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TABLE OF DECISION NUMBERS

	Page
B–114817, Dec. 18	143
B–188227, Dec. 10	124
B–193653, Dec. 11	128
B–193771, Dec. 17	130
B–194421.3, Dec. 27	184
B–194440, Dec. 17	134
B–194445.3, Dec. 21	146
B–194493.2, Dec. 10	126
B–194932, Dec. 18	144
B–195251.2, Dec. 17	140
B–195268, Dec. 21	158
B–195646, Dec. 27	185
B–195823, Dec. 6	122
B–196559, Dec. 3	115

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[B-196559]

Appropriations — Availability — Promoting Public Support or Opposition — Pending Legislation — Livable Cities Program

Subcommittee of House Committee on Appropriations requested ruling on whether information package sent to members of the public by National Endowment for the Arts (NEA), concerning Livable Cities Program, then scheduled for House action on appropriations, violated restrictions on use of appropriated funds contained in section 304, Department of Interior and related agencies Appropriations Act, 1979, Pub. L. No. 95-465, 92 Stat. 1279. Section 304 prohibits use of funds for activities, or for publication and distribution of literature, tending to promote or oppose legislation pending before Congress. The material contained in NEA package supporting the Program during scheduled House action on appropriations constituted a clear violation of section 304. Because funds expended by NEA were small in amount and commingled with legal expenditures, it is not practical to attempt recovery.

To The Honorable Edward P. Boland, House of Representatives, December 3, 1979:

This is in response to your request for an independent opinion on whether the National Endowment for the Arts (NEA) violated the anti-lobbying restriction on the use of appropriated funds contained in section 304 of the Department of the Interior and related agencies Appropriation Act, fiscal year 1979, Pub. L. No. 95-465, October 17, 1978, 92 Stat. 1279, 1302. In view of the urgent nature of your request, we have not requested an administrative report from NEA. Instead, we studied the October 3, 1979, memorandum to you from the NEA General Counsel, Mr. Robert Wade, Subject: Endowment's Participation in the Livable Cities Program—Alleged Lobbying Activities, and also obtained a copy of the information package sent out by NEA. We agree that NEA violated the provisions of section 304 in this instance.

The facts may be summarized as follows. In the fall of 1977, NEA and the Department of Housing and Urban Development (HUD) jointly developed proposed legislation for a neighborhood revitalization program, utilizing the arts, culture, and historic preservation. Upon approval by the Administration in the spring of 1978, this proposed legislation, the Livable Cities Program, was submitted to the Congress, and was enacted as the Livable Cities Act of 1978, Pub. L. No. 95-557, October 31, 1978, 92 Stat. 2122 (42 U.S.C. §§ 8141 *et seq.*). This enabling legislation authorized appropriations of $5 million for fiscal year 1979 and $10 million for fiscal year 1980. Although appropriations were authorized for the Program, no funds were appropriated to put the Program in operation.

The General Counsel of NEA states that from about the time the law was enacted in October 1978 until August 1979, his agency re-

ceived a great number of inquiries from the public about the legislation. The inquiries indicated that there was substantial confusion and misunderstanding concerning the legislation's purpose and the NEA's role in the Program. NEA decided, according to the General Counsel, that it was necessary to inform people of the status of the legislation and to correct some misunderstandings involving among other things, the difference between authorization and appropriation of funds for the Program. HUD and NEA developed an information package for distribution to those who had made requests for information. The NEA General Counsel described the package as follows:

> That package contained an article from the Washington Star, a fact sheet describing the future content of the potential program, a list of legislative actions to date and projected imminent final action by the House (the objective of all of the Administration's efforts in this program), and an explanation of the background and intent of the Livable Cities Act. This material was accompanied by a covering letter signed by Paul J. Asciolla, our designated Federal Agency Liaison. Mr. Asciolla had been coordinating our efforts with HUD on the Livable Cities Program since May 1978. This letter, after generally describing the situation with regard to the Livable Cities legislation, concludes with a statement indicating that *should* an appropriation be approved by the Congress, guidelines *would* be issued as soon as possible thereafter, a common practice relevant to all legislation, and thanking the addressees, appropriately in my opinion, for their continuing, *i.e.*, sustained, interest in the efforts on behalf of this program over the period of many months that had elapsed during the legislative process.

Section 304 of Pub. L. No. 95–465, Department of the Interior and related agencies Appropriations, fiscal year 1979, under which NEA received its operating funds during the time in question, provides as follows:

> No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete, in accordance with the Act of June 25, 1948 (18 U.S.C. 1913).

We have not previously had occasion to construe this provision of the law. However, we have construed appropriations restrictions prohibiting "lobbying" activities by Government officials, such as section 607(a), Treasury, Postal Service, and General Government Appropriations Act, 1979, Pub. L. No. 95–429 (October 10, 1978), 92 Stat. 1001, which provides:

> No part of any appropriation contained in this or any other Act, or of funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.

Since the NEA General Counsel relies on our decisions construing the similarly worded predecessors of section 607(a) to argue that NEA has not violated section 304, and since section 607(a) is construed as having the same purpose as 18 U.S.C. § 1913, which is referred to in section 304, some discussion of section 607(a) and section 1913 is necessary as background to our discussion of section 304. (Also, the pro-

hibition of section 607(a) applies to the use of any appropriations "contained in this or any other Act." Thus, it is applicable to NEA.)

In interpreting "publicity and propaganda" provisions such as section 607(a), this Office has recognized that every Federal agency has a legitimate interest in communicating with the public and with Congress regarding its policies and activities. If the policy of the Administration or of any agency is affected by pending legislation, including appropriations measures, discussion by officials of that policy will necessarily, either explicitly or by implication, refer to such legislation and will presumably be either in support of or in opposition to it. An interpretation of section 607(a) which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would consequently preclude virtually any comment by officials on administration or agency policy, a result we do not believe was intended.

In our view, Congress did not intend, by enactment of section 607 (a) and like measures, to prohibit agency officials from expressing their views on pending legislative and appropriation matters. Rather, the prohibition of section 607(a) applies primarily to expenditures involving appeals addressed to members of the public suggesting that they contact their elected representatives and indicate support of or opposition to pending legislation, or urge their elected representatives to vote in a particular manner. The foregoing general considerations constitute our construction of section 607(a) and form the basis for our determination in any given instance of whether there has been a violation of that section. 56 Comp. Gen. 889 (1977); B–128938, July 12, 1976.

Our construction of section 607(a) was greatly influenced by the legislative history and judicial construction of the anti-lobbying penal statute, 18 U.S.C. § 1913, which is referred to in section 304 of the Department of the Interior and related agencies Appropriation Act and in its history. That statute provides:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designated to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.
>
> Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

From our review of the legislative history of section 1913, and by its terms, it appears that the primary purpose of section 1913 was to prohibit Government officials from making appeals to the public to in turn contact their representatives wtih respect to legislation, but not to prohibit agency officials from expressing their views and agency policy on pending legislative and appropriations matters.

If your question had only involved section 1913 or section 607(a), *supra*, we would have agreed with the NEA General Counsel that no violation took place. However, section 304, the provision here at issue, is a very different matter. It originated as a Senate Appropriations Committee amendment to H.R. 7636, 95th Cong. Ultimately, H.R. 7636 was enacted as the Department of the Interior and related agencies Appropriations, fiscal year 1978, Pub. L. No. 95–74 (July 26, 1977) 91 Stat. 285, which included a slightly modified version of the original amendment. Instead of the phrase "for any activity or the publication or distribution of literature" which now appears in section 304, the original Senate version said "for the publication or distribution of literature designed for public use." The Senate Committee on Appropriations stated the purpose of the amendment as follows:

> The Committee is disturbed to learn of certain public information activities being conducted by the National Park Service, Fish and Wildlife Service, and Forest Service that tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges, national forest and other withdrawals. Colorful brochures printed and actively distributed by these agencies extol the benefits of such proposals and, as a result, tend to promote certain legislative goals of these agencies. The Committee considers these practices to be in violation of the intent, if not the letter, of the Act of June 25, 1948 (Title 18 U.S.C. Sec. 1913). Accordingly, language has been included in the bill prohibiting the use of Federal funds for the publication and distribution of such promotional literature. This prohibition should not be construed as an impediment on the agencies' ability to respond to public information inquiries. S. Rep. No. 95–276, 95th Cong., 1st Sess. 4–5.

As indicated in our discussion of 18 U.S.C. § 1913, we do not believe that statute would be construed by the Department of Justice or by the courts as prohibiting agency officials from expressing their views to the public on pending legislative and appropriations matters, as long as they refrain from suggesting that members of the public ask their Senators or Representatives to vote in a particular fashion on those matters. Section 304 is evidently intended to have broader coverage. We have not seen the brochures referred to in the legislative history of section 304, but there is no indication in the Senate Committee's description of them that they in fact urged readers to contact their elected representatives. The Senate Committee on Appropriations may thus have been mistaken in saying that 18 U.S.C. § 1913 was intended to prohibit such expressions of agency views as are referred to in the above-quoted legislative history. However, whether or not the understanding of 18 U.S.C. § 1913 was correct, the Senate Report in support

of section 304 is a clear expression of Congressional intent that section 304 was designed to prohibit activities like the brochures described therein, even if the brochures were not in violation of section 1913 of title 18, because the brochures tended to promote public support for agency goals which were the subject of legislation (including appropriations) pending before the Congress.

The difference in wording, between section 304 on the one hand, and on the other, 18 U.S.C. § 1913 and section 607(a), confirms the difference in intended coverage. Section 304 does not use the term "publicity or propaganda purposes designed to support or defeat [pending] legislation," as does section 607(a), nor does it refer explicity to activities "intended or designed to influence * * * a Member of Congress," as does section 1913. Moreover, to construe section 304 as, in effect, prohibiting only the kinds of activities encompassed by section 607(a) would make it mere surplusage since, as noted above, section 607(a) is applicable to *all* appropriations, including NEA's and was enacted before section 304.

Accordingly, we do not read the reference in section 304 to 18 U.S.C. § 1913 as limiting the application of section 304 to the circumstances covered in section 1913 (and in section 607(a)). Rather, we construe section 304 as having been intended to cover situations not reached by 18 U.S.C. § 1913 or by section 607(a). It does so by prohibiting the expenditure of funds provided by the Act for any activity or for publication or distribution of literature that tends to promote *public* support for or opposition to legislative proposals pending before the Congress, without regard to whether the public will in turn be moved thereby to urge their elected representatives to act in a particular manner on the legislative proposals.

The section 304 prohibition, although it reaches activities which are permissible under 18 U.S.C. § 1913 (as we understand that section) and section 607(a), was not intended to prevent the agencies covered from communicating in any way with the public. The Senate Report, *supra*, indicates that section 304 should not be understood as impeding the agencies' ability to respond to public information inquiries. The implication is that a response to an inquiry is permissable as long as it is strictly factual and devoid of positive or negative sentiments about the program.

We must point out that there is a very thin line between the provision of legitimate information in response to public inquiries and the provision of information in response to the same requests which "tends to promote public support or opposition" to pending legislative proposals. There is little guidance for the agencies concerned in either the language or the legislative history of section 304. For example, a literal reading of the section might make it impossible for an

agency to provide even a strictly factual response to a question about the status of its program's appropriation, since a statement that the appropriation was awaiting resolution by a Conference committee might well stimulate the reader to write to his Congressman on behalf of the resolution he prefers.

In the absence of any expression of Congressional wishes to the contrary, we have construed section 304 in the light of what we believe the Congress probably intended—just as we have done in the case of section 607(a). We conclude that section 304 was designed to cover particularly egregious examples of "lobbying" by Federal agencies, even though the material provided to the public stops short of actually soliciting the reader to contact his Congressman in support of or in opposition to pending legislation. Thus, a good faith effort to be responsive to a direct question from a member of the public, which did not gratuitously offer the agency's views about the merits of the pending legislation, would not be deemed a violation of section 304, even though the agency response might inadvertently and incidentally influence the reader's opinion about the legislation.

Applying this criterion in the instant case, we are forced to conclude that there was a violation of section 304.

We evaluated the NEA information package concerning the Livable Cities Program in the light of the circumstances concerning the pending legislation at the time the package was sent out. The Livable Cities Program was included in Pub. L. No. 95–557, *supra*, on October 31, 1978. In considering the HUD appropriation request for 1980, the Senate voted $3 million for the program but the House did not fund the Program. Just before the recess on August 2, 1979, the Senate and House conferees met in an attempt to resolve the disagreement on the Program funding. They were unable to reach agreement and the House conferees decided to take the conference report back to the House "in disagreement," where the issue would again be brought before the House sometime after the September 5 end of recess. The House then had the options of receding to the Senate's version or of disagreeing again which would send it back to conference.

On September 3, NEA sent its information package to people who, throughout the previous year, had expressed an interest in the Program. The cover letter for the package, timed to coincide with the House reconsideration of Program funding, purported to be in response to the addressee's request for updated information on the Program. It was highly supportive of the Program, describing it as a "unique piece of legislation," and highlighted the fact that the only obstacle that remained in the way of Program implementation was a favorable House vote on Program funding. The package included a newspaper account of the congressional debate over funding, a de-

scription of the legislation and its history and, under the heading "Livable Cities—Final Action," this statement:

> Objective—we will have a Livable Cities Program if the full House votes to accept the Senate position—that is $3 million for 1980.

The NEA cover letter expressed disappointment with the $3 million Senate-approved funding but said that "we are particularly pleased at the high interest in Congress, and the unprecedented outpouring of support and interest from the field." It closed with the following remarks:

> We share your interest in the outcome of the House vote which incidentally could come at any time after Congress reconvenes on September 5th. If the outcome is favorable, guidelines/regulations would be issued as soon as possible thereafter.
>
> Thank you once again for your sustained interest in these efforts on behalf of this program.

We are of the opinion that the NEA information package, including the cover letter, was designed to promote public support for funding the Program and therefore violated the provisions of section 304. The letter was timed to reach members of the public just before the House reconsideration of its refusal to fund the Program. The implication of the package is that the reader should support a favorable outcome of the impending House vote and thereby save the program. Although the letter purports to respond to requests for updated information on the Program received over the past year from members of the public, it focuses on reconsideration of Program funding in the House of Representatives and, at least by implication, advocates support of that funding. Moreover, it is improbable that all of the hundreds of inquiries had in fact requested a later "update." For these reasons, we do not consider the mass mailing of the information package as merely a response to requests for specific information on the Program from individual members of the public, so as to be outside the restrictions of section 304, in accordance with the legislative history. Accordingly, we conclude that the NEA information package violated the restrictions contained in section 304.

The action to be taken by our Office with respect to expenditures of appropriated funds in violation of law is limited to recovery of the amounts illegally expended. B–178648, September 21, 1973. While appropriated funds were used by NEA in connection with the preparation and mailing of the September 3, 1979, information package on the Livable Cities Program, the amount involved in the violation is presumably relatively small and is commingled with proper expenditures. In view of the small amount involved, and the difficulty in determining the exact amount expended illegally as well as the identity of any particular voucher involved, it would be inappropriate for us to attempt to effect recovery. However, with your concurrence, we plan to notify

the Chairman of NEA of the violation of section 304 and will request him to take action to insure that future violations do not occur.

[B-195823]

Contracts — Awards — Small Business Concerns — Procurement Under 8(a) Program — Notice Requirements — Other-Type Procurement Pending

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question.

Matter of: E-Z Tight, Inc., December 6, 1979:

E-Z Tight, Inc. (E-Z Tight) protests the decision by Department of the Army, Corps of Engineers (Army) to cancel invitation for bids (IFB) No. DACA45-79-B-0098, and to set aside the procurement for a minority contractor under the Small Business Administration's (SBA) 8(a) program. E-Z Tight contends that Government officials acted in bad faith in canceling the original invitation one day before bid opening and setting aside the requirement for minority business. For the reasons that follow, the protest is denied.

Section 8(a) of the Small Business Act (15 U.S.C. § 637(a), as amended by Pub. L. 95-507, October 24, 1978, 92 Stat. 1757), authorizes the SBA to enter into contracts with any Government agency having procurement powers. The SBA is enpowered to select specific procurement contracts in which it certifies that 8(a) program participants are competent to perform. The contracting officer of the procuring agency is authorized to let the contract to SBA upon such terms and conditions as may be agreed upon between the SBA and the procuring agency. 53 Comp. Gen. 143 (1973). Therefore, we have recognized that the determination to cancel a competitive solicitation and initiate a set-aside under section 8(a) is a matter for the contracting agency and the SBA to decide. *Echols Electric, Inc.*, B-194123.2, April 6, 1979, 79-1 CPD 242. In view of the broad discretion vested in the contracting officer and the SBA, we do not review determinations to set aside a procurement under section 8(a) unless it appears that there was fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith. *Arcata Associates, Inc.*, B-195449, September 27, 1979, 79-2 CPD 228; *American Laundry*, 58 Comp. Gen. 672 (1979), 79-2 CPD 49; *Arlandria Construction Co., Inc.*, B-195044, July 5, 1979, 79-2 CPD 10.

Although E-Z Tight alleges that the Army and the SBA acted in bad faith by canceling the competitive solicitation one day before bid

opening, and that this action has caused it to incur substantial bidding costs, we do not find any evidence of bad faith by Government officials. The record indicates that this procurement initially was advertised as a small business set-aside. After bids were opened the low apparent bidder was permitted to withdraw its bid because of a mistake and the solicitation was canceled because the other bids, including the protester's bid, were considered unreasonably high. The requirement was readvertised on an unrestricted basis. Within a few days the SBA requested reservation of the procurement for its 8(a) program. Because the Army requested further information regarding the capabilities of the firm proposed by SBA to perform the required work, the competitive solicitation was not withdrawn until one month after issuance and E–Z Tight did not receive notice of the cancellation until the day before bid opening.

The Interagency Agreement between the Army and the SBA, Attachment No. 1, Section III, paragraph A(2) provides that "[i]n order to permit DA the maximum amount of time for planning, the SBA will endeavor to provide the reservation request at the earliest practicable date in advance of the anticipated requirement." Although the withdrawal of the competitive solicitation was delayed until just prior to bid opening, we note that the SBA did request the reservation of the procurement soon after the cancellation of the initial small business set-aside and the issuance of the unrestricted procurement. It was only because the Army found it necessary to obtain further information on the proposed 8(a) firm that the IFB was not canceled sooner.

In appropriate circumstances it is not improper for an agency to prepare for or even conduct an unrestricted procurement while discussions are taking place with a potential 8(a) subcontractor. *Arcata Associates, Inc., supra; Alpine Aircraft Charters, Inc.*, B–179669, March 13, 1974, 74–1 CPD 135. We think such circumstances clearly existed here, and that the facts do not support the allegation of bad faith. However, we recommend that in future cases bidders be put on notice of the possible withdrawal of the procurement for 8(a) purposes as soon as the procuring agency learns of SBA's interest. Also, bid opening should be postponed or suspended to allow time to resolve the set-aside question. This will help prevent potential bidders from incurring bidding costs unnecessarily.

E–Z Tight also points out that the 8(a) set-aside will create a significant financial hardship for the firm. In recognizing the validity of the 8(a) program, however, the courts have noted that it will necessarily operate to the disadvantage of non-eligible small business concerns to some extent. *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F. 2d 696 (5th Cir. 1973). This monetary detriment to a non-eligible firm does not affect the validity of the 8(a) program or of a

specific set-aside. *Delphi Industries, Inc.*, B–193212, November 9, 1978, 78–2 CPD 336. We do recognize that as a matter of policy the SBA may find a procurement unsuitable for the 8(a) program based upon a finding that a small business concern may suffer a major hardship if the procurement is removed from competition. *See* SBA's Standard Operating Procedures (SOP) guidelines (4). This is a matter within the province of SBA and is not reviewed by this Office under the Bid Protest Procedures, 4 C.F.R. Part 20 (1979). *Delphi Industries, Inc.—Reconsideration*, B–193212, January 30, 1979, 79–1 CPD 70.

The protest is denied.

[B–188227]

Aircraft — Carriers — Fly America Act — Applicability — Freight Transportation

Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B–188227, May 8, 1978, modified.

Matter of: District Containerized Express — Reconsideration, December 10, 1979:

District Containerized Express (District) requests reconsideration of our decision of May 8, 1978, B–188227. In that decision, we held that District's bill for additional freight charges of $237.50 allegedly due for the door-to-door through transportation of part of the personal effects of an employee of the General Accounting Office (GAO) from a warehouse in Bladensburg, Maryland, to Frankfurt, Germany, could not be certified for payment since on the record before us District was not billing in the name of the principal carrier contrary to regulations issued by the General Services Administration. Also, contrary to regulations implementing Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1517 (1976) (Fly America Act), District presented no evidence justifying the use of a foreign-flag air carrier for part of the transportation when an American-flag air carrier was available. District's bill number is DCE 1032.

The employee's travel orders authorized the transportation of 875 pounds of air freight from his official station in Washington, D.C., to Frankfurt at the Government's expense. In August 1976, District was authorized under Government bill of lading No. K–0283598 to transport about 875 pounds of freight from Sterling, Virginia, to Frankfurt, Germany. District has been paid $553.75 which covered the

through door-to-door transportation of 443 pounds of the air freight. In September 1976, District states that the employee gave it an additional 190 pounds of freight at Bladensburg, Maryland, for air shipment to Frankfurt. We are satisfied that the additional weight was part of the weight authorized on the GBL. District packed the 190-pound shipment and tendered it to Trans World Airlines (TWA) at Dulles International Airport, Virginia, for transportation to Frankfurt. TWA, in Paris, France, interlined the shipment with Lufthansa, a foreign-flag air carrier, who transported it to Frankfurt. District also provided for delivery services in Germany.

District contends that it should not be penalized the entire cost of transportation since that cost included transportation to and from the airports, as well as American-flag air carrier service from Dulles to Paris.

In support of its request for reconsideration, District has provided a copy of Operating Authorization No. 404, issued by the Civil Aeronautics Board (CAB), which gives District the authority to engage in business as an international air freight forwarder. It has also provided documents from TWA showing that the cost for transporting the air freight to Frankfurt via Paris was $184.30, the same charge as direct air service on Pan American Airways from Washington to Frankfurt.

As we stated in our prior decision, Section 101–41.310–4 of the Federal Property Management Regulations Temporary Regulation G–23, which was in effect at the time of the shipment, states that a bill is payable to an agent of a carrier so long as the bill is submitted in the name of the principal carrier or forwarder. Based on the record then before us we determined that District must have been the agent for Van Pac Carriers, a carrier also listed on the GBL, since we were aware that District had no operating authority in its own name from the Interstate Commerce Commission to transport the shipment. See *Bud's Moving & Storage, Inc., Declaratory Order*, 128 M.C.C. 56 (1976). However, CAB Authorization No. 404 gives District operating authority to act as an international air freight forwarder ". . . in overseas and foreign air transportation." Based on this new evidence, District is the proper payee on the voucher.

Payment of all transportation charges on District's vouchers would violate the provisions of the Fly America Act which provides:

> * * * The Comptroller General of the United States shall disallow any expenditure from appropriated funds for payment for such personnel or cargo transportation on an air carrier not holding a certificate under Section 401 of this Act in the absence of satisfactory proof of the necessity therefor. * * *

In cases involving passenger air travel we have held that where the travel is improperly routed so that foreign-flag air carriers are used

when American-flag air carrier service is available, the Government will not pay the portion of the air fare which was improperly diverted from the American-flag air carriers. 58 Comp. Gen. 612 (1979); 56 *id.* 209 (1977). We also have adopted the use of a mileage proration formula described in 56 Comp. Gen. 209 to determine the amount of revenue improperly diverted from American-flag air carriers. Applying that rule and formula to this case, District's liability for the use of foreign-flag air service from Paris to Frankfurt is $12.94.

Section 901 of the Merchant Marine Act of 1936, 46 U.S.C. § 1241(a) (1976), a statute similar to the Fly America Act, makes use of American-flag ships mandatory unless it can be proven that it was necessary to use a foreign-flag ship. In cases involving Section 901 we have held that when the carrier submits evidence of ocean freight charges paid to the foreign-flag carrier, its bill for through door-to-door transportation charges less the ocean freight charges may be certified for payment. B-188186, September 5, 1979. We believe that a similar rule should apply to cases involving the Fly America Act.

District submitted copies of the bill from TWA and District's check showing payment of the air freight charges. Therefore, we today have advised GAO's authorized certifying officer that District's bill number DCE-1032, if otherwise proper, may be certified for payment of $224.56, which represents the through door-to-door transportation charges billed less the amount improperly diverted from American-flag air carriers as determined by the mileage proration formula.

Our prior decision is modified accordingly.

[B-194493.2]

Contracts — Protests — Abeyance Pending Court Action — Not All Issues Pending — "Claim Preclusion" Principle

Protest will not be considered because some issues involved are expressly before court, other protest issues not expressly before court are, as practical matter, before court under "claim preclusion" principle, and relief sought from General Accounting Office (GAO) and court is similar. Furthermore, court has not expressed interest in obtaining GAO's views but has instead denied protester-plaintiff's request for preliminary injunction in pending civil action.

Matter of: CompuServe Data Systems, Inc., December 10, 1979:

CompuServe Data Systems, Inc., has protested the award of a contract by the Federal Election Commission (FEC) to Interactive Sciences Corporation (ISC) for computer services under "General Services Administration (GSA) TSP/Basic Agreement program RFP 79-1." Because of alleged irregularities, CompuServe requests that we recommend the reopening of competition for the award.

At the same time CompuServe has commenced litigation (civil action No. 79–1217, U.S. District Court, District of Columbia) seeking: "* * * a declaration that the FEC award was unlawful, a preliminary injunction to preserve the status quo pending disposition of CompuServe's protest to the General Accounting Office, and a permanent injunction requiring that contract negotiations be reopened and conducted according to law." To our knowledge, CompuServe's complaint is still pending in the district court.

We are dismissing the protest because under section 20.10 of our Bid Protest Procedures, Effect of Judicial Proceedings, 4 C.F.R. § 20 (1979), we do not review matters involved in litigation; moreover, the court has denied plaintiff's motion for preliminary injunctive relief in the civil action and has not expressed interest in having our Office review the protest.

Issues Expressly Before the Court and GAO

CompuServe has made two allegations which are expressly before the court and our Office, namely: (1) FEC improperly refused to make available "standard successful offeror information"; and (2) FEC improperly reopened negotiations only with ISC after both companies had submitted "Best and Final" offers for the contract. We refuse to review these issues because of 4 C.F.R. § 20.10, above.

Other Issues

CompuServe makes two additional allegations, namely: (1) Various "GSA officials" were improperly advised of "participants, standings, scores, and bid prices"; and (2) the FEC selected ISC by means of an improper "voting scheme."

Although these issues were not expressly raised in the civil action, it is clear that they could have been raised. Given this fact, and since the permanent relief sought from the court is so similar to the relief sought here, the court's judgment on CompuServe's complaint may result in a judgment on the merits of these issues. As stated in *Kaspar Wire Works, Inc.* v. *Leco Engineering and Machinery*, 575 F. 2d 530, 535 (5th Cir. 1978):

> Under [the] rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised * * * The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties * * *

In view thereof, we will not consider these issues. *See Dyneteria, Inc.; Jets, Inc.*, B–194279, B–194284, August 1, 1979, 79–2 CPD 70; *Frontier Sciences Associates, Inc.—Reconsideration*, B–192654, December 26, 1978, 78–2 CPD 433.

Protest dismissed.

321-284 O - 80 - 3

[B–193653]

Compensation — Overtime — Administrative Workweek — Six-Day/Four-Day

Several nurses, GS–7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment.

Matter of: Nurses at Federal Correctional Institution—Overtime Entitlement, December 11, 1979:

Mr. Norman A. Carlson, Director of the Bureau of Prisons, Department of Justice, requests a decision as to entitlement to overtime compensation for several nurses who worked 6 days during one week and 4 days during the other week of a pay period including related adjustments, if any, that should be made.

The record shows that during the period April 10, 1977, through June 17, 1978, several nurses, grades GS–7 and 9, who were employed at the Federal Correction Institution (Institution), Butner, North Carolina, were scheduled by their immediate supervisor to work 6 days in one administrative workweek and 4 days in the other administrative workweek of each pay period. The agency report states that the work schedules of these nurses were esablished by their immediate supervisor in response to the nurses' request.

The warden of the Institution is the only official at the Institution authorized to order or approve overtime. We have been advised that the basic workweek of these nurses is the 40-hour period consisting of 8 hours in each of 5 consecutive days within the administrative workweek which is the 7-day period of Sunday through Saturday. We were also advised that the warden did not have any knowledge of the work schedule as established.

Whether the nurses would be entitled to overtime compensation for the period of time worked in excess of 40 hours during each workweek is controlled by the overtime provision at 5 U.S.C. 5542 (1976) and the applicability of the overtime provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*

Section 5542 of title 5, United States Code (1976) provides in pertinent part as follows:

Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek or * * * in excess of 8 hours in a day, performed by an employee are overtime work * * *.

