for GAO review

Allegations that solicitation included material allegedly proprietary to protester and that it should have been issued as a small business set-aside are untimely and ineligible for consideration where filed after closing date for receipt of proposals. Moreover, General Accounting Office does not generally review allegations that procurement should have been set aside for small business in view of broad agency discretion to make that determination ---- 244

Restriction

Protest by large business concern against solicitation restricting procurement as total small business set-aside, on basis that there were insufficient small business competitors, filed after closing date for receipt of step-one technical proposals is untimely filed under General Accounting Office Bid Protest Procedures, 4 C.F.R. 20.2(b) (1977 ed.) ---- 809

Solicitation improprieties
Apparent prior to closing date for receipt of proposals

Contention, first made after closing date for receipt of initial proposals, that cost factor should have been added to offeror's prices to represent greater risk of loss and damage is untimely under 4 C.F.R. 20.2(b)(1) (1977) and will not be considered on merits since alleged solicitation defect was not protested prior to closing date for receipt of initial proposals ---- 784

Apparent prior to closing date for step-one proposals
Two-step procurement

Protest by Federal Supply Service (FSS) contractor, alleging procurement should have been effected under FSS, filed after closing date for receipt of step-one proposals is untimely filed and not for consideration on merits. Fact that procuring activity's requirements were not being purchased from FSS was apparent from Commerce Business Daily Notice and from face of step-one solicitation ---- 809

Large business concern's protest against agency's evaluation of its equipment (on basis of which small business offers were rejected as unacceptable) filed after closing date for receipt of step-one proposals is timely filed where evaluation was not publicly disclosed and record does not controvert protestor's statement that it became aware of unfavorable evaluation only at time of issuance of step-two solicitation ---- 809

Protest questioning propriety of retaining set-aside restriction after evaluation of step-one technical proposals, filed after closing date for receipt of proposals is timely filed because price reasonableness in two-step formally advertised procurement cannot be determined until after bid opening under step-two solicitation ---- 809

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

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

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

Releases
Finality of release

Contractor, having mistakenly failed to reserve claims against the Government in general release, may nevertheless have claims considered on merits since contracting officer knew of contractor's active interest in larger claims and prior to payment was informed of error by contractor .. 407

Requirements
Estimated amounts basis

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 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

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 501

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 501

Research and development
Initial production awards
Selection of contractor to continue research project
Review by General Accounting Office

Where agency awards contracts to several contractors to perform initial phase of research project and then essentially conducts cost and technical competition to decide which of them will be selected to continue project, General Accounting Office (GAO) will review agency's refusal to select particular contractor. Rule that GAO will not review protest of agency's refusal to exercise a contract option is not applicable 328

CONTRACTS—Continued
Research and development—Continued
Propriety of award
Follow-on phase of research
Changes in price, specifications, etc.
Not prejudicial Page

Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied..... 328

Samples. (*See* **CONTRACTS, Specifications, Samples**)
Service Contract Act. (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)
Small business concern awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Sole-source procurements. (*See* **CONTRACTS, Negotiation, Sole-source basis**)
Specifications
Ambiguous
Evidence to the contrary

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

Amendments
Failure of bidder, etc., to receive

Fact that bidder may not have received one page of amendment, and therefore omitted price for mandatory item, does not warrant acceptance of bid with omitted price..... 597

Failure to acknowledge
Bid/offer nonresponsive

Protest against possible award to lowest bidder, which allegedly submitted unrealistically low bid under which performance in compliance with solicitation's manning requirements and applicable Department of Labor wage determination is not possible without sustaining huge losses, will not be addressed because procuring activity found low bid nonresponsive and ineligible for award because bidder failed to submit amendments to solicitation with its bid..... 480

"Award amount" (fee)
Mess attendant services

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Conformability of equipment, etc., offered
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Request for proposals (RFP) contemplated (1) that offerors would submit one rate for 2-year contract term and rate wa to be computed on "100 percent basis" and (2) that award would be made based on low evaluated price. General Accounting Office would not object to agency's acceptance of price proposal with separate rates for each year where rate was computed on "80 percent basis" because those deviations relate only to form and are not material 784

Price, quality, quantity effect

Where schedule contractors were competing for award of orders and agency required that (1) relevant contract modifications be effected by September 19 and (2) copies of modifications be submitted to agency's ordering office by September 23, accepting late copy of modification or verifying modification was effective as of September 19 would not have amounted to acceptance of "late proposal," because there was no opportunity for offeror to materially change its offer and thereby gain unfair competitive advantage. Copy requirement was matter of form and waiver by Government would not have prejudiced other offerors .. 627

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Affiliates affidavit
Waiver
As minor informality

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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A carrier awarded a contract without the Civil Aeronautics Board authority needed to perform assumes the risk of obtaining the authority .. 401

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Where specification is clear and definite and fully sets forth requirements of Government, and there are no characteristics which cannot be described adequately in the applicable specification, agency erroneously required submission of bid sample. Therefore, in circumstances, bidder who did not submit sample prior to opening may be considered for award even though invitation for bids (IFB) required bid sample be furnished by opening date. 16 Comp. Gen. 65, modified 231

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Purpose

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

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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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Minimum needs requirement
Administrative determination
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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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Samples
Adequacy
Agency acceptance of nonconforming items in prior procurement effect Page

Assertion that protester previously furnished acceptable bid samples to procuring activity does not determine acceptability of samples submitted in response to instant solicitation, nor does acceptance of items on a prior contract bind agency to accept nonconforming items under a subsequent contract ---------- 686

Defective
Determination upheld

Protest against rejection of bid as nonresponsive because bid samples were found not to comply with objective characteristics listed in invitation for bids (IFB) is denied. Invitation for bids advised that nonconforming samples would require rejection of bid, tested samples manifested condition proscribed by IFB specification, and protester did not show its samples were not fairly evaluated by procuring activity ------- 686

Effect of furnishing or failure to furnish on contract award
Competitive system

Where IFB fully sets forth requirements of Government, bidder obtains no undue advantage by not submitting required sample before bid opening and integrity of competitive bidding system is not hindered, because Government may require bidder to perform in accordance with the specifications notwithstanding failure to submit sample. 16 Comp. Gen. 65, modified ---------- 231

Noncompliance with specifications
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Rejection required

Bid samples furnished without interior graining, not listed as subcharacteristic of prescribed "interior appearance" criterion, could not be evaluated as required by solicitation for neatness and smoothness of interior appearance because samples could not demonstrate that with addition of graining bidder's product would retain requisite appearance. Procuring activity lacked reasonable basis to conclude samples complied with solicitation's subjective characteristics and was required to reject bid as nonresponsive to solicitation ---------- 686

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Evaluation propriety

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Contention that required services for two air bases should have been reprocured separately instead of as one contract item is without merit in light of agency explanation that better pricing results from single procurement 703

Tests
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Two-step procurement

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Veterans Administration is allowed to set its own minimum needs for UPS equipment based on computer hardware to be supplied by such equipment, prevailing electrical environment at its computer site, and availability of back-up computer capacity. Consequently, VA can also conduct its own benchmarking to insure offeror has technical ability to fulfill VA's particular minimum needs. VA need not take into account fact that protester passed behcnmark test for recent UPS procurement by General Services Administration 653

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Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74–7, attachment 0 and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs 85

Subcontractors
Privity. (*See* **CONTRACTS, Privity, Subcontractors**)
Subcontracts
Administrative approval
Review by General Accounting Office

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 527

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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---------- 527
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Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future..... 806

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Military personnel
Dual compensation
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

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Pay, etc. Page

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DEPARTMENTS AND ESTABLISHMENTS
Services between
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Unless otherwise necessary to accomplish some competing congressional goals, policies or interests, cost comparisons and billings under section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686 (1970), to requisitioning agencies should not include items of indirect cost which are not significantly related to costs incurred by the performing agency in executing the requisitioning agency's work and which are not funded from currently available appropriations (*e.g.*, depreciation). 56 Comp. Gen. 275, modified---- 674

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Intra- and inter-departmental

The law vests authority to operate and manage Dulles International and Washington National Airports in the Federal Aviation Administration (FAA) which has delegated this function to Metropolitan Washington Airports, a component of the FAA. There is no reason to distinguish the furnishing of facilities by the airports to other components of the FAA from the provision of facilities to other departments and agencies of the Government. Therefore, the same standard for determining cost under the Economy Act should apply to both---- 674

DEPARTMENTS AND ESTABLISHMENTS—Continued
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Military personnel. (*See* **MILITARY PERSONNEL, Dependents**)

DETAILS
Compensation
Higher grade duties assignment
Department of Health, Education, and Welfare detailed employees to higher grade positions, but finds it difficult or impossible to show that vacancies existed. Claims of employees for backpay under *Turner-Caldwell*, 56 Comp. Gen. 427 (1977), may be considered without any finding of vacancies. It is not a condition for entitlement to a retroactive temporary promotion with backpay that there must have existed, at the time a detail was ordered, a vacant position to which the claimant was detailed. However, the position must be established and classified------ 767
Excessive period
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Status
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Intergovernmental Personnel Act
Per diem
Headquarters
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DISLOCATION ALLOWANCES
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Fact questions
Resolved in favor of administrative office Page
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case 155

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Novelty plastic garbage cans containing candy in the shape of solid waste were distributed at an exposition run by an association, to attract attendees to the Environmental Protection Agency (EPA) exhibit on the Resource Conservation and Recovery Act. An expenditure therefor does not constitute a necessary and proper use of EPA's appropriated funds because these items are in the nature of personal gifts 385
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DRUGS
Drug Enforcement Administration
Employment of South Vietnamese
Drug Enforcement Administration could employ South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1977 despite restriction against Federal employment of aliens in Public Law 94-419, which permitted employment only of South Vietnamese refugees paroled into United States. Appropriation act previously enacted for same fiscal year permitted employment of South Vietnamese aliens lawfully admitted into United States for permanent residence, and legislative history does not indicate second act was intended to repeal first 172
Under express terms of only statute now applicable, there is no basis for continued employment by Drug Enforcement Administration of South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1978, since restriction against Federal employment of aliens contained in Public Law 95-81 contains exception permitting employment only of South Vietnamese refugees paroled into United States and no additional exception to employment restriction provision has been enacted. However, it is doubtful that this result was intended. Therefore General Accounting Office recommends clarifying legislation and will defer action pending its consideration by Congress .. 172

EMINENT DOMAIN (*See* **REAL PROPERTY, Acquisition, Condemnation proceedings**)

ENERGY
Department of Energy
Contracts
Subcontracts
Applicability of Federal procurement rules Page

Where Department of Energy (DOE) contract with prime management contractor for operation and management of DOE facilities requires contractor to award subcontracts on basis of fair and equal treatment of all competitors, the "Federal norm" provides an appropriate frame of reference for determining if fair and equal treatment has been provided in specific situations---- 759

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---- 527

Energy Policy and Conservation Act
Strategic Petroleum Reserve Program
Leases
Limitations on expenditures
Rent and improvements

40 U.S. Code 278a (1970) (section 322, Economy Act of 1932), prohibits paying more than 35 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual rent. However, the Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. General Accounting Office will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved---- 316

Time limitation on authority
Leases extending beyond
Propriety

The Energy Policy and Conservation Act establishes the Strategic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States---- 316

ENLISTMENTS
Constructive

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

ENLISTMENTS—Continued
Constructive—Continued Page

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

De jure **status**

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

Pay rights, etc.

