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[B-195140]

Transportation — Household Effects — Military Personnel — Advance Shipments —Prior to Issuance of Orders — Vessel Overhaul Scheduled

Circumstances—where members' permanent change-of-station orders are not timely issued (when a ship is scheduled for overhaul) because of delay in determining the overhaul port due to Government contract bidding requirements—may be considered unusual circumstances incident to military operations. Therefore, regulations may be amended to authorize transportation of household effects in such cases upon a statement of intent to change the ship's home port, but prior to issuance of orders.

Transportation — Household Effects — Military Personnel — Advance Shipments — Orders Canceled, etc. — Payment of Return Expenses

Where members' permanent change-of-station orders are not timely issued when a ship is scheduled for overhaul and the regulations are amended to permit shipment of household effects before orders are issued, regulations may be further amended to authorize the return shipment of household effects if the ship overhaul is cancelled.

Matter of: Transportation of household effects prior to issuance of orders, June 4, 1980:

This case involves authority to ship members' household goods without issuance of orders because of an unusual situation which arises when Navy ships are scheduled for overhaul but the overhaul port is not known until shortly before the scheduled date of the overhaul.

Three issues are presented. First, may the Joint Travel Regulations be amended to authorize the transportation of household goods at Government expense of members of the uniformed services based on a statement of intent to change a ship's home port but prior to issuance of permanent change-of-station (PCS) orders where the ship is scheduled for overhaul and the PCS orders cannot be timely issued. Second, if the regulations may be amended to authorize shipment of household goods in advance of issuance of orders in the circumstances described above, may the regulations also be amended to provide that the goods may be returned to the member's old or a new local residence at Government expense in case the scheduled overhaul of a vessel is cancelled and the home port change is revoked after the household goods have been picked up and placed in storage-in-transit pending shipment. And, third, if the regulations may not be amended to provide for the return of the household goods in the circumstances described in the second question, may the regulations be amended to provide that an advance shipment of household effects is authorized under the circumstances described in the first question, provided that the member concerned signs a written agreement to pay any of the costs

incurred in connection with the shipment of household effects in the event the scheduled overhaul is cancelled.

The Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) requested an advance decision on these issues. The matter was forwarded here through the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 1358).

The Assistant Secretary refers to a problem that has arisen in connection with paragraph M8017, Volume 1, Joint Travel Regulations (1 JTR), and our ruling in 52 Comp. Gen. 769 (1973).

Paragraph M8017 provides that the transportation of household goods at Government expense is authorized prior to the issuance of PCS orders provided that the request for such shipment is supported by:

1. a statement from the order-issuing authority, or his designated representative, that the member was advised prior to the issuance of such orders that they would be issued;

2. a written agreement by the member to pay any additional costs incurred for shipment to another point required because the new permanent duty station named in the orders is different from that named in the statement prescribed in item 1; and

3. a written agreement to remit the entire cost of shipment if PCS orders are not subsequently issued to authorize shipment.

Paragraph M8017 further provides that the length of time prior to the issuance of the PCS orders during which a member may be advised that his orders will be issued may not exceed the relatively short period between the time when a determination is made to order the member to make a PCS and the date on which the orders are actually issued. General information that may be furnished the member concerning the issuance of orders before the determination is made to actually issue the orders, such as time of eventual release from active duty, time of expiration of term of service, date of eligibility for retirement, date of expected rotation from overseas duty, etc., may not be considered as advice that the orders are to be issued. This paragraph is based on our ruling in 52 Comp. Gen. 769.

A problem has arisen in connection with the reference paragraph concerning the shipment of household goods in advance of orders for members assigned to Navy vessels preparing to enter overhaul. Since a vessel usually spends 9 months to a year or more in an overhaul port, the Navy changes the home port of the vessel being overhauled from wherever it is located prior to overhaul to the overhaul port so that families and household goods can be shipped at Government expense to the new location. However, contract bidding procedures for overhauling Navy vessels required by law often do not permit timely

identification of overhaul sites. This has resulted in the promulgation of home port change messages and certificates as late as 2 weeks prior to the commencement of the overhaul. Thus, while members and transportation officers may be alerted to a forthcoming move of a vessel which will take place on a specific date, Government bills of lading cannot be issued until the actual overhaul port is known and PCS orders and home port change certificates have been issued. Without a Government bill of lading, firm arrangements cannot be made with household goods carriers to pack and pick up household goods for storage and/or shipment. This means that the members concerned are not afforded reasonable time to make arrangements for the relocation of their households and families. It is the view of the Navy that this situation results in an inequity for the members assigned to such a vessel, since members ordered on a normal PCS usually receive their orders at least 90 days prior to the effective date of their move and consequently have ample time to make arrangements for the relocation of their families and household goods.

The Navy has proposed a change to the JTR which would authorize the shipment of household goods in advance of orders for eligible members assigned to ships preparing to enter overhaul based on a statement of intent to change the home port of a vessel to an undetermined overhaul site on a specified date. This statement of intent would be issued only when it is known that less than 90 days will exist between the time of determination of a specific overhaul site and the actual departure of the vessel to such site.

Section 406(e) of title 37, United States Code (1976), provides that when orders directing a PCS for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects, the Secretaries concerned may authorize the movement of the dependents, baggage, and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, in cases involving unusual or emergency circumstances including those in which the member is serving on permanent duty at stations outside the United States, in Hawaii or Alaska, or on sea duty.

In discussing the legislative history of 37 U.S.C. 406(e) we stated in 45 Comp. Gen. 159 at 162 (1965) that:

> * * * While the emphasis of the statutory provision is upon the advance return of dependents, the legislative history of the law indicates an intent to provide authority for movement of dependents and household effects between points in the United States incident to unusual or emergency situations when the member is on sea duty. In S. Rept. No. 733, on H.R. 5007, 81st Cong., 1st sess. (which became the Career Compensation Act of 1949), on page 22, the Senate Committee on Armed Services, referring to section 303(c) stated in pertinent part as follows:
> "This subsection also includes provisions for the transportation of dependents even though there is involved no change of station in order that dependents

may travel at Government expense *between points in the United States* where the service member is on sea duty or on duty outside the United States at a post of duty where dependents are not permitted to accompany him. * * * [Italics supplied.]"

Thus, Congress has recognized that members serving on sea duty occupy a position not unlike those members who are assigned to duty stations overseas. In 49 Comp. Gen. 821 at 824 (1970) we stated:

* * * it is our opinion that 37 U.S.C. 406(e) provides authority for the movement of dependents and household effects from place to place in the United States in unusual or emergency circumstances incident to some military operation or requirement * * *.

In the case of members assigned to vessels preparing to enter a port for overhaul, the contract bidding procedures established by the Government for overhauling Navy vessels do not always permit timely identification of the overhaul site. In those circumstances we believe to require that orders be issued before household effects could be transported at Government expense could result in undue hardship to the members and their dependents and may therefore be regarded as unusual circumstances incident to military operations, as contemplated by section 406(e). On that basis we have no objection to amending the regulations as suggested by the Navy to permit movement of household effects based upon a statement of intent to change a vessel's home port incident to overhaul but prior to issuing PCS orders. Similarly, the regulations may be amended to provide for return of the household goods from storage if the overhaul is cancelled. Accordingly, the first and second questions are answered yes, and a no answer is required to the third question.

[B-196185]

Contracts — Specifications — Tests — First Article — Waiver — Time for Establishment Eligibility

Information in support of waiver of first article testing may be submitted after bid opening, regardless of invitation for bids provision requiring its submission with bid, because such information relates to bidder's responsibility which may be established after bid opening. Where bidder, prior to award, obtained first article approval for same item under prior contract. agency is not required to evaluate bid on basis of furnishing another first article, and agency should consider prior approval in determining whether to waive first article testing under solicitation which is subject of protest.

Contracts — Specifications — Tests — First Article — Waiver — Approval of Same Item Pending Protest on Later Procurement

Where record does not establish that protest of agency's refusal to waive first article testing was filed only to delay award until protester's first article was approved under prior contract for same item, agency is not precluded from considering waiver for protester when first article approval is granted under prior contract while protest is pending.

Matter of: Bruno-New York Industries Corp., June 5, 1980:

Bruno-New York Industries Corporation (Bruno) protests the Army's refusal to waive first article testing and to award Bruno a contract under invitation for bids (IFB) DAAA09-79-B-4822 for 450 ignition test sets used in shop equipment. For the reasons stated below, we recommend that the agency consider waiving first article testing for Bruno.

The IFB, issued on July 26, 1979, by the Army Armament Materiel Readiness Command (Army), required first article testing and approval, but also provided for waiving that requirement where "supplies identical or similar to those called for in the schedule have been previously furnished by the offeror and have been accepted by the Government." The IFB permitted bids to be submitted on the basis of first article testing and on the basis of the test being waived. In the event a bidder desired to bid on the basis of a waiver of first article testing the IFB required it to submit with the bid the contract number under which identical or similar supplies were previously accepted by the Government.

Bids were opened on September 14. Bruno bid a unit price of $319 without first article approval and $324.10 with such approval, but failed to submit any contract number in support of its claim for waiver. Aul Instruments Inc. bid $310 without and $320 with first article approval.

Bruno's eligibility for waiver may hinge upon a prior contract (DAAA09-79-C-4210) which Bruno has with the Army to produce the same item. Although the contract required submission of a first article test report by April 19, 1979, Bruno had not submitted its first article when on September 19 the Army decided to require first article testing for both firms under the subject solicitation. Bruno protested this determination to our Office on September 25. In March while the protest was under consideration, Bruno obtained first article approval.

The Army contends that waiver is not proper since Bruno failed to include the contract number with its bid as required by the IFB. The agency further argues that its determination on September 19 not to waive first article testing for Bruno was proper since at that time the firm had not received first article approval under its prior contract. The Army takes the position that Bruno should not benefit from the delay resulting from its protest. The agency contends that Bruno's protest was filed only to postpone the award until it received first article approval under its prior contract and that the integrity

of the competitive bidding system would be damaged if Bruno were permitted to benefit from such a tactic.

Although the Army argues that Bruno's failure to include the contract number in its bid prevented the agency from waiving first article testing for Bruno, it is our view that such failure does not preclude waiver since the decision whether to waive first article testing relates to the bidder's responsibility and evidence of bidder responsibility may be submitted after bid opening. See *Craig Systems Corporation*, B–188495, June 23, 1977, 77–1 CPD 449. Thus, while the contracting officer's determination not to waive first article testing on September 19 was correct, as Bruno had not previously furnished the required items nor had they been accepted by the Government prior to September 19, see *Bogue Electric Manufacturing Co.*, B–193878, May 10, 1979, 79–1 CPD 330, now that Bruno has first article approval, the Army is not legally precluded from evaluating Bruno's bid on the basis of its actual needs. In other words, under the rules governing bid evaluation, the Army is not required to evaluate Bruno's bid solely on the basis of the firm's furnishing a first article, something the Army at this point may not need.

As the decision whether to waive first article testing for a particular bidder is essentially an administrative one we are not recommending that Bruno be granted a waiver under this solicitation. *Wilco Electric, Inc.*, B–194872, September 24, 1979, 79–2 CPD 218. In light of our conclusion, however, that there is no legal impediment to first article waiver here for Bruno, we are recommending that the Army consider pursuant to the solicitation's "Waiver of First Article Approval" provision the approval of Bruno's first article under contract DAAA09–79–C–4210 in its determination whether to waive first article testing for Bruno under this solicitation.

We take note of the Army's concern over the benefit to Bruno from the delay attendant to its protest. In a variety of circumstances, however, agencies have held up awarding a contract, allowing a particular bidder to qualify for award. *See, e.g., Ver-Val Enterprises, Inc.*, B–198076, March 25, 1980, 80–1 CPD 223; B–178043, July 27, 1973 (where the Army delayed award to permit a bidder to obtain operating authority from a regulatory agency). Although we stated in one case that an *undue* delay of an award solely for the purpose of permitting a bidder to qualify for waiver of a first article requirement would be questionable, in that same case we denied a protest of the Army's delay in making award and considering of first article waiver for a bidder which did not request waiver in its bid and which submitted a first article for evaluation after bid opening. *See* B–175015(1), September 29, 1972. Thus, we think Bruno, reasonably believing it would shortly qualify for first article waiver, could have filed a good

faith protest of the Army's intention to make award without regard to the possibility of Bruno's being able to qualify for waiver if award were delayed for a reasonable period of time. While of course the Army was not required to hold up award if its needs did not so permit, we note that the Army has not yet made award, even though the regulations permit an agency to make award notwithstanding a pending protest when its needs so require. *See* Defense Acquisition Regulation § 2–407.8(b)(3). Thus, under these circumstances, we do not believe there is anything improper with Bruno's benefiting from the situation here.

[B–197682]

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

Government Printing Office (GPO) may not reduce Standard Level User Charge (SLUC) payments to General Services Administration (GSA) by amount of loss suffered by GPO when its supplies were damaged by water leaking through roof while stored at a GSA Stores Depot. In authorizing SLUC payments Congress intended to generate revenue and not to create a landlord-tenant relationship with all the attendant legal rights and duties.

General Services Administration—Motor Pool Vehicles—Liability for Damages—Requisitioning Agency *v.* GSA

Regulation authorizing GSA to recover expenses connected with repair of vehicles damaged in accidents while used to provide interagency motor pool service is proper under 40 U.S.C. 491 (Act) since it is part of the cost of establishing, operating, or maintaining a motor vehicle pool or system. Furthermore, one purpose of Act was establishment of procedures insuring safe operation of motor vehicle on Government business. Charging agency for losses caused by employee misconduct or improper operation of vehicle might help to promote vehicular safety, since it is agency, not GSA, which has direct control over employee using vehicle.