Only that overtime which has been officially ordered or approved in writing or induced by an official having authority to order or approve overtime work is compensable overtime. *Joan J. Shapira*, B–188023, July 1, 1977. Thus, since the appropriate authorizing official, the warden, has not ordered, approved, or induced the performance of work in excess of 40 hours in a workweek there is no entitlement to compensation for those overtime hours worked pursuant to 5 U.S.C. 5542 (1976).

On May 1, 1974, the Fair Labor Standards Act Amendments of 1974, Public Law 93–259, approved April 8, 1974, extended the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* to Federal employees. The FLSA requires payment to nonexempt employees of overtime compensation for hours worked in excess of 40 hours per week. 29 U.S.C. 207 (1976).

Under the provisions of 29 U.S.C. 204(f) (1976) the Civil Service Commission (Commission), now the Office of Personnel Management, is authorized to administer the provisions of the FLSA. Under the FLSA a nonexempt employee becomes entitled to overtime compensation for hours of work in excess of 40 hours a week for all work which management "suffers or permits" to be performed. See para. 3c of the Federal Personnel Manual (FPM) Letter No. 551–1, May 15, 1974.

The Commission has issued criteria for determining whether an employee is exempt under the FLSA. See 5 C.F.R. Part 551, Subpart B and FPM Letter No. 551–7, July 1, 1975.

Concerning the exemption of professional employees, paragraph C3c of Attachment to FPM Letter No. 551–7, provides in pertinent part as follows:

> c. *Exemption of Employees in Occupations Identified in the Series Definition as Professional*
>
> * * * * * * *
>
> (1) The GS–7 level frequently is a developmental level at which employees receive close supervision in process as well as on completion of the work, which precludes exemption. However, some professional disciplines include, as part of the academic training, substantial experience in the practical application of theory and techniques (e.g., nursing or physical therapy) or laboratory courses that closely parallel work situations. Thus, in some professions, employees require relatively brief on-the-job training and are able to apply professional knowledges and independent judgment which qualifies for exemption at the GS–7 grade level.

While the above-cited paragraph indicates that all of the nurses in question would be exempt under the FLSA, paragraph 1C of FPM Letter 551–7 also provides in pertinent part that determination as to the exempt or nonexempt status of a position ultimately rests on the actual duties of the position.

Any questions which may arise concerning the proper FLSA status of each of these nurses should be directed to the Office of Personnel

Management which has the authority to make final determinations as to whether Federal employees are covered by the various provisions of the Act. See B–51325, October 7, 1976.

Those nurses who are determined to be nonexempt under the FLSA would be entitled to overtime compensation for those hours of work in excess of 40 hours in a week. Thus, they would be entitled to additional payment in the amount of the difference between the overtime rate and the straight time rate already received for those hours of work in excess of 40 hours in a week.

Regarding the nurses who are found to be exempt under the FLSA, although the additional day worked in the 6-day workweek was not officially ordered or approved overtime work under 5 U.S.C. 5542, in view of the particular circumstances present, especially the fact that the performance of work was in accordance with the schedule established by their supervisor at the nurses' request, the Bureau may treat the additional day worked in the 6-day workweek as an offset for the day not worked in the 4-day workweek thus eliminating any other adjustment.

[B–193771]

International Organizations — Transfer of Federal Employees, etc. — Federal Employees International Organization Service Act— Transfer Entitlements — Reemployment Guarantees — Equalization Allowance

Agency for International Development (AID) employee transferred to international organization in Indonesia for 1 year and to second international organization in Mexico for 3 years under Federal Employees International Organization Service Act, as amended, 5 U.S.C. 3581 to 3584. In determining employee's entitlement to equalization allowance AID properly considered total pay and allowances received from both international organizations since equalization allowance is effective only upon employee's reemployment by AID at end of second assignment.

International Organizations — Transfer of Federal Employees, etc. — Federal Employees International Organization Service Act— Transfer Entitlements — Limitations

Agency for International Development employee transferred to international organizations for 4 years is not entitled to rest and recuperation travel, granting of earned leave benefits, and reimbursement of expenses incurred in shipment of personal automobile since such benefits are not authorized under 5 C.F.R. 352.310 (a)(3) implementing 5 U.S.C. 3582(b). Also, employee was considered for promotion by agency while serving with international organizations as required by 5 C.F.R. 352.314 (1970).

Matter of: Edward Napoliello—Transfer to International Organizations—Reemployment Guarantees, December 17, 1979:

This action is in response to an appeal by Mr. Edward Napoliello, a former employee of the Agency for International Development

(AID), Department of State, from the settlement action dated October 12, 1978, issued by our Claims Division, which disallowed his claim for earned leave benefits, reimbursement of transportation expenses, and equalization pay, incident to his transfer to two international organizations under the provisions of the Federal Employees International Organization Service Act, Public Law 85-795, as amended, approved August 28, 1958, 72 Stat. 959, codified at 5 U.S.C. §§ 3581 to 3584 (1970). The claimant also has questioned why he was not considered for a promotion by AID while employed by the international organizations.

The record discloses that Mr. Napoliello who was then an employee of AID was transferred from AID to commence work on June 22, 1970, as a technician for the United Nations Industrial Development Organization (UNIDO) in Indonesia for one year. He was not reemployed by AID upon completion of his one-year contract with UNIDO. Instead the Department of State approved a second contract for the claimant to work for another United Nations (UN) agency, the United Nations Development Program (UNDP). He was to be employed by UNDP, in Mexico, for a four-year period until June 21, 1975. However, Mr. Napoliello was in fact reemployed by AID on September 3, 1974. He retired from Federal service on November 1, 1974.

Mr. Napoliello contends that even though he was not reemployed by AID at the end of his one-year assignment in Indonesia, for all intent and purposes, his contract with UNIDO had been completed and he was prepared to return to AID. He states however that he was then assigned by the Department of State to another UN organization, UNDP, under a completely new contract with different responsibilities. He therefore feels that two calculations should be made. The first would be a computation of pay and allowances for his one-year tour of duty in Indonesia where he states hardship benefits of 25 percent and rest and recuperation travel are included. The second computation would be made for his service in Mexico where the aforementioned benefits are not payable.

The claimant also seeks the granting of earned leave benefits and reimbursement of expenses incurred incident to the shipment of his personal automobile. He states that during the entire period of his assignment to the international organizations, he was not compensated for leave.

Mr. Napoliello further contends that even though he advanced rapidly while assigned to the two international organizations, he was not considered for a promotion by the AID review panel during this period although such consideration is required by the Federal Employees International Organization Service Act.

The rights of Federal employees who transfer to an international organization are set forth in section 3582, title 5, United States Code (1970). Subsection (a) provides that an employee who transfers to an international organization with the consent of the head of his agency is entitled to certain rights and benefits pertaining to retirement, life and health insurance, compensation for work injuries, and annual leave. Subsection (b) provides that such an employee is entitled to be reemployed in the agency from which he transferred if—(1) he is separated from the international organization within 5 years or any extension thereof, or within a shorter period named by the head of the agency, and (2) he applies for reemployment not later than 90 days after separation. This subsection also provides that upon reemployment an employee is entitled to the restoration of his sick leave account and to be paid an equalization allowance in an amount equal to the difference between the pay, allowances, post differential, and other monetary benefits paid by the international organization and the same benefits that would have been paid by the agency had he been detailed to the international organization.

A distinction is made between employees who are detailed to international organizations and those who are transferred to such organizations. Detailed employees remain on the Government rolls and receive pay as being in the service of the United States. Those transferred are guaranteed that their pay will not be less than if they had remained on the Government rolls, but such guarantee is effective only upon condition of reemployment. If an employee earns as much as or more while serving with an international organization than he would have earned as a Federal employee, no payment under the guarantee is required. 50 Comp. Gen. 173 (1970).

With respect to the contention by Mr. Napoliello that his equalization pay should be computed separately as to each of his assignments to international organizations, the statutory guarantee that his pay will not be less than if he had remained on the rolls of AID is effective only upon the condition of reemployment. 50 Comp. Gen. 173, *supra*. The claimant was not reemployed by AID at the end of his initial assignment of one year to the UNIDO. He was reemployed by the agency upon completion of his second assignment to the UNDP. Hence, the computation of the equalization pay, if any, due the claimant is to be based upon the entire 4-year period he served with both international organizations. The record discloses that the 25 percent post differential paid to employees serving in Indonesia was in fact included in the computation of equalization pay due the claimant. Further, we are not aware of any hardship benefits payable to employees who serve in Indonesia other than the 25 percent post differential. Finally, in computing the equalization pay of Mr. Napoliello,

the record discloses that during his service with the international organizations his salary and allowances totaled $144,083.79. The salary and allowances that he would have received from AID totaled $143,680.56. Since the salary and allowances received from the international organizations exceeded those that would have been received from the agency, no equalization allowance is payable.

As to rest and recuperation travel to which the claimant apparently refers, this benefit allows employees who are on annual leave to travel, at Government expense, to a designated rest area. It is provided to employees who serve in remote locations. This benefit is not an allowance and is not included in the phrase "pay, allowances, post differential, and other monetary benefits" and therefore may not be included in the computation of equalization pay. See 5 U.S.C. § 3582(b)(2) and *Matter of Michael B. McClellan*, B–181853, August 23, 1976. Also, the granting of earned leave benefits and expenses incurred incident to the shipment of Mr. Napoliello's personal automobile are not considered as monetary benefits and, therefore, may not be included in computing the equalization allowance. 5 C.F.R. § 352.310(a)(3) (1970); *McClellan, supra.*

Regarding consideration for promotion the agency is required to consider each employee detailed or transferred to an international organization for all promotions for which he would have been considered were he not absent. 5 C.F.R. § 352.314 (1970); B–135075, May 10, 1968. Compare 28 Comp. Gen. 159 (1948). The record shows that during the period Mr. Napoliello performed duties as a Senior Industrial Development Field Adviser with UNDP, he was considered for promotion by AID officials. The three members of the promotion panel stated that the claimant had not received a formal and complete evaluation by AID since 1969 and found it almost impossible to render an accurate evaluation of Mr. Napoliello's performance and abilities. In this connection a letter dated August 8, 1975, addressed to the claimant by the Chief, Latin America/Non-Regional Staffing Branch, Foreign Service Personnel, AID, states that employees on transfer to international organizations are considered annually by the evaluation panels. However, the letter points out that the employees' promotion opportunities are limited because the panels do not receive meaningful performance evaluation reports from the supervisors of the transferred employees in the international organization.

In his letter of appeal, Mr. Napoliello states that he was verbally assured that in accepting his second assignment with an international organization he would continue to be a United States Government employee entitled to all the rights and privileges extended to any AID employee assigned to a foreign country. He also states that

he was positively assured that under no circumstances, under the then current regulations, would he encounter any financial loss. However, while AID officials may have made such statements, they do not entitle Mr. Napoliello to any additional pay and allowances since, as noted above, the pay and allowances received by him from the international organizations exceeded those he would have received from AID.

In light of the foregoing, the settlement action of October 12, 1978, by our Claims Division, denying the claim of Mr. Napoliello for the previously discussed benefits under the Federal Employees International Organization Service Act, as amended, and its implementing regulations, is sustained.

[B-194440]

Contracts — Data, Rights, etc. — Disclosure — Owner's Prior Consent, etc.

Claim for disclosure of proprietary information in testimony by Air Force personnel is denied because same information was already disclosed in greater detail with knowledge and assent of claimant.

Contracts—Data, Rights, etc.—Use by Government—Claim for Unauthorized Use

Claim for use of proprietary data by Air Force in efforts to obtain permit for destruction of herbicide orange at sea is denied because it was failure of either Air Force or claimant to accomplish acceptable destruction of dioxin residues that would result from reprocessing of herbicide that was subject of testimony. General and abbreviated references to data already disclosed in same forum in effort to obtain approval for herbicide reprocessing was not use of proprietary information.

Contracts—Data, Rights, etc.—Status of Information Furnished—Bidder, etc. *v.* Government Benefit

Claim for payment for production of information for use and benefit of Air Force is denied where information was produced for benefit of claimant in effort to satisfy prebid condition on sale of surplus herbicide orange.

Sales — Cancellation — Government Liability — Withdrawal of Sales Item — Hazardous Substances — Environmental Impact Consideration

Decision to terminate negotiations and stop proposed sale of surplus herbicide orange is neither arbitrary nor capricious where neither prospective purchaser nor Air Force is able to satisfy presale condition for environmentally acceptable disposition of contaminated filters. Risk that sale might be halted remains with prospective purchaser even though Air Force offers to assume control of filters.

Matter of: Agent Chemical, Inc., December 17, 1979:

Agent Chemical, Inc. (Agent), claims reimbursement for expenses incurred in the construction and test of a pilot plant for the decon-

tamination of herbicide orange (HO) erected to satisfy a prebid condition on a sale of surplus Department of Defense (DOD) stocks of HO. The sale was aborted and the HO was destroyed at sea. Agent asserts entitlement to payment on the basis that proprietary information developed through its pilot plant project was disclosed and/or used by the Air Force to obtain from the Environmental Protection Agency (EPA) the ocean dumping permit required for destruction of the HO. For the reasons that follow, we find no legal basis upon which Agent's claim may be paid.

Background

HO, a combination of two phenoxy herbicides, was first formulated in 1962 for military use as a defoliant. By 1969, however, undesirable side effects attributable to the use of HO were noted, eventually traced to the presence in the HO of certain extremely toxic contaminants called dioxins or TCDD. As a result of these discoveries, in April 1970 the DOD directed the Air Force to dispose of all DOD stocks of HO.

After investigating disposal methods, in November 1974 the Air Force published an Environmental Impact Statement (EIS) proposing the destruction of the HO through high-temperature incineration at sea. The EPA, however, suspended hearings on the Air Force's application for an ocean dumping permit after testimony which indicated that reprocessing technology might exist which would enable the decontamination of the HO and its conversion to a safe and saleable herbicide. Unsuccessful contacts with HO manufacturers concerning the prospect of reprocessing led to the request for quotations (RFQ) which underlies this claim.

The RFQ advised potential purchasers of the proposed sale of DOD's stock of HO and stated that the sale would be limited to a party having the ability to reduce it to a safe and registerable herbicide. Before purchasers could bid on the HO, they were required to explain and document their proposed reprocessing method, comply with all applicable Federal, State and local laws pertaining to the processing or use of the herbicide, submit a description of the residues and their disposal, and, most importantly for our purposes here, process a test batch through a pilot plant.

Agent proposed to use a two-part process for decontamination of the HO and destruction of the TCDD. Decontamination would be accomplished by adsorbing the dioxin onto charcoal in a filtration process developed by Dr. David L. Stalling and other scientists of the United States Fish and Wildlife Service to reduce the level of dioxin contaminants to acceptabel levels: Final destruction of the adsorbed dioxin was to be accomplished by incineration of the contaminated

321-284 O - 80 - 4

charcoal filter cylinders. At this time, charcoal filtration of dioxins had only been demonstrated on a laboratory scale. Dr. Stalling and his associates had performed preliminary research under an interagency agreement with the Air Force which indicated that pyrolysis was a promising method of disposal of the contaminated charcoal residues.

Agent encountered severe difficulties with its pilot plant. The initial and four subsequent tests of Agent's incinerator system conducted over the period from November 2, 1975, through March 1–2, 1976, all resulted in failures, as did the initial test of the filtration system in late January 1976.

In February 1976 Agent advised the Air Force that Dr. Stalling had identified the flow rate as the culprit in the filtration test failure and requested 45 additional days to correct and demonstrate its plant. Before considering Agent's request, the Air Force required Agent to respond to an extensive statement of deficiencies and problems which the Air Force had noted in Agent's efforts. Technical analysis of Agent's response reflected continued dissatisfaction with Agent's performance and plan and culminated in a recommendation that HO reprocessing be dropped. A second submission from Agent led to approval of Agent's requested extension in a letter bearing the caveat: "As in the past, [Agent] will bear all risk and expense of this effort."

Agent successfully demonstrated its filtration process in June 1976, but was still unable to incinerate the dioxin-contaminated filters. In July 1976 Agent filed a report with the Air Force on its filtration process which contained the information upon which this claim is based. After efforts at disposal of the filters in a landfill were unsuccessful, the Air Force proposed that if Agent could not arrange for burial of the filters in an approved landfill, "we should direct our mutual efforts toward negotiating a sales agreement providing for Government control of the containers."

At about the same time, the Air Force published an amended EIS proposing to decontaminate the HO using Agent's process and store the contaminated charcoal cylinders until technology could be developed to permit their disposal. This proposal drew substantial negative reaction. Several of those commenting pointed out that the filtration approach did not resolve the problem of TCDD disposal, but merely converted it to another form. Subsequent investigation by the Air Force of avenues of destruction of the contaminated charcoal cylinders produced the following comment in an internal memorandum dated March 7, 1977:

> Achieving total destruction of the more densely dioxin-contaminated charcoal is technically much more difficult than destroying the lesser concentration of dioxin contained in liquid herbicide orange. The theoretical technology may exist, but no existing incinerator is capable of demonstrating it. The technology will have to be applied; an incinerator designed; military construction funding

obtained; and the incinerator actually constructed. As in the case of storage, only a DOD site outside the jurisdiction of any state possesses the slightest chance of being acceptable. The cost and timing of such an endeavor is unknown and depends on a series of unprovable assumptions, such as how long it will take to prove the technology, design the incinerator, complete an environmental statement process, and have the incinerator successfully compete in the military construction funding process.

The Air Force concluded that "disposal of the dioxin-laden charcoal and their containers in the foreseeable future is not feasible and that herbicide reprocessing should not be regarded as a viable alternative to ocean incineration." This conclusion was apparently induced in part by the continuing deterioration of the herbicide containers.

The Air Force subsequently withdrew its amended EIS and reinstated its original proposal to destroy the HO by high-temperature incineration at sea. The HO was destroyed by this method during the latter part of 1977.

Agent seeks reimbursement for the research and development expenses it incurred in applying the filtration process and in its unsuccessful efforts to incinerate or otherwise dispose of the resulting contaminated filters. Agent bases its claim on the theory that the Air Force, without Agent's permission, used proprietary data developed by Agent to document its earlier unsuccessful request for an EPA permit to incinerate the HO at sea and that such use required either the prior approval of Agent or compensation.

We believe that Agent's claim is a composite of three separate claims: First, a claim resulting from the alleged disclosure of proprietary information; second, a claim for the use of proprietary information; and third, a claim for proposal preparation costs. We discuss each of these claims below. For the purposes of our discussion, we assume without deciding both that the information on which the claim is based is actually proprietary and that Agent's expenses for its pilot plant would be an appropriate measure of recovery.

Disclosure of Proprietary Data

Agent's theory that the Government disclosed proprietary data developed by Agent is based on testimony by Dr. Billy Welch, USAF, during hearings in the spring of 1977 on the Air Force's request for the final granting of an ocean dumping permit. We have reviewed this claim carefully, including examination of that portion of the transcript of Dr. Welch's testimony to which it is believed Agent refers, and do not believe that any information was revealed by Dr. Welch for which Agent would be entitled to payment. During the course of his testimony, Dr. Welch discussed Agent's efforts at HO decontamination in general terms, including a general description of Agent's process and such remarks as: "As many as 1,000 of these canisters,

each approximately ten feet long and 30 inches in diameter and each containing more than one-half ton of charcoal, could be generated by a reprocessing action involving the entire stock of orange herbicide." All of this information, including specific figures for charcoal weight per column, dimensions of the filter columns, and details of the process, was published in greater detail in the Air Force's amended EIS filed on October 12, 1976, with Agent's knowledge and without protest.

The value of proprietary information lies in its possession uniquely by the owner; once such information becomes public knowledge, its value and status as proprietary information are lost. As stated by the Seventh Circuit Court of Appeals, "Of course, as the term demands, the knowledge cannot be placed in the public domain and still be retained as a 'secret.' * * * That which has become public property cannot be recalled to privacy." *Smith* v. *Dravo Corp.*, 203 F. 2d 369, 373 (7th Cir. 1953). A trade secret is no longer protectable when it becomes public knowledge or general knowledge in the trade or business. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 475 (1974); *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F. 2d 912, 921 (7th Cir. 1953); *Chromalloy Division—Oklahoma of Chromalloy American Corporation*, 56 Comp. Gen. 537 (1977), 77-1 CPD 262.

We think the publication of Agent's data in the Air Force's October 1976 EIS amendment placed this information in the public domain. Furthermore, we believe that this disclosure was accomplished with Agent's approval which we infer from Agent's knowledge and lack of protest of the inclusion of its data in the amendment and our belief that it was the understanding of the parties at the time of submission of Agent's July 1976 report that at least some of the details of Agent's process would have to be disclosed in order to win EPA approval of HO reprocessing. In these circumstances, we do not think that Dr. Welch's subsequent testimony constitutes a disclosure of proprietary information.

Use of Proprietary Data

Agent claims reimbursement for "its reasonable research and development expenses for the production of proprietary and confidential data used by the Air Force in documenting its request for a permit from the [EPA] to incinerate Herbicide Orange at sea." For the reasons stated below, we do not think Agent is entitled to compensation for the use of this information.

We are unable to ascertain from the wording of Agent's claim whether it is Agent's intent to claim compensation for the *use* of information proprietary to Agent or whether Agent seeks reimbursement for the expense of *preparation* of information for the benefit of the Air Force. In either event, we find no basis upon which Agent's claim may be paid.

In the first case, we do not think that Dr. Welch's testimony constituted a "use of proprietary and confidential data" in support of the Air Force's renewed request for an ocean dumping permit. It was not Agent's process but rather the fact of Agent's failure to achieve destruction of the dioxin residues which was the focus of Dr. Welch's testimony. However much Agent may have desired to keep this confidential, we do not regard it as proprietary and neither do we regard as proprietary Dr. Welch's general and abbreviated references to materials already disclosed in the same forum to demonstrate the consequences of the inability to dispose of the TCDD-contaminated charcoal filters.

In the second case, we think Agent is trying after the fact to recast the terms of the RFQ under which it proceeded and its subsequent dealings with the Air Force to incorporate or imply an agreement to compensate Agent for the product of its research regardless of the outcome. We find nothing in the record to support Agent's interpretation.

Agent's pilot plant efforts were in response to a clear and unequivocal requirement in the RFQ that prospective purchasers document and demonstrate their process for HO decontamination as a prerequisite to bidding. The RFQ specifically and prominently provided that "No payment will be made for the information solicited" and Agent was advised both at the inception and later that its pilot plant would be at its own risk and expense. We note in this latter regard that both the letter commenting on Agent's proposed operational plan in support of its February 1976 request for a 45-day extension of the time within which to demonstrate its decontamination process and the letter of May 27, 1976, actually granting Agent's request, specifically point out that the Government would incur no liability or obligation to Agent for its efforts. In this same exchange of correspondence Agent also was advised that the Air Force was considering alternate disposal methods. And, while negotiations may have been conducted with Agent concerning the purchase of rights to Agent's data, no agreement was ever completed.

In these circumstances, we believe that Agent's efforts were for its own benefit rather than that of the Air Force and we find no basis, implied or otherwise, upon which Agent might now be compensated for the production of this information.

Proposal Preparation Costs

Lastly, Agent's claim may be construed as a claim for proposal preparation costs. The basis of liability for bid or proposal preparation costs is the breach by the Government of its obligation to fairly

and honestly consider all bids. *Heyer Products Company, Inc.* v. *United States*, 135 Ct. Cl. 63 (1956); *Keco Industries, Inc.* v. *United States*, 192 Ct. Cl. 773, 428 F. 2d 1233 (1970); *T&H Company*, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious towards the offeror-claimant. *T&H Company*, *supra; System Development Corporation*, B-191195, August 31, 1978, 78-2 CPD 159. We do not think this is the case here.

Agent voluntarily accepted the burden and substantial risk of successfully demonstrating both HO reprocessing and the environmentally acceptable disposal of the dioxin residues, each of which was a prerequisite to the sale of the HO. We do not believe that the Air Force's offer to assume control of the contaminated filters after Agent was unsuccessful in arranging their disposition relieved Agent of the risk that the sale would not take place if Air Force efforts at container disposal were also unsuccessful. We think it abundantly clear that neither Agent nor the Air Force was able to satisfy the requirement for acceptable disposal of the residues. Consequently, we find nothing arbitrary or capricious in the Air Force's decision to reject reprocessing as an option for HO disposal and terminate negotiations with Agent.

We find no legal basis upon which Agent's claim may be certified for payment and, therefore, the claim is denied.

[B-195251.2]

Contracts —Awards — Small Business Concerns — End Product Contributor

Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause.

Bids—Mistakes—Correction—Nonresponsive Bids

Nonresponsive bid may not be considered for correction regardless of circumstances since to permit this would be tantamount to permitting submission of new bid.

Contracts — Performance — Place of Performance — Confidentiality — Solicitation Assurances — Propriety

While clause permitting bidders to make their proposed place(s) of contract performance confidential information ("except as inconsistent with existing law") may lessen or negate ability of competing bidders to challenge acceptability of other bids, contrary to fundamental concept of full and free competition, no objection will be made to award under resolicitation since none of bidders participating on resolicitation protested use of clause. However, recommendation is made that provision for confidentiality be deleted in future.

Matter of: Prestex, Inc., December 17, 1979:

Invitation for bids (IFB) No. DLA100-79-B-0593 was issued as a 100-percent small business set-aside for the procurement of cloth. Prestex, Inc. (Prestex), the sole bidder, represented in its bid that it was a small business and that it was bidding as a regular dealer, not as a manufacturer. It also represented that the cloth "will not be manufactured or produced by a small business concern * * *," and it indicated, as required in the IFB "Place of Performance" clause, the names of the firms (and their locations) which would manufacture the cloth. Because of the representation that the cloth "will not" be manufactured by a small business, the contracting officer rejected the Prestex bid as being nonresponsive to the small business set-aside requirement. Consequently, he canceled the invitation and readvertised the procurement. Prestex protested these actions.

It is the position of the contracting officer that Prestex did not bind itself to furnish cloth manufactured by a small business concern since it represented otherwise and since either the size status of the firms (assuming they are now small businesses) listed by Prestex in the "Place of Performance" clause could change after award and Prestex could not be required to change firms or Prestex could engage a large business as a manufacturer after award and no means would exist to compel Prestex to provide small business-manufactured cloth. Second, it is believed that a bid that can be read as one offering to supply small business-manufactured cloth (due to the firms listed by the bidder as the manufacturers) and as one offering to supply large business-manufactured cloth (due to the representation) is ambiguous and should be rejected. To do otherwise, it is noted, would permit the bidder after bid opening to choose the bid interpretation it desired and thereby determine whether or not it would accept an award.

Prestex maintains that its faulty representation was caused by a typing error and, as such, is a minor informality which may be corrected. It believes that the "Place of Performance" clause should govern as the more definitive of the two and as the one referring to bid responsiveness if it is not complied with. That clause provides that the bidder may not change its manufacturing suppliers from those listed in its bid without the permission of the contracting officer. Thus, since the firms it listed are small businesses, it has obligated itself to provide small business-manufactured cloth. As to a possible change in the small business status of those firms, Prestex states that the time to determine their status is at the time of bid opening and contract award. Any change—which Prestex believes is hardly likely—after award would be irrelevant. In conclusion, Prestex believes that since it obligated itself to provide cloth manufactured by the listed small business

concerns and since it would not have bid on the procurement had it not intended to accept an award, there can be no ambiguity in its bid, and it should be given the award. It notes that no other firm would be prejudiced if it were permitted to correct the wording in its bid since it was the sole bidder on the procurement.

We believe that the Prestex bid was found properly to be nonresponsive. While Prestex may have had every intention of meeting the small business set-aside requirement, the fact remains that Prestex represented that it was a regular dealer and that the cloth would not be manufactured by a small business. The failure of Prestex to express its intention in its bid and to thereby submit a binding promise to meet the small business set-aside requirement was sufficient to render the bid nonresponsive, something which now may not be corrected, since to permit a bidder to make its nonresponsive bid responsive after bid opening would be tantamount to permitting the submission of a new bid. *Jack Young Associates, Inc.*, B-195531, September 20, 1979, 79-2 CPD 207. Even though Prestex was the sole bidder, to allow Prestex to alter its nonresponsive bid would be injurious to other potential bidders who might bid—as was done subsequently—on the resolicitation of the procurement.

Finally, we do not view Prestex's completion of the "Place of Performance" clause as obligating it to comply with the small business requirement in view of the contrary representation in the clause intended for that purpose. At best, Prestex's completion of the former clause created an ambiguity which required rejection of the bid as nonresponsive. *M. A. Barr, Inc.*, B-189142, August 3, 1977, 77-2 CPD 77.

Accordingly, the protest is denied.