Validity determination

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

Validity

Administrative determination requirement

Pay and allowances until

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

Void

Pay and allowances entitlements

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

ENTERTAINMENT

Refreshments

Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future 806

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Gifts to attract attendees to EPA exhibit
Novelty plastic garbage cans Page

Novelty plastic garbage cans containing candy in the shape of solid waste were distributed at an exposition run by an association, to attract attendees to the Environmental Protection Agency (EPA) exhibit on the Resource Conservation and Recovery Act. An expenditure therefor does not constitute a necessary and proper use of EPA's appropriated funds because these items are in the nature of personal gifts 385

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
By Government Printing Office
Appropriations availability. (*See* **GOVERNMENT PRINTING OFFICE, Revolving Fund, Automatic Data Processing equipment, etc. procurement**)
Two-step procurement

Veterans Administration is allowed to set its own minimum needs for UPS equipment based on computer hardware to be supplied by such equipment, prevailing electrical environment at its computer site, and availability of back-up computer capacity. Consequently, VA can also conduct its own benchmarking to insure offeror has technical ability to fulfill VA's particular minimum needs. VA need not take into account fact that protester passed benchmark test for recent UPS procurement by General Services Administration 653

Computer service
Basic ordering agreement utilization
Propriety

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

Evaluation propriety

Concern selected for award of software services contract by National Aeronautics and Space Administration (NASA) admits that *it determined* which employees of incumbent contractor currently performing services would be "likely to accept employment" with concern based on indirect questioning about facts mainly relating to employees' community ties. Manner in which concern actually conducted questioning is at complete variance with manner questioning was represented to NASA during negotiations leading to selection which advanced "overwhelming desire" of employees to accept employment. Other representations made to NASA during selection process are also at variance with methods and results of actually conducted questioning 217

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Computers
Hardware/software vendors Page

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

Selection and purchase
Evaluation propriety

Given that RFP provision on "programming languages" did not expressly require—or prohibit—use of "high order" programming language, that provisions of DOD Directive 5000.29 did not apply to procurement, and that Air Force has refuted by force of argument alleged automatic superiority of "high order" programming language, view of implicit procurement requirements for "high order" language is rejected. 715

Minimum needs requirement

To extent that protester objects to Air Force's determination that less restrictive specification—permitting offerors to use either "high order" or "low order" programming language—will meet Air Force's needs, ground of protest is not for review 715

Negotiation procedures
Four-step procurement

Procurement documents in "four-step" procurement established goal for maximum use of "tried and true" computer equipment but did not necessarily rule out modified equipment based on preexisting technology or new equipment if based on preexisting equipment or technology. Documents were written broadly enough to permit use of tried technology or equpiment. Under literal reading of provisions requiring equipment verification, preexisting technology—prototype related equipment—would qualify so long as technology had verified performance characteristics 715

As practical matter, it would have been impossible to have obtained from competitive-range offerors detailed information needed to evaluate life-cycle costs down to module level since design of software to module level would not occur until after award 715

Since it is fundamental that proposed costs of cost-reimbursement contract be analyzed by Government in terms of realism, approval has been granted to process of award selection based on Government-adjusted costs of proposals after close of negotiations even in non-four step procurements 715

Contract price adjustment

No significant difference is seen between process (in non-four-step procurement) which permits cost adjustment of proposed costs after close of discussions for purposes of award selection—even though no formal adjustment of proposed contract price is made—and four-step process which, through cost adjustment process, permits changed contract price in line with Government-evaluated price 715

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Service contracts
General Services Administration
Teleprocessing services
Multiple Award Schedule Contract Page

Where agency ordering office's unconventional negotiated solicitation document required schedule contractors to furnish copies of already effective contract modifications by specific time, but did not warn that failure to comply would eliminate contractor from consideration for award of orders, protest by contractor following its elimination from procurement is not "based upon" any apparent solicitation impropriety. Rather, protest was timely filed within 10 working days after protester knew basis for protest—elimination from procurement for failure to furnish copy of contract modification 627

Contractor
Cost recovery
Major construction contracts
Payment method propriety

Cost of special equipment acquired to perform major construction contract may be paid as incurred under mobilization and preparatory work clause without violating statute prohibiting advance payments. Moreover, Government's interests appear to be protected in case of termination for convenience 597

Telephones. (*See* **TELEPHONES**)

FEDERAL ADVISORY COMMITTEE ACT
"Balance" requirements
Not violated by National Women's Conference

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

National Commission on Observance of International Women's Year not subject to act

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

National Women's Conference subject to Act

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

FEDERAL AVIATION ADMINISTRATION
Airport facilities
Furnished to agency components Page
The law vests authority to operate and manage Dulles International and Washington National Airports in the Federal Aviation Administration (FAA) which has delegated this function to Metropolitan Washington Airports, a component of the FAA. There is no reason to distinguish the furnishing of facilities by the airports to other components of the FAA from the provision of facilities to other departments and agencies of the Government. Therefore, the same standard for determining cost under the Economy Act should apply to both 674

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

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT
Compliance
Competition requirements
Requirement of Act that such competition as is feasible be obtained for 40 U.S.C. 484(e)(3)(H) sale is met when required notices are posted and offers from qualified public entities considered 823
Disposal provisions
Negotiated property disposal
To states, territories, etc.
Competition consideration
Under negotiated sale by General Services Administration of surplus real property to a local government pursuant to section 203(e)(3)(H) of Federal Property and Administrative Services Act of 1949 (Act), 40 U.S.C. 484(e)(3)(H), offers from a source other than local government units described by 40 U.S.C. 484(e)(3)(H) need not be considered 823

FEDERAL REGISTER
Publication
Required Page
Government Printing Office is required by 44 U.S.C. 1504(a)(3) to publish information in Federal Register that Amtrak is required to publish under Freedom of Information, Privacy, and Sunshine Acts. Furthermore, Amtrak may be billed for such publication in accordance with 44 U.S.C. 1509, as amended by Pub. L. No. 95-94, since Amtrak is an "agency" within the context of that provision 773

FEDERAL SUPPLY SCHEDULE CONTRACTS (*See* **CONTRACTS, Federal Supply Schedule**)

FEDERAL TRADE COMMISSION
Attorneys' fees
Reimbursement
The Federal Trade Commission has discretion to determine eligibility for reimbursement of costs of participation in its rulemaking proceedings, including "reasonable attorneys fees" under 15 U.S.C. 57a(h)(1) (1976). However, payment of an amount in excess of the costs actually incurred for legal services is not authorized, even though the participant utilized "house counsel" whose rate of pay is lower than prevailing rates 610

FEES
Attorneys
Claims. (*See* **CLAIMS, Attorneys' fees**)
Generally. (*See* **ATTORNEYS, Fees**)
Grievance proceedings
Employee entitlement to fees
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
Traffic offense cases
Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility 270
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 526

FEES—Continued
Professional examinations
Military personnel Page

Air Force medical officer who performed temporary duty under orders issued at his personal request that he be temporarily assigned to San Francisco, California, to take Part II of the American Board of Pediatrics examination, and who was released from active duty several weeks later, is not entitled to payment of examination fees which he paid prior to taking Part I of the examination before entry on active duty, since applicable service regulations limit payment of such expenses to "career" officers 201

Travel of Reserve officers, serving limited active duty periods, to take medical board examinations shortly before their release from active duty should not ordinarily be authorized at Government expense nor should their examination fees be reimbursed since such trips are primarily a matter of personal convenience and benefit, unrelated to service requirements 201

User fees
Airports

Washington National and Dulles International Airports are operated as self-sustaining commercial entities with rate structures and concession arrangements established so as to assure recovery of operating costs and an appropriate return on the Government's investment during the useful life of the airports, with over 98 percent of their revenue coming from non-Government users. Therefore, fees collected from both Government and non-Government users should include depreciation and interest 674

FINES
Government liability
Carrier violation of weight regulation
Improper loading

Forest Service employee paid fine to Virginia State Court because Government truck that he was driving exceeded maximum weight limitation. He may be reimbursed by Government since the fine was imposed upon him as agent of Government and was not the result of any personal wrongdoing on his part 476

FLY AMERICA ACT
Contracts for transportation
Protests under
Interested party requirement. (*See* **CONTRACTS, Protests, Interested party requirement**)
Intent of Sec. 5. (*See* **TRANSPORTATION, Air carriers, Fly America Act, Intent of Sec. 5**)

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Post differentials
Computation

Agency for International Development properly computed post differential ceiling on biweekly, rather than annual, basis inasmuch as section 552 of the Standardized Regulations requires implementation of the ceiling by reduction in the per annum post differential rate to a lesser percentage of the basic rate of pay than otherwise authorized. The rule that the method of computation prescribed for basic pay by 5 U.S.C. 5504(b) shall be applied as well in the computation of aggregate compensation payments to officers and employees assigned to posts outside

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES—Continued
Post differentials—Continued
Computation—Continued Page
the United States who are paid additional compensation based upon a percentage of their basic compensation rates thus applies to post differential payments under section 552 ---- 299

FOREIGN SERVICE
Home service transfer allowance
Temporary lodgings
"Reasonable expenses"
Guidelines in 52 Comp. Gen. 78 applicable
Employee transferred from Athens, Greece, to Washington, D.C., was authorized home service transfer allowance under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). Employee submitted claim of $33 per day for lodging portion of home service transfer allowance for days that he and family resided with relatives. Since section 251.1a of Standardized Regulations authorizes only "reasonable expenses," this Office applied ruling of 52 Comp. Gen. 78 (1972) which established guidelines for determining reasonableness of employees' claims for subsistence while occupying temporary quarters when they resided with relatives ---- 256
Retirement
Postponement of return to U.S.
Foreign Service employee who retired overseas has delayed return travel more than 7 years even though State Department travel regulations require that such travel must begin not later than 18 months after separation. State Department regulation granting exceptions to travel regulations where allowances are exceeded or excess costs are incurred provides no basis for granting exceptions to time limitation on return travel, and former employee may not be granted any further time extensions -- 387
Temporary lodgings
Home service transfer allowances. (*See* **FOREIGN SERVICE, Home service transfer allowances, Temporary lodgings**)
Travel expenses
Circuitous routes
Personal convenience
Dependents traveled by foreign air carrier from Accra, Ghana, to Frankfurt, Germany, and completed travel from Frankfurt to U.S. aboard U.S. air carriers. Employee is liable for 15 percent amount by which fare via Frankfurt exceeds fare by usually traveled route. Since travel via Frankfurt involved certificated U.S. air carrier service for 4,182 of 7,450 miles traveled, and proper routing via Dakar would have involved travel of 4,143 of 5,610 air miles by U.S. air carriers, employee is liable for loss of U.S. carrier revenues computed in accordance with formula at 56 Comp. Gen. 209 ---- 76

FRAUD
False claims
Debt collection
Where employee has been paid on voucher for travel expenses and fraud is then found to have been involved in a portion of claim, the recoupment of the improperly paid item should be made to the same extent and amount as if his claim were not yet paid and were to be denied because of fraud. Decision 41 Comp. Gen. 285 (1961) and 41 *id.* 206 (1961) are clarified ---- 664

FRAUD—Continued
False claims—Continued
Debt collection—Continued Page

No recoupment action appears necessary where a final and valid settlement voucher has eliminated an earlier false claim. This assumes that where there has been an earlier false claim for lodgings, for example, the final settlement voucher contains no claim for subsistence expenses for that day ---- 664

Effect on subsequent claims

Department of the Air Force asks whether an employee who submits a fraudulent claim may be refused access to the General Accounting Office (GAO) for purpose of settling his claim. Since GAO has authority to settle and adjust claims by the Government or against it, employee may submit claim to GAO even though it is considered fraudulent by his agency. Agency should expedite adjudication by using agency channels to send claim to GAO with its report ---- 664

Evidence

Substantial

Reasonable suspicion of fraud which would support denial of claim or recoupment action in case of paid voucher depends on facts of each case. Fraud must be proved by evidence sufficient to overcome existing presumption in favor of honesty and fair dealing. Generally, where discrepancies are minor, small in total dollar amounts, or where they are infrequently made, fraud would not be found absent the most convincing evidence to the contrary. Where discrepancies are glaring, large sums are involved, or they are frequently made, a finding of fraud is more readily made absent satisfactory explanation from claimant ---- 664