Matter of: Interagency Property Damage Liability, June 5, 1980:

Duwayne D. Brown, authorized certifying officer of the Government Printing Office, requests an advance decision on whether vouchers may be certified for payment under circumstances he describes as follows:

The first voucher concerns the General Services Administration's system of charging commercial rates for rental space utilizing the Standard Level User Charge (SLUC). Subsequent to implementation of GSA's SLUC system, the Government Printing Office incurred damages to property stored in the GSA Stores Depot, Franconia, Virginia. Roof leaks damaged paper stored in the warehouse, recurring incidents going back to November 1976. Accordingly, over $20,000 of Government Printing Office paper was damaged by the water from these roof leaks. Deductions were made from current SLUC billings. Subsequent correspondence with GSA and our own legal staff denied the right of recovery from GSA based on Comptroller General Decision (B–177610 dated December 15, 1977 [57 Comp. Gen. 130]).

The other instance concerns KSA Invoice No. 985702 that includes $473.30

which represents repairs to a GSA rental vehicle damaged in an accident in which a Government Printing Office employee was the driver. Under 41 CFR 101–39.-704 (Amendment C–28, November 1973) and 101–39.807(b) which were promulgated pursuant to 40 U.S.C. § 491, our legal staff recommends payment.

Because he believed that the advice he had received from GPO's counsel was conflicting, Mr. Brown sought an advance decision from this Office. For the reasons discussed below, we agree with the advice given by GPO's legal staff.

The issue presented in your first question was considered and decided in the case you cite, 57 Comp. Gen. 130 (1977). There we were asked by the Defense Department:

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

In rejecting both proposals, we pointed out the general rule against interagency reimbursements for property damage, but then went on to say:

Given the general rule which prohibits claims for damages between Federal agencies, recovery of damages from GSA would depend upon whether, in providing that rental rates "shall approximate commercial charges for comparable space and services," rather than providing that such rates be based on cost alone, Congress intended to invest tenant agencies with all the rights that the agencies would have against a commercial landlord * * *. On this issue, both the legislative history of section 490(j) and our comments on the draft bill are instructive.

* * * * * * *

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

For the same reasons, it is also clear that GSA is not required to lower its rental charges by an amount equal to that which a commercial landlord would pay for liability insurance since the rental charges are not based on cost. There are many expenditures that go into a commercial rental charge for space that are not applicable to GSA. Among these are taxes, depreciation, interest on a long-term debt, and profit, as well as liability insurance. Since it was the intent of Congress that the funds representing the difference between rates based on cost and commercial rates be used to finance new buildings, the rental charges should not be lowered. Id. at 131–132. [Italic supplied.]

Since the first question presented is the same in all material aspects as that presented in 57 Comp. Gen. 130, we hold that GSA is entitled to payment of SLUC's assessed GPO without reduction. The voucher to reimburse GSA for deductions made from SLUC charges may be certified for payment.

As to the second question, we note that GSA's interagency motor vehicle pools are operated and maintained under a revolving fund established by 40 U.S.C. § 491(d), which provides:

(1) The General Supply Fund provided for in section 756 of this title shall be available for use by or under the direction and control of the Administrator

for paying *all elements of cost* (including the purchase or rental price of motor vehicles and other related equipment and supplies) *incident to the establishment, maintenance, and operation* (including servicing and storage) *of motor vehicle pools or systems for the transportation of property or passengers*, and to the furnishing of such motor vehicles and equipment and related services pursuant to subsection (b) of this section.

(2) *Payments by requisitioning agencies so served shall be at price fixed by the Administrator at levels which will recover, so far as practicable, all such elements of cost*, and may, in the Administrator's discretion, include increments for the estimated replacement cost of such motor vehicles, equipment and supplies. [Italic supplied.]

Thus, the law authorizes the payment of all costs connected with the establishing, maintaining, and operating of motor vehicle pools or systems from the General Supply Fund established under 40 U.S.C. § 756, and the recovery of these costs from agency users.

GSA has issued regulations, as authorized by 40 U.S.C. § 486(c) and subject to Executive Order 10579, December 1, 1957, 19 Fed. Reg. 7925 (40 U.S.C. § 486 note) to implement the provisions of 40 U.S.C. § 491 which are set forth in 41 C.F.R. Part 101–39 entitled "Interagency Motor Vehicle Pools." 41 C.F.R. § 101–39.704 provides:

Whenever vehicle damage results through misconduct or improper operation by an employee, the agency employing the vehicle operator shall be financially responsible. (See § 101–39.807.) Misconduct includes but is not limited to vehicle operation under the influence of alcohol or narcotics and willful abuse or misuse of a vehicle. Improper operation by the driver shall include driving the vehicle in a willfully wrong, negligent (including inattentive), or careless manner.

41 C.F.R. § 101–39.807 provides:

(a) Except as provided in (b), below, GSA will be responsible for the costs incurred whenever an interagency motor pool vehicle is damaged.

(b) When an employee damages an interagency motor vehicle through misconduct or improper operation as defined in § 101–39.704, GSA will charge all costs to the agency employing the operator, including the fair market value of the vehicle less any salvage value, if the vehicle is damaged beyond economical repair. GSA will furnish the agency an accident report regarding the incident. Each agency shall be responsible for disciplining its employees who are guilty of damaging motor pool vehicles through misconduct or improper operation.

(1) The costs chargeable to the agency include costs for removing and repairing the vehicle or in the case of total loss, the replacement of the vehicle, including travel and other costs attributable to the accident.

(2) If an agency has information or facts which would have a bearing on the accident, the agency may furnish the data to GSA and request that the costs charged to and collected from the agency be credited to the Agency. The final determination of agency responsibility will be made by GSA, based upon Government as well as police accident reports and any available witness statements.

It is clear that expenses connected with the repair of a vehicle used to provide interagency motor pool service is part of the cost of establishing, operating, or maintaining a motor vehicle pool or system and therefore is proper for recovery under the law. Furthermore, in our opinion, charging such losses directly to the agency whose driver is responsible for the loss is properly within GSA's discretion. Since one of the purposes in enacting 40 U.S.C. § 491 was to establish procedures to insure safe operation of motor vehicles on Government business and since it is the agency which uses the vehicle, and not GSA, which has

direct control of the employees using the vehicle, charging the employing agency for losses caused by employee misconduct or improper operation might help to promote vehicular safety. In addition, since the GSA revolving fund is intended to be operated on a businesslike basis, it is inequitable to impose upon the revolving fund a loss for which the managing agency is in no way responsible.

Consequently, in answer to the second question, GPO is required to reimburse GSA for damage to vehicles which are a part of the interagency motor pool operated by GSA. If otherwise proper, the voucher covering this cost may be certified for payment.

[B-195732]

Appropriations—Availability—More Than One Available—Election of One Effect—Contracts—Cost Overruns

Where Environmental Protecting Agency initially elected to charge no-year "R & D" appropriation with expenditures for cost-plus-fixed-fee contract, continued use of the same appropriation to the exclusion of any other is required for payment of cost overrun arising from adjustment of overhead rates to cover actual indirect costs which exceeded the estimated provisional rates provided for in the contract.

Appropriations—Obligation—Contracts—Rule

As general rule, cost overruns and contract modifications within scope of original contract should be funded from appropriation available in year contract was made. Current appropriations may only be used if additional costs amount to new liability, not provided for in original contract. In instant case, original funds were "no-year" appropriations and are therefore available for both old and new obligations.

Matter of: Recording Obligations Under EPA cost-plus-fixed-fee Contract, June 11, 1980:

An Environmental Protection Agency (EPA) certifying officer has requested our decision on several questions concerning the proper appropriation against which to charge a $474.03 cost overrun on that agency's cost-plus-fixed-fee contract with the Institute of Gas Technology for technical consulting services. For the reasons that follow, the cost overrun must be charged against the same appropriation from which the original contract was funded.

The basic contract, with an estimated cost and fixed fee totalling $28,600, was executed on January 17, 1975, and was later modified through a series of supplemental agreements to extend the period of performance, adjust the number of man hours or level of effort required from the contractor, and to revise the negotiated overhead rates used to compute the indirect cost. Of these modifications, only Modification No. 4, March 23, 1979, revising the final overhead rate, required an adjustment in the estimated cost of the contract. That amendment provided as follows:

1. ARTICLE VI—*Estimated Cost and Fixed Fee*—is hereby amended. The estimated cost of this contract is $27,097.03, exclusive of the fixed fee of $1,977. The total estimated cost and fixed fee is $29,074.03.

2. ARTICLE VIII—*Indirect Costs*—is amended to incorporate the following negotiated rates for the period shown below:

Type	Effective Period From	To	Rate (%)	Base
Final-O/H, Non-Hygas Center	Sept. 1, 1975	May 17, 1976	122.88	(a)

(a) Direct labor dollars plus related fringe benefits.

3. Recapitulation:

	Est. Cost	Fixed Fee	CPFF	Funded
Original Contract Plus Mods 1 thru 3	$26,623.00	$1,977.00	$28,600.00	$28,600.00
Modification No. 4	474.03	----------	474.03	474.03
Total	$27,097.03	$1,977.00	$29,074.03	$29,074.03

The final overhead rates set out above were negotiated pursuant to Clause 29 of the contract's general provisions which provides in pertinent part:

29. NEGOTIATED OVERHEAD RATES

(a) Notwithstanding the provisions of the clause of this contract entitled "Allowable Cost, Fixed Fee, and Payment" the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than ninety (90) days after the expiration of his fiscal year, or such other period as may be specified in the contract, shall submit to the Cost Review and Policy Branch of the Contracts Management Division with a copy to the cognizant audit activity, a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of final overhead rates by the Contractor and the Cost Review and Policy Branch shall be undertaken as promptly as practicable after receipt of the Contractor's proposal. In the event the contractor has more than one contract with the Environmental Protection Agency, only one submittal shall be required with respect to each applicable rate.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with paragraph (a)(i)(A) and (B) of the clause of this contract entitled "Allowable Cost and Fixed Fee and Payment."

(d) The results of each negotiation shall be set forth in a modification to this contract, which shall specify (1) the agreed final rates, (2) the bases to which the rates apply, and (3) the periods for which the rates apply. The incorporation of the negotiated final overhead rates by contract modification shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in the contract.

* * * * * * *

The contract also contains a "Limitation of Cost" clause which provides that once funds equal to the estimated cost or ceiling are expended, the contractor is under no obligation to continue performance and EPA is under no obligation to fund the overrun until the amount allotted to the contract is increased. This clause operates to give EPA an effective tool to prevent the overexpenditure of appropriated funds by establishing the estimated cost as the limit of the Government's obligation to make payment, while at the same time provid-

ing a method whereby the Government could increase the estimated cost and authorize the contractor to continue performance. *Cf.*, *Weinschel Engineering Co., Inc.*, 1962 BCA para. 3348 (1962).

The certifying officer states that in fiscal year 1975, the Mobile Air Pollution Control program, of which we assume this contract was a part, was funded with both Research and Development (R & D) and Abatement and Control (A & C) funds. He states that the original contract was funded in fiscal year 1975 from R & D appropriations. However, EPA proposes to charge the increase in the contract's price resulting from Modification No. 4 to the A & C appropriations available for obligation in fiscal years 1979 and 1980. The contracting officer notes that the program is currently funded with only "A & C" funds.

The certifying officer asks the following questions:

1. Should an overrun be funded from the original appropriation, the current year appropriation, or can either appropriation be used?
2. Is there a general rule that a certifying officer can use to determine the proper appropriation to be charged with cost overruns from prior year contracts?
3. Does a contract modification which extends the period of performance and increases the cost without a change in the scope of work affect the source of funding?

For fiscal year 1975, EPA received separate lump-sum appropriations under the headings "Research and Development" and "Abatement and Control." Each appropriation was:

[T]o remain available until expended: *Provided*, That this appropriation shall be available only within the limits of amounts authorized by law for fiscal year 1975. Agriculture-Environmental and Consumer Protection Appropriation Act, 1975, Pub. L. No. 93-563, 88 Stat. 1835 (1974).

For fiscal year 1979 EPA received separate lump-sum appropriations for "R & D" and "A & C," but the funds remain available for expenditure for only 2 years. Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1979, Pub. L. No. 95-392, 92 Stat. 791, 796 (1978).

The increased cost of this contract must be paid from the original appropriation charged with the contract: the 1975 "R & D" appropriation. With respect to the continued use of "R & D" funds, rather than "A & C" funds, 31 U.S.C. § 628 (1976) restricts the use of appropriations to the particular purposes which they were intended by the Congress to serve. Neither the "R & D" nor the "A & C" appropriation expressly provides for the Mobile Air Pollution Control program. Neither is it apparent on the face of the contract whether the "A & C" appropriations can properly be charged with expenses of the contract. We will assume, however, that either of the two appropriations can be reasonably construed as available for Mobile Air Pollution Control program expenditures. We have held that in such cases an administrative determination as to which appropriation will be charged may be accepted. However, continued use of the same appropriation to the

exclusion of any other for the same purpose is required. 23 Comp. Gen. 827 (1944); 10 *id.* 440 (1931). Thus, even if we assume that either appropriation could have been reasonably construed as available for the original contract, EPA is bound by its election. Therefore, we do not believe the modification in overhead rates may properly be funded from an "A & C" appropriation.

The determination of whether an overrun should be charged against the original appropriation or the current appropriation is governed by the terms of the original contract. When the Government's liability to pay the increased cost arises from the terms of the original contract and is within that contract's scope, the appropriation initially used to fund the contract must be charged.