We note that in the "Place of Performance" clause bidders were permitted to make their proposed place(s) of contract performance confidential information, and the Government would "maintain information so submitted except as inconsistent with existing law." We believe that the granting of any confidentiality to this information is contrary to the fundamental concept of full and free competition since the confidentiality of the information might seriously lessen or even negate the ability of bidders to challenge the acceptability of other bids. For example, see Defense Acquisition Regulation § 2-404.4 (1976 ed.). However, since the participants to the resolicitation have not protested its use, we will not object to an award under the resolicitation. However, we are bringing the matter to the attention of the Department of Defense with the recommendation that it be deleted from future solicitations.

[B-114817]

Railroads—Railroad Retirement Board—"Protective Account"—Set-Off Availability—Insurance Account Indebtedness

The Railroad Retirement Board may set off reimbursements due to railroads from the Regional Rail Transportation Protective Account described in 45 U.S.C. 779 (1976) against amounts owed to the Board by the railroads under the Railroad Unemployment Insurance Act. Board's right of setoff derives from common law right of the Government to retain moneys otherwise due debtors in satisfaction of their debts. Although the withheld protective account reimbursements will be transferred to Board's insurance fund, this does not constitute violation of Protective Account statutory authority forbidding protective account funds to be used for insurance payments. Protective funds are being used for proper purposes but merely being withheld to satisfy independent debt.

Matter of: Railroad Reitrement Board's authority to make setoffs from the Regional Rail Transportation Protective Account, December 18, 1979:

The Railroad Retirement Board (Board) has asked whether it may withhold reimbursements due to the National Railroad Passenger Corporation (Amtrak) and payable from the Regional Rail Transportation Protective Account (Protective Account) pursuant to 45 U.S.C. § 779 (1976), to offset unpaid claims of the Board against Amtrak under section 12(o) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. § 362(o) (1976). The Board plans to transfer the withheld reimbursements from the Protective Account to its Railroad Unemployment Insurance Account. We conclude the Board can make those setoffs.

The question arose when the Board paid sickness benefits for work-related injuries to an employee of Amtrak and then served notice upon Amtrak of its right of reimbursement. For various reasons, Amtrak refused to make full reimbursement but eventually, the Board and Amtrak settled the matter. However, in the expectation that the issue may be raised again, the Board still seeks a decision on the propriety of offsetting amounts due to various railroads and payable from the protective account to discharge debts owed by the same railroads to the Board as reimbursement for sickness benefits. The problem, as both Amtrak and the Consolidated Rail Corporation (ConRail) see it (both railroads submitted comments at our request), is that section 509 of the Regional Rail Reorganization Act of 1973 (3R Act), *supra*, which established the Protective Account, provides specifically that:

* * * the Regional Rail Transportation Protective Account . . . shall [not] be charged for any amounts of benefits paid to a protected employee under the provisions of the Railroad Unemployment Insurance Act or any other income protection law or regulation.

321-284 O - 80 - 5

We do not think this provision applicable. The Board contemplates setting off moneys which would be due to ConRail, Amtrak and other recipient entities as reimbursements from the Protective Account. The moneys the Board intends to transfer to the Railroad Unemployment Insurance Account are not for benefits payable under the RUIA but for payments properly payable from the Protective Account. Instead of mailing the payments to the railroads, however, and hoping that the railroads will then be in a position to discharge the unrelated debts they owe to the Board, it seeks to apply the funds belonging to its debtors which it has in hand to extinguish their debts.

It is well settled that the United States' right of setoff "is but the exercise of the common law right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of debts due to him." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947), citing *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336, 370 (1841). We have held that setoff may be made by Federal agencies, B–170119, December 14, 1976 (in the absence of a prohibitory statute or agreement), so long as the debt is legally valid and the agency determines the setoff is otherwise proper. B–141048, February 11, 1960; 46 Comp. Gen. 178, 182 (1966). Thus, for example, we have approved setoffs against moneys owed the Veterans Administration (VA) by the State of Missouri as a result of surpluses from a federally funded farm training program and trade classes, B–141048, February 11, 1960; against moneys owed the United States by the State of Texas as a result of reimbursements due from Federal funds under the 1954 Emergency Hay Program, B–143573–O.M., August 15, 1960; and, in numerous instances involving overpayments to contractors, *e.g.*, B–168619, January 14, 1970. We have also held that moneys of the debtor in the hands of the United States may properly be set off in liquidation of an independently established debt to the United States. 41 Comp. Gen. 178, 180 (1961); B–141048, February 11, 1960.

Accordingly, we conclude that the Board may set off against reimbursements payable from the Protective Account to entities such as ConRail and Amtrak, amounts owed to the Board by these entities for RUIA reimbursements.

[B–194932]

Purchases — Small — Small Business Concerns — Certificate of Competency Procedures Under SBA — Applicability

Contracting officer's determination that low small business quoter was not responsible without referral to Small Business Administration (SBA) under Certificate of Competency (COC) procedures was improper as contracting officer is required by regulation to refer all matters of responsibility to SBA and no exception exists in Federal Procurement Regulations where procurement is made under small purchase procedures for contracts up to $10,000.

Matter of: J. L. Butler, December 18, 1979:

J. L. Butler (Butler) protests the award of a contract to James M. Mahoney (Mahoney) for trail maintenance and clearing awarded by the Stanislaus National Forest, United States Forest Service (Forest Service) under request for quotations (RFQ) R5–16–79–26.

Butler alleges that his quotation was lower priced than Mahoney's, that he has the financial ability and experience to perform the work required, that he has successfully completed other contracts for the contracting agency in the past, and that he is intimately familiar with the work to be done and the area involved. Butler requests that the contract to Mahoney be terminated and award made to him. We sustain the protest because the Forest Service should not have rejected Butler, a small business concern, without referring the question of Butler's responsibility to the Small Business Administration (SBA) under the Certificate of Competency (COC) procedures.

The RFQ required each quoter to complete a "Qualification Questionnaire" which requested information concerning prior work experience, present work commitments and other outstanding bids, personnel and equipment, and whether the work area covered by the RFQ had been examined. Butler completed the questionnaire, indicating in part that the work area had not been examined.

In its report to this Office the Forest Service states that the basic reason the low quotation of Butler was not selected for award was that Butler's questionnaire showed that he had not visited the work site and gave no indication of prior experience in the type of work required. In addition, the contracting officer also considered the Forest Service's "strained relationship" with the two sons of Butler on other contracts. The contracting officer believed Butler was acting for one of his sons in submitting his quotation. It appears that this perceived relationship between Butler and one of his sons, while denied by Butler, did in fact have a bearing upon the decision of the contracting officer to reject Butler.

This case does not appear to involve a question regarding the contracting officer's judgment of the advantages and disadvantages of the proposed performance as related to price in which case the contracting officer is permitted broad discretion. *See Tagg Associates*, B–191677, July 27, 1978, 78–2 CPD 76. In our opinion, the record clearly establishes that the contracting officer rejected Butler because he believed Butler did not have the capability and capacity to accomplish the promised work in a timely manner and thus was not responsible.

Under the provisions of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. I, 1977), no small business concern may be precluded from award because of nonresponsibility, including but not limited to, a lack of capability, competency, capacity, credit, integrity, persever-

ance and tenacity, without referral of the matter to the SBA for a final disposition regardless of the amount of the procurement. *The Forestry Account*, B-193089, January 30, 1979, 79-1 CPD 68. The SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. *See Com-Data, Inc.*, B-191289, June 23, 1978, 78-1 CPD 459. In this case the agency procured its requirements under the small purchase procedures for procurements not exceeding $10,000. Federal Procurement Regulations (FPR) 1-3.6 (1964 ed. amend. 153). While the FPR provisions which implement the above provisions of the Small Business Act speak in terms of "bids" and "proposals," we believe the COC procedures are equally applicable to awards made pursuant to quotations under small purchase RFQs. FPR 1-1.708-2 (1964 ed. amend. 192). The FPR does not exempt small purchases from the COC procedures otherwise required.

The protest is sustained; however, we cannot recommend relief as we have been advised by the Forest Service that performance under the reprocurement contract is nearly complete and no useful purpose would be served in referring the matter of Butler's responsibility to the SBA for possible issuance of a COC. We are, nevertheless, bringing this matter to the attention of the Secretary of Agriculture by letter of today recommending that appropriate action be taken to preclude a recurrence of this error.

[B-194445.3]

Contracts — Negotiation — Sole-Source Basis — Parts, etc. — Competition Availability

Even though protesting firm with considerable experience in maintaining C-130 aircraft could perform many tasks under contract involving replacement of parts to extend service life of aircraft with data and tooling available under its maintenance contract, procuring agency did not act arbitrarily in determining that specifications could not be provided to achieve competition. Consequently, determination to make sole-source award to original manufacturer is not legally objectionable.

Contracts — Negotiation — Sole-Source Basis — Justification— Initial *v.* Follow-On Contracts or Option Exercise

Where agency's choice of procurement method reflects its own uncertainty as to technical risks which may be overcome during contractor's performance of work on initial quantity of aircraft to be serviced, sole-source determination should be reviewed before exercise of option for increased quantity or award of follow-on contract.

Contracts — Awards — Small Business Concerns — Certifications— Failure To Request—Exclusion On Basis Other Than Contractor's Responsibility

Referral to Small Business Administration for Certificate of Competency (COC) is inappropriate where small business was excluded because agency was not in position to provide specification believed necessary for performance and is re-

quired to make sole-source award to original manufacturer in the absence of such specifications. COC procedure does not affect agency's determination of its technical needs, *e.g.*, the extent to which specifications are considered necessary to reduce risk to acceptable level.

Matter of: Aero Corporation, December 21, 1979:

This case concerns the propriety of the Navy's decision to award a sole-source contract for extending the service life of its C–130 aircraft. The Navy believes that the highly complex and technical work required in the circumstances must be performed only by the original aircraft manufacturer, and that award to another firm would involve unacceptable risks. The decision is challenged by a company which has long performed maintenance on the Navy's C–130 fleet and which believes it can do the service life extension work. We find the Navy's position to be reasonable.

The case arises as a protest filed by Aero Corporation of the award of a letter contract to Lockheed-Georgia Corporation (Lockheed) to perform the C–130 aircraft Service Life Extension Program (SLEP). Aero, a current contactor for performance of Standard Depot Level Maintenance (SDLM) for the C–130 aircraft, believes it can perform the life extension work and filed a companion suit for injunctive and declaratory relief in the United States District Court for the District of Columbia (*Aero Corporation* v. *Department of the Navy*, Civil Action No. 79–2944.)

On November 21, 1979, the Court entered a declaratory judgment for Aero, permitting the Navy to proceed with the award at its own risk while preserving Aero's right to have its complaint decided as though award had not been made. Noting that planning for SLEP had been underway for several years, that the Navy anticipated making a sole-source award to Lockheed for at least four months, and that the Navy was fully aware that a protest or litigation was likely, the court concluded that the Navy in the circumstances had breached a duty to facilitate preaward GAO and court review and to maintain the *status quo* pending review. Aero's request for a preliminary injunction against award was denied because the first aircraft will not be inducted into SLEP at Lockheed until May 1980, and because the award can be terminated for convenience earlier, if required. However, the court's order enjoined the Navy from inducting any aircraft into SLEP prior to January 1, 1980, and in effect, estops the Navy from asserting post-award status or partial performance as a basis for refusing to terminate the contract, should termination be appropriate. We are deciding this matter because the court has requested our opinion. *See* 4 C.F.R. 20.10 (1979).

The SLEP program (or more completely, SLEP/CILOP, *i.e.* Service Life Extension Program/Conversion in Lieu of Procurement) consists of a series of tasks affecting major structural areas of Lockheed-manufactured C–130 aircraft. SLEP is defined by the Navy as "the

restoration and/or replacement of primary aircraft structure that has reached [its] fatigue life limit." CILOP involves improving the capabilities of the aircraft. Accomplishment of these objectives, according to the Navy,

> entails the production and incorporation of components/subcomponents into the airframe to the extent of remanufacturing portions of the airframe structure, such that the service life of the aircraft is extended by approximately 10,000 flight hours.

The envisioned program anticipates replacing a number of components with parts of current design, and in the case of certain series aircraft, increasing permissible gross weight. SLEP also encompasses several miscellaneous tasks, including upgrading field manuals and related functions, to assure that logistical needs are met.

Three aircraft series are included in the program: the C–130 itself, as well as KC–130s (tankers used primarily by the Marine Corps), and EC–130s. The Navy views SLEP on at least three EC–130s as a matter of immediate urgency due to the role planned for these aircraft which are to be used to provide airborne communications to the Trident fleet under the TACAMO program. The Navy plans to induct these aircraft into SLEP so that special communications equipment will be removed prior to SLEP and replaced upon completion of SLEP. This schedule is considered inflexible because of the limited number of aircraft available and the operational demands of the TACAMO mission.

SLEP as proposed here also includes SDLM. SDLM is defined by the Navy as "rework performed at a military rework facility or commercial contractor's facility at specific intervals during the service life of an aircraft." Normally, SDLM includes a comprehensive inspection of an aircraft, focusing on specific aircraft structures and materials. Critical defects are corrected when found and required preventive maintenance is performed. SDLM routinely includes any other work which must be performed to assure that the aircraft complies with all outstanding technical directives before it is returned to service.

The Lockheed letter contract for SLEP calls for negotiation of a formal contract providing for a modification of 13 aircraft, with an option to increase the total number inducted to 20 aircraft. The Navy proposes to induct 29 additional aircraft under contracts it would award Lockheed in the future. The numbers of various series aircraft are summarized in Table 1.

Table 1

	Number of aircraft covered by letter contract	Optional aircraft covered in contract	Other aircraft (future contracts)
Series:			
EC–130	3	2	5
KC–130	8	5	19
C–130	2	–	5
Total	13	7	29

All of the aircraft listed in Table 1 have met, or are close to meeting, their original 15,000 hour service life limit.

The C–130 SLEP was initiated in 1975. At that time, NAVAIR projected a need for SLEP on 61 aircraft which it expected to perform over a seven-year period, from 1976 through 1982. In 1977 the Navy initiated a study "to assess the current aircraft fuselage and empennage condition [of C–130 aircraft]; determine service life extension requirements and consider appropriate modification, logistics and maintenance alternatives." The Naval Air Rework Facility at Cherry Point (NARF) was designated to manage and staff the project, and in that regard to:

> Conduct an evaluation utilizing all available data * * * to determine cost effective modifications and/or replacement components to provide the desired aircraft service extension. Evaluation shall be conducted on the fuselage and empennage structure and their components * * *.

Lockheed was asked to perform a fuselage and empennage fatigue study. By the fall of 1977, Lockheed had been asked under an existing contract to submit an engineering change proposal (ECP) to identify long lead items which would be needed. In early 1978, the Navy also asked Lockheed to submit an ECP regarding performance of the C–130 SLEP, incorporating the results of its earlier fatigue study and reflecting its own studies of SDLM and other maintenance records. Lockheed did so, eventually preparing two proposals assuming: (1) that all of the work would be performed at Lockheed, and (2) alternatively, that Lockheed would prepare a so-called Military Specification kit (Mil. Spec. kit) for installation of SLEP replacement parts by another contractor.

The record shows that a work requirements specification was developed by the Navy which merely identifies the structural and system components which require replacement to achieve the desired service life extension. The Navy believes the specification is not suitable for competitive procurement because it does not describe how the work is to be done, *e.g.*, provide installation procedures (technical directives) and the tools and parts necessary to accomplish the replacements.

Essentially, the Navy contends it would be forced to assume an unacceptable degree of technical risk unless: (1) Lockheed performs the work, or (2) the work is performed by a contractor using a Mil. Spec. kit prepared by Lockheed. It believes that sound practice requires use of a Mil. Spec. kit to assure that the airworthiness of the aircraft is not affected over the proposed extended service life. The Navy believes that it did what it could to compete its requirement. Indeed, in July 1979 NAVAIR had approved a draft procurement plan (the "July plan") which envisioned competition for a portion of the work. As proposed, NAVAIR would have made an initial sole-source award to Lockheed, because: (1) award to Lockheed was the most expeditious means of

satisfying SLEP, (2) Lockheed was believed to be the only firm which could satisfy SLEP using a modification program without kits, and (3) Lockheed in any event would have to accomplish non-recurring engineering, manufacture parts, and produce any kits that would be used for competitive procurement. Significantly, the plan provided that kits would be procured to facilitate future modifications by a firm or firms other than Lockheed.

Nevertheless, the Navy says it now has concluded that the kit preparation process cannot be completed in less than four to five years, because the process includes various requirements, including leadtime needed to obtain parts as well as difficulties which concurrent performance of SLEP and Mil. Spec. kit contracts would place on Lockheed's resources. The time required to complete kit preparation and validation of the kits would not permit, in the Navy's view, a SLEP induction and delivery schedule which would meet Navy requirements. (Validation is defined by the Navy as the process by which kits and technical directives are tested for accuracy and adequacy. Essentially, validation entails performance under Navy observation of all required tasks using the materials furnished with a kit.)

Aero has approximately 10 years experience working on Navy C–130 series aircraft as a contractor. During that period it has performed a variety of so-called "over-and-above" work, *i.e.* work which was required to correct deficiencies discovered in performing SDLM. Pointing out that SDLM contract work has included aircraft modifications as well as crash damage, Aero maintains that it has accomplished at one time or another all but parts of two of the 39 SLEP tasks. It also argues that some of the work it has done was of equal or greater difficulty than is required for the two tasks which it has not completely performed.

Aero believes it does not need kits. In its view, the Navy should have, but failed to, recognize that at least a limited group of experienced SDLM contractors are capable of performing SLEP without kits. Aero says it could be ready to induct the first aircraft six weeks after award to it, that it can perform SLEP within 130 days after each aircraft is inducted, and that it can meet the Navy's projected delivery schedule over the life of the contract.

Indeed, Aero believes it is actually in a better position to perform SLEP than is Lockheed due to its SDLM experience. It can begin performance sooner than can Lockheed, it says, because it does not need to set up tooling, draft planning sheets, and prepare plant space—tasks it has done in performing related SDLM functions. It states it would accept liquidated damages to guarantee its proposed performance schedule.

In addition to taking exception to the Navy's belief that up to five years is needed to produce kits, Aero states it is willing to serve as the contractor for any kit validation. On June 20, 1979, Aero submitted an unsolicited proposal to perform SLEP based upon Aero's then current understanding of the Navy's plans. Through the proposal Aero offered to perform verification of the technical directives which would be included with kits on three aircraft to perform SLEP/SDLM on 10 additional aircraft, and to perform logistics-related data requirements, developing necessary drawings, engineering notices, technical directive and C–130 manual revisions required.

Aero maintains that it is a small business and that Navy should not procure its requirements without referral to the Small Business Administration (SBA) for a Certificate of Competency (COC). Aero's argument is twofold. It suggests that the rejection of its unsolicited proposal was founded in the Navy's belief that Aero is incapable of performing SLEP and further, that the Navy's decision to "direct" an award to Lockheed was based on its conclusion that only Lockheed is "capable" of performing the work in question.

As provided in 10 U.S.C. § 2304(g) (1976), unless exigency or other special (and here, inapplicable) circumstances require, when a procurement is negotiated:

> proposals, including price, *shall be solicited* from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered * * *. [Italic supplied.]

Thus, the question here is whether the Navy, in light of the statutory preference for maximum practical competition, had a reasonable basis for directing award to Lockheed on a sole-source basis.

While presumably no contracting activity will make a sole-source award in good faith without believing that the action taken is in the Government's best interest, a sole-source award may not be justified on that basis or on the basis that the awardee is the best qualified firm. *Precision Dynamics Corporation*, 54 Comp. Gen. 1114 (1975), 75–1 CPD 402. The agency must show that it reasonably believed that there could be no competition. *Control Data Corporation*, 55 Comp. Gen. 1019, 1024 (1976), 76–1 CPD 276; *cf. Constantine N. Polites & Co.*, B–189214, December 27, 1978, 78–2 CPD 437.

We recognize, as the Navy and Lockheed contend, that the magnitude of work required at one time with SLEP is substantially greater than that which is typically required to perform SDLM on a single airplane. If SLEP involves completion of some 39 tasks, a resulting 10,000 hour service life extension, and an increase gross weight of affected KC–130F aircraft, it requires, according to Lockheed, removal of parts totaling 45 percent of the basic empty weight of the aircraft,

321-284 O - 80 - 6

replacement of parts weighing a total of 2,000 pounds, and reassembly of the remainder (totaling some 32,000 pounds). Although there is some disagreement as to the exact percentage, the parties concur that a significant portion of the total effort will be absorbed by three tasks, involving replacement of (1) the wheel well side panels in affected aircraft, (2) the sloping longerons, and (3) the cab frame reinforcement doublers.

The parties agree that wheel well side panel replacement is the largest single task, albeit one which does not apply to the three TACAMO aircraft initially scheduled for SLEP. These panels—a structure consisting of numerous parts—carry bearing loads from the fuselage, wings and landing gear. The task involves removal and reinstallation of hundred of parts.

Replacement of the aft fuselage sloping longerons (two per aircraft) constitutes the second largest operation. Lockheed anticipates that this will require disconnecting the entire aft fuselage structure, involving removal of approximately 100 parts. It views reassembly as a critical task, because the fit of the ramp and cargo door and improper alignment of the aft fuselage structure affect aerodynamic performance.

Windshield and cab frame doubler replacement, the third significant task, requires removal of outside skins in the cockpit area and careful reassembly to insure against air leaks (the area is pressurized) and windshield cracking over the extended service life.

Lockheed's perception of the work is illustrated by its comment in an early submission to our Office:

> Even assuming Aero's ability to perform these work items, the comparison it has drawn [to SDLM] is inappropriate. This is because of the difference between SDLM and SLEP: in the former, work is done on an as-needed basis, with only a limited amount of structural work being performed at any one time. SLEP, however, is a systematic program whereby all work items are to be done simultaneously, and a majority of the work involves replacement of major structural members. Furthermore, there is a synergistic effect of the SLEP requirement for simultaneous work (*i.e.*, the sum of the parts does not equal the whole because one work task affects the way another task is to be done.) For example, to remove the sloping longerons in SDLM, a rather simple support system is all that is needed to hold the aircraft stable. In SLEP, however, because of the other work being performed at the same time, a far more complex support system must be used.

Viewing SLEP as addressing aircraft structure as an integrated whole, Lockheed argues that SLEP can be completed successfully only if proper physical support, location tooling and methodology is used—capabilities which it asserts are available only if the work is done by the original manufacturer. Location tooling refers to jigs and other devices used to position parts during assembly to assure that they are properly aligned.

Specifically, Lockheed focuses on three wheel well replacement related tasks and four additional work items (two related to the longeron and windshield doubler replacement tasks and two others) which it believes are critical, requiring use of location tooling if tolerances and interchangeability of parts and assemblies are to be maintained. These are as follows:

1. The wheel well side panels must be installed to tolerances of 0.030 inches (approximately $\frac{1}{32}$ of an inch). Otherwise, at minimum, the main landing gear operation may be disrupted or excessive stress placed on components of the panel or adjoining structure.

2. Installation of so-called "porkchop fittings" (furnished as blank parts and mated together at the fuselage floor) and related wheel well attachments must be held in proper position to assure that excessive loads are not imposed.

3. Installation of wheel well beams (on EC–130 aircraft only) which support the landing gear tracks must be held to an accuracy of 0.25 degrees vertically and 0.005 degrees laterally to assure proper operation.

4. Lockheed sees installation of the longeron end fitting as critical because it not only controls the position of the sloping longeron but also affects the horizontal stabilizer attach fittings. Unless the position and hold dimensions of the vertical stabilizer attach fittings are maintained, the stabilizer will not match the aft fuselage fittings. (Lockheed admits that it does not have the tool required to assure that this match will be maintained, but intends to borrow it from a subcontractor.)

5. Accuracy of installation of the longerons is considered critical, as indicated, to assure interchangeability of the aft cargo door attachment and ramp.

6. Lockheed also points out that windshield and column frame openings must be held to prescribed dimensions to insure interchangeability of window and windshield components.

7. Likewise, Lockheed notes, replacement of two of the nacelle engine truss mounts is critical to assure interchangeability of other parts.

On the other hand, even the Navy recognizes that the difference between SDLM and SLEP is in part one of degree, as indicated in the deposition taken of Navy Captain Russell E. Davis, the Program Manager for SLEP:

Q. * * * Is it correct that for a SDLM contract, the contractor inspects the airplane? He then makes a determination or a judgment as to what portions or parts of the airplane need to be replaced.

He confers possibly with Navy representatives on the question of whether replacement is in order. An agreement is reached as to whether the part ought to be replaced. When that agreement is reached, then the contractor proceeds

to make the replacement and he does that for every part that agreement has been reached upon.

Then the aircraft is completed. You have a flight inspection and the SDLM task is performed for that particular aircraft. * * *

A. That is a fair description. However, I would like to believe that a tooling requirement determination is made somewhere in the evaluation process, either as a recommendation by the SDLM contractor or as a determination by DCAS and the Navy engineers, and in some cases I believe that tooling is required on an extra order basis for SDLM contractors.

Q. So SDLM contractors have a certain amount of tooling available to do these replacement tasks?

A. You have a depot level outfit for tooling.

Q. Assume that is a C–130 aircraft that comes into the SDLM contractor's plant. The inspection is done and for each and every [item] identified in the SLEP work statement, there is a deficiency found * * *.

A. If he were to replace all of the parts at that particular time in whatever sequence is deemed appropriate by either his engineering group or the Navy engineers and the appropriate tooling is there to do the job and the quality assurance folks buy off on it and the airplane flies, then I think you could probably assume that a like operation to SLEP will [have been] done on that airplane.

This close relationship between SDLM and SLEP is also indicated by the Assistant Deputy Chief of Naval Material's memorandum approving the final procurement plan. At that time he directed that:

C–130 series aircraft scheduled for SLEP * * * at Lockheed will be considered for induction at the then current SDLM contractor's facility in the event a substantial delay occurs in the scheduled SLEP [if] a SDLM is determined [to be] necessary to sustain the material condition of the aircraft.

The significance of this statement is disclosed by the deposition of Mr. Herman, the C–130 project engineer at Naval Air Research Facility, and OPNAV Instruction 3110.11M regarding "policies and peacetime planning factors governing the use of naval aircraft." The Navy admits that most if not all aircraft which reach the end of their original service life are not taken out of service permanently. Rather, the Navy has various procedures, including SDLM, to keep them in service, albeit possibly with increased operating cost and downtime.

Also, Aero does not agree that the magnitude of the total job is quite what Lockheed sets out. As explained by Aero, "The need for * * * simultaneous replacement of all SLEP items is the lynchpin of the Navy's argument that only Lockheed is currently able to perform the SLEP tasks." However, Aero states that it:

* * * will not perform the SLEP tasks "simultaneously," as Lockheed proposes to do. Aero will perform the SLEP tasks in a sequenced group of tasks as it presently performs SDLM, and Aero has all of the tools available to do so. Moreover, Aero has the required technical directives or work instructions for 37 of the 39 tasks and the capability to develop this data for the remaining two tasks.

In Aero's view, Lockheed's "simultaneous" approach is neither required nor desirable. Indeed, Aero views its sequential approach as superior because "it permits the aircraft to be [used as] its own master tool and eliminates the dangers of structural impairment and [residual] stress" which it argues otherwise would be a problem even if Lockheed's approach were used. Aero's proposed technique involves

making the parts fit by finishing them in place, *e.g.*, by "backdrilling" holes using adjacent parts as guides. It argues, and Lockheed concedes, that aircraft which have been flown 15,000 hours have been subjected to stresses in flight and on landing that affect the alignment of parts throughout the airframe. The Navy assumes that every one of the affected aircraft has been operated beyond designed gross load limits. This means, Aero explains, that use of original tooling to "force" parts to conform to original manufacturing tolerances of itself introduces residual stresses and potential damage.

For just the same reasons, Lockheed characterizes the aircraft as an inaccurate locating tool, claiming that backdrilling techniques cannot replace proper location tooling in SLEP because the accuracy and precision obtained using such methods "can be no greater than that of the existing parts and holes." It emphasizes that:

> Where such parts and holes are deformed or out of alignment due to stress and wear, previous maintenance and repair work, or the process of dissembly, they will definitely not provide reliable guides or templates for the sort of work required by SLEP. The age and condition of the aircraft in question, as well as their broad exposure to several generations of depot level maintenance and repair work * * * strongly suggest the imprudence of using the backdrilling expedient in SLEP.

It seems clear from the preceding that the Navy believed that there was significant risk involved if a firm other than Lockheed was to perform the work. The record shows, however, some disagreement among responsible Navy personnel regarding the extent of that risk and the course which should be pursued as a result. NAVAIR contracting personnel believed that competition could be introduced, while throughout, Lockheed was favored by NARF personnel and others.