Fraudulent items as vitiating entire voucher

Where employee submits voucher for travel expenses and part of claim is believed to be based on fraud, only the separate items which are based on fraud may be denied. Moreover, as to subsistence expenses, only the expenses for those days for which the employee submits fraudulent information may be denied and claims for expenses on other days which are not based on fraud may be paid if otherwise proper. B-172915, September 27, 1971, modified ---- 664

When an employee receives a travel advance and then submits a false final settlement voucher, the separable items on the voucher attributable to false statement are subject to being recouped. Any additional amount claimed by claimant should be denied only insofar as it is a separate item of entitlement based on fraud ---- 664

FREEDOM OF INFORMATION ACT

Applicability

The National Railroad Passenger Corporation (Amtrak) is an "agency" for the purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak ---- 773

FUNDS

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

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

Federal grants, etc., to other than States. (*See* **GRANTS**)

Change of grantee Page

Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital. Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed---------- 205

Propriety of grant award

Section 223 of the Higher Education Act of 1965, Title II, Part B, as amended, authorizes the Office of Library and Learning Resources, Office of Education, Department of Health, Education, and Welfare, to make grants to and contracts with public and private agencies and institutions. Regulations define "public agency" to exclude Federal agencies. The National Commission on Library and Information Science is an independent agency in the Executive branch and therefore is not eligible to receive funds under section 223---------- 662

Replacement contracts

Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application---------- 205

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)

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---------- 546

FUNDS—Continued
Revenue sharing
Restrictions on Federal grants
Not applicable Page

Funds distributed by the Department of the Treasury under title II, Public Works Employment Act of 1976 (Countercyclical Revenue Sharing), Public Law 94–369, 90 Stat. 1002, as amended (42 U.S.C.A. 6721 *et seq.*) may be used to meet non-Federal share matching requirements of Medicaid program, 42 U.S.C. 1396–1396j. Congress intends that Federal funds distributed under title II be treated in the same "no strings" manner as general revenue sharing funds under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.* rather than as grants. Accordingly, the lack of specific statutory language permitting use of these funds as non-Federal share does not stand in the way of such use as it would in the case of grants 710

Revolving
Government Printing Office. (*See* **GOVERNMENT PRINTING OFFICE, Revolving fund**)

GARNISHMENT
Military pay, etc.
Alimony or child support

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(e), 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

Community property settlement

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

GENERAL ACCOUNTING OFFICE
Audits
Agencies and activities not subject to audit by GAO
Marshal's accounts

Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future 806

GENERAL ACCOUNTING OFFICE—Continued
Audits—Continued
Transportation accounts
Transfer to agencies
Rate audit functions and personnel to GSA
General Accounting Office appellate authority to review GSA settlements Page

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

Authority
Fair Labor Standards Act
Claims

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

Claims
Statute of limitation effect
Compensation. (*See* **STATUTES OF LIMITATION, Claims, Compensation**)

Decisions
Abeyance
Pending legislative action

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. Overruled in part by 58 Comp. Gen. (B-189782, Jan. 5, 1979) ---- 575

Authority
Contract matters

General Accounting Office rendering decisions on bid protests does not violate separation of powers doctrine ---------- 615

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

Effective date
Date of decision

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

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Hypothetical, academic, etc., questions Page
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
Reconsideration
Error of law or fact basis
Not established
Statement and contentions raised in support of position that agency's determination to negotiate was proper do not constitute submission of facts or legal arguments demonstrating that earlier decision was erroneous; accordingly, GAO declines to reconsider this aspect of earlier decision 615
Errors must be identified
Procuring agency filed timely request that General Accounting Office (GAO) reconsider prior decision but did not timely file required detailed statement concerning factual or legal basis to modify or overturn prior decision. Since detailed statement was not timely filed as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider earlier decision 615
Time limitation
Procuring agency untimely filed additional basis upon which reconsideration of merits of earlier decision is requested. Since additional basis was not filed timely as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider that aspect of earlier decision .. 615
Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Ground of protest questioning finding that prospective awardee is responsible will not be considered since neither fraud on part of procuring agency is alleged nor "definitive" responsibility criteria are involved 67
General Accounting Office (GAO) does not review grantee's affirmative determination of responsibility unless fraud has been alleged or solicitation contains definitive responsibility criteria which have allegedly not been applied. This is consistent with position of GAO in Federal procurement area 85
Defaults and terminations
Reprocurement, etc.
Question concerning propriety of sole-source award of reprocurement contract is within General Accounting Office (GAO) bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals 703

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Contracts—Continued
Disputes
Board of Contract Appeals
Appeal pending Page

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 contractor under identical contractual provisions as those protested and are currently pending before contract appeals board 431

Board of Contract Appeals decisions

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

Modification

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

Nonappropriated fund activities

Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled 311

Protests generally. (*See* CONTRACTS, Protests)
Small business matters
Responsibility determination by SBA
Conclusiveness

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

Grants-in-aid
Grant procurements
Housing and Urban Development Department grant

General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development block grant 872

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
Small business matters Page

GAO declines to consider effect of selfcertification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business ---- 277

Subcontracts

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 ---- 527

Manuals
Policy and Procedures
Statistical sampling procedures

Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b–1(a) (Supp. V, 1975); 3 GAO 44, as amended by B–153509, August 27, 1976 ---- 321

Procedure
Claims
Filing

Department of the Air Force asks whether an employee who submits a fraudulent claim may be refused access to the General Accounting Office (GAO) for purpose of settling his claim. Since GAO has authority to settle and adjust claims by the Government or against it, employee may submit claim to GAO even though it is considered fraudulent by his agency. Agency should expedite adjudication by using agency channels to send claim to GAO with its report ---- 664

Statistical sampling
Policy and Procedures manual. (*See* **GENERAL ACCOUNTING OFFICE, Manuals, Policy and Procedures, Statistical sampling procedures**)

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

Recommendations
Contracts
Basic order agreement use

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

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Disqualification of proposal **Page**
Award to selected concern in view of submission of significant misstatement to NASA would provoke suspicion and mistrust and reduce confidence in competitive procurement system. *Cf. The Franklin Institute,* 55 Comp. Gen. 280 (1975), 75-2 CPD 194. Thus, recommendation is made under Legislative Reorganization Act of 1970 that selected concern's proposal be excluded from consideration for award---- 217
Prior recommendation
Affirmed
Prior decision—with regard to recommendation that startup period be extended—is affirmed, since interested party failed to present any facts or legal arguments which were not thoroughly considered in earlier decision---- 615
Reopen negotiations
Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations---- 627
Request for proposals
Cancellation
Not justified
Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror---- 784
Issuance
Follow-on phases of research projects
While protester was not misled as to evaluation factors for award of follow-on phase of competitive parallel procurement, GAO suggests that agency issue request for proposals prior to selection of contractors for each succeeding phase---- 328
Termination
Contract modification which substitutes diesel for gasoline engines, thereby increasing unit price by 29 percent, substantially extending time for delivery, and resulting in other significant changes to original contract requirements, is outside scope of original contract, and Government's new requirements should have been obtained through competition. General Accounting Office recommends that agency consider practicability of terminating contract for convenience of Government and competitively soliciting its requirement for diesel heaters---- 285
Invitation for bids provided spaces to insert prices for extended price, unit price and subunit price. Although award was based only on evaluation of extended and unit price, subunit price may not be ignored, since it cannot be determined from bid which price is correct---- 410

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Termination—Continued Page
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..... 567
Legislation
Clarifying status of South Vietnamese refugees paroled into U.S.
Under express terms of only statute now applicable, there is no basis for continued employment by Drug Enforcement Administration of South Vietnamese alien lawfully admitted into United States for permanent residence during fiscal year 1978, since restriction against Federal employment of aliens contained in Public Law 95–81 contains exception permitting employment only of South Vietnamese refugees paroled into United States and no additional exception to employment restriction provision has been enacted. However, it is doubtful that this result was intended. Therefore General Accounting Office recommends clarifying legislation and will defer action pending its consideration by Congress..... 172
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GENERAL SERVICES ADMINISTRATION—Continued
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Federal
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Generally, when an original grantee cannot complete the work contemplated and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, award to the alternate must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. An exception is authorized in instant case since (1) Los Angeles County and University of Southern California jointly filed application and grant was awarded by National Cancer Institute (NCI) solely to County only to comply with accounting requirements that there be only one grantee; (2) NCI has determined that the original need still exists; and (3) before using these funds, NCI will determine that the "replacement grant" will fulfill the same needs and purposes and be of the scope as the original application 205
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The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located 357

Grants-in-aid
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Los Angeles County and University of Southern California (USC) jointly filed an application for construction of Cancer Hospital and Research Institute. Grant from National Cancer Institute (NCI) was approved for the Research Institute, which was to be operated by USC, while the Hospital was to be paid for and run by the County. Due to Federal accounting requirements, grant was issued solely to the County, which subsequently decided not to construct the Hospital. Should NCI determine that, as to the Research Institute, the original joint application and a revised application proposed by USC are comparable and that the need for the facility still exists, NCI may "replace" the County with USC as the grantee and charge the original appropriations, even though they otherwise would be considered to have lapsed 205

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

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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

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General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development block grant 872

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Since neither the Federal Medical Care Recovery Act, 42 U.S.C. 2651, nor other authority gave the U.S. the right to collect from the liability insurer of a negligent driver the value of administrative leave granted an injured officer of Secret Service Uniformed Division under 5 U.S.C. 6324, the amount mistakenly collected may be paid to the officer 781

Without legislative authority, the U.S. has no legal claim against third-party tort feasors or their liability insurers for benefits the U.S. provides persons because of injuries caused by tort feasors. Under Supreme Court decisions, such claims involve fiscal policy for Congress to decide. How ever, in a proper case, the U.S. can have a valid claim as a third-party beneficiary under insurance contract terms such as for no-fault, medical payment, and uninsured motorist coverages 781

INTERGOVERNMENTAL PERSONNEL ACT
Per diem
Headquarters

When employees are assigned under the Intergovernmental Personnel Act and authorized per diem, their IPA duty stations are considered temporary duty stations since per diem may not be authorized at headquarters. Therefore, employee stationed in San Francisco, California, who is authorized per diem while on IPA assignment in Washington, D.C., would not be entitled to per diem under 5 U.S.C. 3375(a)(1)(C) while performing temporary duty at San Francisco, since Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, regardless of any unusual conditions involved. However, the employee is entitled to travel allowance under 5 U.S.C. 3375(a)(1)(C) 778

Temporary duty at more than one location

Employee assigned under Intergovernmental Personnel Act (IPA) and receiving per diem at his IPA duty station, may receive an additional per diem allowance for temporary duty (TDY) at another location since 5 U.S.C. 3375(a)(1) permits such payment. The amount of additional per diem should reflect only the increased expenses resulting from the TDY assignment 778

INTERIOR DEPARTMENT
Employees
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Prevailing rate employees who negotiate their wages Page

Department of Interior questions whether it may pay overtime compensation to prevailing rate employees, who negotiate their wages, for work-free meal periods during overtime or alternatively for meal periods preempted by overtime work when employees are credited with an additional 30 minutes of overtime after they are released from duty. Under 5 U.S.C. 5544, employees must perform substantial work during meal periods to be entitled to overtime compensation and no entitlement accrues after employees are released from work. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. (B-189782, Jan. 5, 1979)---- 259