Increased costs may result from changes in specifications, delay, increases in overhead rates, and so forth. The Government's liability to pay for such increased costs is governed by standard clauses such as the "Changes" clause or, as in the present case, by the "Negotiated Overhead Rates" clause. Thus, where a contract's estimated cost increases because of the operation of such a provision contained in the original contract, the Government's liability to pay that increased cost arises at the time the contract is executed and payment must be made from the appropriation current when that original agreement is made. *See* 55 Comp. Gen. 768 (1976); 50 *id.* 589 (1971); 23 *id.* 943 (1944). A current or subsequent appropriation may be used only if the contract modification gives rise to a new liability involving an obligation incurred in the year that appropriation is available. In such cases, the original appropriation is not available. 57 Comp. Gen. 459 (1978); 56 *id.* 414 (1977); 37 *id.* 861 (1968).

Modification No. 4, which increased the estimated cost of the present EPA contract, was issued pursuant to Clause 29 "Negotiated Overhead Rates" of the original contract. That clause entitles the contractor to a price adjustment under certain specified conditions. Accordingly, no new liability is created when a modification is issued in accordance with its terms.

Neither, in our view, does a limitation of cost clause operate to create a new liability. The limitation of cost provision warns the contractor not to incur costs above a particular ceiling unless the ceiling is raised by allotting additional funds to the contract. Accordingly, under the EPA contract, the contractor was not entitled to payment for an overrun unless the increase was within the cost limitation or the ceiling was raised. Clause 29, on the other hand, bound the Government to suspend contract performance or to raise the ceiling to cover increased overhead rates so long as chargeable appropriations had not been exhausted and they remained available for obligation. It follows that where a change or modification does not fall outside the general

scope of the contract, it will affect the source of funding only if it is not authorized by the contract terms and the amendment is not based on any antecedent liability.

In the present case, EPA's 1975 R & D funds, from which the original contract was funded, are "no year" appropriations and are available until expended. Accordingly, they may be charged with both old and new "R & D" obligations. That appropriation is properly chargeable with the increased contract price which arose from Modification No. 4.

[B-196010]

Contracts — Awards — Small Business Concerns — Procurement Under 8(a) Program—Scope of GAO Review—Evaluation of Proposals By Procuring Agency in Behalf of SBA

In light of broad discretion afforded Small Business Administration (SBA) under "8(a)" program General Accounting Office reviews SBA actions in such procurements to determine that regulations were followed, but does not disturb judgmental decisions absent showing of bad faith or fraud. Where contracting agency acts on behalf of SBA in evaluating proposals and recommending contractor to SBA under 8(a) program, agency's actions will be reviewed under criteria applicable to SBA actions.

Contracts — Awards — Small Business Concerns — Procurement Under 8(a) Program—Procurement Statutes and Federal Procurement Regulations—Generally Not Applicable

Agency's selection of offeror for award of 8(a) contract on basis of initial technical proposals without written or oral discussions contemplated by Federal Procurement Regulations is not legally objectionable since normal competitive procurement practices are not applicable to 8(a) procurements.

Contracts—Negotiation—Debriefing Conference—Timeliness

Agency failure to debrief unsuccessful offeror until month after request for debriefing is not improper where regulation specifies no time frame for debriefing and delay is attributed to unavailability of necessary agency personnel.

Contracts — Awards — Small Business Concerns — Procurement Under 8(a) Program—Evaluation of Proposals by Procuring Agency—Conclusiveness

Although protester raises several objections to agency's evaluation of its proposal, since there is no indication in record of fraud or bad faith by agency evaluators there is no basis to object to the agency's determination.

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

Protest allegations not filed until more than 10 working days after basis for allegations was known or should have been known are untimely and ineligible for consideration under Bid Protest Procedures.

Matter of: Arawak Consulting Corporation, June 11, 1980:

Arawak Consulting Corporation (Arawak) protests the evaluation, selection and award process used by the Department of Health, Edu-

cation, and Welfare, now the Department of Health and Human Services (HHS), under request for proposals (RFP) No. 105–79–1200, which solicited services consisting of technical assistance, short-term training, and the conduct of an evaluation of youth participation and community services job development demonstration projects.

Arawak, whose technical proposal was ranked second to that of the successful offeror, Dialogue Systems, Inc. (Dialogue), contends that the selection process was defective because HHS failed, prior to making an award, to conduct competitive negotiations that would have permitted Arawak the opportunity to correct any perceived deficiencies in its proposal. Arawak also argues that HHS failed to provide it with a debriefing until more than a month had elapsed following the selection of Dialogue for award. Finally, Arawak contends that its proposal was erroneously evaluated. For the reasons stated below the protest is denied.

This requirement was solicited as a set-aside under the authority of the "8(a)" program of the Small Business Act, 15 U.S.C. § 637(a) (1976), as amended by Public Law 95–507, 92 Stat. 1757, which authorizes the Small Business Administration (SBA) to enter into prime contracts with any Government agency having procurement powers, and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns.

HHS' regulations applicable to the procurement of technical services under the 8(a) program provide that, except in cases where SBA selects a firm for an 8(a) award, or where one 8(a) firm has exclusive or predominant capability or technical competence to perform the work within the time required, the selection of a contractor shall be made through "limited technical competition." In such cases written technical proposals may be required from the participating firms. 41 C.F.R. § 3–1.713–50(a)(2) (1979). Where limited technical competition is determined appropriate, the firms to be included in the competition will be decided by HHS in consultation with SBA. 41 C.F.R. § 3–1.713–50(a)(4). Due to a potential adverse impact on the limited financial resources of these firms, usually no more than three to five firms should be nominated for the limited technical competition. 41 C.F.R. § 3–1.713–50(a)(6). In this instance, HHS, in consultation with SBA, selected three prospective contractors, including Dialogue and Arawak, for the limited technical competition.

Technical proposals from the three offerors were reviewed by a Technical Evaluation Panel (TEP). Dialogue was awarded the highest rating of 85.8 and Arawak was next at 72.4. These ratings, together with a TEP summary report, were forwarded to the HHS

contracting officer for review to ensure that the evaluation criteria were properly applied. The contracting officer approved the TEP report and submitted copies of it to SBA with a request that HHS be permitted to obtain a cost proposal from Dialogue and conduct negotiations with that firm. As a result of those negotiations Dialogue received the award.

Because of the broad discretion afforded the SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the 8(a) program is generally limited to determining whether the regulations have been followed and whether there has been fraud or bad faith on the part of Government officials. *Orincon Corporation*, 58 Comp. Gen. 665 (1979), 79-2 CPD 39; *Kings Point Mfg. Co., Inc.*, 54 Comp. Gen. 913 (1975), 75-1 CPD 264.

HHS' regulations recognize that the ultimate responsibility for nomination of an 8(a) subcontractor is in the SBA, 41 C.F.R. § 3-1.713-50(a), and HHS indicates that it obtains SBA's approval before entering into negotiations with the successful firm. It is therefore our view that HHS was acting on behalf of SBA in dealing with the competing 8(a) firms and evaluating their proposals and that the scope of our review in this case, even with respect to the evaluation of proposals, is limited as described above. See *Arcata Associates, Inc.*, B-195449, September 27, 1979, 79-2 CPD 228.

Arawak contends that HHS was obligated to conduct discussions with it to enable that firm to correct deficiencies in its proposal. Federal Procurement Regulations (FPR) § 1-3.804 (1964 ed. amend. 155) requires that in negotiated procurements written or oral discussions generally shall be conducted with all offerors in the competitive range. However, we believe that section 8(a) of the Small Business Act, to further a socioeconomic policy of fostering the economic self-sufficiency of certain small businesses, authorizes a contracting approach which in general is not subject to the competition and procedural requirements of the FPR and the statutory provisions they implement. See *Ray Baille Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973); *Eastern Tunneling Corp.*, B-183613, October 9, 1975, 75-2 CPD 218. See also *Vector Engineering, Inc.*, 59 Comp. Gen. 20 (1979), 79-2 CPD 247. Consequently, since neither the applicable HHS nor SBA regulations require that discussions be held regarding an offeror's technical proposal, HHS did not act improperly by not conducting discussions with Arawak.

With regard to the debriefing of unsuccessful offerors under the "limited technical competition" procedure, HHS' regulations merely state that a debriefing, when requested in writing, shall be provided to an unsuccessful offeror. 41 C.F.R. § 3-1.713-50(b). In this instance,

Arawak, by letter of August 1, 1979, requested a debriefing. The debriefing was conducted on August 30. HHS reports that the debriefing could not be held earlier due to the unavailability of both the project officer and his assistant. In view of the absence of any specified time frame for conducting a debriefing after receipt of a written request, and the absence of evidence of a deliberate delay by HHS, we do not believe that the agency acted improperly.

Arawak takes exception to the evaluators' criticisms of its technical proposal as set forth in the TEP report. For example, Arawak objects to the evaluators' judgments that the protester's use of a logistics coordinator in its proposed management plan was unnecessary and that Arawak lacked process evaluation staff expertise. Arawak also objects to the agency's finding that its proposal contained three informational insufficiencies or omissions and to an evaluator's comment that key proposed individuals do not represent a geographical cross-section. The protester argues that the "*equal* 13 point spreads" between each of the offeror's evaluation scores are statistically improbable and are somehow indicative of an improper evaluation.

Although it is clear that Arawak does not agree with the HHS evaluators' judgment in these instances, Arawak does not argue that HHS acted in bad faith or that fraud was involved in the evaluation process. We have reviewed the evaluation record and there is no indication of either bad faith or fraud. Thus, we have no basis to object to HHS' evaluation. See *Jones Steel Erections, Inc.*, B-196800, December 4, 1979, 79-2 CPD 389.

Finally, Arawak has made several allegations which we consider untimely. These are predicated on various matters appearing on the individual rating sheets of the various members comprising the TEP or in Dialogue's proposal. The allegations are that Dialogue was accorded preferential treatment over Arawak through the waiver of various informational inadequacies in Dialogue's proposal whereas Arawak was held responsible for its informational deficiencies; Dialogue's proposal failed to include résumés for proposed subcontract staff; Dialogue's "proposal authorship was not presented;" and the initial point scores on the proposals were changed several times.

Our Bid Protest Procedures, 4 C.F.R. Part 20 (1980), require that protest allegations be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2).

In this instance, Arawak's correspondence reveals that it received the individual rating sheets [and a copy of the Dialogue proposal] in February 1980; however, the protest allegations based on this infor-

mation were not received by our Office until April 4, 1980. In view of their untimely filing, we decline to consider them.

The protest is denied in part and dismissed in part.

[B-198257]

Contracts—Payments—Progress—Limitation—What Constitutes "Contract Price"—Incrementely-Funded Contract

Under fixed-priced, incrementely funded contract, progress payments may be made to contractor up to 80 percent of total contract price so long as progress payments do not exceed total amount of funds allotted to the contract.

Matter of: Progress Payments Pursuant to Raytheon Company Contract, June 12, 1980:

Major S. R. Moody, USA, Disbursing Officer, Defense Contract Administration Services Region, Boston, Massachusetts, requests our decision on the propriety of certain progress payments under contract No. F08635-79-C-0043 with Raytheon Company. The Disbursing Officer disagrees with the contracting officer as to the extent of progress payments which may be allowed under the contract.

The total contract price is $39,094,140 (subsequently increased to $39,506,140 by change order). However, the contract is being incrementely funded, with $12,000,000 allotted initially and $18,978,500 allotted subsequently. An additional allotment of $8,527,640 is scheduled for fiscal year 1981.

The contract provides that progress payments may not exceed 80 percent "of the total contract price." Using the $39,506,140 figure to represent the total contract price, the contracting officer has approved progress payments to the contractor not to exceed 80 percent of $39,506,140.

The Disbursing Officer believes that the total contract price means the total amount obligated so far to the contract. Under the Disbursing Officer's interpretation, the contractor has already been overpaid, since progress payments have been made in excess of 80 percent of $30,978,500, the total amount obligated to the contract as of this date.

We agree with the contracting officer's approach. Defense Acquisition Regulation E-509.7 defines the "contract price" to mean "the total amount fixed by the contract * * * to be paid for complete performance of the contract." Using this definition the contract price is $39,506,140 for complete performance of the contract, not the amount allotted.

Nothing in the "Allotment of Funds" or "Limitation of Government's Obligation" clauses of the contract states otherwise. The "Allotment" clause provides that for purposes of the Limitation of Gov-

ernment's Obligation clause, the Government's contractual obligation only extended to the amount initially allotted ($12,000,000), but that additional allotments were expected to be made as set forth in the contract schedule.

The "Limitations" clause provides that:

(1) Of the total price * * * the sum of $12,000,000 is presently available for payment and allotted to this contract. It is anticipated that from time to time additional funds will be allotted to this contract until the total price of these items is allotted. (The amount allotted to this contract was increased from $12,000,000 to $30,978,500.)

It is evident from the above that the Government's total obligation under the contract is limited to the amount of funds allotted to the contract, which amount may be less than the total contract price. The "Limitations" clause further provides that if additional funds are not allotted, the contract will be terminated for the convenience of the Government but that the Government will not be obligated in any event to pay or reimburse the contractor in excess of the amount allotted to the contract (paragraph 3 of the clause). Clearly there would not be any need to terminate the contract for convenience if, as the Disbursing Officer suggests, the total amount allotted represented the contract price. The contract would simply expire without any need to invoke the termination procedure.

Therefore, although the contractor may be paid up to 80 percent of the total contract price under the "Progress Payments" clause, the payment may not exceed the total amount allotted to the contract.

[B-189782]

Compensation—Prevailing Rate Employees—Negotiated Agreements—Boulder Canyon Project Adjustment Act—Savings' Clauses in Later Legislation

Section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. 618n, which is specific legislation dealing with how the wages and compensation of Boulder Canyon Project employees may be set, has not been superseded by section 9(b) of Pub. L. No. 92-392. The two laws are complementary, the former describing how employee compensation is to be set and the latter guaranteeing continuance of certain negotiated labor-management contract provisions, regardless of restrictions in the compensation laws otherwise applicable to prevailing rate employees.