The minutes of the NAVAIR September 28, 1979 meeting approving sole-source procurement reflect this dichotomy of views:

> In recommending [sole-source to Lockheed], [Captain] Davis pointed out that it is the most responsive to Fleet needs and had the lowest cost, technical, and schedule risks, although it does preclude competition. * * * [Captain] C. M. Rigsbee, AIR-03, felt that NAVAIR should make a hard decision as to which option best serves the Navy's needs regardless of any potential protests. [Captain] N. P. Ferraro recommended that we get a firmer hold on the impact a competitive procurement with its prolonged schedule may have on the Fleet. [Rear Admiral] L. R. Sarosdy, AIR-04, and [Captain] W. J. Finnernan, AIR-05A, agreed that the prime contractor was the only plausible place to perform the SLEP, even if other contractors had installation kits.

As indicated earlier, the Navy considered the use of kits in order to have a competitive procurement and while it found the kits to be an acceptable approach, it also determined that the time frame involved for development and validation of the kits was unacceptable.

We find that the Navy had a reasonable basis for its belief that award to any firm other than Lockheed would involve unacceptable risk, even though we believe the Navy's reluctance may result in part from its inability to assess fully the risks taken.

First, as indicated above, there are significant differences between SLEP and SDLM and the risks involved in each. Although we are convinced that there are good faith differences of opinion regarding the amount of risk, nevertheless we find no abuse of discretion regarding the Navy's higher estimation of the risk in SLEP. Obviously, it is reasonable to expect greater risks in achieving the desired 10,000 hour service life extension for SLEP as opposed to the 3,000 hour extension obtained by SDLM, particularly in view of the greater structural work which Navy categorized as a remanufacturing process.

Second, we are not convinced that SLEP can be performed without some form of kit. Even though Aero has performed most of the tasks during SDLM, its methodology envisions less disassembling of the aircraft using more of the aircraft as its own locating tool. Lockheed, on the other hand, would provide more disassembling of the aircraft and use original manufacturer's tooling. While we believe SLEP might be performed using something less than a Mil. Spec. kit, we are not persuaded that the work can be accomplished entirely as Aero envisions. It is likely, in our opinion, that some "backdrilling" of holes using adjacent parts as guides, as proposed by Aero, would not be acceptable and that use of specialized tooling may be required where original manufacturing tolerances are considered necessary. Moreover, it is logical for the Navy to want to maintain greater control of the remanufacturing process it envisions so as to insure the higher quality of workmanship considered necessary for SLEP but not required for SDLM.

Third, we are aware of no legal requirement for the Navy to provide kits specially tailored to a limited group of maintenance contractors, such as Aero, regardless of whether Navy could have or should have arranged for kits earlier. The Navy is required to seek competition where it can find it. However, in our opinion, the statutory preference for maximum practical competition is not disregarded where, as here, consideration is given to the feasibility of providing Mil. Spec. kits to facilitate competition on a broader basis which included maintenance contractors.

The question remaining is whether the Navy reasonably concluded that the development of kits is not feasible in the time frame for performing SLEP. In this connection, Aero argues that the development of kits does not require five years primarily because it believes kits covering all 39 SLEP tasks are unnecessary, having accomplished replacement of parts during SDLM for 37 out of the 39 SLEP tasks. Moreover, Aero argues, the Navy should exercise its discretion to cut short the kit preparation process, *e.g.*, by waving the trial and validation phases. As explained above, we believe the Navy has not abused its discretion by seeking to control SLEP performance by firms other

than the original manufacturer by requiring performance in accordance with Mil. Spec. kits. We base this conclusion on the Navy's efforts to obtain competition using kits, and on its uncertainty as to how technical risk otherwise should be contained, even though many of the tasks previously may have been performed by others during SDLM. Similarly, whether certain phases of the kit preparation process can be cut short or condensed is largely discretionary with the Navy and because of the technical risks involved we are not in a position to take issue with what may be the Navy's conservative views in this regard.

Aero also argues that the projected operating service life of the C–130 aircraft does not preclude competition because it is merely a projection of the minimum expected service life and the Navy has in fact extended the operating service life of a number of C–130 aircraft. However, as indicated above, the Navy has not sought to justify its sole-source award to Lockheed because of exigency precisely because it cannot certify that aircraft will be grounded after a predetermined number of hours without inspection.

Moreover, we disagree with Aero that the record is inadequate to support Lockheed's time frame for furnishing Mil. Spec. kits and the Navy's conclusion that the kits cannot be designed, developed and produced in the required time frame. The Air Force Plant Representative Office at Lockheed was requested to evaluate Lockheed's schedules based on first hand knowledge of Lockheed's capabilities and performance on similar programs. Apparently, aerospace contractors are experiencing substantial increases in material leadtime and the Air Force plant representative considers Lockheed's schedules to be realistic, although somewhat conservative.

Nevertheless, it is possible that initial SLEP experience will allay much of the Navy's concern. Consequently, we believe, the Navy should continue to evaluate the necessity for the course of action chosen and in this regard: (1) should include in any contract with Lockheed provisions which will afford the Government access to technical data which it may find necessary, and (2) should closely monitor Lockheed's initial performance and evaluate the methods used to determine whether an experienced maintenance contractor's performance would be acceptable. We recommend that the Navy review the sole-source determination before exercising any option or awarding a follow-on contract for all or part of the 29 remaining aircraft to Lockheed.

We conclude that a limited award to Lockheed on a sole-source basis is justified in the circumstances. Aero necessarily has been excluded from competing for this requirement because the Navy, in determining its technical requirements, refused to permit firms other than the original manufacturer to perform SLEP without Mil. Spec.

kits. In these circumstances Aero had no basis for insisting that Navy must first refer the question of Aero's competency to perform SLEP without Mil. Spec. kits to the SBA for certification. The COC procedure does not affect a procuring agency's determination of what are its technical requirements, *e.g.*, the extent to which specifications are considered necessary to reduce risk to an acceptable level. The COC procedure is inappropriate where an agency is not in a position to provide specifications believed necessary for performance and is required to make sole-source award to the original manufacturer. *Applied Devices Corporation*, B–187902, May 24, 1977, 77–1 CPD 362.

The protest therefore is denied.

[B–195268]

Contracts—Buy American Act—Foreign Products—End Product *v.* Components

Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. 10a–d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in request for proposals. However, addition of differential would not have changed order in which offerors stand.

Contracts—Specifications—Tests—Aircraft—Proposed *v.* Testing Model

Although solicitation required that proposed helicopter be directly derived from helicopter submitted for flight evaluation, provision in which requirement is included, when read as whole, indicates that intention was that flight-tested aircraft have potential to meet agency's mission and performance requirements.

Contracts — Negotiation — Evaluation Factors — Administrative Determination

Protest against agency's technical evaluation of proposals is reviewed against General Accounting Office (GAO) standard that judgment of procuring agency officials, based on solicitation's evaluation criteria as to technical adequacy of proposals, will not be questioned unless shown to be unreasonable, an abuse of discretion or in violation of procurement statutes and regulations. Standard is not found to have been violated.

Contractors — Responsibility — Contracting Officer's Affirmative Determination Accepted — Exceptions — Not Supported By Record

Ordinarily GAO does not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not allege fraud, protester had failed to meet standard for review by GAO or courts.

Contracts — Prices — Adjustment — Latest Available Indices — Domestic *v.* Foreign — Foreign Article Procurement

Fact that price adjustment percentages to be used in economic price adjustment clauses are to be based on domestic indexes, instead of French economy where some costs will be incurred, is determined to be irrelevant.

Matter of: Bell Helicopter Textron, December 21, 1979:

Bell Helicopter Textron (Bell) protests the Department of Transportation, United States Coast Guard (DOT), award of contract No. DOT-CG-80513-A on a firm fixed-price basis to Aerospatiale Helicopter Corporation (AHC) for 90 short range recovery (SRR) helicopters, logistics support, training and warranties. The award was made under request for proposals (RFP) No. CG-80513-A, issued on March 17, 1978, which contemplated the award of a multiyear contract to replace Sikorsky HH-52A helicopters currently used to perform the Coast Guard's SRR responsibilities, missions executed within the maritime region extending to 150 nautical miles seaward of the shoreline.

As part of the evaluation of proposals submitted in response to the RFP, DOT conducted a flight evaluation program under a separate contract. The flight evaluation program and the solicitation for it were included in the RFP as Attachment VIII. Each offeror which intended to submit a written proposal in response to the RFP was required to provide a helicopter for the flight evaluation program. DOT awarded flight evaluation contracts to Bell, AHC and Sikorsky Aircraft, Division of United Technologies Corporation (Sikorsky), and flight evaluations were conducted in May and June 1978.

Initial technical and cost proposals under the subject RFP were received on June 19 and July 31, 1978, respectively. DOT conducted technical discussions with the offerors from October 25 to October 30, 1978, and cost discussions from November 27 to November 30, 1978. The offerors submitted their revised technical proposals on December 7, 1978, and revised cost proposals on March 5, 1979. Sikorsky, however, withdrew its proposal from the competition on March 26, 1979. Bell and AHC submitted their best and final offers on May 25, 1979, and the contract was awarded to AHC on June 14, 1979.

Bell was given a debriefing on June 20, 1979, and filed its protest with our Office on June 22, 1979. The protester essentially contends that DOT improperly evaluated the firms' proposals, that the contract awarded to AHC is invalid, and that DOT should resolicit its requirements. More specifically, Bell asserts that:

1. DOT erroneously determined that AHC offered only domestic source end products and therefore failed to evaluate the firm's proposal in accordance with the Buy American Act.

2. The award to AHC contravened the requirement of the RFP and the Flight Evaluation Program under contract No. DOT-CG-828572-A that the flight-tested helicopter "must be one from which the proposed SRR helicopter is directly derived."

3. DOT erred in its technical evaluation of the firms' proposals, failed to apply evaluation criteria consistently, and thus erroneously determined that AHC's proposal and proposed helicopter were technically superior.

4. DOT had no reasonable basis to determine AHC was a responsible prospective contractor; considering the firm's limited net worth, facilities and workforce, the determination constituted an abuse of discretion and the award was made in violation of Federal procurement law and regulations.

5. To the extent AHC's helicopter components are of foreign origin, Economic Price Adjustment Clauses which were included in the firm's contract bear no relation to the costs AHC will actually incur, will result in an improper expenditure of appropriated funds and invalidate the contract.

On July 6, 1979, Bell filed suit in the United States District Court for the District of Columbia (*Textron Inc., Bell Helicopter Textron Division* v. *Adams*, Civil Action No. 79-1749) seeking an order setting aside the contract, requiring reevaluation of the proposals, and requesting that our decision on the protest be transmitted to the court. By order dated July 27, 1979, the court requested our decision "with respect to the merits of all issues set forth in the plaintiff's protest." See 4 C.F.R. § 20.10 (1979).

AHC contends that Bell's protest on grounds 2 and 3 above are untimely. Assuming that is correct, we will still consider those grounds because of the court's request for our decision on the issues. *Sound Refining Inc.*, B-193863, May 3, 1979, 79-1 CPD 308.

Upon consideration of the issues, we deny the protest for the reasons which follow.

BUY AMERICAN ACT DETERMINATION

A. JURISDICTION

DOT and AHC point out that AHC certified in its offer that it will furnish a domestic source end product and contend that whether AHC will comply with the certification is a matter of contract administration for resolution by the procuring activity and the contractor rather than this Office. *See, e.g., Lanier Business Products, Inc.*, B-193204, December 12, 1978, 78-2 CPD 407; *Thorsen Tool Company*, B-188271, March 1, 1977, 77-1 CPD 154. However, since notwithstand-

ing the certification, DOT requested information from AHC to determine whether a domestic source end product is being offered, the question is whether DOT properly evaluated the proposal in light of the information received. Where prior to award an offeror furnishes information to a contracting agency bearing upon whether the offered product is domestic, we have considered the matter. *New Britain Hand Tools Division, Litton Industrial Products, Inc.*, 58 Comp. Gen. 49 (1978), 78-2 CPD 312. We conclude that the issue properly is before us.

B. SUMMARY

The application of the 6-percent Buy American Act differential to AHC's offer would not change the order in which the offerors stand in this case. This is because, even though the addition of the differential would make AHC's cost proposal higher than Bell's cost proposal, the technical advantage in AHC's proposal under the evaluation provided in the request for proposals outweighed the cost advantage. However, in order that an understanding will exist as to how the Buy American Act must be applied in a procurement like this, we are providing our analysis, first, as to the way in which the differential is to be applied where a technical factor is a dominant criterion and, second, as to the articles, materials and supplies to which the Buy American Act differential is to be applied.

The Buy American Act requires that only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States shall be acquired for public use, unless the head of the agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. 41 U.S.C. § 10a (1976). Executive Order No. 10582, December 17, 1954, as amended, which establishes uniform procedures for determinations, provides that materials (including articles and supplies) shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used therein. The order further provides that the price of domestic articles is unreasonable if it exceeds the cost of like foreign articles plus a differential. The differential prescribed for the instant situation is 6 percent.

The act as implemented by Executive order and Federal Procurement Regulations (FPR) § 1-6.104 (1964 ed. circ. 1) imposes two determinative requirements: that manufactured articles, materials or supplies must be manufactured both (1) in the United States and (2) substantially all from "components" mined, produced or manufactured in the United States. If these requirements are not met, the end

product is considered foreign and a specified percentage factor or differential (generally 6 percent) must be added to offers of foreign end products for the purpose of proposal evaluation in order to give the required preference to domestic offers. FPR § 1-6.104-4(b) (1964 ed. circ. 1); *Cincinnati Electronics Corporation, et al.*, 55 Comp. Gen. 1479, 1494 (1976), 76-2 CPD 286.

C. DIFFERENTIAL APPLICATION

Bell's first assertion is that DOT failed to implement the requirements of the Buy American Act. We agree that DOT erred in its determination that AHC was supplying a "domestic" item. But for the reasons set forth below, we do not consider DOT's error to have been prejudicial to Bell in terms of ultimate entitlement to award. DOT's failure to implement the Buy American Act, therefore, is not critical to resolution of Bell's protest.

Ordinarily, in a procurement against precisely stated specifications where all offerors are offering the "same" product, the reasonableness of domestic product cost is determined by comparing it with foreign product cost after the addition of a differential, a rather straightforward procedure where price is the sole determining factor in making the award. If the cost of the foreign product plus the added differential remains lower, the domestic product cost is considered unreasonable and foreign purchase is authorized. FPR § 1-6.104-4 (1964 ed. circ. 1).

A different situation is involved, however, where the procurement is negotiated on the basis of technical merit as well as cost and each proposer offers a different product. In that circumstance, if the foreign offer is evaluated as the higher priced offer after application of the differential, but is determined to be the best offer considering the combination of price, differential and technical approach, then an award based on the foreign offer should be made.

The reason for this is best explained by example. Assume a situation where there are three offers as follows, technical proposals are rated on a scale of 100 points, and cost is evaluated equal to technical merit:

Offeror	Price	Technical Score
A (foreign)	$100,000	95
B (domestic)	105,000	80
C (domestic)	108,000	95

If the Buy American differential of 6 percent were applied to A's offer, it would clearly be out of contention with regard to B's offer *if price were the sole criterion.* Yet if A's foreign offer is not considered, C's domestic offer, not B's, would clearly win the competition consider-

ing both price and technical scoring. But, closing the circle, C's proposal would not win over A's with the differential added. The dilemma posed by the example shows that the only way to properly evaluate foreign offers where both price and technical merit are to be evaluated is to apply the Buy American differential to the price portion and evaluate the total proposal on the basis of the price as thus adjusted. In other words, the foreign product offered by A as evaluated with the differential is more advantageous considering the technical superiority over the domestic product offered by B and the technical equality of the domestic product offered by C.

Keeping this in mind, let us examine the evaluation procedure set forth in DOT's RFP. Clause D–1 of the RFP advised prospective offerors that award would be made on the basis of the proposal most advantageous to the Government, price and other factors considered, and cautioned that, because factors other than price would be given paramount consideration, neither the lowest fixed-price proposal nor a proposal meeting minimum requirements with the lowest price would necessarily be chosen if a higher priced proposal contained sufficiently greater technical merit to justify the additional expenditure. Clause D–2 listed the following three principal evaluation factors and their subfactors in descending order of importance: a) Technical/Program Suitability (Mission Capability, Design Quality, Logistic Support and Test, Demonstration and Qualification Program), b) Cost (Contract Price, Relative Life Cycle Cost) and c) Management.

DOT's Source Evaluation Board (SEB) verbally rated the offerors' technical proposals for the evaluation criteria listed above and made an oral and written report of its findings to the Source Selection Advisory Council (SSAC), which applied numerical weighting factors to evaluate the offerors' proposals according to the evaluation criteria and subcriteria. Although the SEB and SSAC final reports and the SSAC members' evaluation scores were furnished to us *in camera*, we feel it necessary to state that in the SSAC evaluations the maximum possible score for "Contract Price" was 20 percent of the entire evaluation score possible. In other words, technical merit was accorded significantly greater importance than proposal price under the evaluation procedure established in the RFP.

"Contract Price" was scored by the SSAC members in a subjective manner. The assignment of numerical scores or ratings to proposals is an attempt to quantify what is essentially a subjective judgment. *Didactic Systems, Inc.*, B–190507, June 7, 1978, 78–1 CPD 418; 52 Comp. Gen. 198, 209 (1972). Neither of the offerors was accorded the maximum points possible for the "Contract Price" subcriterion by the entire SSAC, although AHC whose proposal cost was lower was con-

sistently awarded a higher score than Bell and several of the members gave AHC the maximum points. However, to insure that the 6-percent differential required to be assessed against a foreign offer carries its due weight in the consideration of proposals, we believe that an objective evaluation of cost with differential is required. Usually the "normalization" value system is the method used in the price evaluation process. Under this method, the lowest price proposal is assigned the maximum point rating and the remaining price proposals are converted to normalized point ratings by a formula in which the lowest price is divided by the other offeror's price and the quotient is multiplied by the maximum possible points. *See*, *e.g.*, 52 Comp. Gen. 382, 387 (1972); *Francis & Jackson, Associates*, 57 *id.* 245 (1978), 78–1 CPD 79. If the offerors' prices in this case are normalized after the application of the Buy American differential, Bell's net increase of 2 points is not enough to change the standing of the offerors in view of the difference between the AHC and Bell total evaluation scores.

Stated another way, the addition of the 6-percent differential for a subcriterion worth 20 percent of the entire evaluation range would not be sufficient to overcome the difference in scores largely attributable to technical considerations.

D. END PRODUCT

Now we turn to the "end product" question. Bell contends that the helicopters, not the entire contract, are the "end products" and that they are manufactured in France.

We agree with the protester that the entire contract is not the appropriate end product for the purpose of the determinations required by the act. The process of training personnel to operate and maintain aircraft cannot in our opinion be considered "manufacturing;" although materials and supplies may be used in providing training, they are merely tools used in performing training services rather than a result or product which can be directly incorporated into an end product. Acquisition of maintenance training, instructor pilot training and the services of the contractor's employees constitutes the procurement of services which is not subject to the Buy American Act. *Blodgett Keypunching Company*, 56 Comp. Gen. 18, 19–20 (1976), 76–2 CPD 331. Similarly, a reliability assurance warranty, the contractor's guarantee of the reliability of the products and responsibility for repair or replacement of parts, is basically an agreement to furnish necessary maintenance and repair services. See *Curtiss-Wright Corporation* v. *McLucas*, 381 F. Supp. 657 (D.N.J. 1974); *B. B. Saxon Company, Inc.*, 57 Comp. Gen. 501 (1978), 78–1 CPD 410; 53 Comp. Gen. 412 (1973) (Department of Labor determinations that contracts

for aircraft engine overhaul and maintenance and aircraft modification and depot maintenance were contracts principally for the purpose of furnishing services). Because services are not subject to the act, the SRR helicopter system or entire contract, comprised of the SRR helicopter and these services line items, cannot be considered the "end product" for purposes of the Buy American Act and the cost of these items must be excluded from consideration in determining whether AHC is offering a foreign or domestic end product.

DOT and AHC rely in their further analyses on the Contract Work Breakdown Structure (CWBS) (RFP, Attachment II "Cost Proposal Instructions," Appendix 1), a table breaking down 5 levels of items, tasks and services to be produced or performed with reference to the proposed contract line items, from which the offerors cost proposals were to be derived. DOT argues alternatively that if the CWBS level 1 SRR helicopter is the relevant "end product," its components are the CWBS level 2 items: the air vehicle, system test and evaluation, data and integrated logistics support (ILS). The "end product," DOT concludes, is domestic because the cost of the air vehicle, which will be manufactured in Texas, will exceed 50 percent of the cost of all components.

We cannot concur in DOT's position that CWBS level 2 items are manufactured or directly incorporated in the SRR helicopter. First, "system test and evaluation," as defined in the CWBS Appendix, refers to the use of hardware to gather or validate engineering data on the performance of the air vehicle. Although the data generated from such operations is eventually reduced and reports exclusive of those required under "data" may be delivered to DOT, neither the testing operations nor any reports resulting from them are directly incorporated in or made a part of the helicopter. Second, "data" summarizes the preparation, assembly and delivery of non-ILS management and engineering data; the former includes data required for configuration management, cost and schedule control, data management and SRR helicopter planning and control, while the latter refers to engineering drawings, associated lists, specifications and documentation. Although the data constitutes a product, it is not directly incorporated into the SRR helicopter and cannot therefore be considered a component of the helicopter. "Integrated Logistics Support" refers to the tasks and associated costs involved in determining and integrating all support considerations necessary to assure effective, economical support of the SRR air vehicle for its entire life cycle. The "support" involved consists mainly of services necessary to identify and determine the needs of the maintenance and provisioning programs required for the helicopters and includes the reliability assurance warranty program. Again, any products resulting from ILS activities will

not be directly incorporated into the SRR helicopter. We note that the procuring activity did not list "system engineering/management (non-ILS)," another CWBS level 2 item, among the "components;" we believe the item refers to management and engineering services which cannot properly be considered as a component. We conclude, therefore, that the "SRR helicopter" defined by DOT to include the CWBS level 2 items set forth above is not the appropriate end product upon which to base the required Buy American analysis because the level 2 items are not directly incorporated in and consequently not "components" of the helicopter.

Finally, DOT asserts that, if the CWBS level 2 "air vehicle" is the relevant "end product," the components are the CWBS level 3 items: the airframe, the propulsion system, the avionics integration/installation and the avionics software programs. DOT states that the airframe is the only component which will include substantial foreign articles, materials and supplies, but concludes that the airframe is domestically manufactured. The airframes will be assembled at Aerospatiale Division Helicopter (A/DH) in France with "slave" equipment for initial certification. Following certification, the airframe is partially disassembled for shipment and the "slave" equipment is removed and retained for use on subsequent airframes. AHC terms the airframe shipped to Texas a "green" airframe, which consists of the aircraft structure and flight systems separated into cabin, tail boom, rotor head, rotor blades and other equipment detached from the airframe in France. In DOT's judgment the integration, modification and assembly work to be done on the "green" airframe by AHC in Texas to manufacture a deliverable aircraft constitutes manufacturing for the purpose of the act, citing *Hamilton Watch Company, Incorporated*, B–179939, June 4, 1974, 74–1 CPD 306; and *Dubie-Clark Company, et al.*, B–189642, February 28, 1978, 78–1 CPD 161. DOT concludes that the air vehicle is a "domestic source end product" because the cost of the airframe represents more than 50 percent of the cost of all other CWBS level 3 components.

It is our opinion that the "air vehicle" (helicopter in common parlance) is the "end product" being procured under the RFP in question. We agree that the airframe is a manufactured article which is directly incorporated into and properly a component of the air vehicle. We have not dealt with whether any of the other level 3 components are part of the end product.

For reasons which follow, the airframe is a foreign product. Paragraph 6.3.1.2 of AHC's manufacturing plan contained in Volume 20 of the firm's proposal provides the following summary of the responsibilities of A/DH with regard to the airframe:

A/DH–Airframe Manufacturer

A/DH will be the subcontractor for the SRR "green" airframe and *will perform primary flight testing of the air vehicle in Marignane, France.* These tests will be conducted using slave engines, gear, and other equipment supplied by AHC. After tests are completed for each *aircraft,* A/DH will remove the slave items for use on subsequent airframes. The "green" airframe will be separated into two sections (cabin and tail boom) and shipped with the rotor head and blades to AHC for completion of the manufacturing process. The SRR airframe is basically the same as the production model parent SA 365N airframe. Accordingly, *A/DH will manufacture* both SA 365N and *SA 366 airframes* with only minor differences in tooling or manufacturing lines. [Italic supplied.]

Similarly, paragraph 6.3.3.1 provides in pertinent part:

After the ground test and flight test are completed and *standard FAA airworthiness obtained for the "green" aircraft* as discussed in para. 6.3.1.1, all slave units are removed. The slave units are U.S. manufactured systems (including engines, main gear box, landing gear) which must be installed for issuance of the Export Airworthiness Certification and are then removed before *the SA 366 is shipped to AHC.* The "green" airframe is then separated in two major airframe sections * * *, crated and shipped with the blades, rotor head and other miscellaneous equipment to AHC *for manufacture of the air vehicle.* [Italic supplied.]

Notwithstanding DOT's position to the contrary, materials furnished to us *in camera* by the agency also indicated that it was the DOT SEB's opinion that the air vehicle was to be manufactured, tested and certified at A/DH in Marignane, France. We note, too, that the term "airworthy" means that an aircraft is fit to be flown.

Nevertheless, we find that the aircraft sections delivered to AHC's Texas facility, without more, do not constitute a deliverable helicopter. If we follow the CWBS as both DOT and AHC have suggested, we note that CWBS level 4 does not list the "green" airframe. Instead, CWBS level 4 items include the fuselage, landing gear, drive system (transmission), rotor system, engine, communications system, engine/fuel management system, navigation subsystem, flight guidance subsystem equipment and radar.

We believe it sufficient, however, for the purpose of the analysis required by the act to concentrate upon the airframe. Although we have held that *assembly* in the United States of articles from foreign-manufactured articles or components may constitute domestic manufacture of "components" or "end products," the meaning and application of those terms are considered in light of the particular facts of each case. *Cincinnati Electronics Corporation, et al., supra,* at 1495. While many separate processes or operations may be used to manufacture an item, each manufacturing operation does not necessarily manufacture a basically new or different article, material or supply. B–166613, May 26, 1969. In this case, the airframe is manufactured, tested and certified in France. The "slave" equipment that is used for testing and certification of the airframe is removed and the airframe is disassembled for the purpose of shipment to Texas. The airframe is *reassembled* by AHC in Texas in the process of completing manu-

facture of the "air vehicle." The reassembly in Texas is no more than that and the operation cannot detract from the fact that the airframe is manufactured in France. Therefore, the airframe is a foreign-manufactured component of the "air vehicle."

As noted above, DOT reported to us that the cost of the airframe represented more than 50 percent of the cost of all components of the air vehicle. DOT's statement, presumably, was based on its view that the airframe was manufactured in Texas. As pointed out above, we conclude that the airframe was manufactured in France, not in Texas. Our reliance on DOT's conclusion that the cost of the airframe represents more than 50 percent of the cost of all components would not be altered by the consideration of any costs of assembly in Texas. Labor, administration and overhead, and other costs incurred after delivery of the airframe to AHC's Texas facility must be deducted from the proposal price in computing the component's cost for comparison with the cost of domestic components. Similarly, costs related to combining the airframe with domestic components or testing combinations thereof must be excluded from the proposal price in determining whether the offer is foreign or domestic. 35 Comp. Gen. 7, 9 (1955). We do not know what cost DOT considered to arrive at the 50-percent determination.

DIRECT DERIVATION FROM FLIGHT-TESTED HELICOPTER

Bell contends that the SA 366 SRR helicopter offered by AHC was not a direct derivative of the SA 365C helicopter which the firm offered for flight testing as required by the RFP, citing our decision in *System Development Corporation*, 58 Comp. Gen. 475 (1979), 79-1 CPD 303. The protester's argument is twofold: 1) that AHC did not comply with the requirements of the RFP and 2) that data obtained from the flight evaluation was an inadequate and unreliable basis from which to project the performance capabilities of AHC's SRR candidate.

Section 1.1, Attachment VIII, "Flight Evaluation Specification," of the RFP explains the scope of the Flight Evaluation Program in pertinent part as follows:

> * * * The helicopter made available [for flight evaluation] must be one from which the proposed SRR helicopter is directly derived. This evaluation helicopter need not be configured so as to be capable of meeting the stated Coast Guard mission and performance requirements, but must be judged as having the potential to meet those mission and design requirements listed as required in the SRR Helicopter Type Specification [Attachment III]. Each offeror offering a helicopter which is judged as having the potential to meet required mission and design requirements will be required to enter into a contract for the conduct of a flight evaluation program.
>
> * * * * * * *
>
> The data and evaluations resulting from this flight program will be incorporated directly into the formal SRR helicopter proposal evaluation system. * * *.