National Park Service
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Department of the Interior may revise National Park Service (NPS) standard concession contract language to allow new park concessioners to encumber the possessory interest in the concession operation in order to provide collateral for loan used to purchase the concession operation. This practice is authorized by 16 U.S.C. 20e (1976) and would not be contrary to 16 U.S.C. 3 (1976), which provides for encumbrance of concessioner's assets to finance expansion of existing facilities. Congress made it clear in enacting 16 U.S.C. 20e that possessory interest sanctioned by that section could be encumbered for any purpose---- 607

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JOINT VENTURES
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Affidavits stating belief that firm bidding both as subcontractor and as member of joint venture, without informing competitors of dual role, improperly attempted to influence bid prices, are not sufficient to overcome affidavits denying such intent. General Accounting Office (GAO) therefore does not object to award to joint venture. If protester has further evidence of collusion or false certification of Independent Price Determination, it should be submitted to procuring agency for possible forwarding to Department of Justice under applicable regulations---- 277

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GAO declines to consider effect of self-certification as small business by joint venture whose combined receipts may exceed dollar limit contained in solicitation because GAO does not review questions relating to small business size status and procurement was not set aside for small business---- 277

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The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located 357
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General Services Administration (GSA) is not required to reimburse tenant agencies for damage to agency property caused by building failures or to lower Standard Level User Charges by amount equal to liability insurance premium paid by commercial landlords. The general rule is that one Federal agency is not liable to another for property damages. There is no basis in Federal Property and Administrative Services Act or its legislative history to create an exception to this general rule where GSA serves as landlord 130
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Since neither the Federal Medical Care Recovery Act, 42 U.S.C. 2651, nor other authority gave the U.S. the right to collect from the liability insurer of a negligent driver the value of administrative leave granted an injured officer of Secret Service Uniformed Division under 5 U.S.C. 6324, the amount mistakenly collected may be paid to the officer 781

LEAVES OF ABSENCE—Continued
Administrative leave—Continued
Propriety Page

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

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Recredit on restoration after unjustified removal
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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

***De facto* employees**
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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

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Retroactive wage adjustments for Federal wage board employees which are not based upon a Government "wage survey," but rather on negotiations and arbitration under a 1959 basic bargaining agreement, are not governed by 5 U.S.C. 5344 as added by section 1(a) of Public Law 92–392, section 9(b) of that law preserving to such employees their bargained for and agreed to rights under that basic bargaining agreement.. 589

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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

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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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Bona fide adoptive parents of members of the uniformed services should be included, similarly to natural parents, as eligible dependents to receive medical benefits pursuant to 10 U.S.C. 1071–1088 (1976), despite the fact that the statute does not expressly include adoptive parents within the term "parents" in authorizing such benefits. Decisions to the contrary should no longer be followed 797

MILEAGE
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Portal-to-portal mileage allowance

Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee most bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement 379

Between residence and temporary duty points
Distance between residence and headquarters
Twenty-five mile point

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

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Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires the Department of Agriculture to authorize the maximum mileage rate for meat grader employees who use their privately owned vehicles in connection with their work. The Federal Travel Regulations (FTR) require agency and department heads to fix mileage rates in certain situations at less than the statutory maximum. Hence, the proposed provision is contrary to the FTR 379

MILITARY PERSONNEL
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De jure status Page
Constructive enlistments may arise for purposes of pay and allowances generally when individuals "otherwise qualified" to enlist enter upon and voluntarily render service to the armed forces and the Government accepts such services without reservation. A member serving under a constructive enlistment is regarded as being in a *de jure* enlisted status and entitled to pay and allowances ---------- 132
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Bona fide adoptive parents of members of the uniformed services should be included, similarly to natural parents, as eligible dependents to receive medical benefits pursuant to 10 U.S.C. 1071–1088 (1976), despite the fact that the statute does not expressly include adoptive parents within the term "parents" in authorizing such benefits. Decisions to the contrary should no longer be followed ---------- 797
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Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it is our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly ---------- 178

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Fees Page
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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
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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 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

MILITARY PERSONNEL—Continued
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Payments resulting from correction
Acceptance effect Page

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

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
Active duty
Hospitalization, medical treatment, etc.
Termination

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(2) because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 40 Comp. Gen. 664, modified ---- 305

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in-line-of-duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty purposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204. 40 Comp. Gen. 664, modified ---- 305

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified ---- 305

A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured

MILITARY PERSONNEL—Continued
Reservists—Continued
Active duty—Continued
Hospitalization, medical treatment, etc.—Continued
Termination—Continued Page
as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a causal relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status. 40 Comp. Gen. 664, modified 305
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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
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A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the original orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a causal relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status. 40 Comp. Gen. 664, modified 305
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MISCELLANEOUS RECEIPTS

Special account *v.* miscellaneous receipts

Reimbursement payments Page

While section 601 of the Economy Act permits the depositing of reimbursements to the credit of appropriations or funds against which charges have been made pursuant to any order (except as otherwise provided), such reimbursements may, at the discretion of the agencies, be deposited in the Treasury as miscellaneous receipts. However, deposit of reimbursements to an appropriation or fund against which no charge has been made in executing an order is an unauthorized augmentation of the agency's appropriation and such sums must be deposited as miscellaneous receipts 674

MOBILE HOMES

Owned or rented by displaced persons

Benefits entitlement

Person who owns or rents mobile home and who, respectively, rents or owns land on which the mobile home rests and is displaced due to a Federal or federally assisted program so as to be entitled to benefits pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 may not receive benefits under both sections 203 and 204 of that Act. Benefits under section 204 are limited to those for displaced persons who are not eligible to receive payment under section 203 613

NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR

National Women's Conference

"Balance" requirements of Federal Advisory Committee Act

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

Subject to Federal Advisory Committee Act

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

Not subject to Federal Advisory Committee Act

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

NATIONAL COMMISSION ON OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR—Continued
State and regional meetings
Purpose
Selecting representatives to Conference Page
Since the State and regional meetings, organized under Public Law 94–167, have the sole statutory purpose of selecting representatives to the Conference, and they are not required to make recommendations to the IWY Commission and others, they are not "advisory committees" under the Federal Advisory Committee Act and are therefore not subject to its "balance" requirement with regard to meeting participants. Nor are the State coordinating committees "advisory" since they have only the operational role of organizing and conducting the State or regional meetings and are, in effect, grantees of the National Commission_ 51

NATIONAL GUARD
Death and injury
While on training duty
Illness beyond termination date
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized due to an in-line-of-duty injury not due to own misconduct during that time, would not be placed in a status of being on active duty for 30 days or more even though the period of hospitalization is covered by an amendment to his orders or new orders issued to extend his period of active duty solely for the purpose of such hospitalization, since such a change in status is not authorized. Thus, such orders would not carry him beyond 30 days for active duty proposes and his rights to be retired for physical disability would remain determinable under 10 U.S.C. 1204. 40 Comp. Gen. 664, modified_____ 305
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified_____ 305

NATIONAL PARK SERVICE (*See* INTERIOR DEPARTMENT, National Park Service)

NATIONAL RAILROAD PASSENGER CORPORATION
Applicability of Freedom of Information, Privacy and Sunshine Acts
The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak_____ 773

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

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

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

OFFICERS AND EMPLOYEES
Back Pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)
Compensation. (*See* **COMPENSATION**)
Debt collections. (*See* **DEBT COLLECTIONS**)
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
Details. (*See* **DETAILS**)
Fines. (*See* **FINES**)
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

OFFICERS AND EMPLOYEES—Continued
Hours of work
Day defined
Twenty-four hour period Page

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

Forty-hour week
First forty-hour basis
Overtime and traveltime
Couriers

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

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

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**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Portal-to-portal mileage allowance
Travel by privately owned automobiles. (*See* **MILEAGE, Travel by privately owned automobile, Between residence and headquarters, Portal-to-portal mileage allowance**)
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

OFFICERS AND EMPLOYEES—Continued
Promotions—Continued
Temporary—Continued
Detailed employees—Continued Page

Employee, who was successively detailed to two higher grade positions, can only be awarded retroactive temporary promotion and backpay for details extending more than 120 days, each detail being treated as a separate and distinct personnel action ---------- 605

Retroactive

Department of Health, Education, and Welfare detailed employees to higher grade positions, but finds it difficult or impossible to show that vacancies existed. Claims of employees for backpay under *Turner-Caldwell*, 56 Comp. Gen. 427 (1977), may be considered without any finding of vacancies. It is not a condition for entitlement to a retroactive temporary promotion with backpay that there must have existed, at the time a detail was ordered, a vacant position to which the claimant was detailed. However, the position must be established and classified ---------- 767

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

Residence

Twenty-five mile point

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

Service agreements

Transfers. (*See* **OFFICERS AND EMPLOYEES, Transfers, Service agreements**)

Subsistence

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

Suits against

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

Traffic offenses

Attorney fees for defending

Funds appropriated to the Bureau of Alcohol, Tobacco and Firearms may not be used to pay attorney's fees of one of its inspectors charged with reckless driving. Attorney's fees and other expenses incurred by the employee in defending himself against traffic offenses committed by him (as well as fines, driving points and other penalties which the court might impose) while in the performance of, but not as part of, his official duties, are personal to the employee and payment thereof is his personal responsibility ---------- 270

OFFICERS AND EMPLOYEES—Continued
Transfers
Cancellation
Government liability Page

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

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

Foreign Service personnel
Home service transfer allowances
Temporary lodgings
Staying with relatives, etc.

Employee transferred from Athens, Greece, to Washington, D.C., was authorized home service transfer allowance under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas). Employee submitted claim of $33 per day for lodging portion of home service transfer allowance for days that he and family resided with relatives. Since section 251.1a of Standardized Regulations authorizes only "reasonable expenses," this Office applied ruling of 52 Comp. Gen. 78 (1972) which established guidelines for determining reasonableness of employees' claims for subsistence while occupying temporary quarters when they resided with relatives 256

Relocation expenses
Attorney fees
Preparing conveyances, other instruments, and contracts
Purchase and/or sale of house not consummated

Legal fees for the preparation of a sales contract are not reimbursable where the sale is not consummated. Charges for title search, abstract of title, tax search and similar activities are reimbursable only if customarily paid by seller of old residence or purchaser of new residence in area where transactions take place 669

Restrictions on reimbursement

Employee claimed reimbursement for attorney's fees paid incident to sale of old residence and purchase of new residence incident to transfer of station. Claim for attorney's fees for services in connection with closing on purchase of new residence is allowed only to extent such fee represents the attorney's work in conducting closing or preparing closing documents. Charges for conferences, correspondence and review of documents are advisory in nature and are not reimbursable 669

All expenses arising from legal services related to items determined to be structural changes or capital improvements are not reimbursable as they are reflected in the purchase price of the residence and not provided for in the regulations 669

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Dependents
Per diem. (*See* **SUBSISTENCE, Per diem, Dependents**)
House purchase
Seller's mortgage interest **Page**

Employee who transferred to new duty station claims reimbursement for payment of seller's mortgage interest due to delay in settlement on residence at new duty station. Despite employee's contention that delay was due, in part, to his performing temporary duty away from the new duty station, claim is not allowable as miscellaneous expense or incidental charge customarily paid in the area under Federal Travel Regulations (FPMR 101–7) (May 1973), paras. 2–5.2d and 2–5.2f 696

"Settlement date" limitation on property transactions
Contract date as settlement date
"Contract for deed"

Employee, incident to transfer of official station effective August 18, 1975, sold residence through "contract for deed" on February 27, 1976, and was reimbursed for expenses incident to transaction. His claim for additional expenses incurred incident to legal title transfer upon purchaser's payment of loan may be paid. Extension of time limit for settlement is not required since "contract for deed" date, which was within 1 year of employee's transfer, is settlement date under FTR para. 2–6.1e. Additional expenses were made "within a reasonable amount of time" since they were incurred within 2-year maximum time limitation of FTR para. 2–6.1e. However, payment for title search may not be made if it duplicates expenses for title insurance. B–188300, August 29, 1977, amplified 770