Compensation—Prevailing Rate Employees—Negotiated Agreements—Boulder Canyon Project Employees' Entitlements—Fringe Benefits, etc. Status

The term "wages or compensation" under section 15 of the Boulder Canyon Adjustment Act, 43 U.S.C. 618n, does not include commuting travel expenses, housing allowances, or similar fringe benefits. Such benefits neither come within the definition of wages or compensation nor are specifically provided for by Congress, as other expenses are, and therefore there is no legal basis for Boulder Canyon Project employees to be paid them.

Compensation—Prevailing Rate Employees—Negotiated Agreements—Boulder Canyon Project Adjustment Act—Applicability to Employees of Defunct Parker-Davis Project

Unless employees of the now defunct Parker-Davis Project are engaged in activities associated with the Hoover Dam, they are not covered by section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. 618n.

Matter of: Boulder Canyon Project Employees—Wages and Compensation, June 18, 1980:

Mr. Larry E. Meierotto, Assistant Secretary—Policy, Budget and Administration, Department of the Interior, has requested our decision on a series of questions relating to employees entitled to be paid wages and compensation under section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618n (1976). Mr. Meierotto refers to our decision B–189782, March 1, 1978, which was issued in response to a request from the Secretary of the Interior. The Secretary had asked whether certain overtime pay, penalty pay and various other pay provisions negotiated on behalf of employees covered by both section 15 of the Boulder Canyon Project Adjustment Act and section 9(b) of Pub. L. No. 92–392, August 19, 1972, 5 U.S.C. § 5343 note, were legal, in view of our decisions 57 Comp. Gen. 259 (1978) and 57 *id.* 575 (1978), which had rendered similar payments illegal.

Mr. Meierotto states in his submission that certain issues left unresolved in our decision to the Secretary of the Interior still need to be addressed.

> * * * Your decision No. B–189782, dated March 1, 1979, ruled that it was unnecessary to rule on the questions posed other than our ability to agree to overtime rates in excess of one and one-half time. Since such authority emanated from other sources, you found it was not relevant whether Section 15 independently authorized such payments.
>
> Because the overtime issue is only one of an infinite number of variations of the question "what constitutes compensation within the meaning of Section 15?" which continually arise in collective bargaining, your March 1, 1979, decision does not assist us in determining our legal authority to meet such requests. Although Section 704 of the Civil Service Reform Act was passed and became effective since our question was first posed, it does not clarify the nature of our obligations. Section 704 preserves rights that existed on August 19, 1972. Our question is what rights existed prior to that time. In effect, the real question is whether employees covered by Section 15 have any greater rights than other hourly employees covered by Section 9(b) of P.L. 92–392 and whether there is a different procedure for determining such rights. Therefore, we are resubmitting our questions, hopefully clarified, but nevertheless broadly stated. Our hope is to know our basic rights and obligations so that there does not have to be a dispute every time a variation of the same question arises. Admittedly, a full response will not dispose of every question that could exist. However, a full response can greatly diminish the number of questions and remove their far reaching implications. Consequently, such limited questions may be able to be resolved through the normal labor relations processes or through the mechanism of Section 15 itself, if that is still valid.

The Department of the Interior has served a copy of its request on each of the labor unions involved. but they chose not to furnish comments on the matter.

JURISDICTION

In decision B–189782, January 5, 1979, 58 Comp. Gen. 198, we stated:

> The Comptroller General's authority to render advance decisions to heads of agencies and to certifying and disbursing officers on matters involving appropriated funds is found in 31 U.S.C. §§ 74 and 82d. It is clear that under Title VII of the Civil Service Reform Act, the Comptroller General may not overrule a specific arbitration award or a decision of the Federal Labor Relations Authority made thereon. However, with those exceptions, the Comptroller General retains the authority to render decisions on the legality of expenditures of appropriated funds.

From the record before us, we find nothing to indicate that our decision on this case would violate the restrictions on our jurisdiction stated above.

OPINION

Section 15 of the Boulder Canyon Project Adjustment Act, 43 U.S.C. § 618n, states:

> All laborers and mechanics employed in the construction of any part of the project, or in the operation, maintenance, or replacement of any part of the Hoover Dam, shall be paid not less than the prevailing rate of wages or compensation for work of a similar nature prevailing in the locality of the project. In the event any dispute arises as to what are the prevailing rates, the determination thereof shall be made by the Secretary of the Interior, and his decision, subject to the concurrence of the Secretary of Labor, shall be final.

In our decision B–189782, March 1, 1979, to the Secretary of the Interior, we stated that section 704 of the Civil Service Reform Act of 1978, Pub. L. No. 95–454, October 13, 1978, 92 Stat. 1218, overruled decisions 57 Comp. Gen. 259 and 57 *id.* 575 insofar as those decisions invalidated labor-management contract provisions concerning various overtime pay provisions (double time, penalty pay) for employees whose contracts are covered by section 9(b) of Pub. L. No. 92–392. Accordingly, we held it was not necessary that we deal with whether there was independent statutory authority in section 15 of the Boulder Canyon Project Adjustment Act for such payments. The Boulder Canyon Project employees could negotiate such overtime contract provisions by virtue of section 704 of the Civil Service Reform Act.

For reasons given above, however, Mr. Meierotto asks the following questions (our answers are set out after each question):

1. *Has Section 43 U.S.C. 618n been superseded by any other law? If so, what law and with what result?*

Examples:

A. This provision was enacted in 1940 before collective bargaining of wages became a common phenomenon in the Department of the Interior or the Federal government. The first legislation, of which we are aware, which specifically addressed negotiation of wages was Section 9(b) of P.L. 92–392 in 1972. Since that later enactment purported to be governmentwide, did it supplant 43 U.S.C. 618n?

B. When there is a dispute as to what are prevailing rates, 43 U.S.C. 618n requires the resolution to be made by the Secretary of the Interior, subject to the

concurrence of the Secretary of Labor. To what extent are others, not specified in the statute (such as arbitrators, the Federal Labor Relations Authority, etc.), without jurisdiction to render final decisions on such disputes?

Answer to Question No. 1

Section 9(b) of Pub. L. No. 92–392 is a savings provision which protects certain labor-management contract provisions from being affected by the provisions of Pub. L. No. 92–392 which generally govern the wages of prevailing rate employees.

Section 704 of Pub. L. No. 95–454 is also a savings provision which further expands on the protection afforded the contract provisions of employees who negotiate their wages under section 9(b) of Pub. L. No. 92–392. Section 704 provides that employees whose contract provisions are negotiated under section 9(b) may negotiate their pay and pay practices in accordance with prevailing rates and pay practices without regard to certain provisions in title 5, United States Code, including more specifically 5 U.S.C. § 5544, or any rule, regulation, decision or order relating to rates of pay or pay practices under 5 U.S.C. § 5544.

With respect to Mr. Meierotto's first question, 43 U.S.C. § 618n, which is specific legislation dealing with how the wages and compensation of Boulder Canyon Project employees may be set, has not been superseded by section 9(b) of Pub. L. No. 92–392. Section 15 of the Boulder Canyon Project Act requires that employees covered by section 15 shall be paid not less than the prevailing rate of wages or compensation for work of a similar nature prevailing in the locality of the project. Section 15, therefore, is the legal basis for setting the pay of Boulder Canyon Project employees.

The subsequently enacted section 9(b) of Pub. L. No. 92–392 and section 704 of the Civil Service Reform Act are of different effect in that they do not prescribe the basic pay entitlements of the covered employees. Rather, the latter two sections are merely savings clauses which guarantee that the labor-management contract provisions of the covered employees may be continued regardless of certain stated restrictions in various compensation laws found in title 5, United States Code, which are otherwise applicable to prevailing rate employees. Section 15 of the Boulder Canyon Adjustment Act and section 9(b) of Pub. L. No. 92–392 are in fact complementary and are not inconsistent with each other. Question 1A is answered accordingly.

In regard to Question 1B, however, we shall not venture to delineate the limits of the Federal Labor Relations Authority's jurisdiction over employees covered by both section 9(b) of Pub. L. No. 92–392, August 19, 1972, 5 U.S.C. § 5343 note, and section 15 of the Boulder Canyon Project Adjustment Act. We feel that question may more properly be directed to the Federal Labor Relations Authority.

2. *Assuming 43 U.S.C. 618n has an independent existence unlimited by laws not purporting to repeal it or portions thereof, does the term "prevailing rate of wages or compensation" allow negotiation of payments not otherwise permitted to employees under 9(b) of P.L. 92-392?*

Examples:

A. In *Amell* v. *U.S.* 390 F. 2d 880 (1968), the Court of Claims held that fringe benefits are not encompassed within the terms "wages" or "compensation."

B. On March 28, 1975, the Assistant Secretary of the Department of the Interior, as concurred in by the Assistant Secretary of the Department of Labor on April 8, 1975, (pursuant to the Section 15 procedure), rejected the contention of William S. Davis, an employee of the Boulder Canyon Project, that the prevailing rate process must take into account the value of free housing and utilities provided to employees of the Los Angeles Department of Water and Power who work at the Project site and whose base wages are the predicate for the wages of the employees of the Project. Similarly, rejected were further contentions that the Government, alternatively, should provide free housing or a comparable allowance.

C. *In McCoy and Local 1978, American Federation of Government Employees* v. *Larsgaard, Project Manager, Boulder Canyon Project,* AFGE contended that the Project improperly terminated the busing of employees between their homes and their worksites, especially since Los Angeles DWP and Southern California Edison transport their employees from Boulder City down to the dam. The Government defended primarily on the basis of Comptroller General rulings on 31 U.S.C. 638a which preclude residence-to-work transportation. On December 15, 1976, Judge Roger D. Foley, of the U.S. District Court for the District of Nevada, dismissed the action having been advised by counsel for plaintiffs "that plaintiffs have withdrawn their opposition to defendants' Motion for Judgment on the Pleadings." Since that time, AFGE has advocated that we grant some form of monetary compensation in lieu of the transportation. We have taken the position that to allow some payment as a substitute for an illegal practice would subvert the statutory proscription.

D. It should be evident why we are reluctant to pose other variations of the same theme and to set forth union proposals that have never reached a formal stage. It should be equally evident how a ruling on what Section 15 means when it uses the term "compensation" can put to an end a great many present and future disputes.

Answer to Question No. 2

The legislative history of the Boulder Canyon Project Adjustment Act does not explain the term "prevailing rate of wages or compensation." Moreover, there is a dearth of judicial precedent as to the meaning of "wages or compensation" under 43 U.S.C. § 618n.

The Court of Claims' decision in *Amell* v. *United States*, 390 F.2d 880 (1968), however, while not dealing with 43 U.S.C. § 618n, is instructive. In *Amell* the court was called upon to construe section 606 of the Federal Employees' Pay Act of 1945, 59 Stat. 304, as amended, 5 U.S.C. § 946 (1964), and section 202(8) of the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. § 1082 (1964).

The Classification Act of 1949 states in section 202(8):

* * * *compensation* shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry * * *. [Italic supplied.]

The Federal Employees' Pay Act of 1945 states in section 606:

Employees * * * *may be compensated in accordance with the wage practices* of the maritime industry. [Italic supplied.]

The question before the court in *Amell* was whether the maritime employees covered by the above-cited laws were entitled to an increase

in their base wage rates in an amount equivalent to the increased contributions made by private shipping companies to the pension fund of the private sector maritime employees. The Court of Claims found:

> Much of the difficulty presented by this case is occasioned by the use of the word "compensation" in the comparability provision of the Classification Act of 1949, in the regulations, and in Article XII of the negotiated contract. Since neither party has cited any decisional law which is dispositive of the question, we think the congressional intent is to be determined by viewing the term "compensation" in its broad statutory context and in connection with various benefits which Congress has provided for MSTS employees in other laws. From such an analysis it becomes apparent that Congress did not intend "compensation" to cover either the whole ambit of employment costs or those in issue here. 390 F. 2d at 884.
>
> Thus, the inference to be drawn from the fact that benefits for MSTS employees are provided in various statutes, totally distinct from the Classification Act of 1949, is that the word "compensation," as used in that statute, is not broad enough to encompass benefits provided in other laws. 390 F. 2d at 885.

Thus, the Court of Claims has interpreted laws with wording similar to that in section 15 of the Boulder Canyon Project Adjustment Act, to mean that "compensation" is not so broad as to include all of the monetary benefits which employees may be granted. We think the court's reasoning is applicable to our interpretation of the meaning of "wages or compensation" as used in section 15. Consequently, we do not think wages or compensation includes every item of reimbursement which could be paid to an employee.

Specifically, we conclude that the meaning of compensation under section 15 does not include travel expenses for commuting, housing allowances, or similar fringe benefits. We note that similar expenses of Federal employees, such as travel expenses for temporary duty or the furnishing of Government-owned quarters, are specifically provided for by law, *e.g.*, chapters 57 and 59 of title 5, United States Code. It is significant that these expenses or allowances are not authorized in chapter 55, title 5, United States Code, concerning Pay Administration, but are authorized under separate chapters of title 5 specifically designated for fringe benefits and nonpay allowances. Since Congress has in this manner specifically provided for payment of such nonpay benefits and allowances to Federal employees, including employees of the Boulder Canyon Project, we find it necessary to conclude that these various benefits and allowances are not intended also to be covered under the general term of "wages or compensation" under the compensation laws. Accordingly, the payment of the above-described fringe benefits to Boulder Canyon Project employees would not be appropriate under law because these benefits neither come within the term "wages or compensation" in section 15 nor are they specifically provided for in other laws which have been enacted to allow for payment of the various noncompensation benefits and allowances.