Paragraph 2(a) of the Forward to Attachment III further provides:

> The U.S. Coast Guard intends to procure an SRR helicopter that will be in production in time to meet the delivery schedule requirements of (the) RFP. The Coast Guard recognizes that the helicopter offered must be well beyond a preliminary design stage, at the time of SRR helicopter proposal submittal, * * * and, therefore, * * * does not expect that the basic design of the aircraft offered will be significantly changed except to meet those requirements designated as "Required" in this Type Specification.

On the basis of these provisions, Bell contends that the RFP established a requirement that the helicopter furnished to DOT under the contract be *directly* derived from a model in commercial production, flight-tested by the procuring activity, and modified only as necessary to meet the Coast Guard's special requirements. Bell believes that AHC's Model SA 365C was flight-tested, but that the Model SA 366 offered under the contract is directly derived from the firm's Model SA 365N which is a newly designed model that differs in major respects from the flight-tested SA 365C. These differences, Bell asserts, undermine the purpose of the flight evaluation, contravene the terms of the RFP, render the test data on which DOT based its proposal evaluation significantly less reliable than the RFP contemplated and result in disparate treatment of the offerors.

DOT argues that pursuant to paragraph 1.1 of the Flight Evaluation Specification, quoted above, the agency entered into flight evaluation contracts with the three potential offerors after having judged that the helicopters they offered for evaluation had the potential to meet the SRR helicopter specifications. None of the flight-tested helicopters was the same as the offeror's proposed SRR candidate nor were they required to be; there were numerous changes between all flight-tested and proposed helicopters and the evaluators considered those changes for both Bell and AHC. The adequacy and utility of the flight-test data from which performance of the proposed helicopters were predicted were corroborated by the close correlation between the Government's and the offerors' performance estimates. DOT concludes that assessment of the flight-tested helicopters' potential adaptability to meet the RFP specifications was a technical matter for its evaluators to decide, that their determination that the offerors' helicopters were aircraft from which their proposed helicopters could be "directly derived" was reasonable and should not be disturbed, citing our decisions in *John M. Cockerham & Associates, Inc., et al.*, B–193124, March 14, 1979, 79–1 CPD 180, and *Struthers Electronics Corporation*, B-186002, September 10, 1976, 76–2 CPD 231.

AHC takes the position that Bell's reliance on *System Development Corporation, supra*, is misplaced because the RFP in that case, unlike DOT's solicitation, expressly required the testing of a production model or an operational prototype to establish the ability of the of-

ferors' equipment to satisfy the specifications and did not contemplate that the equipment tested would require any modification in order to meet the specifications. Because the solicitation was significantly more restrictive than DOT's RFP, AHC concludes that the case is not applicable to the facts of this protest.

Although AHC's management plan, quoted beginning p. 13, *supra*, states that the SA 365N is the parent of the SA 366, the RFP does not require that the "parent" of the proposed helicopter be flight tested. We believe that the language of the above-quoted Flight Evaluation Specification provision must be taken as a whole and, when so read, states that the purpose for flight evaluation is the agency's need to assess the proffered aircraft's potential to meet the Coast Guard's mission and performance requirements.

Clearly the SRR helicopters were not expected to be identical to those flight tested. Rather DOT was to project the changes required in the flight-tested aircraft to render its potential a reality in the proposed SRR helicopter. The fact that those changes may have been developed or perfected via an intermediary aircraft should not have affected the agency's ability to predict the effect of changes between the flight-tested and proposed SRR helicopters, provided that DOT first assured itself that the flight-tested aircraft had the requisite potential.

The Forward of the Type Specification to which the protester refers clearly pertains to the proposed SRR helicopters rather than to the helicopters submitted for flight evaluation. Contrary to Bell's interpretation, we believe it indicates that, while DOT did not desire a major design and development effort, the proposed SRR helicopter might be a preproduction model at the time proposals were submitted as long as it would be in production in sufficient time to comply with the RFP delivery schedule.

We believe that the determination that AHC's SA 365C had the potential to meet the agency's needs, like the evaluation of proposals, is the responsibility of the procuring activity. We will not substitute our judgment for that of the contracting officials or question their expert technical determination absent a clear showing that it was unreasonable. See *RAI Research Corporation*, B-184315, February 13, 1976, 76-1 CPD 99; 46 Comp. Gen. 606, 608 (1967). Bell has not made such a showing and the fact that it disagrees with the judgment of the contracting agency does not make it unreasonable. See *John M. Cockerham & Associates, Inc., et al., supra; Honeywell, Inc.*, B-181170, August 8, 1974, 74-2 CPD 87.

Bell takes the position that the data which the SEB developed to rate the technical qualifications of the proposed helicopters was

neither adequate to define true differences between the helicopters nor sufficiently reliable for the selection process. However, DOT states that the data was obtained and correlated under procedures developed and refined over many years and that the procedures provided satisfactory results in the past. Moreover, DOT states that the accuracy of the evaluation data was corroborated by the close correlation between the agency's and the offerors' performance estimates. Thus, it was reasonable for DOT to use the same procedures for the immediate procurement as it used before and to rely upon the data generated.

TECHNICAL PROPOSAL EVALUATION

Bell disagrees with DOT's evaluation of the Bell and AHC helicopter proposals.

The overall determination of the relative desirability and technical adequacy of proposals is primarily a function of the procuring agency which enjoys a reasonable range of discretion in the evaluation of proposals. Since determinations as to the needs of the Government are the responsibility of the procuring activity concerned, the judgment of such activity's specialists and technicians as to the technical adequacy of proposals submitted in response to the agency's statement of its needs ordinarily will be accepted by our Office. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of the procurement statutes and regulations. *Struthers Electronics Corporation, supra.*

With these ground rules in mind, we will review each of Bell's contentions against the technical evaluations.

SRR MISSION SUITABILITY

OPERATIONS AT SEA

Bell contends that DOT failed to consider that the AHC helicopter is not suitable for shipboard use in rough seas. There is agreement that the AHC helicopter can operate from ships at sea. The disagreement between Bell and DOT centers around the amount of time the AHC helicopter will be able to be used under rough sea conditions. However, the RFP does not specify that the helicopter must operate under any particular sea condition. Moreover, DOT had indicated that it recognized in its evaluations that the Bell helicopter was more compatible to heavy sea conditions than the AHC helicopter. We are unable to conclude in the circumstances that DOT acted unreasonably in its consideration of the AHC helicopter for sea operations.

RADIUS OF ACTION

Paragraph 3.1.2.1 of the Type Specification requires guaranteed performance for the Short Range Search and Rescue Mission (paragraph 1.2.1.1), the helicopter's primary mission, of a radius of action (ROA) of not less than 150 nautical miles and an ROA of not less than 300 nautical miles (400 desired) for the Maximum Range Mission (paragraph 1.2.2.1.2). DOT states that the Bell 222C's ROA for the primary and maximum range missions were 151 and 371 nautical miles, respectively, and those for AHC's SA 366 were 165 and 421 nautical miles, respectively.

A. HARPOON MECHANISM

Bell takes exception to DOT's ROA calculations contending that the agency failed to consider the effects of a harpoon or similar device which Bell alleges must be added to the SA 366 to enable it to operate aboard ships during the heavy winter seas. The protester asserts that in order for performance comparisons to be meaningful 50 pounds must be added to the SA 366's weight or deducted from its fuel load to compensate for the addition of the mechanism to the aircraft. Such a reduction in fuel would, in Bell's opinion, reduce the helicopter's primary mission ROA by 5 nautical miles. Bell also asserts that the cost of the harpoon must be added to AHC's proposal price.

As indicated above, the RFP did not provide for the helicopter being evaluated under special sea conditions. Furthermore, most of the flying is from shore bases where sea state is not a consideration. Therefore, it was not unreasonable for DOT to evaluate AHC's ROA without the addition of the harpoon mechanism which Bell indicates is necessary only under shipboard use in rough sea conditions.

B. HOVER-THRUST MARGIN

Bell states that AHC did not provide a margin of power and hover thrust to ensure the operational capability and safety of the helicopter. The protester asserts that evaluation of the SA 366 using the hover-thrust margin provided in the 222C would reduce AHC's primary mission ROA to 154 nautical miles. However, the RFP did not require the offerors to allow such a margin at takeoff and DOT was not required to evaluate the SA 366 as if the RFP did.

C. FUEL EXPANSION ALLOWANCE

The Bell 222C and the AHC SA 366 provided fuel expansion space of 3.6 percent and 2 percent, respectively. The RFP only required the offerors to describe the fuel expansion space design; the minimum

requirement was compliance with FAA certification requirements, a 2-percent fuel expansion space. Bell contends that the SA 366 ROA should be computed using the same fuel expansion space proposed by Bell with a resultant 3-nautical mile reduction in the SA 366 primary mission ROA. However, the 2-percent fuel expansion proposed by AHC met the RFP requirements. Therefore, it was reasonable to evaluate the SA 366 on the basis proposed.

D. FUEL CAPACITY

DOT assigned the SA 366 a maximum fuel quantity of 1,976 pounds, which the protester argues can only be achieved by gravity rather than pressure refueling. Bell believes that the Coast Guard ships use pressure refueling, that hover in-flight refueling (HIFR) from ships requires pressure refueling, and that the Coast Guard may operate at other locations where only pressure refueling is available. Bell therefore concludes that because the SA 366 will be able to load only 1,922 pounds of fuel with pressure refueling (a 54-pound reduction) during many operations, its primary mission ROA should have been determined on the basis of the minimum fuel load it may carry, reducing the ROA by 6 nautical miles. DOT and AHC, in contrast, assert that the RFP did not require ROA calculation on the basis of pressure refueling and that gravity refueling is the normal method used by the Coast Guard aboard ship and at most land bases.

While paragraph 3.13.9.13.3, "Off-Deck Refueling," of the Type Specification requires that offerors provide an HIFR system capable of receiving fuel at a rate to completely refuel the aircraft within 5 minutes at 55 PSIG (pounds per square inch gauge) at the aircraft HIFR nozzle (indicating pressure refueling), the HIFR operation was not included in the primary mission. We note that section 5.3 of AHC's proposal (Vol. 17, p. 5–16) summarizing ship based fueling, states that gravity, pressure and HIFR refueling are provided but that "(*g*)*ravity refueling* on USCG cutters is not planned because [sic] the risk of fuel spillage on the deck." However, notwithstanding the statement in AHC's proposal, it appears to be the intention of the Coast Guard to make gravity fueling the usual method of fueling. While there may be conditions under which the Coast Guard may have to use pressure fueling, it is apparent from its statement that it does not contemplate that will be the normal situation. Thus, it was reasonable for DOT to make its evaluation on the gravity fueling basis.

E. ENVIRONMENTAL CONTROL UNIT OPERATION

The protester states that due to limited power the SA 366's environmental control unit (ECU) (air conditioning) must be turned off

during critical hover operations and while the door is open and that the engine-activated automatic ECU shutoff AHC proposed is a safety hazard. Bell asserts that AHC's proposal must be evaluated in accordance with paragraph 3.1.2.1, Note 8, of the Type Specification which requires that the helicopter's fuel consumption be determined with the air conditioning operating.

DOT responds that, contrary to the protester's assertions, the SA 366 ECU does not have to be shut off when the door is open, the aircraft door is open during the hover portion of rescue missions and largely negates ECU cooling effect, AHC's ROA was computed on the basis that the ECU was operating as the RFP required and AHC's automatic ECU shutoff device and proposal were judged acceptable. Therefore, no basis exists for us to object to the evaluation of this item.

F. CHANGES AND WEIGHT PENALTIES

Bell alleges that DOT assessed inconsistent and unreasonable weight penalties in evaluating changes between the offerors' flight-tested and proposed SRR helicopters. Fuselage changes for AHC affected 5,168 pounds and those for Bell affected only 2,506 pounds, yet AHC was penalized only 26 pounds (0.5 percent of the weight affected) while Bell was penalized 54 pounds (2.2 percent of the affected weight). The protester states that not only were actual weights used for the 79.4 percent of the parts common to its flight-tested and proposed models, but that during the course of proposal revisions the firm added a total of 185 pounds as a contingency factor to its weight estimate.

DOT explains that the weight increases in excess of the protester's estimate are attributable to changes made from the Model 222 to the Model 222C, and that the reason for the greater percentage weight increase in Bell's case was because Bell's weight estimates were inadequate for its design—the avionics system, for example, was underestimated by 50 pounds. As Bell indicates, any change in weight affects a helicopter's ROA. Because DOT considered Bell's weight estimate inadequate, it increased the empty weight estimate. The evaluation result about which the protester complains, however, arose because Bell's original mission gross weight (the empty weight plus that of the crew, fuel and equipment) was also the FAA certification weight. The mission gross weight therefore could not be increased because it would exceed the certification weight so DOT had to reduce the 222C's estimated fuel load, which reduced the helicopter's ROA for the various missions. The action of DOT appears to have been reasonable in the circumstances.

DESIGN QUALITY

STRUCTURAL INTEGRITY

In Bell's opinion, the basic structural load factor of the SA 366 is 2.59 g's at a gross weight of 8,400 pounds, which means that the helicopter was designed for a vertical limit load of 21,756 pounds with an ultimate design load of 32,634 pounds (limit load x 1.5). In contrast, Bell states that the 222C design has a structural load factor of 3.14 g's at a gross weight of 8,260 pounds, a limit load of 25,936 pounds and an ultimate design load of 38,904 pounds. Bell concludes therefore that the 222C is capable of withstanding more thrust load than the SA 366, has greater structural integrity than AHC's design, and DOT's conclusion to the contrary is incorrect.

DOT states that in its calculations Bell has used structural and design load data from Volume 7 of the proposals which was not included in the SRR contract and was not contractually binding on the offerors. DOT relied upon the Detail Specification, Volume 2 of the proposal, because it was contractually binding on the offerors. Paragraph 3.4.1 of Bell's Detail Specification provides a structural load factor of 2.40 (0.19 lower than AHC's 2.59 factor), which DOT used in its structural integrity determination. Finally, DOT states that the load factor alone was not the sole structural characteristic considered; in determining the helicopters' structural integrity, the agency included many other factors, a few of which were fatigue criteria and life, component and landing gear strength and vibration and damage tolerance, and AHC was equal or better than Bell in all those areas.

Bell, however, argues that the 2.40 load factor used by DOT is the load factor for the 222C rotor and that paragraph 3.4.1.1.11.1 of the protester's Detail Specification clearly states that the airframe design load factor is 3.5 at a gross weight of 7,415 pounds. Bell states that when the airframe design load factor is used to calculate the structural load factor at the FAA certification weight (8,260 pounds) the structural load factor is 3.14. However, even if the correct load factor should be 3.5 or 3.14, we cannot conclude that DOT's determination based on the totality of factors considered in assessing the helicopters' relative structural integrity was unreasonable.

CRASHWORTHINESS

Bell objects to the procuring activity's conclusion that the SA 366 design was safer and more crashworthy than that of the 222C, contending that crash load factors do not suffice to define or evaluate the crashworthiness of an aircraft and that DOT failed to consider the

helicopter's ability to absorb the energy of a crash, egress during a crash at sea and the location of the helicopter's pressure refueling receptacle.

Contrary to the protester's assertions, DOT states that it considered not only crash load factors but also other factors including energy absorption, emergency evacuation and fuel system safety in assessing the crashworthiness of the offerors' designs. DOT notes that the evacuation design proposed by AHC, incorporated in prior Coast Guard helicopters, provides acceptable egress even when the aircraft is under water, but to its knowledge Bell's design system has not been tested under water or credited by the FAA for commercial helicopter use. DOT observes that, while the SA 366 pressure refueling receptacle for HIFR from a ship is located inside the cabin, its ground refueling receptacle is externally located on the fuselage. DOT recognized Bell's HIFR design advantage. However, notwithstanding the fact that the protester's design was judged superior in some respects, we do not find DOT's conclusion based on the overall crashworthiness of the designs unreasonable.

CABIN VOLUME AND FIELD OF VIEW

DOT concluded that the AHC design provided larger cabin volume and a better field of view (visibility range from inside the helicopter). Bell states that the former conclusion is contrary to the opinion of Coast Guard personnel whose consensus was that the Model 222's smaller size would not impede performance of SRR missions. We agree with DOT that Bell's survey results are irrelevant to the agency's evaluation. The protestor's survey solicited information about the firm's Model 222 rather than the 222C from DOT personnel other than the evaluators prior to the issuance of the RFP and the comparison was made in relation to the Sikorsky HH–52A helicopter rather than to the design features of the SA 366. DOT found the cabin volume which Bell proposed was acceptable, but determined that the larger cabin volume afforded by AHC's design was better. We find DOT's conclusion reasonable, particularly in light of the mission demands on cabin space.

On the basis of field-of-view plots included in the offerors' proposals and Bell's use of bubble windows which allegedly provide greater aft and downward visibility, Bell also contends that DOT erred in concluding that the SA 366 design affords better visibility than the 222C. DOT states that its visibility determination was based primarily on pilot and crew observations during flight evaluations and review of the SRR airframe mockups rather than the field-of-view diagrams. Although we agree with the protester that observations made during

the flight test pertained to visibility from the flight-tested aircraft rather than the SRR helicopters, DOT asserts that fields of view of the SA 365C and the SA 366 do not differ significantly. We believe that the agency's conclusion based on flight evaluations, mockups and diagrams that the SA 366 provides better overall visibility from the cabin and cockpit was not unreasonable.

ELECTRICAL POWER

The protester objects to DOT's determination that the SA 366 design providing excess electrical power was superior to Bell's design which provided the minimum electrical power required. Bell asserts that AHC's electrical capacity which exceeds the minimum power requirement by 700 percent constitutes an excessive cost design and that Bell's design which meets the mission power requirements with all necessary margins is cost efficient and therefore superior.

DOT states that AHC offered more electrical capacity for the money and therefore presented a better electrical power design than Bell. While we agree that reserve electrical power appears to be more advantageous to the Government, we cannot agree that an excessive reserve would necessarily indicate a superior design. AHC, however, notes that the size of the reserve is attributable to electrical power necessary in the event of an alternator failure pursuant to paragraph 3.16.2.3 of the RFP Type Specification and to operate equipment which DOT intends to add to the aircraft at a later date. We cannot conclude therefore that DOT's evaluation in this regard was unreasonable.

HOIST SPEED

DOT found the hoist offered by AHC superior to Bell's because it is capable of handling a full load (600 pounds) at a speed of 200 feet per minute (f.p.m.) while Bell's hoist speed is 100 f.p.m. The protester, however, asserts that cable speeds in excess of 100 f.p.m. could cause the rescue basket to spin, injuring the rescuee; thus its design resulted in cost and weight savings while meeting all RFP requirements. Bell states that its hoist can operate at the 200 f.p.m. speed with loads up to 300 pounds.

Bell's contentions, DOT suggests, overlook the fact that there are situations other than rescue operations in which higher hoist speed will be advantageous and that AHC's infinitely variable hoist speed control allows the operator to select any speed up to 200 f.p.m. appropriate for the particular operation. AHC's higher powered hoist also provides a design margin which the agency expects will reduce the frequency of breakdown and repairs.

Although the protester states that it also provides infinitely variable hoist control, Bell's hoist speed with the maximum load is still limited to 100 f.p.m. We are unable to conclude in the circumstances that DOT's evaluation was unreasonable.

ADVANCED TECHNOLOGY RISK

Bell complains that its design was deemed to involve greater risk than AHC's because its avionics system included a number of new technology items and the SA 366 uses state-of-the-art components. Bell asserts that the facts are actually reversed, that AHC proposed advanced composite materials for the rotor blades, horizontal stabilizer and lateral fins and that DOT's evaluation was inconsistent. Bell states that the technology used in the Flight Management System Computer, Control Display Units and Altitude Reference System included in the 222C avionics system has been developed and is in current use on the F–14, F–15, F–16 and F–18 fixed-wing aircraft and the AH–64 attack helicopter. According to Bell, the only difference between these elements and those proposed for the 222C are the additional features necessary to meet the SRR mission requirements, which the protester contends would be necessary for any existing avionics system.

DOT responds that AHC's state-of-the-art avionics components minimized the risk of developing and integrating the system in the SRR helicopter, that despite the protester's assertions to the contrary the procuring activity remains of the opinion that the system Bell proposed incorporated fundamental design concepts which have not been tried in service use, and that its evaluation of the relative risk involved in the avionics system designs was substantiated by the differences between the two systems. DOT did consider the risk associated with the composite materials AHC proposed to use in the aircraft structure, as well as those Bell proposed to use for the rotor blades, fuel cell cavities and transmission cowling, and determined that these uses were consistent with the state-of-the-art and did not pose a risk. We are unable to conclude that the procuring activity's assessment of the risks involved in the offerors' designs was either inconsistent or unreasonable.

YAW CONTROL

Bell pointed to a portion of AHC's proposal as indicating that the AHC helicopter will not meet the required sideward flight speed of 35 knots (RFP, Attachment IV, Table 3).

However, DOT assessed the yaw control of both offerors' designs and concluded that AHC offered acceptable yaw control on the basis of design assessment including the flight evaluation and AHC's contrac-

tual commitment to meet the RFP requirement. We believe the agency's determination on these bases was not unreasonable.

TAIL BUMPER DESIGN

The protester asserts, and DOT agrees, that the SA 366 tail bumper was designed to a sink speed of 8 feet per second (f.p.s.) while DOT required Bell's to be designed for sink speeds of 10 f.p.s. DOT, however, explains that the disparate sink speeds required were due to differences in the helicopters' landing approach attitudes. AHC's tail bumper is higher off the ground than Bell's so a lower sink speed was appropriate for the SA 366 design. We believe that application of the same requirement to the offerors' different designs would have been unreasonable and that the use of ostensibly inconsistent sink speeds was appropriate.

AUTOROTATION

In Bell's opinion, the autorotation (power-off landing) of the 222C is much better than that of the SA 366. Bell notes that the SA 365C handbook prohibits intentional autorotation to a full landing and concludes that based on disc loading factors the SA 366 will have worse autorotation characteristics than the SA 365C. Bell states that the 222C permits pilots to practice full touch down emergency procedures, enhancing aircraft safety. Bell therefore believes that DOT failed to consider autorotation characteristics in its evaluation.

Unlike the SA 365C handbook prohibition, DOT states that there is no such restriction in the contract specifications for the SA 366. Full autorotations were made during the SA 365C flight evaluation and DOT's autorotation design evaluation was based in part on the flight evaluation data. Moreover, the procuring activity explains that the Coast Guard has not previously considered it necessary to practice autorotations to a full landing in two-engine helicopters. We cannot conclude that DOT's design evaluation in this regard was unreasonable.

ROTOR STOPPING

The RFP requires that rotor stopping be demonstrated under the contract in headwinds of 60 knots and in winds from any other direction of 45 knots. Bell points out that AHC did not cover the 45-knot requirement in its proposal. However, DOT has indicated that compliance with the 60-knot requirement provides a high probability of assurance of satisfactory capability in winds from any other direction. Bell says there is no assurance that there will be 60 knot winds during the demonstration period, since AHC has offered to demonstrate under natural wind conditions, but DOT apparently believes the condition

will exist. In the circumstances, it is not apparent that the AHC deviation is material and the determination to permit it does not appear to be unreasonable.

AIRCRAFT CERTIFICATION

Bell states that AHC has an advantage in being able to certify its aircraft in France. However, no advantage is apparent, since AHC also is required to obtain certification in the United States.

RESPONSIBILITY DETERMINATION

Ordinarily, we do not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which have not been met. *New Haven Ambulance Service, Inc.*, 57 Comp. Gen. 361 (1978), 78-1 CPD 225. Our standard is much the same as that followed by the courts. They have taken the view that responsibility is a matter of discretion not subject to judicial review absent fraud or bad faith. *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974); *Friend* v. *Lee*, 221 F. 2d 96 (D.C. Cir. 1955); *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. Mass. 1934). Since Bell does not allege fraud and essentially what is involved is a difference of opinion between Bell and DOT as to whether AHC is a responsible contractor, Bell has failed to meet the standard for review by us or the courts. Accordingly, notwithstanding the court's involvement in this case, we find it unnecessary to engage in any further consideration of the responsibility matter because of the limited judicial standard of review.

ECONOMIC PRICE ADJUSTMENT CLAUSES

Section J of AHC's contract provides for contract price adjustments, regardless of the actual changes in the cost of labor and materials during performance of the contract, based solely on changes in prescribed labor and material indexes furnished by the Department of Labor (DOL). DOT will determine the semiannual upward or downward adjustments in the contract price depending on whether the net difference in the labor and material adjustments is a plus or minus factor, and will modify the contract accordingly. Sections J-1(d) and J-1(g) provide for contract price adjustment due to changes in airframe labor and material costs based, respectively, upon changes in the DOL "Gross Average Hourly Earnings of Production or Non-Supervisory Workers in the Aircraft Industry (SIC Code 3721)" and "Producer Price Index for Industrial Commodities."

Similarly, section J-4 provides for adjustments in the prices of spare parts based on changes in DOL's "Producer Price Index for Industrial Commodities." The contract also contains price adjustment clauses pertaining to changes in the costs of labor and materials involved in the avionics, engines, reliability assurance warranty, and training.

Bell believes that at least the AHC airframe and related spare parts will be produced in France and that components subject to other price adjustment clauses may also be foreign produced. The protester therefore contends that application of price indexes based upon United States labor and material costs to determine contract price adjustments bears no rational relationship to costs that AHC may actually incur, will result in improper expenditure of appropriated funds and renders the contract invalid.

The fixed-price contract with escalation is appropriate for use "where serious doubt exists as to the stability of market and labor conditions which will exist during an extended period of production and where contingencies which would otherwise be included in a firm fixed-price contract are identifiable and can be covered separately by escalation." FPR § 1-3.404-3(b) (1964 ed. circ. 1). DOT asserts that the use of the economic price adjustment clauses in AHC's contract was reasonable and lawful since it was needed for flexibility in assuring contract performance over a 7½-year period. The clause used in AHC's contract was based on industry-wide indexes and was identical to the clause which would have been required in Bell's contract had Bell obtained the award.

Bell, however, contends that the escalation clauses could properly be included in AHC's contract only if DOT made the required findings with respect to the stability of market and labor conditions in France. Bell states that there is no evidence that DOT considered French market and labor conditions and the fact that American indexes were used in the contract demonstrates that no such findings were made. Furthermore, DOT does not indicate that domestic indexes would be appropriate for forecasting conditions in France.

DOT states that the economic price adjustment provisions used in the AHC contract are based on industry-wide indexes applied to the contract price according to the provisions of Armed Services Procurement Regulation (ASPR) (now Defense Acquisition Regulation) § 3-404.3(c)(3) (Defense Acquisition Circular No. 76-18, March 12, 1979). Although the Coast Guard derives its basic procurement authority from the Armed Services Procurement Act, 10 U.S.C. § 2303(a)(4), over the years it has relied primarily on the FPR and the procurement regulations of the departments of which it has been a component, but where those regulations have not covered a partic-

ular situation it has followed ASPR. Because the actual material and labor costs of all the offerors in this procurement were unknown, DOT decided to use an expenditure profile based on a predetermined rate of expenditure (expressed as the percentage of material or labor usage as it related to total contract price) in lieu of an actual cost method. The expenditure profile was developed from information solicited from all offerors in order that all companies would compete on an equal basis according to the applicable ASPR provisions. Based upon the fact that DOT wanted to treat all offerors equally, it decided to employ domestic labor and material indexes and the same escalation provisions were included in all solicitations. Finally, DOT takes the position that Bell cannot argue that its proposal was evaluated any differently or that it was adversely affected in any way by the inclusion of the escalation clauses used in AHC's contract. Because AHC contracted to provide and must provide a "domestic source end product," DOT concludes that its determination to use an escalation clause based on industry-wide price idexes and to treat offerors equally was reasonable.

AHC concurs in the application of a clause relating domestic costs to a domestic end product and characterizes Bell's argument as requiring that DOT tailor escalation clauses to take into account economic conditions in every foreign country in which a potential prime or subcontractor might be located. AHC states that there is no statutory or regulatory basis for such a proposition which would impose a ludicrously untenable administrative burden on the Government. Selection of the type of contract to be used is, pursuant to FPR § 1-3.403 (a), a matter for negotiation and requires the exercise of judgment. AHC asserts that because the escalation clauses in question were included in the RFP to all prospective offerors, including the protester, all offerors were therefore treated equally with respect to potential fluctuations in labor and material costs and possible disparities in the impact on individual offerors were not considered during source selection, citing *Lockheed Propulsion Company et al.*, 53 Comp. Gen. 982 (1974), 74-1 CPD 339. AHC concludes that it is clear that there was no abuse of discretion in DOT's selection of the clauses and that, because the clauses had no impact on DOT's award decision, it is nonsensical to argue that the clauses somehow tainted the award process or injured the protester in any way.