Extension
Date of request

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

Temporary quarters
Absences

Employee who transferred to new duty station performed temporary duty at old duty station. Period for claiming temporary quarters may be interrupted for periods of temporary duty, but since temporary quarters may be reimbursed only in increments of calendar days, occupancy of temporary quarters for even less than a full day constitutes one of the 30 calendar days. 56 Comp. Gen. 15 (1976). Computation of 30-day period would depend upon when employee departed on temporary duty, when he returned, and which days he has claimed temporary quarters. 47 Comp. Gen. 322, modified 696

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Beginning of occupancy
Thirty day period Page

Transferred employee begins occupancy of temporary quarters at 6:45 p.m. after travel of less than 24 hours. Although he occupies quarters for only one quarter day on first day, that day should be counted as full day in computing temporary quarters allowance. Calendar day is used to compute number of days for which reimbursement may be made. Therefore, maximum reimbursement for first 10-day period is 10 times daily rate (not 9-¼) since the Federal Travel Regulations, para. 2–5.4c provides for daily rate without proration. 56 Comp. Gen. 15, amplified... 6

Computation of allowable amount
Thirty day period

Employee, while in temporary quarters, performed official travel during ¾'s of 2 days, for which time he was paid per diem. If he chooses, he does not have to count those 2 days as part of his 30-day entitlement to temporary quarters. He may, instead, be paid temporary quarters allowance for the 2 days following the date on which his entitlement would otherwise have expired..... 700

Former residence

Employee who transferred to new duty station returned to family residence at old duty station on weekends. Where the return trips were not attributable to "official necessity" under the Federal Travel Regulations (FPMR 101–7) (May 1973), para. 2–5.2a, the period for claiming temporary quarters continues to run 30 consecutive days without interruption..... 696

Subsistence expenses
Husband and wife both civilian employees

Husband and wife, both civilian employees of Marine Corps in Philadelphia, were authorized temporary quarters subsistence expenses incident to transfer to Albany, Georgia. Where transfers were approximately 2 weeks apart, wife was entitled to temporary quarters subsistence expenses as employee as of date husband departed shared temporary quarters at old station for new duty station. While Federal Travel Regulations para. 2–1.5c provides that where members of immediate family are entitled to allowances incident to transfer only one is eligible as employee, restriction is only applicable to transfers which occur at same time..... 389

Title insurance

Employee, incident to transfer of official station effective August 18, 1975, sold residence through "contract for deed" on February 27, 1976, and was reimbursed for expenses incident to transaction. His claim for additional expenses incurred incident to legal title transfer upon purchaser's payment of loan may be paid. Extension of time limit for settlement is not required since "contract for deed" date, which was within 1 year of employee's transfer, is settlement date under FTR para. 2–6.1e. Additional expenses were made "within a reasonable amount of time" since they were incurred within 2-year maximum time limitation of FTR para. 2–6.1e. However, payment for title search may not be made if it duplicates expenses for title insurance. B–188300, August 29, 1977, amplified..... 770

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Transfer not effected Page

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 transfer was cancelled---- 447

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers**)
Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Administrative determination
Layover time

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

"Arduous" travel

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

Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
OIL AND GAS
Leases
Rent and improvements
Limitations on expenditures
Applicability
Strategic Petroleum Reserve Program

40 U.S. Code 278a (1970) (section 322, Economy Act of 1932), prohibits paying more than 35 percent of first year's rent for improvements to leased premises or more than 15 percent of value of premises for annual

OIL AND GAS—Continued
Leases—Continued
Rent and improvements—Continued
Limitations on expenditures—Continued
Applicability—Continued
Strategic Petroleum Reserve Program—Continued
rent. However, the Energy Policy and Conservation Act provides authority, for purposes of Strategic Petroleum Reserve Program, to locate and construct storage facilities on leased property. General Accounting Office will not object to expenditures for rent and improvements incurred in creation of Strategic Petroleum Reserve which may exceed Economy Act fiscal limits if disclosed to Congress in Strategic Petroleum Reserve Plan and not disapproved 316
Storage
Strategic Petroleum Reserve Program
Leasing authority
The Energy Policy and Conservation Act establishes the Strategic Petroleum Reserve (SPR) Program. All authority under any provision relating to SPR Program expires June 30, 1985. Department of Energy may enter into leases for storage space which extend beyond June 30, 1985, if such leases are found to be necessary for Program and in best interests of United States 316
ORDERS
Amendment
Retroactive
Travel completed
Where employee was authorized subsistence on actual expense basis for temporary duty in Washington, D.C., a designated high-rate geographical area, and he failed to maintain daily record of subsistence expenses, his travel orders may not be retroactively amended to provide reimbursement on per diem basis. Travel orders may not be revoked or modified retroactively so as to increase or decrease rights that have accrued and become fixed under law and regulation except to correct error apparent on face of orders or when facts demonstrate a provision previously definitely intended has been omitted through error or inadvertance. Record shows no such error or omission in original orders 367
Failure to issue
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
Active duty
Reservists
Injured in line of duty
Requirement for pay entitlement
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less under self-terminating orders who is hospitalized under the provisions of 10 U.S.C. 3721(2)

PAY—Continued
Active duty—Continued
Reservists—Continued
because of an in-line-of-duty injury not due to own misconduct during that time, remains in an active military status only through the last day of duty as prescribed by those orders, with the right to continue to receive pay and allowances thereafter based on disability to perform military duty as authorized by 37 U.S.C. 204(g)(2). 40 Comp. Gen. 664, modified 305
Injury or death
During hospitalization Page
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less who is hospitalized for an in-line-of-duty disability not due to own misconduct, and who suffers an injury in the hospital during the period of active duty covered by the original orders, so long as that injury is administratively determined to be in line of duty and not due to own misconduct, may be considered as being injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204. 40 Comp. Gen. 664, modified 305
A member of the Army National Guard or Army Reserve, called or ordered to active duty for a period of 30 days or less, who is hospitalized for disease under 10 U.S.C. 3722, or injury under 10 U.S.C. 3721, who is injured while in the hospital after his active duty period under the orginal orders had terminated, is not considered to have been injured as the proximate result of the performance of active duty for the purpose of 10 U.S.C. 1204 benefits unless there is established a causal relationship between the original injury or disease and the injury while in the hospital, since such injury did not occur while he was in an active duty status. 40 Comp. Gen. 664, modified 305
Additional
Parachute duty
Active duty for training status
Under current regulations member of Reserves receiving parachute pay while assigned to parachute duty on inactive duty status is not entitled to receive such incentive pay while assigned to active duty for training where the latter position is not designated as parachute duty. Secretary of Defense advised that regulations may be changed to provide parachute pay in appropriate circumstances 392
Sea duty
Unusual circumstances
When a member of the uniformed services is assigned on a permanent change of station to sea duty and the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e). 43 Comp. Gen. 639, modified 266

PAY—Continued
Civilian employees. (*See* **COMPENSATION**)
Promotions
Temporary
Saved pay
Items for inclusion or exclusion Page

A Navy enlisted member appointed as a temporary officer under 10 U.S.C. 5596 (1976) may not receive an Incentive Bonus authorized for officers under 37 U.S.C. 312c in addition to the "saved pay and allowances" of an enlisted member. Such bonus is only an item of pay of the temporary officer grade to which the member is appointed or promoted. However, if his pay and allowances entitlement in his officer status, including the bonus, exceeds his pay and allowances as an enlisted member (under save pay) he is entitled to be paid as an officer including the Nuclear Career Annual Incentive Bonus 643

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 release and was retained on active duty for physical evalaution, 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

Retired
Survivor Benefit Plan
Children

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where the member had elected both spouse and children coverage and there is termination of reduction of retired pay for spouse coverage because of loss of an eligible spouse beneficiary, the previously elected child coverage is to be recomputed since the law governing the SBP requires such coverage to be determined on an actuarial basis and the loss of the eligible spouse beneficiary has increased the probability that an annuity would be payable to an elected dependent child 847

Eligible spouse effect

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where the cost of children coverage had been recomputed and charged following the loss of eligible spouse beneficiary, then upon the reacquisition of an eligible spouse beneficiary, since children coverage is to remain on an actuarial basis, and since the gain of an eligible spouse beneficiary has reduced the probability that an annuity would be payable to an elected dependent child, the cost of such coverage should be further recomputed 847

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, since dependent children coverage, either alone or in combination with spouse coverage, is to be determined on an actuarial basis, in order to maintain such basis upon the gain of an eligible spouse beneficiary, further recomputation of children coverage is to be based on the age of the youngest child and the ages of the member and remarriage spouse on the date the spouse qualified as an eligible spouse beneficiary 847

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Cost deductions and coverage
Effective date Page

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, where a member reacquires an eligible spouse beneficiary, and there is further recomputation of the cost of coverage because of the existence of previously elected dependent children beneficiaries, since reduction in retired pay for coverage purposes is charged on an indivisible monthly basis, such further recomputed coverage charges would not resume until the first day of the month following change of coverage status, unless such status change occurred on the first day of the month, then appropriate charges are to be made for that month 847

Spouse
Alternate rights

Monthly Survivor Benefit Plan annuity payable to a widow age 62 under 10 U.S. Code 1451 shall be reduced by Social Security survivor benefit to which she would be entitled based solely upon the deceased husband's military service, notwithstanding fact that the Social Security Administration may allow her an alternative of receiving the higher of Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage 339

Coverage
Termination

Under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, as amended by section 1(5)(A)(ii) of Public Law 94–496, effective October 1, 1976, where a member had elected spouse coverage but reduction of retired pay for spouse coverage is terminated because the member no longer has an eligible spouse beneficiary, so long as he had an eligible spouse beneficiary on the first day of the month, full reduction of retired pay for spouse coverage is required since charges are made on an indivisible monthly basis 847

Eligible beneficiary

Under the SBP, 10 U.S.C. 1447–1455, as amended by Public Law 94–496, effective October 1, 1976, after spouse coverage is terminated due to loss of eligible spouse beneficiary and the member remarries, since reduction in retired pay for spouse coverage purposes is charged on an indivisible monthly basis, such reduction in retired pay would not resume until the first month following the date such spouse attains eligible spouse beneficiary status, unless such date is on the first of a month, then appropriate charges are to be made for that month 847

Post-participation election changes of member

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

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Spouse—Continued
Prior undissolved marriage Page

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

Social Security offset

Monthly Survivor Benefit Plan annuity payable to a widow under 10 U.S. Code 1451 and Section 401a(2) of Department of Defense Directive 1332.27 should not be offset by Social Security mother's benefit when entitlement is denied administratively by the Social Security Administration 339

Saved
Temporary promotions. (*See* **PAY, Promotions, Temporary, Saved pay**)
Sea duty. (*See* **PAY, Additional Sea duty**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.**)
Withholding
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

Garnishment. (*See* **GARNISHMENT, Military pay, etc.**)

PAYMENTS
Advance
Contracts. (*See* **CONTRACTS, Payments, Advance**)
State lands
Leased by Federal Government
Rent

The advance payment of rent, on annual basis, under proposed lease of land with the State of Idaho is not in contravention of the prohibition against advance payments in 31 U.S. Code 529 since possibility of loss is remote where a State is the recipient 399

Subscriptions to newspapers, periodicals, etc.
Microfilm, etc.
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Authority

Advance payment authority for subscriptions to newspapers, periodicals and other publications contained in 31 U.S.C. 530a and 530b extends to *rental* of microfilm library 583

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Where employee has been paid on voucher for travel expenses and fraud is then found to have been involved in a portion of claim, the recoupment of the improperly paid item should be made to the same extent and amount as if his claim were not yet paid and were to be denied because of fraud. Decision 41 Comp. Gen. 285 (1961) and 41 *id.* 206 (1961) are clarified ---- 664