We believe, however, that it would be inappropriate for us to attempt to set guidelines as to whether other possible entitlements do

or do not fit within the term "wages or compensation" under section 15. We do not think it wise or possible to so delineate the term "wages or compensation," and our decision is limited to the specific benefits and allowances dealt with herein.

3. *Assuming both that Section 15 has an independent existence and further that Section 15 allows or requires some things to which employees operating under Section 9(b) of P.L. 92-392 are not entitled, can Section 15 be applied to employees of other Bureau of Reclamation dams who have been merged or intermingled for purposes of administration and efficiency, with employees of the Boulder Canyon Dam?*

Explanation—As pointed out in our June 9, 1978, submission, the establishment of the Department of Energy resulted in transferring to that Department employees of the Bureau of Reclamation whose work was associated with the transmission of electricity. This left a greatly reduced work force engaged in power generation at the Parker and Davis Dams in the now defunct Parker-Davis Project, which was administratively adjacent to the Boulder Canyon Project. The employees at the Parker and Davis Dams have been placed for administrative purposes in a new project entitled the Lower Colorado Dams Project which encompass also the Boulder Canyon Project. The union, which represents Parker-Davis employees and negotiates wages for them pursuant to 9(b) of P.L. 92-392, has presently agreed to coordinated wage bargaining with the union which represents the Boulder Canyon project employees whose wages are negotiated. The obvious question is whether the Parker-Davis employees can obtain "compensation" to which they are not entitled under 9(b) by virtue of the extension of Section 15 to them?

Answer to Question No. 3

Whether employees of the now defunct Parker-Davis Project are entitled to "compensation" under section 15 of the Boulder Canyon Project Adjustment Act depends on whether these employees are now engaged in the "* * * construction * * * operation, maintenance, or replacement of any part of the Hoover Dam * * *." It does not appear that Parker-Davis employees are actually engaged in any of the activities associated with the Hoover Dam. However, we pass no judgment upon whether Parker-Davis employees may bargain to have their wages and compensation determined in the same manner as Boulder Canyon Project employees. An answer to this question concerning the extent of the Parker-Davis employees' right to bargain their compensation as if they were covered by section 15, if it still needs to be answered, should be directed to the Federal Labor Relations Authority.

[B-195431]

Contracts—Awards—Small Business Concerns—Set-Asides—Criteria for Set-Aside Determination—Military Procurement

Contracting officer need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before determining to set aside procurement for exclusive small business participation. Under Defense Acquisition Regulation 1-706.5(a)(1), contracting officer has broad discretion and is only obligated to make informed business judgment that there is "reasonable expectation" of sufficient number of responsible small business bidders so that awards may be made at reasonable prices taking into account circumstances which exist at time determination to set aside is made.

Contracts—Protests—Allegations—Not Supported by Record

Protest alleges unwritten Department of Defense/Department of Army policy to set aside procurements for exclusive small business participation whenever two or more small businesses are expected to compete without considering responsibility of anticipated small business bidders. Protest is denied because record does not support allegation.

Contracts—Awards—Small Business Concerns—Fair Proportion Criterion

Statutory provisions that "fair proportion" of Government contracts be awarded to small business concerns refer to proportion of total Government awards for all goods and services. Therefore, Department of Army may properly set aside significant proportion of Government contracts for particular category of items (or even make class set-aside of all contracts for particular items) without violating statutory provisions.

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

Ordinarily General Accounting Office (GAO) does not review protests against affirmative determinations of responsibility unless fraud is alleged on 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 or failure to apply definitive responsibility criteria, protester has failed to meet standard for review by GAO or courts.

Bids—"Buying In"—Not Basis For Precluding Award

Allegation of buy-in does not provide basis upon which award may be challenged.

Contracts—Awards—Small Business Concerns—Set-Asides—Partial *v.* Total—Administrative Determination

Decision to make 100-percent small business set-aside is not objectionable where contracting officer reasonably determined that procurement was within capability of small business concerns and that there was reasonable expectation of receiving adequate competition.

Contracts—Awards—Approval—Protest Pending

Awards made pending resolution of protests before GAO were properly made where awards were approved at appropriate level above contracting officer and GAO was notified of intention to make awards.

Matter of: Fermont Division, Dynamics Corporation of America; Onan Corporation, June 23, 1980:

Fermont Division, Dynamics Corporation of America (Fermont), and Onan Corporation (Onan) have protested under invitation for bids No. DAAJ09-79-B-5034, issued by the United States Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) for large quantities of 5 and 10 kilowatt, diesel engine, generator sets, and a small quantity of related generators. The protests relate to the contracting officer's decision to set aside the procurement for exclusive participation by small businesses.

We find no merit to the protests.

BACKGROUND

In 1978, during the preliminary planning stages for this procurement, the contracting activity received an inquiry from the John R. Hollingsworth Company (Hollingsworth) concerning the possibility of setting aside a portion of the proposed procurement for exclusive small business participation. TSARCOM also received copies of correspondence Hollingsworth had sent to a United States Senator and a Small Business Administration (SBA) representative, dated September 5, 1978, pointing out that the proposed quantities for the impending procurement would be sufficiently large as to make a partial set-aside for exclusive small business participation appropriate. Shortly thereafter, the SBA representative issued to TSARCOM a preliminary request that the procurement be made a 50-percent set-aside for small businesses.

In response, TSARCOM prepared a letter to the Senator which explained that the only known previous supplier of 5 and 10 kilowatt generator sets was Onan, a large business, and indicated that the production quantity was expected to be too small for an economical production run. Therefore, TSARCOM did not believe that any part of the requirement for 10 kilowatt sets could be set aside at that time. This letter also showed that a careful review of the 5 and 10 kilowatt generator program would be undertaken. The contracting officer acknowledged the SBA's preliminary request by letter of September 20, 1978, and stated that TSARCOM proposed course of action regarding possible set-asides would be coordinated with the SBA representative when program quantities and funds were better defined.

Approximately 7 months later, on April 16, 1979, the contracting officer issued a determination and findings that the procurement of 5 and 10 kilowatt generator sets should be procured under a 100-percent small busines set-aside since he had determined that a sufficient number of responsible small business concerns would bid so that award could be made at reasonable prices in accord with Defense Acquisition Regulation (DAR) § 1-706.5(a)(1) (1976) ed.). In support of the total set-aside determination the contracting officer stated in pertinent part:

> * * * In the previous procurement of the 5 & 10 KW Generator Sets, competition was unrestricted with Bogue Electric a Small Business Concern receiving the award. John R. Hollingsworth a small business and Onan a large business were close behind in fierce competition. Another small business Libby Welding is a keen competitor of the above companies. All of these companies have produced Generator Sets of a comparable size to the 5 & 10 KW Sets. The small quantity of the first program year (FY 79) of the 10 KW Set does not lend itself to a 50% Small Business Set-Aside.

On April 17, 1979, the contracting officer, with the concurrence of the SBA representative, recommended that the proposed procurement of 5 and 10 kilowatt generator sets be set aside 100-percent for small

business participation. The Director of Procurement and Production, TSARCOM, forwarded a procurement plan to the Assistant Secretary of the Army for approval on April 20, 1979, which showed that TSARCOM had decided to set aside the procurement for exclusive participation by small businesses. The project manager responded to the procurement plan on April 30, 1979, and objected to the recommendation to make a total small business set-aside out of the procurement. The project manager recommended that both large and small businesses be allowed to bid in unrestricted competition. He indicated that small businesses which were likely to bid included Hollingsworth, Libby Welding Company (Libby), and Bogue Electric Manufacturing Company (Bogue). The project manager pointed out that Bogue had not performed well on the previous contract and that he believed Bogue to be in a weak financial position. He concluded that only Libby and Hollingsworth would be able to compete if the procurement were set aside for small businesses. In light of the large quantity of generator sets being procured and the high estimated cost of such equipment, the project manager did not believe that the Government would be guaranteed adequate competition.

During this period, Onan representatives had apparently contacted Department of Defense officials to express their concern about the exclusion of large businesses from competition and the "shrinking industrial base." In response to inquiries from Department of Defense personnel and the objections voiced by the project manager, the contracting officer held a meeting on May 1, 1979, to discuss the possibility of reversing his decision. The fact that Onan, a large business, had developed the generators used in these generator sets, and the fact, that Bogue, a small business, was not performing satisfactorily on the previous contract, were among the arguments made in favor of reversing the set-aside decision. The SBA representative at that meeting indicated that he would not agree to any change in the set-aside status.

After review of the above arguments, the Director, Procurement and Production, TSARCOM, by memorandum of May 11, 1979, affirmed the contracting officer's determination and the procurement plan's recommendation to set aside this procurement for exclusive small business participation. The Director acknowledged that an unrestricted procurement had originally been considered but rejected in view of the SBA representative's insistence on at least a partial set-aside. TSARCOM procurement personnel had concluded that the applicable provisions of the DAR supported the SBA representative's view. TSARCOM procurement officials also determined that a partial set-aside would not be in the Government's best interest because it

would result in duplication of procurement and contract administration costs. This memorandum stated that at least two small businesses, Libby and Hollingsworth, were expected to compete, that these firms have been very competitive in the past, and that these firms have the capability to successfully produce the items in accord with the delivery schedule. Moreover, TSARCOM took into account that, since the engines used in these generator sets are source-controlled items which must be purchased from Onan, a large business would benefit from about one-third of the program dollars spent.

Solicitation DAAJ09–79–B–5034 was issued on July 5, 1979, as a set-aside for exclusive small business participation, and called for bids on either a single-year or multi-year basis (or both) with options.

Fermont filed its initial protest against TSARCOM's determination to set aside the procurement for small business participation only in our Office on August 10, 1979, prior to the August 23, 1979, bid opening. Bids were received from four small businesses: Hollingsworth, Libby, Seaboard International Equipment Company, and Precision Products. (Precision Products withdrew its bid by letter of September 20, 1979).

On September 12, 1979, Onan filed a Complaint in the United States District Court for the District of Minnesota, Fourth Division (Civil No. 4–79–423), seeking, among other things, a declaratory judgment and injunctive relief on matters related to TSARCOM's determination to set aside this procurement exclusively for small business participation. The Court, in its Memorandum and Order dated September 28, 1979, granted Onan's motion for limited discovery and denied Onan's motion for a temporary restraining order. Pending resolution of Fermont's protest before our Office and Onan's litigation before the United States District Court, TSARCOM proceeded on September 28, 1979 to make split awards to Hollingsworth for a multi-year contract for 5 kilowatt generator sets and stator generators and to Libby for a single-year contract for supply of 10 kilowatt generator sets. On October 15, 1979, a hearing was held before the District Court, and by Memorandum and Order of October 23, 1979, the Court indicated its interest in our resolution of the issues raised in Onan's September 12, 1979, Complaint.

Counsel for Onan then filed its protest in our Office on November 1, 1979, but indicated that negotiations were being conducted with the Department of Defense and the Department of Justice with regard to limiting the issues to be resolved by our Office. By letter of December 12, 1979, the Court wrote us and indicated that it desired our decision on the three counts of Onan's September 12, 1979, Complaint, and that our Office should fully develop the protest in accord with our

Bid Protest Procedures (4 C.F.R. part 20 (1980)). In accordance with the Court's request of December 12, 1979, we have limited our consideration of Onan's protest to those issues which were originally raised in Onan's September 12, 1979, Complaint.

ISSUE I

In Counts I and II of its September 12, 1979, Complaint, Onan concedes that it is the policy of Congress, as expressed in the Armed Services Procurement Act of 1947 (10 U.S.C. § 2301 (1976)) and the Small Business Act (15 U.S.C. § 631 (1976)), that a "fair proportion" of all Government contracts be placed with small business concerns. Onan points out that this policy has been implemented by the Department of Defense in section 1, part 7, of the DAR. However, Onan also points out that DAR § 1-706.5(a)(1) required the contracting officer to make a determination that a reasonable expectation existed that bids would be obtained from a sufficient number of *responsible* small business concerns so that awards would be made at reasonable prices. Onan protests that it is a general policy of the Department of Defense and the Department of the Army to totally set aside procurements for small businesses whenever there are two small business concerns which are expected to bid on the procurements without considering the matter of the responsibility of the expected small business bidders. Onan alleges that this illegal policy directive was followed by the contracting officer and other TSARCOM procurement officials in contravention of the specific requirements of DAR § 1-706.5(a)(1).

At the time the determination to set aside this procurement was made, DAR § 1-706.5(a)(1) stated, in pertinent part:

> * * * the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, *shall be set aside for exclusive small business participation (see 1-701.1) if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices.* * * * [Italic supplied.]

Onan argues that this provision requires a contracting officer to consider the responsibility of some or all of the potential small business offerors prior to making a determination to set aside a particular procurement. While Onan concedes that the contracting officer need not make a complete or final responsibility determination on any of the prospective offerors, it is clear that Onan interprets the DAR as requiring something very close to affirmative responsibility determinations before a set-aside can be made. Onan appears to interpret the phrase "reasonable expectation" as calling for a strict standard approaching virtual certainty. We do not agree with this interpretation,

and we find that DAR § 1–706.5(a)(1) does not require such an interpretation.