Our Office has held agreements entered into by the Government providing for an adjustment of material and labor costs unobjectionable where it was administratively determined to be necessary or desirable in the interests of the Government because the evident purpose of the adjustment provision is to protect the Government in case of a de-

crease in the cost of labor or material and the contractor in the event of cost increases. 22 Comp. Gen. 95, 98 (1942); 20 *id.* 695, 697 (1941).

Bell, however, asserts that the purpose cannot be satisfied here because the contract clauses bear no rational relationship to protection of the contractor. The protester suggests that French costs and United States indexes may fluctuate in opposing manner, resulting in the escalation clauses providing a windfall to or inadequately protecting AHC; the result will be wholly fortuitous, not predictable. Contrary to DOT's characterization, if AHC's proposal included escalation clauses based on French inflation, the two companies would have been treated comparably because neither offeror would have been advantaged by the clauses as compared to the other. Bell suggests rather that, as actually implemented, the clauses may create a windfall for AHC, that AHC may have set its proposal price with that outcome in mind to Bell's obvious detriment, and that this potential handicap plainly constitutes inequitable treatment. Regardless of the legal status of AHC's helicopters for the purpose of the Buy American Act, Bell takes the position that they will be manufactured in France where the labor and material costs governed by the price escalation clauses will be incurred and that AHC's certificate is therefore irrelevant to the propriety of the clauses used in the contract. Bell concludes that DOT has not responded to its argument that use of domestic price escalation clauses in the RFP and contract implies a requirement that American labor and materials be used to manufacture the helicopters.

In our opinion, it is irrelevant that price adjustment percentages are to be based on domestic factors. Although Bell contends that these percentages will not be based on the French economy and may therefore produce results in AHC's contract inconsistent with the intention of the economic adjustment clause, that is purely speculative as there is no evidence to establish that will be the case. In the circumstances, it is not apparent that the clause has resulted in dissimilar treatment to the offerors. Rather, the application of a consistent factor to both offerors virtually insures that the low offeror will remain low during the term of the contract, since both offers will vary by the same proportion. Moreover, while Bell complains that AHC stands to make a windfall or to be inadequately protected by an escalation based on United States inflation rates, the same result could occur under the escalation provision if Bell were the contractor since the escalation clause provides for a price adjustment for changes in the economy without any regard for the actual cost a contractor experiences in performing the contract. Thus, AHC is in no different position than Bell.

As indicated above, the protest is denied.

[B-194421.3]

Contracts—Awards—Delayed Awards—Cancellation Propriety—Lower Price On Subsequent Procurement—Military Regulation Applicability

Protest that prior solicitation should be canceled and items added to protester's current contract because of lower prices and resultant savings to Government is denied as contracting officer has determined prior prices to be reasonable and, therefore, DAR 2-404.1(b)(vi), permitting cancellation for unreasonable prices, is inapplicable.

Contractors — Responsibility — Contracting Officer's Affirmative Determination Accepted

Contention that there would be less risk of delivery delay by purchasing items under protester's (established producer) contract rather than from proposed awardee (new producer) is denied since contracting officer has determined awardee to be responsible bidder.

Matter of: Century Metal Parts Corporation, December 27, 1979:

Century Metal Parts Corporation (Century) has protested the proposed award of a contract to Howe Machine and Tool Corporation (Howe) under invitation for bids (IFB) No. DAAB07-79-B-2832 issued by the U.S. Army Communications and Electronics Materiel Readiness Command.

Howe was the low bidder under IFB No. -2832, which was opened on January 22, 1979, for a quantity of antenna elements. No award has been made under the solicitation because of various protests and court actions filed by Century, of which this protest is the final action still pending.

The Army, in July 1979, issued IFB No. DAAB07-79-B-2460 for additional quantities of the antenna element. Century was the low bidder on this IFB and contends that because its price on IFB -2460 is lower than Howe's price on IFB -2832, the Army should cancel the prior solicitation and include those items under its current award. Such action would result in a 5-percent savings to the Government.

Before deciding the merits of the protest, the Army's contention that the protest was untimely filed must be answered. IFB -2460 was opened on August 23, 1979, and Century's protest was filed with our Office on September 10, 1979. The Army argues that Century knew of the basis for its protest at bid opening and, therefore, the protest was untimely filed.

Section 20.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 20 (1979)) requires protests be filed within 10 working days after the basis of protest was known or should have been known. However, Century argues that it was not at bid opening and notwithstanding a phone call to the agency the afternoon of bid opening, did not learn the results of the bidding until 2 days later. Therefore, Century's

protest was filed on the 10th working day following its knowledge of the basis for its protest and is timely.

Regarding Century's contention that the prior solicitation should be canceled, Century argues that its lower bid on the second solicitation shows that Howe's price in January 1979 was unreasonable and that under Defense Acquisition Regulation (DAR) § 2-404.1(b)(vi), the cancellation would be justified.

The contracting officer has advised our Office that he feels Howe's price is reasonable in view of the adequate price competition under IFB No. -2832 and the past procurement history of the item.

The determination of price reasonableness is a matter within the discretion of the contracting officer which our Office will not question absent a showing of unreasonableness, which has not been made here. *North American Signal Company—Reconsideration*, B-190972, August 4, 1978, 78-2 CPD 87. Therefore, since the contracting officer has determined the price of Howe to be reasonable, DAR § 2-404.1(b)(vi), which permits cancellation where prices are unreasonable, is not for application.

We believe DAR § 2-404.1(a) is the controlling regulation in the instant factual situation. The regulation reads, in pertinent part, as follows:

> * * * As a general rule, after opening, an invitation for bids should not be canceled and readvertised due solely to increased requirements for the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

The above action is what the Army has done here and as our Office has stated numerous times in the past, the maintenance of the integrity of the competitive bidding system is more in the public interest than the pecuniary advantage to be gained in a particular case. *A. D. Roe Company, Inc.*, 54 Comp. Gen. 271, 275 (1974), 74-2 CPD 194.

Century also contends that there would be less risk of delivery delay if the earlier quantity were purchased from Century, an established producer of the item, rather than Howe, which has never manufactured the item. The contracting officer has found Howe to be a responsible bidder based on a preaward survey which noted a satisfactory rating for its ability to meet the required delivery schedule. Therefore, this basis of protest is denied.

The protest is denied.

[B-195646]

Compensation—Removals, Suspensions, etc.—Back Pay—Entitlement—Unjustified or Unwarranted Personnel Action—Not Affecting Pay or Allowances

Employee's reassignment and reduction in rank from GS-12 supervisory position to GS-12 nonsupervisory position was determined to be erroneous personnel

action. However, such erroneous personnel action creates no entitlement to retroactive temporary promotion and backpay because it did not affect his pay and allowances as to constitute "an unjustified or unwarranted personnel action" remediable pursuant to the Back Pay Act, 5 U.S.C. 5596 (1976).

Compensation—Removals, Suspensions, etc.—Back Pay—Unjustified Personnel Action Requirement—What Constitutes—Termination of Detail Status

Although action on March 6, 1977, reducing employee in rank from a supervisory GS–12 to a nonsupervisory GS–12 position was erroneous, correction of that action does not entitle employee to retroactive temporary promotion with backpay based on earlier action on October 30, 1976, terminating his detail to a GS–13 supervisory position and returning him to his GS–12 supervisory position. Termination of detail was within agency discretion and after October 30, 1976, employee no longer performed higher grade duties, which were assigned to another individual.

Matter of: Samuel Freiberg—Retroactive Temporary Promotion and Backpay, December 27, 1979:

Mr. Samuel Freiberg requests reconsideration of his claim for retroactive temporary promotion and backpay which was denied by our Claims Division's settlement dated June 12, 1979. Consistent with the following analysis we are sustaining our Claims Division's adjudication.

The record shows that Mr. Freiberg served in a GS–13, Supervisory General Supply Specialist position under temporary promotion and informal details during the period March 1 to October 30, 1976. He was then returned to his official position as a GS–12, Supervisory General Supply Specialist. Subsequently, Mr. Freiberg was advised by letters dated January 7 and February 18, 1977, that he would be reassigned to a nonsupervisory GS–12, General Supply Specialist position. That reassignment and reduction in rank took place effective March 6, 1977.

When Mr. Freiberg sucessfully appealed his reduction in rank, the Civil Service Commission (now Office of Personnel Management) directed his employing agency to cancel the action, retroactively restoring him to his GS–12, Supervisory General Supply Specialist position effective March 6, 1977, and continuing until his retirement on April 15, 1977.

In a separate action based on these facts, Mr. Freiberg filed a claim with his agency for a retroactive temporary promotion and backpay in connection with his service in the GS–13, Supervisory General Supply Specialist position. The claim was allowed by the agency and Mr. Freiberg received a retroactive temporary promotion and backpay for the period from August 28, 1976 (the 121st day of the improper detail), through October 30, 1976, the last day of his detail based on the *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 *id.* 427 (1977).

Mr. Freiberg subsequently filed a claim for retroactive temporary promotion and backpay for the period October 31, 1976, to his retirement on April 15, 1977, on the basis of his erroneous reassignment and reduction in rank.

Entitlement to backpay is governed by 5 U.S.C. § 5596(b) (1976) which provides in pertinent part as follows:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective-bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period * * *.

The Back Pay Act was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and other unjustified or unwarranted actions affecting pay and allowances that could occur in the course of reassignments and change from full-time to part-time work. *United States* v. *Testan*, 424 U.S. 392, 405 (1976). Although Mr. Freiberg's reassignment and reduction in rank from a GS–12 supervisory position, to a GS–12 nonsupervisory position was later determined to be an erroneous personnel action, it is clear that the erroneous personnel action did not result in the reduction or withdrawal of all or a part of his pay, allowances, or differentials, and is therefore not an "unjustified or unwarranted personnel action" remediable pursuant to the Back Pay Act.

Mr. Freiberg further contends that although his erroneous reduction in rank was effective on March 6, 1977, the erroneous personnel action was actually commenced in September 1976 when agency officials asked him to accept a reduction in rank. He claims that he was adversely affected as early as October 30, 1976, when his detail to the GS–13, Supervisory General Supply Specialist position was terminated and a new employee assumed the GS–13, supervisory position. Mr. Freiberg asks that the effective date of his erroneous reduction in rank be established as October 31, 1976, and contends that but for the alleged adverse personnel action on October 31, 1976, he would have continued to fill the GS–13, supervisory position—either by permanent promotion or through a continued detail—from October 31, 1976, through April 15, 1977. On this basis Mr. Freiberg contends that he is entitled to a retroactive temporary promotion with backpay for this additional period.

Since, the Civil Service Commission corrected Mr. Freiberg's improper reassignment and reduction in rank by directing that he be restored to his GS–12 Supervisory General Supply Specialist and since he in fact held that position prior to March 6, 1977, there is no personnel action subject to correction on the basis of the Civil Service Commission's findings for the period from October 31 to March 5, 1976.

In the *Turner-Caldwell* decisions, *supra*, we held that employees officially detailed to established higher level positions for more than 120 days are entitled to retroactive temporary promotions with backpay beginning with the 121st day of the detail until the detail is terminated. Since the record clearly indicates that Mr. Freiberg no longer performed the duties of the GS–13 position after October 30, 1976, the *Turner-Caldwell* line of decisions provides no basis to retroactively promote him to the GS–13 position and award him backpay for the period after October 30th.

The personnel action which returned Mr. Freiberg to his appointed position as a GS–12 Supervisory General Supply Specialist at the end of his detail to the GS–13 Supervisory General Supply Specialist position, cannot be considered an adverse action under 5 C.F.R. Part 752 and creates no entitlement to continued receipt of the higher rate of pay. In the circumstances presented, the detail action was properly subject to the agency's discretion and Mr. Freiberg obtained no vested right under law or regulation to have the detail continued or to be permanently promoted to the higher graded position.

Mr. Freiberg received a retroactive temporary promotion and backpay in connection with his extended detail for the period from August 28 through October 30, 1976, when the detail was terminated and Mr. Freiberg returned to his regular duties. As indicated by our Claims Division's determination, from October 31, 1976, until he retired effective April 15, 1977, Mr. Freiberg was entitled to and properly received the salary of the GS–12 Supervisory General Supply Specialist position in which he was employed.

In regard to Mr. Freiberg's inquiry as to his right of appeal, decisions of the Comptroller General are binding on executive agencies of the United States. 54 Comp. Gen. 921, 926 (1975). However, independent of the jurisdiction of this Office, the United States Court of Claims and District Courts have jurisdiction to consider certain claims against the Government if suit is filed within 6 years after the claim first accrued. See 28 U.S.C. §§ 1346(a)(2), 1491, 2401, and 2501 (1976).

INDEX

OCTOBER, NOVEMBER, AND DECEMBER 1979

LIST OF CLAIMANTS, ETC.

	Page
Aero Corp.	147
Agency for International Development	130
Agent Chemical, Inc	134
Agriculture, Dept. of	25, 28, 84, 96
Air Force, Acting Asst. Secretary of	59
Air Force, Asst. Secretary of	41
Air Force, Dept. of	34
AMF Inc., American Athletic Equipment Div	90
Army, Asst. Secretary	39, 99
Army, Dept. of	63, 93
Bell Helicopter Textron	159
Bentz, Edward J., Jr	31
Boland, The Honorable Edward P	115
Broz, James A	110
Bureau of Prisons, Director	128
Butler, J. L	145
Century Metal Parts Corp	184
Colonial Ford Truck Sales, Inc	61
Commerce, Dept. of	57
CompuServe Data Systems, Inc	126
Creahan, David J., Jr	36
Currier, John B	96
Davis, James L., Jr	15
District Containerized Express	124
E-Z Tight, Inc	122
Forest Service	84, 96
Freiberg, Samuel	186
Greene, Richard L	57
Health, Education and Welfare, Dept. of	15, 101
Homan, David R	62
House of Representatives	115
Immigration and Naturalization Service	110
Immigration and Naturalization Service, Acting Associate Commissioner	113
Interscience Systems, Inc	69
Justice, Dept. of	128
Marine Corps, United States	12
Merit Systems Protection Board	108
Methods Research Products Co	43
Milne, David L	113
Napoliello, Edward	130
National Credit Union Administration, Administrator	105
Navy, Dept. of	36
Navy, Deputy Asst. Secretary of	1
Niedermeyer-Martin Co	73
Northland Anthropological Research, Inc	80
Office of Personnel Management, Director	31
Prestex, Inc	141
Railroad Retirement Board	143
Saulter, David G	12
Schultz, James A	28
Sharma, Jandhyala L	105
Shelley, Leo C	25
Social Security Administration	15, 101
State, Dept. of	131
Suburban Elevator Co., Inc	18
Treasury, Acting Asst. Secretary of	66
United States Courts, Administrative Office	52
Vector Engineering, Inc	20
Way, Andrew G	34
Willamette Industries, Inc	84

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

UNITED STATES STATUTES AT LARGE

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

	Page
1963, Oct. 17, 77 Stat. 258	94
1965, Sept. 29, 79 Stat. 863	94
1976, Feb. 9, 90 Stat. 153	34
1976, July 16, 90 Stat. 993	10
1976, Sept. 30, 90 Stat. 1349	9
1977, July 26, 91 Stat. 285	118
1977, Aug. 1, 91 Stat. 358	8
1978, Oct. 10, 92 Stat. 1001	116
1978, Oct. 13, 92 Stat. 1231	42, 94
1978, Oct. 13, 92 Stat. 1244	94
1978, Oct. 17, 92 Stat. 1279	151
1978, Oct. 17, 92 Stat. 1302	151

UNITED STATES CODE

See also U.S. Statutes at Large

	Page
5 U.S. Code Ch. 57	106
5 U.S. Code Ch. 63	33
5 U.S. Code 104	29
5 U.S. Code 912a	104
5 U.S. Code 1206	108
5 U.S. Code 1206(c)(1)(A)	109
5 U.S. Code 2105	33
5 U.S. Code 2107	33
5 U.S. Code 3301	32
5 U.S. Code 3371—3376	105
5 U.S. Code 3372(b)	105
5 U.S. Code 3372(c)	105
5 U.S. Code 3375	106
5 U.S. Code 3375(a) (2)	106
5 U.S. Code 3375(b)	106
5 U.S. Code 3551	64
5 U.S. Code 3581—3584	131
5 U.S. Code 3582	132
5 U.S. Code 3582(a)	132
5 U.S. Code 3582(b)	132
5 U.S. Code 3582(b)(2)	133
5 U.S. Code 5[illegible]1	32
5 U.S. Code 5331	32
5 U.S. Code 5335(a)(1)(A)	16
5 U.S. Code 5514	30
5 U.S. Code 5542	128
5 U.S. Code 5542(a)	104
5 U.S. Code 5542(b)(1)	104
5 U.S. Code 5542(b)(2)(B)	97
5 U.S. Code 5545(a)	102
5 U.S. Code 5551	17
5 U.S. Code 5584	17, 30
5 U.S. Code 5596	64, 108
5 U.S. Code 5596(b)	187
5 U.S. Code 5702(b)	57
5 U.S. Code 5723	30
5 U.S. Code 5724(i)	25
5 U.S. Code 5724a	30
5 U.S. Code 6301	31
5 U.S. Code 6301(2)(A)	33
5 U.S. Code 6301(2)(B)(vi)	33
8 U.S. Code 1353a	110
10 U.S. Code 952	13
10 U.S. Code 2303(a)(4)	181
10 U.S. Code 2304(g)	151
10 U.S. Code 2634	42
15 U.S. Code 533(a)	24
15 U.S. Code 631	22
15 U.S. Code 631 note	24
15 U.S. Code 637	20
15 U.S. Code 637(a)	21, 122
15 U.S. Code 637(a)(1)	22
15 U.S. Code 637(b)(7)	62, 145
16 U.S. Code 535	88
18 U.S. Code 1913	116
22 U.S. Code 2381	77
23 U.S. Code 101 note	31
25 U.S. Code 450	24
28 U.S. Code 753	52
28 U.S. Code 753(e)	54
28 U.S. Code 1346(a)(2)	188
28 U.S. Code 1491	188
28 U.S. Code 2401	188
28 U.S. Code 2501	188
29 U.S. Code 201	97, 102, 128
29 U.S. Code 204(f)	129
29 U.S. Code 207	129
31 U.S. Code 82a-1	113
31 U.S. Code 951	30
31 U.S. Code 952(b)	30

UNITED STATES CODE—Continued

	Page
31 U.S. Code 1176	8, 51
33 U.S. Code 1251	2
33 U.S. Code 1282(a)(1)	3
33 U.S. Code 1283(a)	5
33 U.S. Code 1284	5
33 U.S. Code 1285	5
37 U.S. Code Ch. 7	42
37 U.S. Code 404	42
37 U.S. Code 404(d)	100
37 U.S. Code 405	42, 59
37 U.S. Code 406	34, 42
37 U.S. Code 407	42
37 U.S. Code 409	42
37 U.S. Code 411	42
37 U.S. Code 501	14
39 U.S. Code 3202	52
39 U.S. Code 3202(a)(1)(A)	56
39 U.S. Code 3202(c)	54
39 U.S. Code 3203(a)	52
39 U.S. Code 3205	52
40 U.S. Code 541	21
40 U.S. Code 541(2)	23
40 U.S. Code 543	24
41 U.S. Code 10a	161
41 U.S. Code 10a—d	49
41 U.S. Code 253(a)	51
42 U.S. Code 421 notes	16
42 U.S. Code 1305 note	16
42 U.S. Code 1383	16
42 U.S. Code 2000e-16(b)	64
42 U.S. Code 7623	32
42 U.S. Code 8141	115
45 U.S. Code 362 o)	143
45 U.S. Code 779	143
46 U.S. Code 1241(a)	126
49 U.S. Code 1517	38, 66, 124

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
17 Comp. Gen. 585	51
20 Comp. Gen. 695	183
22 Comp. Gen. 95	183
24 Comp. Gen. 483	112
24 Comp. Gen. 526	17
26 Comp. Gen. 102	17
28 Comp. Gen. 159	133
30 Comp. Gen. 449	13
32 Comp. Gen. 179	93
32 Comp. Gen. 232	40
32 Comp. Gen. 315	42
33 Comp. Gen. 4	102
33 Comp. Gen. 281	13
34 Comp. Gen. 621	102
35 Comp. Gen. 7	168
36 Comp. Gen. 657	102
37 Comp. Gen. 1	104
37 Comp. Gen. 228	13
37 Comp. Gen. 276	111
38 Comp. Gen. 326	24
38 Comp. Gen. 369	40
39 Comp. Gen. 73	104
39 Comp. Gen. 455	29
39 Comp. Gen. 566	62
40 Comp. Gen. 271	59
40 Comp. Gen. 397	103
41 Comp. Gen. 8	103
41 Comp. Gen. 82	98
41 Comp. Gen. 178	144
41 Comp. Gen. 285	100
41 Comp. Gen. 453	59
42 Comp. Gen. 1	51
42 Comp. Gen. 326	103
44 Comp. Gen. 693	93
44 Comp. Gen. 783	57
45 Comp. Gen. 680	27
46 Comp. Gen. 178	144
46 Comp. Gen. 400	15
46 Comp. Gen. 606	170
46 Comp. Gen. 784	49
47 Comp. Gen. 127	42
47 Comp. Gen. 724	59
48 Comp. Gen. 334	104
49 Comp. Gen. 219	24
49 Comp. Gen. 444	15
50 Comp. Gen. 173	132
51 Comp. Gen. 231	39
51 Comp. Gen. 732	98
52 Comp. Gen. 198	163
52 Comp. Gen. 319	103
52 Comp. Gen. 382	164
53 Comp. Gen. 143	122
53 Comp. Gen. 412	164
53 Comp. Gen. 547	6
53 Comp. Gen. 982	182
54 Comp. Gen. 66	91
54 Comp. Gen. 92	39
54 Comp. Gen. 271	185
54 Comp. Gen. 375	83
54 Comp. Gen. 416	71
54 Comp. Gen. 509	91
54 Comp. Gen. 747	31
54 Comp. Gen. 913	23
54 Comp. Gen. 921	188
54 Comp. Gen. 1021	140
54 Comp. Gen. 1028	64
54 Comp. Gen. 1114	151
55 Comp. Gen. 1	90
55 Comp. Gen. 139	76
55 Comp. Gen. 391	77
55 Comp. Gen. 539	186
55 Comp. Gen. 765	24
55 Comp. Gen. 1019	151
55 Comp. Gen. 1051	20
55 Comp. Gen. 1230	67
55 Comp. Gen. 1479	162
56 Comp. Gen. 18	164
56 Comp. Gen. 131	31

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL—Continued

	Page		Page
56 Comp. Gen. 209	66, 126	57 Comp. Gen. 519	67
56 Comp. Gen. 216	37, 68	57 Comp. Gen. 664	99
56 Comp. Gen. 427	186	58 Comp. Gen. 49	161
56 Comp. Gen. 537	138	58 Comp. Gen. 132	29
56 Comp. Gen. 889	117	58 Comp. Gen. 149	51
56 Comp. Gen. 1014	42	58 Comp. Gen. 381	90
57 Comp. Gen. 85	79	58 Comp. Gen. 388	89
57 Comp. Gen. 245	164	58 Comp. Gen. 475	168
57 Comp. Gen. 361	180	58 Comp. Gen. 509	20
57 Comp. Gen. 489	83	58 Comp. Gen. 612	126
57 Comp. Gen. 501	164	58 Comp. Gen. 672	122

DECISIONS OVERRULED OR MODIFIED

	Page		Page
44 Comp. Gen. 783	57	B-176128, Aug. 30, 1972	57
51 Comp. Gen. 231	39	B-188227, May 8, 1978	124

DECISIONS OF THE COURTS

	Page		Page
Aero Corp. *v.* Dept. of the Navy, Civil Action No. 79-2944	147	Kaspar Wire Works, Inc. *v.* Leco Engineering and Machinery 575 F. 2d 530	127
Aviles *v.* United States, 151 Ct. Cl. 1	103	Keco Industries, Inc. *v.* United States, 428 F. 2d 1233; 192 Ct. Cl. 773	140
Baille, Ray Trash Hanling, Inc. *v.* Kleppe, 477 F. 2d 696, cert. denied, 415 U.S. 914	22, 123	Keco Industries, Inc. *v.* United States, 492 F. 2d 1200; 203 Ct. Cl. 566	92, 180
Brawley *v.* United States, 96 U.S. 168	87	Kewanee Oil Co. *v.* Bicron Corp., 416 U.S. 470	138
Brock *v.* United States, 84 Ct. Cl. 453	87	Manatee County, Fla. *v.* Train, 583 F. 2d 179	6
Bud's Moving & Storage, Inc., Declaratory Order, 128 M.C.C. 56	125	McCarty Corporation *v.* United States, 499 F. 2d 633; 204 Ct. Cl. 768	84
Cowden *v.* United States, Ct. Cl. No. 242-78, dec. June 13, 1979	14	Munsey Trust Co., United States *v*, 332 U.S. 234	144
Curtiss-Wright Corp. *v.* McLucas, 381 F. Supp. 657	164	O'Brien *v.* Carney, 6 F. Supp. 651	180
Everett Plywood & Door Corp. *v.* United States, 190 Ct. Cl. 80	89	Penn, W. Horological Inst., Inc. *v.* United States, 146 Ct. Cl. 540	31
Ferroline Corp. *v.* General Aniline & Film Corp., 207 F. 2d 912	138	Sauer *v.* United States, 354 F. 2d 302; 173 Ct. Cl. 642	32
Friend *v.* Lee, 221 F. 2d 95	180	Smith *v.* Dravo Corp., 203 F. 2d 369	138
Gratiot *v.* United States, 40 U.S. (15 Pet.) 336	140	Testan, United States *v.*, 424 U.S. 392	187
Heyer Products Co., Inc. *v.* United States, 135 Ct. Cl. 63	140	Textron Inc., Bell Helicopter Textron Div. *v.* Adams, Civil Action No. 79-1749	160
		T.V.A. *v.* Hill, 437 U.S. 153	7

INDEX DIGEST

OCTOBER, NOVEMBER, DECEMBER 1979

ABSENCES

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

ACCOUNTABLE OFFICERS

Relief
Delegation of authority
Administrative denial
Finality regardless of amount involved Page

Delegation of authority to agencies to resolve administrative irregularities up to $500 is relevant only when agency believes accountable officer should be relieved of responsibility. Since General Accounting Office's (GAO) role is limited to concurring or refusing to concur with agency head's findings that statutory requisites for relief have been met, GAO may not grant relief, when no such findings have been made, regardless of the amount involved 113

AIRCRAFT

Carriers
Fly America Act
Applicability
Freight transportation

Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B–188227, May 8, 1978, modified 124

Contracts
Dismantling, transportation, and reassembly
Buy American Act applicability

Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. 10a–d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in request for proposals. However, addition of differential would not have changed order in which offerors stand 158

AIRCRAFT—Continued
Contracts—Continued
Service Life Extension Program Page
Even though protesting firm with considerable experience in maintaining C–130 aircraft could perform many tasks under contract involving replacement of parts to extend service life of aircraft with data and tooling available under its maintenance contract, procuring agency did not act arbitrarily in determining that specifications could not be provided to achieve competition. Consequently, determination to make sole-source award to original manufacturer is not legally objectionable 146

AIRLINES

Accommodations
Failure to furnish
Penalty payment. (*See* **COMPENSATION, Penalty payment by airline**)
Foreign
Travel expenses
Employees. (*See* **TRAVEL EXPENSES, Air travel**)

ALLOWANCES

Military personnel
Temporary lodgings. (*See* **STATION ALLOWANCES, Military personnel, Temporary lodgings**)
Travel allowances. (*See* **TRAVEL ALLOWANCES, Military personnel**)

APPOINTMENTS

Delay
Backpay
Entitlement
Individual hired by the Army after determination by Civil Service Commission that he had been improperly denied consideration for competitive civil service position is not entitled to backpay for the period prior to his actual appointment. The individual did not have a vested right to the appointment and since the Army retained administrative discretion with respect to filling the position until it exercised that discretion by appointing him effective January 4, 1978, he is not entitled to backpay for the period prior to his appointment 62

APPROPRIATIONS

Amended regulations effect. (*See* **REGULATIONS, Retroactive, Amended regulations**)
Availability
Promoting public support or opposition
Pending legislation
Livable Cities Program
Subcommittee of House Committee on Appropriations requested ruling on whether information package sent to members of the public by National Endowment for the Arts (NEA), concerning Livable Cities Program, then scheduled for House action on appropriations, violated restrictions on use of appropriated funds contained in section 304, Department of Interior and related agencies Appropriation Act, 1979, Pub.