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Detective employment prohibition
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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
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***Equifax* case effect**
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Where statute authorizes imposition of surcharge on sales of goods sold in commissaries and provides for specific use of funds collected, such funds are appropriated and subject to settlement by General Accounting Office (GAO). Therefore, GAO will consider bid protest involving procurement funded by commissary surcharge fund. Prior decisions are overruled ---- 311

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Applicability
The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak 733

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Relocation expenses to "displaced persons"
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Person who owns or rents mobile home and who, respectively, rents or owns land on which the mobile home rests and is displaced due to a Federal or federally assisted program so as to be entitled to benefits pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 may not receive benefits under both sections 203 and 204 of that Act. Benefits under section 204 are limited to those for displaced persons who are not eligible to receive payment under section 203 613
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Station allowances Page

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

Unable to occupy

Military members without dependents

Dislocation allowance

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

QUARTERS ALLOWANCE

Basic allowance for quarters (BAQ)

Assigned to Government quarters

Member on sea duty

Living with family while in port

A member assigned to sea duty who occupies Government family-type quarters assigned to his spouse when the vessel is in port is assigned to quarters on the vessel and is considered a member without dependents by virtue of 37 U.S.C. 420 (1970). Therefore he is not entitled to BAQ under 37 U.S.C. 403(c), and is entitled to partial BAQ authorized by 37 U.S.C. 1009(d) 194

Nonoccupancy for personal reasons

When a member without dependents is offered an assignment to adequate Government quarters and chooses not to occupy such quarters for personal reasons, he is considered to have been assigned Government quarters within the meaning of 37 U.S.C. 403(b) and is not entitled to a basic allowance for quarters (BAQ) even if quarters are subsequently assigned to another member. Therefore, since the member is not entitled to BAQ because of 37 U.S.C. 403(b), partial BAQ may be paid under 37 U.S.C. 1009(d) 194

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Navy members assigned to two-crew nuclear submarines
Permanent change of station
Not assigned quarters Page

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

RAILROADS
Amtrack
Applicability of Freedom of Information, Privacy and Sunshine Acts

The National Railroad Passenger Corporation (Amtrak) is an "Agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advicc and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshinc Acts indicates congressional intent to include Amtrak 773

REAL PROPERTY
Acquisition
Condemnation proceedings
Propriety of initiating
Economy Act restrictions
Lease ceiling applicability

The Economy Act, 40 U.S.C. 278a, which prohibits the Government from entering into a lease wherein the annual rental to be paid excecds 15 percent of the fair market value of the property, precludes the initiation of condemnation proceedings under the Declaration of Taking Act, 40 U.S.C. 258a, when agency bclieves condemnation award would exceed 15 percent limitation 591

Relocation costs
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Person who owns or rents mobile home and who, respectively, rents or owns land on which the mobile home rests and is displaced due to a Federal or federally assisted program so as to be entitled to benefits pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 may not receive benefits under both sections 203 and 204 of that Act. Benefits under section 204 are limited to those for displaced persons who are not eligible to receive payment under section 203 613

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Mandatory *v.* permissive
Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91-114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distinguished 281
Constructive
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Agency's determination that provisions of one of its regulations are not applicable to particular situation is clearly correct. Moreover, even if regulation was less than clear and subject to being construed to cover situation, agency interpretation of its own regulation would be entitled to "great deference." 347
Legality
Bid responsiveness
Nonconforming bid samples
Acceptance
While award of contract to bidder which submitted nonconforming bid samples on belief that bidder's production items would comply with solicitation specifications follows agency's internal regulations, such procedures violate statutory and regulatory requirements that award be made to responsible bidder whose bid *conforms* to the solicitation. 41 U.S.C. 253(b) (1970) 686

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Station allowances
Navy members assigned to two-crew nuclear submarines
Although station allowances authorized under the provisions of 37 U.S.C. 405 (1970) for members without dependents ordinarily are not payable to a member until he reports at his permanent station, the Joint Travel Regulations may be amended to provide that permanent change of station travel terminates when a member reports to the home port of a two-crew nuclear submarine at which time he becomes entitled to allowances applicable to training and rehabilitation duty at the home port of such vessel even though he has not reported on board. At that time station allowances would be payable under current rates if he is not assigned to Government quarters, since he incurs expenses which these allowances were designed to defray. Contrary decisions are modified accordingly ---------- 178
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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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Navy members assigned to two-crew nuclear submarines
Although a member without dependents assigned by permanent change of station orders to a two-crew nuclear powered submarine will be assigned to quarters of the United States on the submarine, when he arrives at the home port of the submarine, in many instances he is required to secure non-Government quarters at which time his travel allowances are terminated. In such cases it is our view that Congress did not intend 37 U.S.C. 407(a)(3) to preclude entitlement to a dislocation allowance when a member is not able to occupy the assigned quarters and incurs expenses which the allowance is intended to defray. Regulations may be promulgated authorizing entitlement and 48 Comp. Gen. 480 and other similar decisions are modified accordingly ---------- 178

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RELEASES
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Acquisition of private property by Government. (*See* **PROPERTY, Private, Acquisition, Relocation expenses to "displaced persons"**)
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REPORTS
Administrative
Contract protest
Report not requested by GAO
Reconsideration request
Error of law basis
General Accounting Office (GAO) Bid Protest Procedures contemplate that requests for reconsideration of bid protest decisions are to be resolved as promptly as possible. Therefore, where it appears from record and submission of party requesting reconsideration that prior decision is not legally erroneous, GAO will decide reconsideration request without requesting comments from procuring agency. Issuance of decision under such circumstances is not premature or unfair to party requesting reconsideration which states it expected to receive copy of agency response and have opportunity to reply thereto 395
Timeliness of report
Agency report on protest filed within 25 working days is within guidelines of General Accounting Office Bid Protest Procedures, which anticipate that report will be filed within that time period 251
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Disputed questions of fact
In reviewing General Services Administration (GSA) settlements, General Accounting Office must rely on written record and, in the absence of clear and convincing contrary evidence, will accept as correct facts in GSA's administrative report. Carrier has burden of affirmatively proving its case 155

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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

RETIREMENT—Continued
Civilian—Continued
Service credits
Civil Service Commission jurisdiction Page

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

Foreign Service personnel. (*See* **FOREIGN SERVICE, Retirement**)
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SERVICE CONTRACT ACT OF 1965 (*See* **CONTRACTS, Labor stipulations, Service Contract Act of 1965**)

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

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

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Retired
Survivor Benefit Plan
Offset
Formula

Monthly Survivor Benefit Plan annuity payable to a widow age 62 under 10 U.S.C. Code 1451 shall be reduced by Social Security survivor benefit to which she would be entitled based solely upon the deceased husband's military service, notwithstanding fact that the Social Security Administration may allow her an alternative of receiving the higher of Social Security payments resulting from her marriage to the member or the Social Security payments of a subsequent marriage..... 339

Mother's Social Security benefit

Monthly Survivor Benefit Plan annuity payable to a widow under 10 U.S. Code 1451 and Section 401a(2) of Department of Defense Directive 1332.27 should not be offset by Social Security mother's benefit when entitlement is denied administratively by the Social Security Administration..... 339

STATE DEPARTMENT
Employees
Couriers
Hours of work Page

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

Dead head travel

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

Travel with pouch-in-hand

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

Layover time

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

STATES
Federal aid, grants, etc.
Municipalities
Grant procurements
Award propriety
Review authority

General Accounting Office will take jurisdiction to review complaint against an award of a contract by grantee, which is recipient of Department of Housing and Urban Development block grant 872

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Recovery by Federal Government
Antitrust violations Page

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

Restrictions imposed by law
Grant percentages

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

Lands
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Advance payments. (*See* **PAYMENTS, Advance, State lands, Leased by Federal Government, Rent**)

Revenue sharing by Federal Government
Used to obtain matching funds
Legality

Funds distributed by the Department of the Treasury under title II, Public Works Employment Act of 1976, (Countercyclical Revenue Sharing), Public Law 94–369, 90 Stat. 1002, as amended (42 U.S.C.A. 6721 *et seq.*) may be used to meet non-Federal share matching requirements of Medicaid program, 42 U.S.C. 1396–1396j. Congress intends that Federal funds distributed under title II be treated in the same "no strings" manner as general revenue sharing funds under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.* rather than as grants. Accordingly, the lack of specific statutory language permitting use of these funds as non-Federal share does not stand in the way of such use as it would in the case of grants 710

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

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

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

STATUTES OF LIMITATION
Claims
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

Date of accrual
Compensation payments
Back pay

Individuals who "opted out" of plaintiff-class in *March* v. *United States*, 506 F. 2d 1306 (D.C. Cir. 1974), may be paid backpay in accordance with the court's interpretation of Public Law 89-391. However, since these claims are being allowed administratively, and not under *March*, the statute of limitations contained in 31 U.S.C. 71a applies to limit recovery where applicable 856

Per diem

Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91-114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distinguished 281

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

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

STATUTORY CONSTRUCTION
"Plain meaning" rule

Department of Interior questions whether it may pay prevailing rate employees who negotiate their wages at higher rate of pay than their basic rate (penalty pay) during overtime where a scheduled meal period is delayed or preempted. In effect this added increment of pay during overtime would constitute a special type of overtime or "overtime on top of overtime" which is not authorized by 5 U.S.C. 5544. An act which is contrary to the plain implication of a statute is unlawful although neither expressly forbidden nor authorized. *Luria* v. *United States*, 231 U.S. 9, 24 (1913). Hence, it may not be paid. Modified by 57 Comp. Gen. 575 and overruled in part by 58 Comp. Gen. (B-189782, Jan. 5, 1979)..... 259

SUBSISTENCE
Per diem
Actual expenses
Itemization of actual food expenses
Requirement

Employee of National Oceanic and Atmospheric Administration on temporary duty in Washington, D.C., a designated high-rate geographical area, was authorized actual expenses of subsistence. Employee failed to itemize actual subsistence expenses and claims reimbursement on a flat-rate basis. Claim on a flat-rate basis may not be allowed since employee may not be reimbursed on per diem basis and voucher does not identify daily expenditures for meals so that such expenses may be reviewed by the agency to determine that they are proper subsistence items... 367

Calendar day
Midnight to midnight

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

Dependents
Rates

The rate of per diem for a member of an employee's family performing permanent change-of-station travel is determined on the basis of the age of the family member at the time the travel is performed..... 700

SUBSISTENCE—Continued
Per diem—Continued
Headquarters
Permanent or temporary
Administrative determination
Reevaluation recommended Page

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

Prohibition against payment

When employees are assigned under the Intergovernmental Personnel Act and authorized per diem, their IPA duty stations are considered temporary duty stations since per diem may not be authorized at headquarters. Therefore, employee stationed in San Francisco, California, who is authorized per diem while on IPA assignment in Washington, D.C., would not be entitled to per diem under 5 U.S.C. 3375(a)(1)(C) while performing temporary duty at San Francisco, since Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, regardless of any unusual conditions involved. However, the employee is entitled to travel allowance under 5 U.S.C. 3375(a)(1)(C) 778

Increases. (*See* **SUBSISTENCE, Per diem, Rates, Increases**)
"Lodgings-plus" basis
Computation

When an employee on TDY rents lodgings by the week or month rather than by the day but actually occupies them for a lesser period because he voluntarily returns home on weekends, the average cost of lodging may be derived by prorating the rental cost over the number of nights the accommodations are actually occupied, rather than over the entire rental period, provided that the employee acts prudently in renting by the week or month, and that the cost to Government does not exceed the cost of renting a suitable motel or hotel room at a daily rate. 54 Comp. Gen. 299; B-180910, July 18, 1978 and July 6, 1976, overruled in part 821