The responsibility of a prospective contractor is to be determined after bid opening on evidence available up to the date of award. *See*, for example, *Eastern Microwave Corporation*, B–181380, May 27, 1975, 75–1 CPD 312. A contracting officer's determination not to set aside a procurement under DAR § 1–706.5(a)(1) need not be referred to the SBA for a responsibility determination under the certificate of competency procedures. *Cosmos Engineers, Inc.*, B–193203, December 15, 1978, 78–2 CPD 419. We believe that allowing contracting officers to make determinations concerning prospective offerors' responsibility prior to deciding whether to set aside procurements would amount to a system whereby small businesses would have to be prequalified before they could compete under exclusive small business set-asides. Such a procedure would unduly restrict competition. While we have allowed prequalification of prospective offerors in limited circumstances where the usual preaward methods of determining responsibility were found inadequate because the urgency of the requirements restricted the extent of the responsibility investigations which could be performed, there are no such compelling circumstances in the present case. *See*, for example, 53 Comp. Gen. 209 (1973). Accordingly, it is clear that responsibility determinations as that term impacts on eligibility for award cannot properly be made prior to bid opening.

Moreover, relevant DAR provisions require that responsibility determinations for award purposes be made after bid opening. Section 1–705.4(c)(i) states that under no circumstances should the matter of the responsibility of a small business bidder be referred to the SBA before the contracting officer makes a determination that the small business bid is responsive; section 1–905.1(d) indicates that information necessary to make responsibility determinations shall be obtained only concerning contractors within range for contract award; section 1–905.2 indicates that information regarding the responsibility of a prospective contractor shall be obtained "after bid opening" and should be on "as current basis as feasible with relation to the date of contract award." We think these provisions give no support to the argument that responsibility determinations or anything close to such determinations are to be made prior to determining that a particular procurement be totally set aside for small business participation under DAR § 1–706.5(a)(1).

We also believe that it would be impractical to require contracting

officers to make responsibility determinations or anything close thereto prior to setting aside procurements. The present procurement illustrates this point. The solicitation was sent to 47 small businesses. Every one of those firms could potentially have been in line for award if all had bid. To require responsibility evaluations on all 47 prospective contractors or even those which were considered most likely to receive award would be an unnecessary, extremely time consuming, and expensive task, which would require the contracting officer to speculate as to which firms would bid, whether their bids would be responsive, and whether the bids would be low enough to be in line for award.

While we are holding that contracting officers are not required to make responsibility determinations on prospective small business bidders before determining to set aside procurements for exclusive small business participation, we do not think that our holding reads out of DAR § 1–706.5(a)(1) the word "responsible." We believe that DAR § 1–706.5(a)(1) clearly imposes an obligation on a contracting officer to make an informed business judgment that there is a "reasonable expectation" of offers from a sufficient number of responsible small businesses so that award can be made at reasonable prices. The standards of responsibility enunciated in DAR § 1–903 are certainly relevant to deciding whether such a "reasonable expectation" exists. However, the contracting officer may exercise broad discretion in making this determination.

The extent of this discretion is evidenced by a review of our decisions in the area. There is no requirement that the contracting activity perform an in-depth survey prior to initiating a small business set-aside. See *U.S. Divers Company*, B–192867, February 26, 1979, 79–1 CPD 132. The past procurement history of the item or similar items is always an important factor. DAR § 1–706.5(a)(1); *Tufco Industries, Inc.*, B–189323, July 13, 1977, 77–2 CPD 21. In this regard, we have upheld a set-aside determination where the basis was the fact that competitive bids were received from two small businesses on the previous procurement. *See*, for example, *KDI Electro-Tec Corporation*, B–185714, June 8, 1976, 76–1 CPD 364. We have approved a contracting officer's decision to set-aside a procurement where the contracting officer relied solely upon a commodity source list to determine that there were a sufficient number of responsible small businesses which could be expected to bid so that award could be made at a reasonable price. *Wyle Laboratories*, B–186526, September 7, 1976, 76–2 CPD 223. We have even upheld a contracting officer's determination in this regard where only one bid from a small business concern was received in response to the solicitation. See *U.S. Divers Company*, *supra*. Since the circumstances of each procurement are unique, there

can be no simple formula for making such business judgments. In any event, if after receipt of bids a contracting officer determines that there is not sufficient small business participation or that awards cannot be made at reasonable prices, a contracting officer may properly withdraw the set-aside in accord with DAR § 1–706.3(a). See *Hein-Werner Corporation*, B–195747, May 2, 1980, 80–1 CPD 317, where we indicated that doubt as to the number of responsible small businesses expected to compete could be resolved by opening bids to determine the propriety of the set-aside.

Onan alleges that it is an unwritten Department of Defense/Department of the Army policy to issue total small business set-asides whenever two or more small business concerns are expected to bid without considering whether such small businesses ultimately will be found responsible. Onan has supplied numerous depositions and Army correspondence in support of this allegation. We have examined these documents and cannot conclude that any such policy exists. It appears to us that Onan has taken quotations out of context from these documents. Onan has made much out of the fact that, on several occasions, the word "responsible" was not used when a procurement official was describing the process of making a set-aside determination. We think the failure to use the word "responsible" when describing potential bidders was mere oversight on the part of the procurement officials involved. Certainly, these out-of-context statements do not amount to a policy which overrides the policies stated in the DAR, and we find no evidence that the present procurement was set aside because of any alleged unwritten policy.

Therefore, the protests are denied on this issue. The propriety of this particular determination will be discussed under Issue 3, below.

ISSUE 2

Both Fermont and Onan (in Count II of its September 12, 1979, Complaint) contend that the Department of Defense and the Department of the Army policies go beyond the congressional policy of awarding a "fair proportion" of all Government contracts to small businesses. Essentially, the protesters believe that small business set-asides in the generator field are being made more and more frequently and that large businesses are being driven out of the generator field. Both protesters cite the "shrinking industrial base" in the generator field as being directly attributable to set-aside policies of the Department of Defense and the Department of the Army in giving small businesses more than a "fair proportion" of generator contracts. Fermont contends that frequent set-asides erode the industrial base and violate

congressional policy of maintaining the defense capabilities of our nation. The protesters also point out that once an item has been successfully produced under a small business set-aside, that item will always be procured through the use of set-asides under DAR § 1-706.1(f), as amended by Defense Acquisition Circular No. 76-19, July 27, 1979.

As previously shown, it is a congressional policy that small businesses be awarded a "fair proportion" of all Government contracts. However, we know of no precise definition for the phrase "fair proportion." What Congress intended by this phrase is not evident from either the statutory language or the legislative history. We have held that the broadly worded statutory language refers to the totality of Government procurement. That is, small businesses are to be awarded a fair proportion of the Government's total procurements. The fact that small businesses may receive a significant proportion of Government contracts in a particular industry does not necessarily mean that more than a fair proportion of the Government's total contracts have been awarded to small businesses. See *J. H. Rutter Rex Manufacturing Co., Inc.* B-190905, July 11, 1978, 78-2 CPD 29. Section 1-706.5(a)(1) specifically provides that classes of procurements may be set aside so long as the relevant determinations are made by the contracting officer. Thus, it is clear that, under appropriate circumstances, entire classes of procurements can properly be set-aside without violating the "fair proportion" policy. *See*, for example, *Allied Maintenance Corporation*, B-188522, October 4, 1977, 77-2 CPD 259. We are not here conceding that large businesses have been systematically precluded from competing for generator contracts. In fact, the evidence shows that large businesses have been fairly successful in obtaining contracts for the supply of similar generators in the past.

The argument that repeated issuance of set-aside solicitations will erode the industrial base and have an adverse impact on our nation's industrial preparedness is not a matter for our Office to consider. Even if true, this contention does not affect the validity of the contracting officer's determination to set aside this procurement for small business concerns since it is irrelevant to the determinations which must be made under DAR § 1-706.5(a)(1). See *U.S. Divers Company*, *supra*. Moreover, the DAR amendment dealing with repetitive set-asides (now DAR § 1-706.1(f)) is irrelevant to the contracting officer's determination to set aside the present procurement since the amendment was issued on July 27, 1979, or more than 3 months after the contracting officer decided to set aside the present procurement. We note, however, that the provision now provides that once an item has been successfully acquired through a small business set-aside all future re-

quirements of the contracting office are to be set aside, unless the contracting officer determines there is not a reasonable expectation that offers from two responsible small businesses will be received and award will be made at a reasonable price. In other words, the contracting officer will have to examine potential competition in much the same manner as is now required under DAR § 1–706.5(a)(1) to set aside the procurement initially. Therefore, this new provision appears to be consistent with the present set-aside policy as set forth in the DAR.

Accordingly, this portion of the protest is denied.

ISSUE 3

Fermont and Onan (in Count III of its September 12, 1979, Complaint) contend that, if the contracting officer made the determinations required by DAR § 1–706.5(a)(1) before deciding to set aside this procurement for exclusive small business participation, then the contracting officer's determinations were arbitrary and capricious.

Fermont believes that the contracts awarded are too big for small businesses to successfully produce the generator sets in accord with required delivery schedules at reasonable prices without financial assistance from the Government. Fermont expresses fear that the small business awardees may have to be defaulted by the Department of the Army or that they may be driven into bankrutpcy in attempts to expand their production capabilities for these contracts. Onan argues that the contracting officer must have made the DAR § 1–706.5(a)(1) determination without having taken into account the prior procurement history of these generators. Such history allegedly shows a pattern of "buy-ins" by small businesses and financial assistance by the Government in the form of contract modifications after award; more specifically, a contract awarded to Bogue, the last small business contractor for these generator sets, is referred to where the Government had to delete a large portion of the requirement in order to prevent Bogue from being defaulted. Onan also argues that Libby and Hollingsworth will be unable to successfully perform this large requirement because of inadequate production capabilities and inadequate financial resources. Onan also alleges that no small business bidders could possibly have been expected to meet the standards for responsibility set forth in DAR § 1–903, especially with regard to financial capability and ability to comply with proposed delivery schedules.

Onan has placed heavy reliance on the case of *J. H. Rutter Rex Manufacturing Co.* v. *United States*, Civil Action No. 77–3018, United States District Court for the Eastern District of Louisiana, decided

March 10, 1978, as support for its contention that the contracting officer's determination was arbitrary, and, therefore, should be overruled by our Office. Onan also cites statements made in the Department of the Army's supplemental report dated March 5, 1980, which allegedly show that the contracting officer's decision to make a total set-aside rather than a partial set-aside was arbitrary. Onan contends that these statements, to the effect that if the contracting officer deemed portions of the instant requirement to be within the potential capabilities of Libby and Hollingsworth he could properly have determined to make a total set-aside, clearly show the contracting officer's determination to have been deficient. Onan argues that only if the potential offerors were believed to have the capabilities to perform the entire minimum requirement set forth in the solicitation could the DAR § 1-706.5(a)(1) determination properly have been made. Otherwise Onan argues that, if small businesses were to be given any preference, it should have been in the form of, at most, a partial set-aside.

As mentioned above, determinations regarding the reasonable expectation of bids from a sufficient number of responsible small business concerns are necessarily within broad administrative discretion, and this Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of that discretion. *Allied Maintenance Corporation*, *supra*. Both protesters have charged that the contracting officer's determinations are arbitrary and capricious. We do not agree.

Prior to making awards, TSARCOM made an affirmative determination that the awardees were responsible. The charge that the awardees will not be able to adequately perform is essentially a challenge to the contracting activity's affirmative determinations of responsibility. This Office no longer reviews affirmative determinations of responsibility, unless fraud is alleged on the part of the contracting officer or the solicitation contains definitive responsibility criteria which allegedly have not been applied. *Louisville Billiard Supply Company*, B-190413, October 31, 1977, 77-2 CPD 336. Our standard is much the same as that followed by the courts, which have taken the view that responsibility is a matter of discretion not subject to judicial review absent fraud or bad faith. See *Bell Helicopter Textron*, 59 Comp. Gen. 158 (1979), 79-2 CPD 431 (at p. 31) and cases cited. Since neither fraud nor failure to apply definitive responsibility criteria have been charged, the protesters have failed to meet the standard for review by our Office 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.

Generally, protests against acceptance of allegedly unreasonable, below-cost proposals for fixed-price contracts imply that the allegedly too-low bidder is attempting to "buy-in" to a contract with the expectation of either (1) increasing the contract price or estimated cost during the performance period through change orders or other means or (2) receiving future follow-on contracts at prices high enough to recover any losses on the original "buy-in" contract. Acceptance of unreasonably low or even below-cost offers by the Government is not illegal and, therefore, the possibility of a "buy-in" does not provide a basis upon which an award may be challenged if the procuring activity has not made a determination of nonresponsibility. It is, however, the contracting officer's duty to see that amounts excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on contracts. *KET, Inc.*, B–190983, December 21, 1979, 79–2 CPD 429. There is no evidence that either Libby or Hollingsworth have offered below-cost bids on these contracts.

Moreover, nothing in *Rutter Rex* v. *United States*, cited by Onan, indicates that the instant set-aside is contrary to law. There, the contracting officer decided not to set aside a procurement for small business because of the absence of sufficient competition from small business to assure reasonable prices. This determination, however, was reversed by the contracting officer's superior within the agency. The court found that the superior's action was taken to enable the agency to meet an interim goal for awards to small business, which the court identified as "an arbitrary statistical goal." The court held that the agency abused its discretion by disregarding the criteria for set-asides contained in the Armed Services Procurement Regulation (now called the DAR). Since we find, *infra*, that the criteria of DAR § 1–706.5(a)(1) were followed, the holding of *Rutter Rex* v. *United States* is distinguishable. See *J. H. Rutter Rex Manufacturing Co., Inc., supra.*

We believe the contracting officer reasonably determined within his discretion that bids from a sufficient number of responsible small business concerns would be received so that awards could be made at reasonable prices. The contracting officer and other TSARCOM officials examined the prior procurement history for similar generator sets. The previous procurement for generator sets was an unrestricted competition which was awarded to Bogue, a small business. The April 16, 1979, determinations and finding made by the contracting officer cited this fact and the fact that Hollingsworth, another small business, was close behind in the bidding for that contract. The contracting officer also expected Libby, a small business, to bid. Since all

three of these small businesses had previously produced generator sets comparable in size to the 5 and 10 kilowatt sets required under the present procurement, the contracting officer believed that at least these small businesses would be able to perform successfully under the present contract if they received the award.