APPROPRIATIONS—Continued
Availability—Continued
Promoting public support or opposition—Continued
Pending legislation—Continued
Livable Cities Program—Continued Page
L. No. 95-465, 92 Stat. 1279. Section 304 prohibits use of funds for activities, or for publication and distribution of literature tending to promote or oppose legislation pending before Congress. The material contained in NEA package supporting the Program during scheduled House action on appropriations constituted a clear violation of section 304. Because funds expended by NEA were small in amount and commingled with legal expenditures, it is not practical to attempt recovery---------- 115

Defense Department
Sewage treatment
Percentage limitation
Capital costs
Department of Navy would normally have no authority to make up "shortfall" in construction funds due to EPA funding policy, described above, unless costs were amortized and shared equally as part of the rate by all users of sewer services. See B-189395, April 27, 1978. However, recent military construction authorization and appropriation acts specifically make available funds for Navy's share of treatment facility at Hampton Roads Sanitation District, Virginia, and at plant in Honolulu, Hawaii. Navy may pay these costs without requiring additional consideration for the Government as long as its contribution does not exceed 75 percent of the costs—the amount the locality would have received but for the EPA funding policy----------

Limitations
Construction projects
Sufficient money was appropriated to enable Navy to pay 100 percent of Navy's share of wastewater treatment projects at Hampton Roads Sanitation District and Honolulu. However, there is no evidence that Congress intended to give localities more construction assistance than the 75 percent they would have otherwise received but for EPA's funding policy. Therefore, Navy must negotiate to obtain an additional benefit for the Government commensurate with the extra 25 percent contribution for capital costs---------- 1

ATTORNEYS

Fees
Agency authority to award
The Special Counsel of the Merit Systems Protection Board may not recommend the payment of attorney fees in those cases where the corrective action recommended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees---------- 107

ATTORNEYS—Continued

Fees—Continued
Appropriate authority to award
Merit Systems Protection Board
Special Counsel's status
Back Pay Act applicability Page

The Special Counsel of the Merit Systems Protection Board is not an "appropriate authority" with power to award attorney fees under the Back Pay Act, as amended, 5 U.S.C. 5596. However, the Special Counsel may include a recommendation to pay reasonable attorney fees in his recommendation for corrective action to be taken by an agency under 5 U.S.C. 5596 107

AUTOMOBILES

Transportation. (*See* **TRANSPORTATION, Automobiles**)

BIDDERS

Qualifications
Experience
Service contracts
Elevator maintenance, etc.

Where solicitation requires bidders to have three years experience in maintaining elevators similar to those covered by solicitation and to meet special training requirements, bidders must satisfy both criteria to be considered responsible. If one criterion was inadvertently included in solicitation and is not actual agency requirement, solicitation should be canceled as unduly restrictive 18

Qualified products procurement
Bidder *v.* product qualification

GAO fails to see why GSA does not accept apparent Department of Defense (DOD) position which stresses responsibility of QPL manufacturer for integrity of QPL product when bid by distributor. DOD position seems to constitute adequate protection against defective repackaging by distributor of qualified product in that if QPL manufacturer tolerates defective repackaging QPL status would be jeopardized 43

Unsuccessful
Anticipated profits

Anticipated profits are not recoverable against Government, even if claimant is wrongfully denied contract 61

BIDS

Acceptance time limitation
Extension
Responsiveness of bid

Bidder who has offered required bid acceptance period but subsequently allows bid to expire may accept award on basis of bid submitted. If at same time bid bond expires, procuring activity is not precluded from considering and/or accepting bid 73

BIDS—Continued

Ambiguous

Nonresponsive bid Page

Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause 140

Buy American Act

Price differential

Exclusionary items

Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. 10a–d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in request for proposals. However, addition of differential would not have changed order in which offerors stand 158

Competitive system

Confidentiality

Solicitation assurances

Propriety

Place of contract performance

While clause permitting bidders to make their proposed place(s) of contract performance confidential information ("except as inconsistent with existing law") may lessen or negate ability of competing bidders to challenge acceptability of other bids, contrary to fundamental concept of full and free competition, no objection will be made to award under resolicitation since none of bidders participating on resolicitation protested use of clause. However, recommendation is made that provision for confidentiality be deleted in future 140

Federal aid, grants, etc.

Compliance with requirements

Agency for International Development's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded 73

Qualified products use

Repackaging restriction which either increases cost of delivered product to Government or eliminates some concerns from bidding absent separate QPL listing is seen, based on present record, to be inconsistent with statutory requirement for "full and free" competition. Therefore, GAO recommends corrective action under Legislative Reorganization Act of 1970 43

BIDS—Continued

Invitation for bids
Cancellation
Request by SBA for 8(a) set-aside
Notice to bidders of possible set-aside
Timeliness

Page

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question 122

Interpretation
Definitive responsibility criteria
Small business set-aside

Where solicitation requires bidders to have three years experience in maintaining elevators similar to those covered by solicitation and to meet special training requirements, bidders must satisfy both criteria to be considered responsible. If one criterion was inadvertently included in solicitation and is not actual agency requirement, solicitation should be canceled as unduly restrictive 18

Mistakes
Correction
Nonresponsive bids

Nonresponsive bid may not be considered for correction regardless of circumstances since to permit this would be tantamount to permitting submission of new bid 140

Opening
Postponement
Pending consideration of 8(a) set-aside
Recommended by GAO

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question 122

Prices
Reasonableness
Administrative determination

Protest that prior solicitation should be canceled and items added to protester's current contract because of lower prices and resultant savings to Government is denied as contracting officer has determined prior prices to be reasonable and, therefore, DAR 2-404.1(b)(vi), permitting cancellation for unreasonable prices, is inapplicable 184

BIDS—Continued

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Responsiveness
Responsiveness *v.* bidder responsibility Page
GSA's professed concern about quality of process involved in repackaging QPL product is contradicted by solicitation which requires packaging in accordance with "normal commercial practice" without reference to applicable Federal Specification against which product was tested under QPL procedures. To extent GSA reasonably finds that concern does not have capacity to effectively repackage qualified product in accordance with "normal commercial practice" or has prior history of unsatisfactory repackaging, finding would serve as basis for decision that concern is not responsible---------- 43

BONDS

Bid
Deficiencies
Expiration date of bond
Bidder who has offered required bid acceptance period but subsequently allows bid to expire may accept award on basis of bid submitted. If at same time bid bond expires, procuring activity is not precluded from considering and/or accepting bid---------- 73

BUY AMERICAN ACT

Applicability
Supplies *v.* services in single contract
Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. 10a–d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in request for proposals. However, addition of differential would not have changed order in which offerors stand-------- 158

CLAIMS

False. (*See* **FRAUD, False claims**)

COMPENSATION

Backpay. (*See* **COMPENSATION, Removals, suspensions, etc., Backpay**)
Civilian employment of service member
Earnings set-off. (*See* **MILITARY PERSONNEL, Civilian service employment**)
Night work
Intermittent overtime basis
Absence of fixed schedule
Discernible pattern requirement
Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) where such overtime is considered "regularly scheduled work." Regularly scheduled means duly authorized in advance (at least 1 day) and scheduled to recur on successive days or after specified intervals. The overtime need not be subject to a fixed schedule each night but it must fall into a predictable and discernible pattern---------- 101

COMPENSATION—Continued

Night work—Continued
Night differential
Overtime basis
Entitlement criteria
Intermittent overtime Page

Night differential under 5 U.S.C. 5545(a) (1976) is payable not only to employees who regularly work a night shift but also to employees who perform occasional overtime during a scheduled night shift, not necessarily in their tour of duty. However, the scheduled night tour must be in the same office or work unit and must not be a special shift established for the convenience of one employee 101

Regular tour of duty requirement
Intermittent overtime status

Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) when they habitually and recurrently perform overtime at night due to the nature of their employment which requires them to remain on duty until their tasks are completed or until they are relieved from duty 101

Overtime
Administrative workweek
Six-day/four-day

Several nurses, GS–7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment 128

Inspectional service employees
Sunday and holiday work
Midnight-to-midnight cutoff

Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1½ days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper 110

COMPENSATION—Continued

Overtime—Continued

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

Traveltime

Administratively controllable Page

Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event 95

Penalty payment by airline

Acceptance by employee

Penalty payments made by air carriers for failing to furnish accommodations for confirmed reserved space are due the Government, not the traveler, when payments result from travel on official business. This is so notwithstanding that the delay in the employee's travel did not result in any additional cost to the Government and regardless of the fact that the travel was performed outside of the employee's regular duty hours 95

Periodic step-increases

Service credits

Lump-sum leave period

Employees cannot receive credit for accrued annual leave on his service computation date upon separation and reappointment by different agency since period covered by lump-sum payment is not counted as civilian Federal service 15

Removals, suspensions, etc.

Backpay

Appointment delay

Individual hired by the Army after determination by Civil Service Commission that he had been improperly denied consideration for competitive civil service position is not entitled to backpay for the period prior to his actual appointment. The individual did not have a vested right to the appointment and since the Army retained administrative discretion with respect to filling the position until it exercised that discretion by appointing him effective January 4, 1978, he is not entitled to backpay for the period prior to his appointment 62

Entitlement

Unjustified or unwarranted personnel action

Not affecting pay or allowances

Employee's reassignment and reduction in rank from GS–12 supervisory position to GS–12 nonsupervisory position was determined to be erroneous personnel action. However, such erroneous personnel action creates no entitlement to retroactive temporary promotion and backpay because it did not affect his pay and allowances as to constitute "an unjustified or unwarranted personnel action" remediable pursuant to the Back Pay Act, 5 U.S.C. 5596 (1976) 185

COMPENSATION—Continued

Removals, suspensions, etc.—Continued
Backpay—Continued
Unjustified personnel action requirement
What constitutes
Termination of detail status Page

Although action on March 6, 1977, reducing employee in rank from a supervisory GS–12 to a nonsupervisory GS–12 position was erroneous, correction of that action does not entitle employee to retroactive temporary promotion with backpay based on earlier action on October 30, 1976, terminating his detail to a GS–13 supervisory position and returning him to his GS–12 supervisory position. Termination of detail was within agency discretion and after October 30, 1976, employee no longer performed higher grade duties, which were assigned to another individual.. 185

CONTRACTORS

Incumbent
Failure to solicit
"Testing of market" solicitation

Suggestion is made to General Services Administration that it require agencies to include incumbent contractor as a participant whenever market is to be tested through solicitation---------- 68

Responsibility
Contracting officer's affirmative determination accepted

Contention that there would be less risk of delivery delay by purchasing items under protester's (established producer) contract rather than from proposed awardee (new producer) is denied since contracting officer has determined awardee to be responsible bidder---------- 184

Advice to procuring agency
Qualified products procurement

General Accounting Office will not review affirmative determination of responsibility, alleged to have been "carelessly and negligently" made; prior decision on this point is affirmed---------- 90

Exceptions
Not supported by record

Ordinarily GAO does not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not allege fraud, protester had failed to meet standard for review by GAO or courts------- 158

Responsibility v. contract administration
Allegation of nonresponsibility after award

Mere fact that allegation of nonresponsibility is made after award does not change question of responsibility into one of contract administration---------- 90

CONTRACTS

Aircraft. (*See* **AIRCRAFT, Contracts**)
Amounts
Estimates
Specific lot, job, etc.
Timber sales Page

Claim for unamortized road construction costs resulting from 39-percent discrepancy between estimated timber volume and actual timber volume cut is denied where: (1) record fails to establish that the Forest Service grossly disregarded applicable factors and procedures in preparing estimate; (2) there is no basis upon which to conclude that limited warranty (that road construction costs would be fully amortized) existed; and (3) volume estimate 39 percent under actual volume does not constitute gross error 84

Architect, engineering, etc. services
Contractor selection base
"Brooks Bill" application
Small business concerns
Procurement under 8(a) program

Award of architect and engineering contracts are governed by provisions of Brooks Bill, 40 U.S.C. 541 *et seq.* (1976), notwithstanding that zone of competition eligible for award may be legally limited by Small Business Administration's 8(a) program established pursuant to 15 U.S.C. 637(a) (1976), as amended 20

Awards
Delayed awards
Cancellation propriety
Lower price on subsequent procurement
Military regulation applicability

Protest that prior solicitation should be canceled and items added to protester's current contract because of lower prices and resultant savings to Government is denied as contracting officer has determined prior prices to be reasonable and, therefore, DAR 2-404.1(b)(vi), permitting cancellation for unreasonable prices, is inapplicable 184

Erroneous
Anticipated profits, etc. claims

Anticipated profits are not recoverable against Government, even if claimant is wrongfully denied contract 61

Performance
Substantial

Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. Request for proposals, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; General Accounting Office recommends that options not be exercised ... 80

CONTRACTS—Continued

Awards—Continued

Federal aid, grants, etc.

Competitive bidding procedure

Foreign countries using AID funds — Page

Agency for International Development's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded ---- 73

Small business concerns

Certifications

Failure to request

Exclusion on basis other than contractor's responsibility

Referral to Small Business Administration for Certificate of Competency (COC) is inappropriate where small business was excluded because agency was not in position to provide specification believed necessary for performance and is required to make sole-source award to original manufacturer in the absence of such specifications. COC procedure does not affect agency's determination of its technical needs, *e.g.*, the extent to which specifications are considered necessary to reduce risk to acceptable level ---- 146

Mandatory referral to SBA

Small purchases

Contracting officer's determination that low small business quoter was not responsible without referral to Small Business Administration (SBA) under Certificate of Competency (COC) procedures was improper as contracting officer is required by regulation to refer all matters of responsibility to SBA and no exception exists in Federal Procurement Regulations where procurement is made under small purchase procedures for contracts up to $10,000 ---- 144

End product contributor

Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failuure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause ---- 140

Erroneous award

Certificate of Competency status

Where agency terminated existing contract in order to award remainder of contract to claimant, a small business receiving a Certificate of Competency from Small Business Administration, agency can only offer 4-month balance of 1-year contract to claimant since award of full year contract at that point would go beyond original solicitation ---- 61

CONTRACTS—Continued

Awarss—Continued
Small business concerns—Continued
Procurement under 8(a) program
Notice requirements
Other-type procurement pending Page

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question 122

Subcontractor eligibility
Architect and engineering services. (*See* **CONTRACTS, Architect, engineering, etc., services, Contractor selection base**)

Buy American Act
Foreign products
End product *v.* components

Airframe manufactured, tested and certified in France and disassembled for shipment to offeror in United States is foreign-manufactured component and, if airframe's cost is more than 50 percent of costs of all components of helicopter end product, helicopter is foreign source end product, and 6-percent differential required by Buy American Act, 41 U.S.C. 10a–d (1976), and implementing regulations, should have been added to foreign offer before offers were evaluated according to technical/cost basis procedure in request for proposals. However, addition of differential would not have changed order in which offerors stand 158

Clauses
Escalation. (*See* **CONTRACTS, Escalation clauses**)

Confidentiality
Protection
Solicitation assurances
Effect on competition. (*See* **BIDS, Competitive system, Confidentiality, Solicitation assurances**)

Data, rights, etc.
Disclosure
Owner's prior consent, etc.

Claim for disclosure of proprietary information in testimony by Air Force personnel is denied because same information was already disclosed in greater detail with knowledge and assent of claimant 134

Status of information furnished
Bidder, etc. *v.* Government benefit

Claim for payment for production of information for use and benefit of Air Force is denied where information was produced for benefit of claimant in effort to satisfy prebid condition on sale of surplus herbicide orange 134

CONTRACTS—Continued

Data, rights, etc.—Continued
Use by Government
Claim for unauthorized use Page

Claim for use of proprietary data by Air Force in efforts to obtain permit for destruction of herbicide orange at sea is denied because it was failure of either Air Force or claimant to accomplish acceptable destruction of dioxin residues that would result from reprocessing of herbicide that was subject of testimony. General and abbreviated references to data already disclosed in same forum in effort to obtain approval for herbicide reprocessing was not use of proprietary information..... 134

Escalation clauses
Prices

Fact that price adjustment percentages to be used in economic price adjustment clauses are to be based on domestic indexes, instead of French economy where some costs will be incurred, is determined to be irrelevant. 158

Extension
Remainder of contract after termination and reaward
Propriety. (*See* **CONTRACTS, Termination, Erroneous award remedy, Re-award of contract remainder, Extension of contract period**)

Modification
Additional work or quantities

City and County of Honolulu, Hawaii, supplies wastewater treatment for some Navy facilities, under contract. Upgraded system would also include other Navy facilities which presently have their own systems. Extention of service to additional facilities might afford adequate consideration for Government's payment of 100 percent Federal facility share of new plant costs..... 1

Consideration
Absence

Sufficient money was appropriated to enable Navy to pay 100 percent of Navy's share of wastewater treatment projects at Hampton Roads Sanitation District and Honolulu. However, there is no evidence that Congress intended to give localities more construction assistance than the 75 percent they would have otherwise received but for EPA's funding policy. Therefore, Navy must negotiate to obtain an additional benefit for the Government commensurate with the extra 25 percent contribution for capital costs..... 1

Rule

Department of Navy would normally have no authority to make up "shortfall" in construction funds due to EPA funding policy, described above, unless costs were amortized and shared equally as part of the rate by all users of sewer services. See B–189395, April 27, 1978. However, recent military construction authorization and appropriation acts specifically make available funds for Navy's share of treatment facility at Hampton Roads Sanitation District, Virginia, and at plant in Honolulu, Hawaii. Navy may pay these costs without requiring additional consideration for the Government as long as its contribution does not exceed 75 percent of the costs—the amount the locality would have received but for the EPA funding policy..... 1

CONTRACTS—Continued

Modification—Continued

Sewer agreements. (*See* **SEWERS, Service charges, Increases, Agreement modification**)

Negotiation

Evaluation factors

Administrative determination Page

Protest against agency's technical evaluation of proposals is reviewed against General Accounting Office (GAO) standard that judgment of procuring agency officials, based on solicitation's evaluation criteria as to technical adequacy of proposals, will not be questioned unless shown to be unreasonable, an abuse of discretion or in violation of procurement statutes and regulations. Standard is not found to have been violated.. 158

All offerors informed requirement

Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. Request for proposals, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; General Accounting Office recommends that options not be exercised... 80

Offers or proposals

Preparation

Costs

Arbitrary and capricious Government action

Protester's claim for proposal preparation costs must be denied where it cannot be shown that protester would have been awarded the contract but for the agency's action..... 80

Sole-source basis

Justification

Initial *v.* follow-on contracts or option exercise

Where agency's choice of procurement method reflects its own uncertainty as to technical risks which may be overcome during contractor's performance of work on initial quantity of aircraft to be serviced, sole-source determination should be reviewed before exercise of option for increased quantity or award of follow-on contract..... 146

Parts, etc.

Competition availability

Even though protesting firm with considerable experience in maintaining C–130 aircraft could perform many tasks under contract involving replacement of parts to extend service life of aircraft with data and tooling available under its maintenance contract, procuring agency did not act arbitrarily in determining that specifications could not be provided to achieve competition. Consequently, determination to make sole-source award to original manufacturer is not legally objectionable..... 146

CONTRACTS—Continued

Options
Advantage to Government Page
When additional price reduction properly is taken into consideration, making incumbent's option prices more favorable than protester quotation, agency decision to exercise options is rationally founded and not subject to legal objection 68

Price reduction
After closing date for market testing solicitation
When agency "tests the market" through issuance of request for quotations to determine if it is advantageous to exercise contract purchase options, but does not solicit incumbent or otherwise place incumbent on notice of market test, Government should not be precluded from evaluating more advantageous option price offered by contractor after deadline for receipt of quotations since unlike situation in formal advertising, competitive pricing is not exposed and contractor did not otherwise have opportunity to meet competition of market test 68

Performance
Place of performance
Confidentiality
Solicitation assurances
Propriety
While clause permitting bidders to make their proposed place(s) of contract performance confidential information ("except as inconsistent with existing law") may lessen or negate ability of competing bidders to challenge acceptability of other bids, contrary to fundamental concept of full and free competition, no objection will be made to award under resolicitation since none of bidders participating on resolicitation protested use of clause. However, recommendation is made that provision for confidentiality be deleted in future 140

Prices
Adjustment
Latest available indices
Domestic *v.* foreign
Foreign article procurement
Fact that price adjustment percentages to be used in economic price adjustment clauses are to be based on domestic indexes, instead of French economy where some costs will be incurred, is determined to be irrelevant 158

Protests
Abeyance pending court action
Not all issues pending
"Claim preclusion" principle
Protest will not be considered because some issues involved are expressly before court, other protest issues not expressly before court are, as practical matter, before court under "claim preclusion" principle, and relief sought from General Accounting Office (GAO) and court is similar. Furthermore, court has not expressed interest in obtaining GAO's views but has instead denied protester-plaintiff's request for preliminary injunction in pending civil action 126

CONTRACTS—Continued

Protests—Continued
Authority to consider
Grant procurements
Foreign government grantee Page

General Accounting Office (GAO) will undertake reviews concerning propriety of contract awards by foreign governments under Agency for International Development grants. Purpose of GAO review is to determine whether there has been compliance with applicable statutory requirements, agency regulations and terms of grant agreement and advise Federal grantor agency, which has authority for administering grant, accordingly 73

Sustained
Evaluation of proposals
Deviation from stated criteria

Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. Request for proposals, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; General Accounting Office recommends that options not be exercised 80

Timeliness
Grant-funded procurements

GAO Bid Protest Procedures are not applicable to review of grant complaints; consequently, GAO will consider complaint notwithstanding possible failure to comply with timeliness standards of Bid Protest Procedures 73

Solicitation improprieties
Request for quotations

Portion of protest alleging insufficient time to furnish proposals, an unrealistically short delivery schedule, and other solicitation defects should have been filed before closing date for receipt of quotations and is untimely 68

Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)

Requests for quotations
Competition
Equality of competition

Suggestion is made to General Services Administration that it require agencies to include incumbent contractor as a participant whenever market is to be tested through solicitation 68

CONTRACTS—Continued

Specifications

Failure to furnish something required

Small business data Page

Bid received on total small business set-aside wherein sole bidder indicated that it, as regular dealer, would not supply materials manufactured by small business concerns was determined properly to be nonresponsive due to failure to submit binding promise to meet set-aside requirement, even though allegedly small business firms were listed in "Place of Performance" clause 140

Minimum needs requirement

Administrative determination

Agency for International Development's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded 73

Qualified products

Costs

Repackaging restriction which either increases cost of deliverd product to Government or eliminates some concerns from bidding absent separate QPL listing is seen, based on present record, to be inconsistent with statutory requirement for "full and free" competition. Therefore, GAO recommends corrective action under Legislative Reorganization Act of 1970 43

Dealer or distributor

GAO fails to see why GSA does not accept apparent Department of Defense (DOD) position which stresses responsibility of QPL manufacturer for integrity of QPL product when bid by distributor. DOD position seems to constitute adequate protection against defective repackaging by distributor of qualified product in that if QPL manufacturer tolerates defective repackaging QPL status would be jeopardized. 43

Listing

Capability to deliver listed product

Contractor responsibility and/or contract administration matter

Mere fact that allegation of nonresponsibility is made after award does not change question of responsibility into one of contract administration 90

Packaging requirements

GSA's professed concern about quality of process involved in repackaging QPL product is contradicted by solicitation which requires packaging in accordance with "normal commercial practice" without reference to applicable Federal Specification against which product was tested under QPL procedures. To extent GSA reasonably finds that concern does not have capacity to effectively repackage qualified product in accordance with "normal commercial practice" or has prior history of unsatisfactory repackaging, finding would serve as basis for decision that concern is not responsible 43

CONTRACTS—Continued

Specifications—Continued
Qualified products—Continued
Requirement
Erroneous
Repackaging of qualified product Page

Although GSA alludes generally to prior "problems" involving repackaging of qualified products by non-QPL distributors giving rise to repackaging restriction, there is nothing in record which explains what "problems" were or extent of such problems. Further, there is no evidence supporting current validity of repackaging restriction—which is waived in certain circumstances—even if there may have been some justification, not revealed to GAO, for original restriction adopted in 1968 43

Status
Repackaging effect

Essential needs of Government are for end item being procured rather than for containers holding end item so that QPL status of qualified product should not generally be regarded as being affected by nonmanufacturing step such as repackaging end item. That repackaging generally should not be considered "manufacturing" is seen from analysis of term "manufacturing" taken from case interpreting Buy American Act. Although care must be taken to avoid contamination of adhesives in repackaging process, GAO doubts whether care required would convert repackaging into manufacturing process so as to affect QPL status of adhesive brand being offered 43

Tests
Aircraft
Proposed *v.* testing model

Although solicitation required that proposed helicopter be directly derived from helicopter submitted for flight evaluation, provision in which requirement is included, when read as whole, indicates that intention was that flight-tested aircraft have potential to meet agency's mission and performance requirements 158

Termination
Erroneous award remedy
Re-award of contract remainder
Extension of contract period
Propriety

Where agency terminated existing contract in order to award remainder of contract to claimant, a small business receiving a Certificate of Competency from Small Business Administration, agency can only offer 4-month balance of 1-year contract to claimant since award of full year contract at that point would go beyond original solicitation 61

COURTS

Reporters
Federal courts
"Penalty mail" use
Propriety
Official business requirement Page

Court reporters may not use penalty mail envelopes for fee-generating correspondence even though they reimburse the Administrative Office of the United States Courts if Office determines that such activities are not official business. 39 U.S.C. 3202 permits use of penalty mail only for official business 51

Reimbursement
Official business requirement

United States court reporters must pay for postage and associated expenses of mailings of official court correspondence pursuant to their duties under 28 U.S.C. 753, because of the requirement that they must furnish all supplies at their own expense. The statute allowing official mail of officers of the United States (39 U.S.C. 3202) to be sent without postage prepaid does not exempt the court reporters from bearing the ultimate costs of the postage. The reporters may be permitted by the Administrative Office of the United States Courts to use penalty mail on a reimbursable basis in connection with the part of their duties which does not involve sale of transcripts for a fee 51

CUSTOMS

Employees
Overtime services
Reimbursement
Customs Service inspector employees
"1931 Act overtime"

Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1½ days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper 110

DEBT COLLECTIONS

Waiver
Civilian employees
Relocation expenses

Employee of Postal Service hired by Forest Service was erroneously authorized and reimbursed for travel and relocation expenses instead of travel and transportation expenses as new appointee to manpower shortage position. Employee must repay amounts erroneously paid since overpayments of travel and relocation expenses may not be waived under 5 U.S.C. 5584; there is no basis for compromise or termination of collection action under Federal Claims Collecting Act; and Government is not estopped from repudiating erroneous advice or authorization of its agents 28

DEPARTMENTS AND ESTABLISHMENTS

Services between
Reimbursement
Damages Page

In the absence of specific statutory authority, the Department of Army may not reimburse the Department of Agriculture for cost of restoration of real property damaged by Army training exercises in De Soto National Forest. Generally, one executive department may not be reimbursed for real property damaged by another executive department. 44 Comp. Gen. 693 (1965)---------- 93

DETAILS

Terminations

Although action on March 6, 1977, reducing employee in rank from a supervisory GS–12 to a nonsupervisory GS–12 position was erroneous, correction of that action does not entitle employee to retroactive temporary promotion with backpay based on earlier action on October 30, 1976, terminating his detail to a GS–13 supervisory position and returning him to his GS–12 supervisory position. Termination of detail was within agency discretion and after October 30, 1976, employee no longer performed higher grade duties, which were assigned to another individual---- 146

DISBURSING OFFICERS

Accounts
False, etc. claims

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for those days. 57 Comp. Gen. 664, amplified---------- 99

ENVIRONMENTAL PROTECTION AND IMPROVEMENT

Environmental Protection Agency
Hazardous substances
Disposal, etc. control
Surplus sales

Claim for use of proprietary data by Air Force in efforts to obtain permit for destruction of herbicide orange at sea is denied because it was failure of either Air Force or claimant to accomplish acceptable destruction of dioxin residues that would result from reprocessing of herbicide that was subject of testimony. General and abbreviated references to data already disclosed in same forum in effort to obtain approval for herbicide reprocessing was not use of proprietary information---------- 134

ENVIRONMENTAL PROTECTION AND IMPROVEMENT—Continued

Grants-in-aid
Waste treatment
Recovery costs
Costs allocable to Government use Page

Department of Navy would normally have no authority to make up "shortfall" in construction funds due to EPA funding policy, described above, unless costs were amortized and shared equally as part of the rate by all users of sewer services. See B-189395, April 27, 1978. However, recent military construction authorization and appropriation acts specifically make available funds for Navy's share of treatment facility at Hampton Roads Sanitation District, Virginia, and at plant in Honolulu, Hawaii. Navy may pay these costs without requiring additional consideration for the Government as long as its contribution does not exceed 75 percent of the costs—the amount the locality would have received but for the EPA funding policy 1

EQUIPMENT

Automatic Data Processing System
Lease-purchase agreements
Acquisition of equipment
Option evaluation
Market testing

When additional price reduction properly is taken into consideration, making incumbent's option prices more favorable than protester quotation, agency decision to exercise options is rationally founded and not subject to legal objection 68

FAIR LABOR STANDARDS ACT

Overtime
Fair Labor Standards Act *v.* other pay laws

Several nurses, GS-7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment 128

FEDERAL EMPLOYEES INTERNATIONAL ORGANIZATION SERVICE ACT

Transfer of Federal employees etc. (*See* INTERNATIONAL ORGANIZATIONS, Transfer of Federal employees, etc.)