Military personnel
Temporary duty
Station later designated as permanent

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

SUBSISTENCE—Continued
Per diem—Continued
Rates
Increases
Administrative implementation Page

Drug Enforcement Administration employees on temporary duty for training, September through December 1969, under travel authorizations prescribing $16 per diem, maximum at time of issuance, claim $25 per diem from November 10, 1969, date maximum was increased by Public Law 91–114 and Standardized Government Travel Regulations. Claims are disallowed under 31 U.S.C. 71a since they were not filed with the General Accounting Office within 6 years after the date they accrued. Moreover, law and regulation merely established new higher limit and did not make increase mandatory or automatic. Agency took no administrative action to authorize higher rate. Therefore, there is no lawful basis for paying more than $16. 49 Comp. Gen. 493, 55 *id.* 179, distinguished ---------- 281

Lodging costs
Purchase of residence at temporary duty station

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

Temporary
Headquarters determination. (*See* **SUBSISTENCE, Per diem, Headquarters, Permanent or temporary**)
Temporary duty
Intergovernmental Personnel Act assignments

Employee assigned under Intergovernmental Personnel Act (IPA) and receiving per diem at his IPA duty station, may receive an additional per diem allowance for temporary duty (TDY) at another location since 5 U.S.C. 3375(a)(1) permits such payment. The amount of additional per diem should reflect only the increased expenses resulting from the TDY assignment ---------- 778

When employees are assigned under the Intergovernmental Personnel Act and authorized per diem, their IPA duty stations are considered temporary duty stations since per diem amy not be authorized at headquarters. Therefore, employee stationed in San Francisco, California, who is authorized per diem while on IPA assignment in Washington, D.C., would not be entitled to per diem under 5 U.S.C. 3375(a)(1)(C) while performing temporary duty at San Francisco, since Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, regardless of any unusual conditions involved. However, the employee is entitled to travel allowance under 5 U.S.C. 3375 (a)(1)(C) ---------- 778

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Rates. (*See* **SUBSISTENCE, Per diem, Rates**)
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Payment basis Page

When an employee on TDY rents lodgings by the week or month rather than by the day but actually occupies them for a lesser period because he voluntarily returns home on weekends, the average cost of lodging may be derived by prorating the rental cost over the number of nights the accommodations are actually occupied, rather than over the entire rental period, provided that the employee acts prudently in renting by the week or month, and that the cost to Government does not exceed the cost of renting a suitable motel or hotel room at a daily rate. 54 Comp. Gen. 299; B-180910, July 18, 1978 and July 6, 1976, overruled in part 821

Transferred employees

Employee, while in temporary quarters, performed official travel during ¾'s of 2 days, for which time he was paid per diem. If he chooses, he does not have to count those 2 days as part of his 30-day entitlement to temporary quarters. He may, instead, be paid temporary quarters allowance for the 2 days following the date on which his entitlement would otherwise have expired 700

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

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

SUNSHINE ACT
Applicability

The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak 773

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

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

TAXES—Continued
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Gasoline tax
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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

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Wrongful separation Page
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 of damages based on a tort theory of wrongful separation from active duty 554
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Without legislative authority, the U.S. has no legal claim against third-party tort feasors or their liability insurers for benefits the U.S. provides persons because of injuries caused by tort feasors. Under Supreme Court decisions, such claims involve fiscal policy for Congress to decide. However, in a proper case, the U.S. can have a valid claim as a third-party beneficiary under insurance contract terms such as for no-fault, medical payment, and uninsured motorist coverages 781

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Fly America Act
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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
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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 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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Containerized cargo

Government under container agreement cannot apply contract rates to some containers in a shipment and tariff rates to others to obtain lowest transportation cost; under terms of that agreement Government must apply either contract or tariff rates to all containers in shipment to obtain lowest available transportation cost. See 10 U.S.C. 2631 (1976) and case cited ---- 584

Government
Single cause of action

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

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

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

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

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Government vehicles
Employees on temporary duty Page

Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable 226

Military personnel
Advance travel of dependents
School facilities lacking, etc.

Member of armed services stationed overseas whose dependent son returned to the United States for his second year of college is not entitled to reimbursement for such travel notwithstanding orders issued subsequent to the travel stated that the travel was in accordance with paragraph M7103–2, item 7, 1 JTR, and the Base Commander certified that the delay in publishing the orders was through no fault of the member. Even if orders had been timely issued, there is no legal basis for such travel at Government expense because the law and regulations authorize such travel only if there is a lack of overseas educational facilities which arose after the dependent's arrival at the overseas station, and that was not the case 343

Vessel and port changes
Same port

When a member of the uniformed services is assigned on a permanent change of station to sea duty and the duty is determined by the Secretary concerned as being unusually arduous (absent from the home port for long periods totaling more than 50 percent of the time), regulations may be amended to authorize transportation at Government expense of dependents, baggage and household effects to and from a designated place even though the location of the home port or shore station are the same, since such duty is considered sea duty under unusual circumstances as provided for in 37 U.S.C. 406(e). 43 Comp. Gen. 639, modified. 266

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Household effects
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Metropolitan area rates

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Property damage, loss, etc.

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Rates

Classification

Character at time of shipment Page

Nature and character of each shipment at time it is tendered to carrier determines its status for rate purposes ---- 649

Factors for consideration

Significant facts which weigh heavily in classifying shipment for rate purposes are producer's description of article for sales purposes, manner in which it is billed, its use and value, how it is regarded in the trade -- 649

More than one applicable description

Carrier is correct in its contention that commodity shipped is properly described as insulating material, NOI, and not as vermiculite, other than crude, where Federal Specification and sales pamphlets characterize it as such and where advertising pamphlets indicate that commodity is regarded in the trade as insulating material ---- 649

More than one use for article

Predominant use determinative

Where an article has more than one use, the predominant use determines its character for rate purposes ---- 649

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Special *v.* tariff rates

Government under container agreement cannot apply contract rates to some containers in a shipment and tariff rates to others to obtain lowest transportation cost; under terms of that agreement Government must apply either contract or tariff rates to all containers in shipment to obtain lowest available transportation cost. See 10 U.S.C. 2631 (1976) and case cited ---- 584

Travel agencies

Use approved

Official passenger travel may be purchased from travel agents where American-flag carriers cannot furnish the transportation and it is administratively determined that substantially lower air fares are offered through the travel agents ---- 644

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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

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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
Actual expenses
Evidence sufficiency

Employee of National Oceanic and Atmospheric Administration on temporary duty in Washington, D.C., a designated high-rate geographical area, was authorized actual expenses of subsistence. Employee failed to itemize actual subsistence expenses and claims reimbursement on a flat-rate basis. Claim on a flat-rate basis may not be allowed since employee may not be reimbursed on per diem basis and voucher does not identify daily expenditures for meals so that such expenses may be rereviewed by the agency to determine that they are proper subsistence items 367

Air travel
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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

Employees' liability
Travel by noncertificated air carriers

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

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

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

Circuitous routes
Rest stops

In traveling from Accra, Ghana, to U.S. under particular circumstances, Frankfurt is not a proper rest stop location and travelers who route travel via Frankfurt and take side trip to France are deemed to have traveled by indirect route and lose rest stop entitlement under 6 FAM 132.4..... 76

Dependents. (*See* **TRANSPORTATION, Dependents**)

Illness
Distress due to illness of wife, etc.

Employee was notified of sudden serious illness of his wife upon his arrival at temporary duty station. His supervisor determined that employee was incapacitated for the performance of duty by his illness and ordered employee to return to headquarters. In such circumstances, claim for return trip travel expenses may be paid. *Matter of Gary B. Churchill*, B–187198, April 18, 1977, is reversed..... 1

Interviews, qualifications, etc.
Competitive service positions

Prospective employee who was reimbursed travel expenses for preemployment interview travel was properly reimbursed if such reimbursement was made in accordance with the authority described in subchapter 1–3d and e of Attachment 2 to Federal Personnel Manual Letter 571–66, (i.e., 5 U.S.C. 5703 and the Federal Travel Regulations)..... 192

TRAVEL EXPENSES—Continued
Interviews, qualifications, etc.—Continued
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Military personnel
Change of station status
Member return to old station
To complete moving arrangements
Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense 198
Medical board examinations. (*See* **TRAVEL EXPENSES, Military personnel, Personal convenience, Travel to take professional examinations**)
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Travel of Reserve officers, serving limited active duty periods, to take medical board examinations shortly before their release from active duty should not ordinarily be authorized at Government expense nor should their examination fees be reimbursed since such trips are primarily a matter of personal convenience and benefit, unrelated to service requirements 201
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Where a member is assigned to temporary duty and the temporary duty station becomes his permanent duty station, or where a member is assigned to a vessel and while the vessel is deployed from the home port, the home port of the vessel is changed, the member's round-trip travel to the old permanent station or old home port should be considered travel incident to the permanent change of station. Therefore round-trip travel of the member to the former permanent station or home port may be performed at Government expense 198
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Personal convenience Page

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

Foreign Service personnel. (*See* **FOREIGN SERVICE, Travel expenses**)
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Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
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Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Rest stops
Location selection
Midway and practicable interchange point

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

Temporary duty
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Return expenses, etc.
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Employee was notified of sudden serious illness of his wife upon his arrival at temporary duty station. His supervisor determined that employee was incapacitated for the performance of duty by his illness and ordered employee to return to headquarters. In such circumstances, claim for return trip travel expenses may be paid. *Matter of Gary B. Churchill*, B–187198, April 18, 1977, is reversed ---------- 1

Intergovernmental Personnel Act assignments

When employees are assigned under the Intergovernmental Personnel Act and authorized per diem, their IPA duty stations are considered temporary duty stations since per diem may not be authorized at headquarters. Therefore, employee stationed in San Francisco, California, who is authorized per diem while on IPA assignment in Washington, D.C., would not be entitled to per diem under 5 U.S.C. 3375(a)(1)(C) while performing temporary duty at San Francisco, since Government may not pay subsistence expenses or per diem to civilian employees at their headquarters, regardless of any unusual conditions involved. However, the employee is entitled to travel allowance under 5 U.S.C. 3375 (a)(1)(C) ---------- 778

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Vouchers and invoices. (*See* **VOUCHERS AND INVOICES, Travel**)

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Civilian personnel
Requirements
Administrative determination
Agriculture Department
Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide frocks as uniforms for meat grader employees. If the Secretary of Agriculture determines that these employees are required to wear frocks as uniforms, appropriated funds may be expended for this purpose. Applicable law and regulations do not preclude negotiations on the determination---- 379

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Agreements
Legality
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Federal Labor Relations Council requests our ruling on the legality of a union-proposed bargaining agreement provision that would require Department of Agriculture to provide cooler coats and gloves as protective clothing for meat grader employees. If the Secretary of Agriculture or his designee determines that protective clothing is required to protect employees' health and safety, the Department may expend its appropriated funds for this purpose. Applicable law and regulations do not preclude negotiations on the determination---- 379
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Retroactive wage adjustments for Federal wage board employees which are not based upon a Government "wage survey," but rather on negotiations and arbitration under a 1959 basic bargaining agreement, are not governed by 5 U.S.C. 5344 as added by section 1(a) of Public Law 92-392, section 9(b) of that law preserving to such employees their bargained for and agreed to rights under that basic bargaining agreement ---- 589
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Dependents of employees on temporary duty
Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable ---- 226

VEHICLES
Government
Transportation of dependents of employees on temporary duty
Criteria
Length of assignment and Government interest
Union proposal would allow Federal employees on temporary duty for more than a specified period of time to transport their dependents in Government vehicles. Agency states that proposal violates 31 U.S.C. 638a(c)(2), which prohibits use of Government vehicles for other than "official purposes." However, where agency determines that transportation of dependents in Government vehicle is in interest of Government and vehicle's use is restricted to official purposes, the statute would not be violated. Accordingly, section 638a(c)(2) does not, by itself, render the union proposal nonnegotiable ---- 226