Onan's allegations regarding Libby and Hollingsworth are mere speculation on Onan's part. In fact, the matters raised by Onan and Fermont were investigated by the Army during the preaward survey, and both firms were found to have adequate financial resources and any necessary capability to expand to meet new production demands. Regarding the problems which arose with Bogue under the prior contract, we note that these problems were partially caused by Onan's demand for $500,000 in escrow or an irrevocable letter of credit in that amount before Onan would supply Bogue with engines. Bogue was unable to meet this demand. Therefore, the Army deleted the engines from the contract, and the Army purchased the engines directly from Onan to be assembled as part of the generator sets.

The possibility of Onan demanding "up-front" financing from Libby or Hollingsworth was raised by the project manager after the contracting officer had decided to set aside this procurement. Contracting officials at TSARCOM considered this issue and determined that either Libby or Hollingsworth would be able to comply with such a demand if made by Onan. Furthermore, TSARCOM believed that it was unlikely that a demand for financial guarantees would be made by Onan on either of these companies because of their sound financial conditions. The record shows that TSARCOM felt that the price of the generator sets would be reasonable even if Libby and Hollingsworth were the only two bidders since past experiences had shown these two firms to be very competitive. Moreover, TSARCOM procurement officials believed that small businesses would be able to meet the production schedules since those schedules had been drawn up with a total small business set-aside in mind. Since the small businesses in the generator field are generally packagers or assemblers of parts supplied to them by other firms, TSARCOM believed that small businesses would be able to meet production schedules without any significant problems. Moreover, due to the fact that small business packagers generally do not have a large capital investment in engineering and plant expansion and because these firms often operate at a lower profit margin, the project manager indicated that small businesses are able to offer the end-products at competitive prices. Due to the project manager's objection that adequate competition might not be obtained if only small businesses were allowed to compete, the SBA repre-

sentative was consulted and a meeting was held on May 1, 1979, to reconsider the matter. After reconsideration by TSARCOM, the determination to set aside was affirmed.

Regarding Onan's charge that this procurement should have been, at most, a partial set-aside, the contemporaneous records show that the ability of potential small businesses to produce the minimum requirement of the contract was carefully considered. Even though the Army indicated in its supplemental report that a potential bidder might be considered even if capable of producing less than the entire contract minimum, there is no contemporaneous evidence that the contracting officer considered the capabilities of potential small business bidders to perform less than the entire minimum requirement. In fact, the record shows that the contracting officer considered but rejected the possibility of making only a partial set-aside, on the bases of (1) duplicative solicitation and contract administration expenses, (2) the SBA representative's steadfast refusal to agree to a partial set-aside, and (3) the small quantity of the 10 kilowatt generator sets required. Regarding the small quantity of 10 kilowatt generator sets required, we note that DAR § 1–706.6(a)(ii) provides that the requirement must be severable into two or more economic production runs before the procurement may be partially set-aside.

In sum, the solicitation was sent to 47 small business concerns and three bids were received (excluding the withdrawn bid). Two of these firms were selected for award and were subjected to careful scrutiny by the Army to determine if they were responsible. The responsibility factors enumerated in DAR § 1–903 were carefully considered and an affirmative determination was reached on each firm. This determination was based on the ability to successfully produce the entire minimum requirement, and not on the ability of the awardees to produce only a part of the requirement as alleged by Onan. Thus, not only did the contracting officer's decision to set aside appear to be reasonable at the time it was made but the reasonableness of this decision was confirmed by the detailed preaward surveys which were available to the contracting officer before the award was made. In view of the above, we cannot find the decision to set aside to have been unreasonable.

Therefore, this protest issue is dismissed in part and denied in part.

ISSUE 4

Fermont protests that the Department of the Army failed to notify our Office in a timely manner that awards were being made pending resolution of the protests, as required under DAR § 2–407.8(b)(2),

and, therefore, the awards were improperly made and a new solicitation is required.

The last issue, raised by Fermont, is a procedural one. Section 2-407.8(b)(2) of the DAR provides that when a protest has been filed in our Office prior to award of the contract, an award may properly be made if it is approved at an appropriate level above the contracting officer and notice of intent to make award is furnished to our Office. See *Price Waterhouse & Co.*, B-186779, November 15, 1976, 76-2 CPD 412. The present awards were approved by the Office of the Assistant Secretary, Department of the Army, on September 28, 1979. Our Office was notified by telephone on that same day that awards were being made. We received written notification of the awards to Libby and Hollingsworth on October 24, 1979.

Accordingly, this protest issue is denied.

[B-196254]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Deficiencies in Proposals

Where proposal in competitive range was found informationally inadequate, so that contracting agency could not determine extent of offeror's compliance with requirements, contracting agency should have discussed inadequacies with offeror, especially since solicitation did not specifically call for missing information but merely contained general request for information.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Right to Discussion—Deficiencies *v.* Weaknesses

Contracting agency may not avoid duty to conduct meaningful discussions by labelling informational inadequacies in offeror's proposal as weaknesses and thus not for discussion under its regulation.

Contracts—Negotiation—Discussion With All Offerors Requirement—Technical Transfusion or Leveling

Contracting agency may not avoid duty to conduct meaningful discussions, by pointing out informational inadequacies in offeror's proposal, on basis that to do so would constitute technical leveling. Technical leveling is not involved where sole purpose of discussion is to ascertain what offeror proposes to furnish.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—What Constitutes Discussion

Contracting agency does not fulfill duty to point out informational inadequacies in offeror's personnel and facilities areas merely by requesting offeror to furnish cost information pertaining to these areas. Offeror could not reasonably relate agency's request for cost detail to the specific informational inadequacies.

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

Grounds of protest concerning failure of all initial proposal evaluators to evaluate final proposals, procuring agency's refusal to release documents bearing on evalu-

ation of proposals, and procuring agency's alleged bias against small concerns are without merit since: (1) final proposal evaluation did not contradict solicitation; (2) procuring agency, not General Accounting Office, determines releasability of documents; and (3) procuring agency's position that bias in evaluation did not exist is supported by record.

Contracts—Negotiation—Prices—"Best Buy Analysis"

Given closeness of scoring and inadequate negotiating approach, offeror having "best buy" for three phases of decontamination and cleanup contract is in doubt.

Matter of: Logistic Systems Incorporated, June 24, 1980:

Logistic Systems Incorporated (LSI) protests the award of a contract to Rockwell International Corporation (Rockwell) under request for quotations (RFQ) DAAK11-79-Q-0095 issued by the Chemical/Ballistics Procurement Division, United States Army Armament Research and Development Command, Aberdeen Proving Ground, Maryland. The solicitation was for the decontamination and cleanup of Frankford Arsenal, Philadelphia, Pennsylvania, so that the area could be turned over to the public for recreational or industrial use.

LSI primarily challenges the adequacy of discussions leading to the contract which was awarded under a "best buy" analysis at an estimated cost ($6,302,187) nearly 50 percent higher than LSI's proposed cost for the work. We conclude the discussions in question should have been more extensive.

BACKGROUND

In 1976 Frankford Arsenal, a 110-acre facility located within the city limits of Philadelphia, was determined to be excess of the Army's needs. During the 160-year period that the facility had been in existence, a wide range of explosive, pyrotechnic, radiological and industrial chemicals were utilized in carrying out the facility's research, design and manufacturing mission. A sampling and analysis program was then undertaken to determine the extent of radiological contamination and explosive residues present at the arsenal.

The RFQ, which was issued on May 8, 1979, divided the cleanup and decontamination of Frankford Arsenal into three phases. The first phase would consist of verifying detailed decontamination and cleanup methods and procedures for the contaminants present at the arsenal. Based on the information generated in phase I, detailed plans and standard operating procedures to conduct the cleanup would then be prepared under phase II. Under the terms of the solicitation, these plans and procedures would have to be submitted to the Government for approval prior to starting operations. Upon approval by the Gov-

ernment, the contractor would conduct the actual decontamination and cleanup operations under phase III.

The RFQ also informed offerors that proposals would be evaluated on the basis of the following criteria listed in descending order of importance:

(1) Technical approach
(2) Management, Personnel and Facilities
(3) Cost Realism
(4) Proposal quality and Responsiveness

Moreover, listed in the RFQ were the mathematical formulas which were to be used to determine the "best buy" for the work. Under these formulas, "technical merit," which included all four evaluation factors, carried three times the weight of cost quantum.

On the closing date for receipt of proposals, June 14, 1979, the Army received five proposals. These proposals were then submitted to the Army's Toxic and Hazardous Materials Agency for technical evaluation. Teledyne Isotopes, Inc., Rockwell, and LSI were found to be qualified and thus placed within the zone of consideration. On July 30, 1979, the contracting officer sent letters to the three qualified firms requesting certain price data and the submission of best and final offers. Best and final offers were received on August 6, 1979.

The Toxic and Hazardous Materials Agency was then requested on August 7, 1979, to review the best and final offers to determine whether any changes in technical scoring were necessary. The Agency stated on August 8, 1979, that there should be no change in the previously assigned technical ratings. Between August 9 and September 20, 1979, the Army conducted a "best buy" analysis in accordance with the terms of the solicitation and the analysis was reviewed by its Board of Award. Because of this analysis, a cost-plus-fixed-fee contract was awarded to Rockwell on September 21, 1979. By letter dated September 25, 1979, LSI submitted its protest against the award to Rockwell.

There is no dispute as to the essential facts pertinent to the "discussions" issue. Both LSI and the Army agree that the questions posed in the contracting officer's July 30 letter constitute the only discussions that were held concerning the LSI proposal. Issue is taken, however, as to whether these discussions constituted "meaningful" discussions as contemplated by 10 U.S.C. § 2304(g) (1976) and the decisions of our Office. See, for example, B–173677, March 31, 1972, as summarized in 51 Comp. Gen. 621 (1972).

The contracting officer's July 30, 1979, letter to LSI asked that the company give consideration to the following:

a. In order to adequately judge analytical costs for each phase of the contract, you should provide the Government with the number of samples taken and the

analyses performed in each of the areas addressed, i.e., cleanup of 400 area, cleanup of radiological material, cleanup of heavy metals and cleanup of explosives. In addition, the associated manhours and costs for both prime contractor and subcontractors should also be provided.

b. Your total Phase I manhours would appear excessive. What is your rationale for these projected manhours?

c. Your estimated 4,500 manhours to prepare detailed SOP's would appear inadequate. What is your rationale for these projected manhours?

d. You present analytical manhours during Phase II which deals with preparation of operational SOPs. Do the analytical manhours represent actual analytical effort or time spent by analytical personnel preparing SOP's?

e. Your estimate (3.9 million square feet) of the area to be painted is considerably less than that contemplated by the Government. How was your estimate computed?

f. Backup data relating to your estimate of $20,600 disposal cost for radiological material during Phase III should be provided. Your allocation for disposal in this area is considered inadequate. What is the rationale for your estimate?

g. What is the rationale for the analytical costs required during Phase III for cleanup of the 400 area?

h. What is the rationale for the analytical manhours required during Phase III for painting and cleanup of heavy metals? The total manhours would appear excessive.

The contracting officer argues that a detailed review of these questions would have necessarily led LSI to a discovery of proposal areas judged "weak," rather than "deficient," by the Army. These areas and the paragraphs of the July 30 letter which purportedly relate to the weaknesses, in the contracting officer's view, are as follows:

1. Sampling and analyses for heavy metals and explosives treated too lightly (paragraphs a, g and h).

2. Insufficient information on laboratory facilities and capabilities (paragraphs a, g and h).

3. Underestimated laboratory requirements (paragraphs a, g and h).

4. Underestimated analytical and painting requirements (paragraphs a, g and h).

5. Details on proposed procedures for heavy metals and explosives cleanup lacking (paragraph b).

6. Treatment of waste water contaminated with heavy metal waste not addressed (paragraph b).

7. Little original ideas or specific details provided for Phase I so that proposal repeated what was in the RFQ (paragraph b).

8. Subcontracting not fully defined (paragraph e).

9. Allocation for radiological waste disposal low (paragraph f).

Under the "best buy" formula, these weak areas sufficiently offset, in part, LSI's $2 million cost advantage, therefore dictating award to Rockwell. Apart from this list of weaknesses, the record also shows that the Army considered LSI's proposal to contain an additional weakness regarding alleged inadequate information about proposed personnel.

As to the weaknesses concerning laboratory facilities and personnel, the contracting officer has emphasized the importance of the areas and

why he thought explicit discussion of the weaknesses would have been inappropriate, as follows:

With respect to the factor management, personnel and facilities, there was some significant difference between the score assigned LSI and that assigned the other two firms. However, each of the competing firms had equal opportunity to establish a proposed management plan, to engage qualified personnel, to arrange for facilities, and to communicate their background and experience. In this particular case, the difference sprang not merely from any weakness of the LSI proposal, but the superiority of the resources available, in terms of personnel and facilities, to the other two competing offerors. To negotiate these factors with LSI toward upgrading its proposal and to giving LSI further opportunity to seek other personnel and facilities would have constituted leveling rather than any meaningful negotiation.

Additionally, the contracting officer's legal counsel has offered a defense of the negotiating approach which he believes is expressly consistent with Defense Acquisition Regulation § 3-805.3 (DAC #76-7, April 29, 1977). The argument, is as follows:

DAR 3-805.3(a) requires that when discussions are held that the offeror be advised of deficiencies * * * Deficiencies are defined as parts of a proposal which *do not* satisfy the Government's requirements. The contracting officer has indicated * * * that LSI had numerous weaknesses and overall its proposal was inferior to that of [the other offerors] * * *. [But there] were no areas where LSI failed * * * to address the RFQ requirements.