FEDERAL WATER POLLUTION CONTROL ACT

Grants-in-aid
Limitations Page
Environmental Protection Agency has no authority to exclude from eligibility for a construction grant a percentage of the total costs of an otherwise acceptable project to upgrade a wastewater treatment facility equal to the percentage of service the facility would be required to provide to a major Federal facility. Section 202(a)(1) of the Federal Water Pollution Control Act as amended requires payment of full 75 percent of approved costs of the total project. Although justified as "saving" grant funds, EPA may not artifically reduce the total costs of a project which otherwise meets its standards solely to stretch available grant funds to cover additional projects 1

FEES

Attorneys
Grievance proceedings
Employee entitlement to fees
The Special Counsel of the Merit Systems Protection Board may not recommend the payment of attorney fees in those cases where the corrective action recommended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees 107

FLY AMERICA ACT

Applicability to freight transportation. (*See* **AIRCRAFT, Carriers, Fly America Act, Applicability, Freight transportation**)

FOREIGN AID PROGRAMS

Contracts
Agency for International Development (AID) grants
Procurement procedures
Control by AID reserved
Review by GAO
General Accounting Office (GAO) will undertake reviews concerning propriety of contract awards by foreign governments under Agency for International Development grants. Purpose of GAO review is to determine whether there has been compliance with applicable statutory requirements, agency regulations and terms of grant agreement and advise Federal grantor agency, which has authority for administering grant, accordingly 73

FRAUD

False claims
Forefeiture
Rule
Applicability
Military personnel
The decision in 57 Comp. Gen. 664 (1978), holding that where a civilian employee submits a travel voucher wherein part of the claim is believed to be fraudulent, and that only the expenses for days for which fraudulent information was submitted should be denied, is applicable to military members and non-Government employees traveling pursuant to invitational travel orders as well. 57 Comp. Gen. 664, amplified 99

FRAUD—Continued

False claims—Continued
Related, etc. claim effect
Item and date separability
Fraudulent claim for lodgings effect
Actual expenses *v.* per diem Page

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for those days. 57 Comp. Gen. 664, amplified 99

A fraudulent claim for lodgings taints the entire claim for an actual expense allowance for days for which fraudulent information was submitted and payments for those days will be denied to the claimant. 57 Comp. Gen. 664, amplified 99

GENERAL ACCOUNTING OFFICE

Decisions
Abeyance
Pending court, quasi-judicial, appellate board, etc. action

Protest will not be considered because some issues involved are expressly before court, other protest issues not expressly before court are, as practical matter, before court under "claim preclusion" principle, and relief sought from General Accounting Office (GAO) and court is similar. Furthermore, court has not expressed interest in obtaining GAO's views but has instead denied protester-plaintiff's request for preliminary injunction in pending civil action 123

Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Negligence in determination alleged

General Accounting Office will not review affirmative determination of responsibility, alleged to have been "carelessly and negligently" made; prior decision on this point is affirmed 90

Small business matters
Procurement under 8(a) program

In protest involving 8(a) procurement, bad faith is not shown merly by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question .. 122

Scope of review

General Accounting Office will review 8(a) set-aside determination where question is whether relevant rules and regulations have been followed by agencies involved 20

GENERAL ACCOUNTING OFFICE—Continued

Jurisdiction—Continued
Grants-in-aid
Grant procurements
Foreign government grantee Page

General Accounting Office (GAO) will undertake reviews concerning propriety of contract awards by foreign governments under Agency for International Development grants. Purpose of GAO review is to determine whether there has been compliance with applicable statutory requirements, agency regulations and terms of grant agreement and advise Federal grantor agency, which has authority for administering grant, accordingly ---------- 73

GRANTS

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

INTERGOVERNMENTAL PERSONNEL ACT

Transportation of household goods
Return expense reimbursement
New location

Under 5 U.S.C. 3375, Western Carolina University employee who completed assignment with Federal Government under Intergovernmental Personnel Act (IPA) may be reimbursed cost of moving his household goods and dependent travel to Cleveland State University, not to exceed the constructive cost of such travel and transportation to Western Carolina University. Employee's own travel costs may be reimbursed to the same extent since he was not required by regulation or the terms of his IPA agreement to return to Western Carolina University ---------- 105

INTERNATIONAL ORGANIZATIONS

Transfer of Federal employees, etc.
Federal Employees International Organization Service Act
Transfer entitlements
Limitations

Agency for International Development employee transferred to international organizations for 4 years is not entitled to rest and recuperation travel, granting of earned leave benefits, and reimbursement of expenses incurred in shipment of personal automobile since such benefits are not authorized under 5 C.F.R. 352.310(a)(3) implementing 5 U.S.C. 3582(b). Also, employee was considered for promotion by agency while serving with international organizations as required by 5 C.F.R. 352.314 (1970) -- 130

Reemployment guarantees
Equalization allowance

Agency for International Development (AID) employee transferred to international organization in Indonesia for 1 year and to second international organization in Mexico for 3 years under Federal Employees International Organization Service Act, as amended, 5 U.S.C. 3581 to 3584. In determining employee's entitlement to equalization allowance AID properly considered total pay and allowances received from both international organizations since equalization allowance is effective only upon employee's reemployment by AID at end of second assignment --- 130

LEAVES OF ABSENCE

Annual and Sick Leave Act

Coverage

Temporary commission employees Page

Employees of certain temporary commissions are subject to the Annual and Sick Leave Act since they are not specifically excepted from the Act and are employees as defined in section 2105, title 5, United States Code 31

Compensatory time

Travel on nonworkday

Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event 95

Lump-sum payments

Status

Period of payment not service

Employees cannot receive credit for accrued annual leave on his service computation date upon separation and reappointment by different agency since period covered by lump-sum payment is not counted as civilian Federal service 15

LOBBYING

Appropriation prohibition

Promoting public support or opposition

Subcommittee of House Committee on Appropriations requested ruling on whether information package sent to members of the public by National Endowment for the Arts (NEA), concerning Livable Cities Program, then scheduled for House action on appropriations, violated restrictions on use of appropriated funds contained in section 304, Department of Interior and related agencies Appropriation Act, 1979, Pub. L. No. 95-465, 92 Stat. 1279. Section 304 prohibits use of funds for activities, or for publication and distribution of literature, tending to promote or oppose legislation pending before Congress. The material contained in NEA package supporting the Program during scheduled House action on appropriations constituted a clear violation of section 304. Because funds expended by NEA were small in amount and commingled with legal expenditures, it is not practical to attempt recovery ... 115

MERIT SYSTEMS PROTECTION BOARD

Special Counsel

Authority under Civil Service Reform Act of 1978

Corrective action

Recommendations

Attorney fees

The Special Counsel of the Merit Systems Protection Board may not recommend the payment of attorney fees in those cases where the corrective action recommended is outside the purview of the Back Pay Act, absent some other statutory authority authorizing the complainant employee's agency to award attorney fees 107

MILEAGE

Proration formula

Air transportation in violation of "Fly America Act" Page

Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B–188227, May 8, 1978, modified 124

MILITARY PERSONNEL

Civilian service employment

Incompatibility with active military service

The rules governing parole of a service member confined by military authorities as a result of a court-martial sentence require as a prerequisite to that parole that the parolee will have gainful employment. Therefore, in the absence of a statute so authorizing, it would be improper to set off civilian earnings against military pay due for a parole period which becomes a period of entitlement to pay and allowances, unless the earnings are from Federal civilian employment which is considered incompatible with military service 12

Claims

Fraudulent

Forfeiture rule. (*See* **FRAUD, False claims, Forfeiture, Rule**)

Dependents

Certificates of dependency

Filing requirements

Recertification of dependency certificates for entitlement to basic allowance for quarters by members of the Army Reserves may be accomplished by the use of computer-generated listing. Further, such recertification may be made for a period exceeding 1 year where annual training cannot be programmed within 12 months of the prior training period. 51 Comp. Gen. 231 (1971), modified 39

Pay. (*See* **PAY**)

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

Temporary lodging allowances. (*See* **STATION ALLOWANCES, Military personnel, Temporary lodgings**)

Transportation

Household effects. (*See* **TRANSPORTATION, Household effects, Military personnel**)

Travel allowances. (*See* **TRAVEL ALLOWANCES, Military personnel**)

NATIONAL ENDOWMENT FOR THE ARTS

Appropriation availability

Promoting public support or opposition. (*See* **APPROPRIATIONS, Availability, Promoting public support or opposition**)

OFFICERS AND EMPLOYEES

Appointments. (*See* **APPOINTMENTS**)
Compensation. (*See* **COMPENSATION**)
Details. (*See* **DETAILS**)
Hours of work
Forty-hour week
Workweek changes
Leave and overtime effect Page

Several nurses, GS–7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment.. 128

Household effects
Transportation. (*See* **TRANSPORTATION, Household effects**)
Leave of absence. (*See* **LEAVES OF ABSENCE**)
Reemployment or reinstatement
Rights

Employee alleges he had reemployment rights upon separation from agency in reduction in force. He is not entitled to service credit or pay adjustment based on violation of reemployment rights. Civil Service Regulations provide that employee may appeal alleged violation of reemployment rights to Civil Service Commission and there is no evidence of determination by Commission upon which to base entitlement to service credit or pay adjustment..... 15

Removals, suspensions, etc. (*See* **COMPENSATION, Removals, suspensions, etc.**)
Service agreements
Transfers. (*See* **OFFICERS AND EMPLOYEES, Transfers, Service agreements**)
Transfers
Relocation expenses
New appointments
Manpower shortage category

Employee of Postal Service hired by Forest Service was erroneously authorized and reimbursed for travel and relocation expenses instead of travel and transportation expenses as new appointee to manpower shortage position. Employee must repay amounts erroneously paid since overpayments of travel and relocation expenses may not be waived under 5 U.S.C. 5584; there is no basis for compromise or termination of collection action under Federal Claims Collection Act; and Government is not estopped from repudiating erroneous advice or authorization of its agents..... 28

OFFICERS AND EMPLOYEES—Continued

Transfers—Continued
Service agreements
Failure to fulfill
Absent without leave status Page

Agriculture employee agreed to remain in Government service for 12 months after effective date of transfer on June 5, 1977. Employee applied for disability retirement and agency granted him sick leave August 7, 1977, pending outcome of application. Atfer employee exhausted sick and annual leave agency granted him leave without pay. When application and request for reconsideration were denied by Civil Service Commission, agency ordered employee to report for duty on June 2, 1978, or be placed in "absent without leave (AWOL)" status. Employee is not entitled to relocation expenses since he failed to report and AWOL time is not creditable service for purpose of service agreement..... 25

Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Hours of travel
Regular *v.* nonduty hours

Where airline overbooked the Thursday night flight on which employee had reservations for return travel and rebooked him on the next available flight, employee is not entitled to overtime compensation or compensatory time off for his travel time under 5 U.S.C. 5542(b)(2)(B). Although agency did not have control over airline's actions which delayed employee's travel, the event that necessitated his travel—return to his permanent duty station—was subject to administrative control. Employee's presence at his duty station the following workday was not an administratively uncontrollable event..... 95

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

OFFICE OF PERSONNEL MANAGEMENT

Jurisdiction
Fair Labor Standards Act

Several nurses, GS–7 and 9, employed by Bureau of Prisons were scheduled by supervisor as requested by the nurses to work 6 days in one administrative workweek and 4 days in other workweek during pay periods involved. If any nurses are covered by Fair Labor Standards Act they would be entitled to overtime compensation for work in excess of 40 hours a week. For those nurses not covered by FLSA and where warden, only official authorized to order or approve overtime, did not do so, there is no entitlement under 5 U.S.C. 5542 to compensate nurses for overtime hours worked. For those nurses not covered by FLSA, Bureau may treat additional workday in the 6-day workweek as an offset day in the related 4-day workweek eliminating any other adjustment..... 128

PAY

After expiration of entlistment
Confinement, etc. periods
Review of court-martial pending
Parole status
Acquittal effect Page

A service member whose enlistment expired while in confinement pending appellate review of his court-martial sentence is not entitled to pay and allowances for period of confinement subsequent to expiration of his enlistment unless the conviction is completely overturned or set aside. Where it is so overturned or set aside and a portion of confinement time is served in a parole status, since the military exercises constraints on parolee's action, even though to a lesser degree than actual confinement, such constraints are just as real. Therefore, the individual is entitled to pay and allowances for his parole period. Compare *Cowden* v. *United States*, Ct. Cl. No. 242-78, decided June 13, 1979 12

Civilian employees. (*See* **COMPENSATION**)

POSTAL SERVICE, UNITED STATES

Mails
"Penalty" mail
Use
Court reporters
Federal courts. (*See* **COURTS, Reporters, Federal courts, "Penalty mail" use**)

PUBLIC LANDS

Interagency loans, transfers, etc.
Damages, restoration, etc.
Authority

In the absence of specific statutory authority, the Department of Army may not reimburse the Department of Agriculture for cost of restoration of real property damaged by Army training exercises in De Soto National Forest. Generally, one executive department may not be reimbursed for real property damaged by another executive department. 44 Comp. Gen. 693 (1965) 93

PURCHASES

Small
Small business concerns
Certificate of Competency procedures under SBA
Applicability

Contracting officer's determination that low small business quoter was not responsible without referral to Small Business Administration (SBA) under Certificate of Competency (COC) procedures was improper as contracting officer is required by regulation to refer all matters of responsibility to SBA and no exception exists in Federal Procurement Regulations where procurement is made under small purchase procedures for contracts up to $10,000 144

QUARTERS ALLOWANCE

Basic allowance for quarters (BAQ)
Dependents
Certificates of dependency
Filing requirements
Annual recertification

Page

Recertification of dependency certificates for entitlement to basic allowance for quarters by members of the Army Reserves may be accomplished by the use of computer-generated listing. Further, such recertification may be made for a period exceeding 1 year where annual training cannot be programmed within 12 months of the prior training period. 51 Comp. Gen. 231 (1971), modified---------- 39

RAILROADS

Railroad Retirement Board
"Protective Account"
Set-off availability
Insurance account indebtedness

The Railroad Retirement Board may set off reimbursements due to railroads from the Regional Rail Transportation Protective Account described in 45 U.S.C. 779 (1976) against amounts owed to the Board by the railroads under the Railroad Unemployment Insurance Act. Board's right of setoff derives from common law right of the Government to retain moneys otherwise due debtors in satisfaction of their debts. Although the withheld protective account reimbursements will be transferred to Board's insurance fund, this does not constitute violation of Protective Account statutory authority forbidding protective account funds to be used for insurance payments. Protective funds are being used for proper purposes but merely being withheld to satisfy independent debt---------- 143

REGULATIONS

Retroactive
Amended regulations

Although the Department of Defense Appropriation Act, 1979, appropriated funds which could be used for extension of travel and transportation entitlements to junior enlisted service members, the regulations authorizing the entitlements were issued under the existing authority of 37 U.S.C. Chapter 7 (1976) and 10 U.S.C. 2634 (1976). Therefore, the effective date of the junior enlisted travel entitlements is the effective date of the regulations, which may not be amended retroactively, and not the earlier effective date of the Appropriation Act---------- 41

SALES

Cancellation
Government liability
Withdrawal of sales item
Hazardous substances
Environmental impact consideration

Decision to terminate negotiations and stop proposed sale of surplus herbicide orange is neither arbitrary nor capricious where neither prospective purchaser nor Air Force is able to satisfy presale condition for environmentally acceptable disposition of contaminated filters. Risk that sale might be halted remains with prospective purchaser even though Air Force offers to assume control of filters---------- 134

SALES—Continued

Hazardous substances
Disposal, etc. control
Surplus sales. (*See* **ENVIRONMENTAL PROTECTION AND IMPROVEMENT, Environmental Protection Agency, Hazardous substances, Disposal, etc. control, Surplus sales**)
Timber. (*See* **TIMBER SALES**)

SET-OFF

Pay, etc. due military personnel
Private employment earnings
Members in parole status — Page

The rules governing parole of a service member confined by military authorities as a result of a court-martial sentence require as a prerequisite to that parole that the parolee will have gainful employment. Therefore, in the absence of a statute so authorizing, it would be improper to set off civilian earnings against military pay due for a parole period which becomes a period of entitlement to pay and allowances, unless the earnings are from Federal civilian employment which is considered incompatible with military service ---------- 12

SEWERS

Services charges
Increases
Agreement modification

Sufficient money was appropriated to enable Navy to pay 100 percent of Navy's share of wastewater treatment projects at Hampton Roads Sanitation District and Honolulu. However, there is no evidence that Congress intended to give localities more construction assistance than the 75 percent they would have otherwise received but for EPA's funding policy. Therefore, Navy must negotiate to obtain an additional benefit for the Government commensurate with the extra 25 percent contribution for capital costs ---------- 1

SMALL BUSINESS ADMINISTRATION

Authority
Small business concerns
Allocation of 8(a) subcontracts

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of Small Business Administration's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question --- 122

Contracts
Contracting with other Government agencies
Subcontracting under 8(a) program
Architect-engineering services. (*See* **CONTRACTS, Architect, engineering, etc., services, Contractor selection base**)

SOCIAL SECURITY ADMINISTRATION

Employees
Overtime
Night differential
Entitlement

Page

Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) when they habitually and recurrently perform overtime at night due to the nature of their employment which requires them to remain on duty until their tasks are completed or until they are relieved from duty 101

STATES

Federal aid, grants, etc.
Percentage limitation

Environmental Protection Agency has no authority to exclude from eligibility for a construction grant a percentage of the total costs of an otherwise acceptable project to upgrade a wastewater treatment facility equal to the percentage of service the facility would be required to provide to a major Federal facility. Section 202(a)(1) of the Federal Water Pollution Control Act as amended requires payment of full 75 percent of approved costs of the total project. Although justified as "saving" grant funds, EPA may not artificially reduce the total cost of a project which otherwise meets its standards solely to stretch available grant funds to cover additional projects 1

STATION ALLOWANCES

Military personnel
Temporary lodgings
Concurrent payment of per diem and temporary lodging allowance

The Joint Travel Regulations may be amended to authorize a member to receive his portion of temporary lodging allowance during a period of temprorary duty away from his new permanent station when he continues to incur his share of lodging expenses at the hotel or hotel-like accommodations where his family or baggage and personal belongings are housed at his permanent station, provided that in each case the maintenance of dual living accommodations is required by the member's military assignment, rather than as a matter of personal choice and convenience 58

TIMBER SALES

Quantity variances
Access road cost recovery

Claim for unamortized road construction costs resulting from 39-percent discrepancy between estimated timber volume and actual timber volume cut is denied where: (1) record fails to establish that the Forest Service grossly disregarded applicable factors and procedures in preparing estimate; (2) there is no basis upon which to conclude that limited warranty (that road construction costs would be fully amortized) existed; and (3) volume estimate 39 percent under actual volume does not constitute gross error 84

TRANSPORTATION

Air carriers
Foreign
American carrier availability
Penalty for use of foreign
Mileage proration formula. (*See* **MILEAGE, Proration formula, Air transportation in violation of "Fly America Act"**)

Reserve space denial
Carrier liability Page

Penalty payments made by air carriers for failing to furnish accommodations for confirmed reserved space are due the Government, not the traveler, when payments result from travel on official business. This is so notwithstanding that the delay in the employee's travel did not result in any additional cost to the Government and regardless of the fact that the travel was performed outside of the employee's regular duty hours.. 95

Automobiles
Illness of employee
While on temporary duty

Employee on temporary duty travel may be reimbursed payment to private firm for transporting his privately owned vehicle back to permanent duty station, since injury prevented his operation of vehicle on return trip. 5 U.S.C. 5702(b) and Federal Travel Regulations para. 1–2.4 authorize expense of return of vehicle to permanent duty station when employee is incapacitated not due to misconduct. 44 Comp. Gen. 783 (1965) and B–176128, August 30, 1972, overruled..... 57

Bills
Payment
Agent, principal, etc.

Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B–188227, May 8, 1978, modified..... 124

Household effects
Entitlement
Intergovernmental Personnel Act assignment

Under 5 U.S.C. 3375, Western Carolina University employee who completed assignment with Federal Government under Intergovernmental Personnel Act (IPA) may be reimbursed cost of moving his household goods and dependent travel to Cleveland State University, not to exceed the constructive cost of such travel and transportation to Western Carolina University. Employee's own travel costs may be reimbursed to the same extent since he was not required by regulation or the terms of his IPA agreement to return to Western Carolina University.. 105

TRANSPORTATION—Continued

Household effects—Continued

Foreign air carrier use. (*See* **AIRCRAFT, Carriers, Fly America Act, Applicability, Freight transportation**)

Military personnel

"Do It Yourself" movement

Vehicle ownership Page

Although the language of the Joint Travel Regulations appears to preclude participation in the "do-it-yourself" program by members transferring household goods via borrowed privately owned vehicle, such a conclusion would be inconsistent with the purposes of the program. Thus, we agree with PDTATAC that the term "privately owned," as found in 1 JTR paragraph M8400, was used merely as a means of distinguishing the vehicle in question from rental and commercial vehicles, and does not require ownership of the vehicle by the relocating member..... 34

TRAVEL ALLOWANCES

Military personnel

Junior enlisted service members

Increases

Effective date

Although the Department of Defense Appropriation Act, 1979, appropriated funds which could be used for extension of travel and transportation entitlements to junior enlisted service members, the regulations authorizing the entitlements were issued under the existing authority of 37 U.S.C. Chapter 7 (1976) and 10 U.S.C. 2634 (1976). Therefore, the effective date of the junior enlisted travel entitlements is the effective date of the regulations, which may not be amended retroactively, and not the earlier effective date of the Appropriation Act..... 41

TRAVEL EXPENSES

Air travel

Foreign air carriers

Prohibition

Availability of American carriers

A service member may execute a justification certificate regarding "unavailability" of United States-flag air carriers, and paragraph M2150–3(1), 1 JTR, defines United States-flag air carrier passenger service "unavailable" if a traveler, en route, has to wait 6 hours or more to transfer to a United States-flag air carrier to proceed to destination. However, it does not apply to a service member waiting to begin travel but not "en route" from origin air port to destination and does not apply if only military reduced rate seats are unavailable when other seats are available. So service member executing such a justification certificate as the basis for United States-flag air carrier "unavailability" when it does not apply may not be reimbursed for travel performed on a foreign-flag air carrier..... 35

In the case of an employee of the Jewish faith, where the agency finds that the individual's determination not to travel on his Sabbath is not a matter of his preference or convenience, but the dictate of his religious convictions, it may properly determine that U.S. air carrier service to the furthest practicable interchange point, requiring departure before dark on Saturday, cannot provide the transportation needed and, thus, is unavailable under the Fly America Act and the implementing guidelines..... 66

TRAVEL EXPENSES—Continued

Air travel—Continued

Reservation penalties

Recovery Page

Penalty payments made by air carriers for failing to furnish accommodations for confirmed reserved space are due the Government, not the traveler, when payments result from travel on official business. This is so notwithstanding that the delay in the employee's travel did not result in any additional cost to the Government and regardless of the fact that the travel was performed outside of the employee's regular duty hours-- 95

Illness

Automobile return to headquarters

Employee on temporary duty travel may be reimbursed payment to private firm for transporting his privately owned vehicle back to permanent duty station, since injury prevented his operation of vehicle on return trip. 5 U.S.C. 5702(b) and Federal Travel Regulations para. 1-2.4 authorize expense of return of vehicle to permanent duty station when employee is incapacitated not due to misconduct. 44 Comp. Gen. 783 (1965) and B-176128, August 30, 1972, overruled---------- 57

Military personnel

Air travel. (*See* **TRAVEL EXPENSES, Air travel**)

Reimbursement

Intergovernmental Personnel Act assignment

Under 5 U.S.C. 3375, Western Carolina University employee who completed assignment with Federal Government under Intergovernmental Personnel Act (IPA) may be reimbursed cost of moving his household goods and dependent travel to Cleveland State University, not to exceed the constructive cost of such travel and transportation to Western Carolina University. Employee's own travel costs may be reimbursed to the same extent since he was not required by regulation or the terms of his IPA agreement to return to Western Carolina University---------- 105

Vouchers and invoices. (*See* **VOUCHERS AND INVOICES, Travel**)

VOUCHERS AND INVOICES

Certifications

False claims

The decision in 57 Comp. Gen. 664 (1978), holding that where a civilian employee submits a travel voucher wherein part of the claim is believed to be fraudulent, and that only the expenses for days for which fraudulent information was submitted should be denied, is applicable to military members and non-Government employees traveling pursuant to invitational travel orders as well. 57 Comp. Gen. 664, amplified- 99

Transportation

Principal carrier billing requirement

Where carrier submits evidence of air freight charges paid, part of which were improperly diverted from American-flag air carrier contrary to the Fly America Act, its bill for through door-to-door transportation charges, less air freight charges improperly diverted as determined by the mileage proration formula in 56 Comp. Gen. 209 (1977), may be certified for payment. B-188227, May 8, 1978, modified---------- 124

VOUCHERS AND INVOICES—Continued

Travel

False or fraudulent claims — Page

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for those days. 57 Comp. Gen. 664, amplified 99

WORDS AND PHRASES

"Accountable officer"

Delegation of authority to agencies to resolve adminstrative irregularities up to $500 is relevant only when agency believes accountable officer should be relieved of responsibility. Since General Accounting Office's (GAO) role is limited to concurring or refusing to concur with agency head's findings that statutory requisites for relief have been met, GAO may not grant relief, when no such findings have been made, regardless of the amount involved 113

"Agency head" definition in Brooks Bill

Award of architect and engineering contracts are governed by provisions of Brooks Bill, 40 U.S.C. 541 *et seq.* (1976), notwithstanding that zone of competition eligible for award may be legally limited by Small Business Administration's 8(a) program established pursuant to 15 U.S.C. 637(a) (1976), as amended 20

"Claim preclusion" principle

Protest will not be considered because some issues involved are expressly before court, other protest issues not expressly before court are, as practical matter, before court under "claim preclusion" principle, and relief sought from General Accounting Office (GAO) and court is similar. Furthermore, court has not expressed interest in obtaining GAO's views but has instead denied protester-plaintiff's request for preliminary injunction in pending civil action 126

"Directly derived"

Although solicitation required that proposed helicopter be directly derived from helicopter submitted for flight evaluation, provision in which requirement is included ,when read as whole, indicates that intention was that flight-tested aircraft have potential to meet agency's mission and performance requirements 158

"Do-It-Yourself"

Although the language of the Joint Travel Regulations appears to preclude participation in the "do-it-yourself" program by members transferring household goods via borrowed privately owned vehicle, such a conclusion would be inconsistent with the purposes of the program. Thus, we agree with PDTATAC that the term "privately owned," as found in 1 JTR paragraph M8400, was used merely as a means of distinguishing the vehicle in question from rental and commercial vehicles, and does not require ownership of the vehicle by the relocating member 34

WORDS AND PHRASES—Continued

"Normal commercial practice" for packaging Page

GSA's professed concern about quality of process involved in repackaging QPL product is contradicted by solicitation which requires packaging in accordance with "normal commercial practice" without reference to applicable Federal Specification against which product was tested under QPL procedures. To extent GSA reasonably finds that concern does not have capacity to effectively repackage qualified product in accordance with "normal commercial practice" or has prior history of unsatisfactory repackaging, finding would serve as basis for decision that concern is not responsible ---- 43

"Regularly scheduled work"

Employees who perform overtime work at night in the absence of an established tour of duty may be paid night differential under 5 U.S.C. 5545(a) (1976) where such overtime is considered "regularly scheduled work." Regularly scheduled means duly authorized in advance (at least 1 day) and scheduled to recur on successive days or after specified intervals. The overtime need not be subject to a fixed schedule each night but it must fall into a predictable and discernible pattern ---- 101

"Rollback time" for Customs employees

Immigration inspector entitled to overtime pay under 8 U.S.C. 1353a for 3.25 hours worked on Sunday morning and 3 hours worked Sunday night outside his 8-hour Sunday shift was properly paid 1½ days' pay for time on duty of 6.25 hours, computed as an aggregate of the two periods of overtime work. Attorney General did not exceed his broad authority to determine what constitutes overtime services under 8 U.S.C. 1353a in prescribing a midnight-to-midnight cutoff for Sundays and holidays. Also, computation of overtime on second Sunday under similar circumstances was proper. ---- 110

"Subsistence expenses" *v.* "actual subsistence expense" allowances

A fraudulent claim for lodgings taints the entire claim for an actual expense allowance for days for which fraudulent information was submitted and payments for those days will be denied to the claimant. 57 Comp. Gen. 664, amplified ---- 99

"Subsistence expenses" *v.* per diem allowance

A fraudulent claim for lodgings taints the entire claim for per diem under the lodgings-plus system for days for which fraudulent information is submitted, and per diem payments will not be made to an individual for those days. 57 Comp. Gen. 664, amplified ---- 99

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