VESSELS

Cargo preference. (*See* **TRANSPORTATION, Vessels, American, Cargo preference**)

Crews

Two-crew nuclear-powered submarines

Basic allowance for quarters (BAQ) Page

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

Change of home port

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

Dislocation allowances

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

Foreign

Use. (*See* **TRANSPORTATION, Vessels, Foreign**)

Transportation. (*See* **TRANSPORTATION, Vessels**)

VIETNAM
South Vietnamese refugees
Admitted to United States
Employment
Page

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

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

VOUCHERS AND INVOICES
Certification
Approval effect

Funds appropriated to the judiciary for jury expenses are not legally available for expenditure for coffee, soft drinks, or other snacks which the District Court may wish to provide to the jurors during recesses in trial proceedings. Refreshments are in the nature of entertainment and in the absence of specific statutory authority, no appropriation is available to pay such expenses. Since under 28 U.S.C. 572 (1976) a marshal's accounts may not be reexamined to charge him or her with an erroneous payment of juror costs, we cannot take exception to certification of vouchers for expenses incurred to date. However, we recommend that the Director of the Administrative Office of the United States Courts and the Director of the U.S. Marshals Service take steps to try to prevent the incurring of similar expenses in the future 806
Sampling procedures
Use of statistical sampling

Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b–1(a) (Supp. V, 1975); 3 GAO 44, as amended by B–153509, August 27, 1976 321
Travel
Administrative correction of errors
Limitation on amount correctible

Agencies may administratively correct travel vouchers with underclaims not exceeding $30. Overclaims in any amount may be administratively reduced. 36 Comp. Gen. 769 and B–131105, May 23, 1973, modified 298

VOUCHERS AND INVOICES—Continued
Travel—Continued
False or fraudulent claims Page
Where employee submits voucher for travel expenses and part of claim is believed to be based on fraud, only the separate items which are based on fraud may be denied. Moreover, as to subsistence expenses, only the expenses for those days for which the employee submits fraudulent information may be denied and claims for expenses on other days which are not based on fraud may be paid if otherwise proper. B–172915, September 27, 1971, modified 664
When an employee receives a travel advance and then submits a false final settlement voucher, the separable items on the voucher attributable to false statement are subject to being recouped. Any additional amount claimed by claimant should be denied only insofar as it is a separate item of entitlement based on fraud 664
No recoupment action appears necessary where a final and valid settlement voucher has eliminated an earlier false claim. This assumes that where there has been an earlier false claim for lodgings, for example, the final settlement voucher contains no claim for subsistence expenses for that day 664

WAIVERS
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

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

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

WORDS AND PHRASES
"Adequate price competition"
Agency properly did not require proposed awardee to submit certified cost or pricing data since such data need not be submitted where price is based on adequate price competition. Adequate price competition was achieved where RFP permitted award to other than low-priced offeror, price was substantial evaluation factor (30 percent), and price evaluation was proper and did not have effect of eliminating price as evaluation factor 827
"Adverse agency action—protest timeliness"
Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations 627

WORDS AND PHRASES—Continued

"Agency" Page

The National Railroad Passenger Corporation (Amtrak) is an "agency" for purposes of the Freedom of Information, Privacy, and Sunshine Acts, notwithstanding the statement in 45 U.S.C. 541 that Amtrak was not "to be an agency or establishment of the Government of the United States" since it is (1) headed by a collegial body—board of directors—the majority of whom are appointed by the President with the advice and consent of the Senate, and (2) a Government-controlled Corporation as that term is used in 5 U.S.C. 552(e). Furthermore, legislative history of Freedom of Information and Sunshine Acts indicates congressional intent to include Amtrak---------- 773

Government Printing Office is required by 44 U.S.C. 1504(a)(3) to publish information in Federal Register that Amtrak is required to publish under Freedom of Information, Privacy, and Sunshine Acts. Furthermore, Amtrak may be billed for such publication in accordance with 44 U.S.C. 1509, as amended by Pub. L. No. 95-94, since Amtrak is an "agency" within the context of that provision---------- 773

Auction technique

Agency did not utilize prohibited "auction technique" when it informed offerors of monetary amount available for the procurement---- 8

"Award amount" fee

Use of "award amount" (fee) provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose---- 271

"Balance" requirements of Federal Advisory Committee Act

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

"Basic ordering agreement"

Agency's conducting informal competition whereby order for data base development was to be placed under one or 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

"Bid equalization factor"

Record indicates only one step-one offeror was benchmarked. Since FPR provides for discontinuance of two-step method of procurement after evaluation of step-one technical proposals, VA should consider cancellation of IFB issued under step two and instead negotiate price with only offeror---------- 653

"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

"Common fund" Page

Counsel for plaintiff-class in *March* v. *United States*, 506 F. 2d 1306 (D.C. Cir. 1974), is not entitled to be paid the 2 percent counsel fee awarded to him in *March*, when the claims of individuals who "opted out" of *March* are paid administratively. The rule that a party who creates or protects a "common fund" is entitled to counsel fees is not controlling here since the claimants herein are barred from recovery from the fund that counsel created in *March*..... 856

"Contract for deed"

Employee, incident to transfer of official station effective August 18, 1975, sold residence through "contract for deed" on February 27, 1976, and was reimbursed for expenses incident to transaction. His claim for additional expenses incurred incident to legal title transfer upon purchaser's payment of loan may be paid. Extension of time limit for settlement is not required since "contract for deed" date, which was within 1 year of employee's transfer, is settlement date under FTR para. 2–6.1e. Additional expenses were made "within a reasonable amount of time" since they were incurred within 2-year maximum time limitation of FTR para. 2–6.1e. However, payment for title search may not be made if it duplicates expenses for title insurance. B–188300, August 29, 1977, amplified..... 770

Cost Accounting Standard 402

Contention that cost evaluation of proposal of $19,902 violates Cost Accounting Standard 402 is without merit since Standard is not applicable to negotiated contracts under $100,000..... 151

Day care centers for children

The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S. Code 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW-controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose for establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located..... 357

"Dead head" time

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

"Defensive protests"

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

WORDS AND PHRASES—Continued

Deployment of the vessel Page

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

"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

Follow-on phase of research project

Where agency awards follow-on phase of research project based on reduced scope of work, protester, whose technical proposal was evaluated based on full scope of work, was not prejudiced since protester's proposal was rejected only because its proposed costs were considered too high even after cost reductions for reduced scope of work were applied 328

"Four-step" procurement

Procurement documents in "four-step" procurement established goal for maximum use of "tried and true" computer equipment but did not necessarily rule out modified equipment based on preexisting technology or new equipment if based on preexisting equipment or technology. Documents were written broadly enough to permit use of tried technology or equipment. Under literal reading of provisions requiring equipment verification, preexisting technology—prototype related equipment—would qualify so long as technology had verified performance characteristics 715

Layover time

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

Level of effort

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

"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

WORDS AND PHRASES—Continued

"Multiple Award Schedule Contract" Page

Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations 627

"Non-storage credits" bidders

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

"Opted out"

Individuals who "opted out" of plaintiff-class in *March* v. *United States*, 506 F. 2d 1306 (D.C. Cir. 1974), may be paid backpay in accordance with the court's interpretation of Public Law 89–391. However, since these claims are being allowed administratively, and not under *March*, the statute of limitations contained in 31 U.S.C. 71a applies to limit recovery where applicable 856

"Parents"

Bona fide adoptive parents of members of the uniformed services should be included, similarly to natural parents, as eligible dependents to receive medical benefits pursuant to 10 U.S.C. 1071–1088 (1976), despite the fact that the statute does not expressly include adoptive parents within the term "parents" in authorizing such benefits. Decisions to the contrary should no longer be followed 797

Portal-to-portal mileage allowance

Federal Labor Relations Council requests our ruling on a union-proposed bargaining agreement provision that requires Department of Agriculture to authorize portal-to-portal mileage allowances for meat grader employees who use their private vehicles in connection with their work. The proposed provision is contrary to the general requirement that an employee must bear the expense of travel between his residence and his official headquarters, absent special authority, and therefore may not be properly included in an agreement 379

Pouch-in-hand time

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

WORDS AND PHRASES—Continued

"Public agency" Page

Section 223 of the Higher Education Act of 1965, Title II, Part B, as amended, authorizes the Office of Library and Learning Resources, Office of Education, Department of Health, Education and Welfare, to make grants to and contracts with public and private agencies and institutions. Regulations define "public agency" to exclude Federal agencies. The National Commission on Library and Information Science is an independent agency in the Executive branch and therefore is not eligible to receive funds under section 223 ---- 662

"Publications"

Advance payment authority for subscriptions to newspapers, periodicals and other publications contained in 31 U.S.C. 530a and 530b extends to *rental* of microfilm library ---- 583

"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

"Request for Technical Proposals"

Technical evaluations are based on degree to which offerors' written proposals adequately address evaluation factors specified in solicitation. Request for technical proposals (RFTP) which does not require samples or include sample testing and evaluation criteria does not authorize procuring activity to acquire and test proffered equipment to determine acceptability of technical proposals ---- 809

Res judicata

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

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

Revenue sharing

Funds distributed by the Department of the Treasury under title II, Public Works Employment Act of 1976 (Countercyclical Revenue Sharing), Public Law 94–369, 90 Stat. 1002, as amended (42 U.S.C.A. 6721 *et seq.*) may be used to meet non-Federal share matching requirements of Medicaid program, 42 U.S.C. 1396–1396j. Congress intends that Federal funds distributed under title II be treated in the same "no strings" manner as general revenue sharing funds under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.* rather than as grants. Accordingly, the lack of specific statutory language permitting use of these funds as non-Federal share does not stand in the way of such use as it would in the case of grants ---- 710

WORDS AND PHRASES—Continued

"Saved pay and allowances" Page

A Navy enlisted member appointed as a temporary officer under 10 U.S.C. 5596 (1976) may not receive an Incentive Bonus authorized for officers under 37 U.S.C. 312c in addition to the "saved pay and allowances" of an enlisted member. Such bonus is only an item of pay of the temporary officer grade to which the member is appointed or promoted. However, if his pay and allowances entitlement in his officer status, including the bonus, exceeds his pay and allowances as an enlisted member (under saved pay) he is entitled to be paid as an officer including the Nuclear Career Annual Incentive Bonus 643

"Schedule" provision of IFB

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

Scope of work statement

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

"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

"Short haul" toll calls

Certification of "short-haul" toll telephone calls may be made on the basis of a regular, random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. 31 U.S. Code 82b–1(a) (Supp. V, 1975); 3 GAO 44, as amended by B–153509, August 27, 1976 321

"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

WORDS AND PHRASES—Continued

"Stepladder" bidding procedure

"Storage credits" pricing option Page

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

"Storage credits" pricing option

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

"Storage Facilities" provision of IFB

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

"Subscription or other charge"

Advance payment authority for subscriptions to newspapers, periodicals and other publications contained in 31 U.S.C. 530a and 530b extends to *rental* of microfilm library 583

"Teleprocessing Services Program"

Decision to reject schedule contractor as technically unacceptable to perform proposed work orders solely because contractor had failed to submit copy of extremely simple contract modification to agency ordering office—where contractor had timely filed contract modification with agency headquarters and with reasonable effort ordering office could have verified existence and contents of modification—clearly had no reasonable basis. GAO recommends that GSA either terminate existing orders and order Government's requirements under protester's schedule contract, or reopen negotiations 627

Twenty-five mile point

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

WORDS AND PHRASES—Continued

Vessel which is deployed away from home port Page

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

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