* * * * * * *

* * * the contracting officer does not have to advise an offeror of its weaknesses * * *. [But as] a practical matter, the contracting officer will normally inform an offeror of its weakness * * *. This is exactly what the contracting officer did in this case.

In reply, LSI challenges the Army's position that by questioning manhours and costs, an implied notification is being made concerning specific weaknesses in technical approach. LSI alleges that it was not alerted to any weaknesses in technical approach by the contracting officer's July 30, 1979, letter which merely required LSI to "adequately judge analytical costs for each phase of the contract." The remaining paragraphs of the letter indicated only that either manhours or costs in various areas appeared excessive or inadequate and requested a rationale from LSI. In addition, LSI points out that prior to the July 30, 1979, letter the contracting officer on July 10, 1979, issued a communication to all competing offerors asking that manhours and costs be resupplied on a predetermined evaluation format by July 11, 1979. LSI asserts that it assumed the request for additional information on July 30, 1979, regarding the same cost and manhours categories meant only that further comparisons were being made between the competing offerors and that the contracting officer was attempting to insure that he was evaluating all offerors on the same basis.

Most importantly, LSI alleges that the contracting officer's July 30, 1979, letter did not specifically apprise the company of any "weaknesses" at all in its proposal. Finally, LSI contends that the contract-

ing officer abused his discretion in failing to conduct more comprehensive discussions in view of the approximately $2.1 million difference between the proposals.

GAO ANALYSIS

When an agency conducts competitive range discussions, it must make those discussions meaningful. *Raytheon Company*, 54 Comp. Gen. 169 (1974), 74–2 CPD 137. At the same time, we have also recognized that the requirement for meaningful discussions should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76–1 CPD 134. Since disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is clearly unfair, such "transfusion" should be avoided. 51 Comp. Gen. 621, *supra*. It is also unfair to point out deficiencies or weaknesses when to do so would result in technical leveling by helping one proposer to bring his original inadequate proposal up to the level of other adequate proposals where these deficiencies or weaknesses were the result of the proposer's own lack of diligence, competence, or inventiveness in preparing his proposal. 52 Comp. Gen 870 (1973).

The record shows that LSI scored lower than the other firms in the zone of consideration under each of the above-described evaluation criteria with the widest disparity existing in technical approach, the most heavily weighted of the evaluation criteria. Even if we were to conclude that LSI could directly infer the evaluation inadequacies conveyed by some of the questions, this conclusion would not apply to the informational inadequacies in proposed personnel and "laboratory facilities and related capabilities." In our view, LSI could not have reasonably related the Army's request for cost details to the specific inadequacies found in these areas. While LSI might have inferred from paragraphs (a), (g) and (h) of the Army's July 30 letter that the company had generally underestimated work requirements, we do not think that it would have also inferred the presence of specific informational inadequacies in these areas.

Where, as here, a proposal in the competitive range is informationally inadequate so that the agency evaluators cannot determine the extent of the offeror's compliance with its requirements, the agency should use the discussion process to attempt to ascertain exactly what the offeror is proposing. In this connection, we have recognized that where a solicitation specifically calls for certain information, the agency should not be required to remind the offeror to furnish the necessary information with its final proposal. *Value Engineering*

Company, B–182421, July 3, 1975, 75–2 CPD 10. But here the solicitation was not so specific in calling for information on the offeror's personnel and laboratory facilities.

As to personnel, the RFQ required offerors to provide:

> Management Flow Chart
> Project organization chart showing personnel by name in each job category
> Résumés for Program Manager, key engineering, and support personnel
> Experience, educational background and record of past accomplishment of key personnel * * *.

The Army found LSI's project chart to be deficient because it included names of personnel in only 11 of 20 organizational blocks found on the chart. Specifically, the contracting officer states that LSI's proposal was "weak" because it omitted the name and qualifications of LSI's "explosives and heavy metals team leader." In reply LSI argues that it "did identify * * * all the key technical personnel involved in the decision making process who would be directly assigned to this job."

Contrary to the contracting officer's statement, LSI's project chart does not identify a position entitled "explosives and heavy metals team leader;" rather the organizational block is entitled "Explosives and Heavy Metals Team" which is shown as operating directly under LSI's named manager for "Explosives and Heavy Metals Decontamination." Moreover, we infer from the contracting officer's statement that LSI's proposal would not have been considered informationally deficient in this particular organizational block had the putative "team leader" been identified even if the rest of the team members not been identified. This inference runs counter to a literal interpretation of the phrase "in each job category" if one assumes that the phrase was intended to denote each organizational block shown on an offeror's project chart.

Consequently, we do not consider the RFQ's personnel requirements to have been so specific that the Army can be held to have been excused from discussing LSI's perceived informational deficiencies relating to personnel whom LSI evidently did not consider to be "key." At a minimum, the present record suggests possible misinterpretation of the phrase "in each job category" by both the Army and LSI. This misinterpretation, in itself, would have justified explicit negotiation in order to assure an appropriate informational exchange between the parties on personnel requirements.

As to laboratory facilities, the RFQ merely asked offerors to show how their "laboratory * * * equipment/techniques were adequate for the requirements of the work." In our view, this RFQ requirement can only be read as a general call for information. Since the requirement was stated in general terms, it is our view that the Army was

obligated to have explicit discussions with LSI if there were specific informational inadequacies relating to laboratory facilities.

The comments of some of the Army evaluators regarding LSI's proposed laboratory facilities were:

(1) Radiation only—instrumentation not provided for heavy metal analytical procedures;
(2) Radiation excellent—others?;
(3) No details in equipment and techniques other than some radiation;
(4) Subcontract—Lab Facilities except PMC suspect.

In reply to the Army's criticism that its proposal in these areas was informationally inadequate, LSI contends that the "alleged weakness could have been clarified very simply if any meaningful negotiations had been conducted."

From our review of the record. it appears that the evaluators were uncertain as to the adequacy of LSI's laboratory facilities in areas other than radiation. In view of the evaluator's uncertainties further exploration would have been worthwhile during the course of the competitive range discussions. This conclusion is particularly appropriate given the closeness of the revised numerical rankings of offerors (the awardee was only .01178 ahead of LSI on a revised "Best Buy Index" evaluation) and the potential cost savings theoretically available under an award to LSI. Moreover, by our calculations, a slight increase in LSI's "technical" score (perhaps as little as one point) might have displaced Rockwell under the "best buy" provision of the RFQ.

Thus, we believe that the informational inadequacies relating to laboratory facilities and personnel should have been pointed out to LSI during the discussion process. We are mindful of the Army's argument that such discussions were not required under DAR § 3–805.3, above. Neither, however, does the regulation sanction the Army's failure to point out informational inadequacies which prevent the contracting agency from ascertaining exactly what the offeror is proposing to furnish and whether it will meet the Government's requirements. In short, a contracting agency may not avoid its duty to conduct meaningful discussions by labelling informational inadequacies in a proposal as "weaknesses" rather than "deficiencies." Indeed the Army states that as a practical matter "the contracting officer will normally inform an offeror of its weakness."

Finally, on this point, we do not accept the contracting officer's position that discussion of LSI's informational inadequacies would have constituted improper leveling. In our opinion leveling is not involved where the sole purpose of the discussions is to ascertain what the offeror is proposing to furnish.

We think this result is consistent with 52 Comp. Gen. 466 (1973) where we held:

> * * * we believe it is incumbent upon Government negotiators to be as specific as practical considerations will permit * * *. In view of the substantial difference between the evaluated amounts of [the protester's] offer and the award price ($388,073 v. $635,600), we do not find the record persuasive that savings could not have been effected * * * had those offerors in the competitive range been called in for detailed discussions * * *

This situation is distinguishable, therefore, from the facts in *Systems Engineering Associates Corporation*, B-187601, February 24, 1977, 77-1 CPD 137, cited by the Army, where we upheld the procuring agency's decision not to conduct technical discussions. In that case, unlike here, the protester did not show prejudice resulting from the lack of discussions; moreover, the potential savings that might have been obtained through negotiations were not nearly as significant as here.

LSI has also raised other issues about the propriety of the Rockwell award. Specifically, LSI asserts:

(1) all proposal evaluators did not evaluate final proposals to LSI's prejudice;

(2) the Army improperly refused to release information about the evaluation of proposals;

(3) the Army's actions show bias against small business concerns;

(4) mistakes were made in evaluating LSI's proposal.

PROPOSAL EVALUATORS

As to LSI's argument that some proposal evaluators did not evaluate final proposals, the Army replies that one member of the evaluation panel "did not feel that his input [in reviewing final offers], even if he had been contacted [for the review], would have had any significant impact [on the evaluation of final proposals]." In any event, the Army argues that LSI was not prejudiced by this circumstance since:

(1) "all final offers were treated equally and received full and adequate consideration;"

(2) the "RFQ did not define the number of individuals on the evaluation team;"

(3) there is "no requirement that a minimum number [of evaluators] be on the team, nor that number be constant."

In reply, LSI argues that at least "three, not one, evaluation committee members did not consider the final offers" and that this lends evidence to LSI's contention that the award was "predetermined."

Our Office has recognized that all of the original evaluators need not

rescore revised proposals. As we stated in *Ray F. Weston, Inc.*, B-197866, B-197949, May 14, 1980:

> Weston challenges the manner in which the revised proposals were evaluated since only two members of the TEP conducted the reevaluation rather than reconvening the entire TEP as required by the RFP.
>
> However, the REP stated that "the revised proposal will be reevaluated and scored in accordance with the solicitation evaluation criteria." This does not require the entire TEP to reevaluate the revised proposals and our Office has recognized that all of the original evaluators need not rescore the revised proposals. *Cheechi and Company*, B-187982, April 4, 1977, 77-1 CPD 232, and *Columbia Research Corporation*. B-193154, May 15, 1979 79-1 CPD 353.

Here, the RFQ stated that initial quotations woud be evaluated by a "team of government personnel" and that the "initial evaluation of proposals may be revised in light of * * * [final offers]." We do not consider that these RFQ statements were breached in the final evaluation of proposals. In any event, we find no evidence in the record to support LSI's allegation that the selection of Rockwell was "predetermined."

Improper Refusal to Release Information

LSI takes exception to the Army's decision not to release many procurement documents bearing on the evaluation of proposals. LSI suggests it would be appropriate for GAO to release these documents directly to LSI.

We have consistently held that our Office is without authority to determine what records must be released by other Government agencies; therefore, we cannot honor LSI's request. *Security Assistance Forces and Equipment International, Inc.*, B-196008, March 14, 1980, 80-1 CPD 198.

Bias Against Small Business

LSI argues that the circumstances of this procurement show bias against LSI's status as a small business concern. The Army insists that there is no evidence to support the allegation and that, as the procurement was not set aside for small business, "no mechanism existed wherein LSI could have been given preferential treatment." Based on our review of the record, we cannot question the Army's position.

Mistaken Evaluation

Related to the discussion issue, LSI also argues that the Army erroneously interpreted parts of its proposal (for example, in considering LSI's subcontracting plans not to be "fully defined") and that our Office should therefore independently evaluate the points assigned proposals to determine if the award was proper.

It is not our function, however, to independently evaluate proposals in the manner suggested by LSI. See, for example, *Ads Audio Visual Productions, Inc.*, B–190760, March 15, 1978, 78–1 CPD 206. However, given the closeness of the scoring situation and the inadequate negotiating approach, the offeror having the "best buy" is in doubt. Consequently, in sustaining, in part, LSI's protest, the most that we could recommend is a reopening of negotiations with LSI and another evaluation of its proposal, rather than an immediate termination of the contract and award to LSI as originally requested by the company. See *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76–1 CPD 134.

In deciding whether to recommend action which may lead to a possible termination of a contract, we consider the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the procurement, and other appropriate noncost effects to the Government, apart from the procurement deficiency involved and its effect on the integrity of the procurement system. See *System Development Corporation*, B–191195, August 31, 1978, 78–2 CPD 159, and cases cited in text at page 12.

On May 23, 1980, the Army informed us that phases I and II of the contract were 100 percent complete as compared with 80 percent completion rates for these phases reported by the Army to us on April 8; moreover, as of May 23, Rockwell had supplied the Army with 100 percent of the data to be developed under these phases. Phase III, which calls for the conduct of the actual cleanup and decontamination of Frankford Arsenal, was almost 20 percent complete. Further, out of a total projected contract cost of $6.3 million, approximately $2 million has been expended. Based on these facts, the Army estimates that termination costs would be in the area of $500,000.

Given the status of the work, moreover, the Army insists that a recompetition for remaining Phase III work under a revised solicitation would be the only practical remedy now rather than the reopening of negotiations solely with LSI under its proposal for all three phases of the work. On this point, the Army insists that a "period of 8 months would be required to prepare a revised scope of work, issue, evaluate and award a new contract [for remaining Phase III work]." The Army has also informed us that, should Rockwell's contract be terminated as a result of the recompetition and a new contract awarded, the new contractor would require 3 additional months to "assimilate * * * information from [Phases I and II], assemble a team of personnel and equipment, and let subcontracts to initiate further progress on the resulting contract."

These delays, the Army contended, would also cause adverse side

effects to the economy of the city of Philadelphia and the operations of the United States Treasury Department. Further, the Army stated it would incur an additional "caretaker" cost of $200,000 for each month of the delay.

In reply LSI argues:

(1) It would take 3 months, rather than 8 months, to reprocure under a revised solicitation for phase III involving a "firm, fixed-price effort" under which "LSI would be willing to bid;"

(2) Contrary to the Army's view that it would take 3 months for a new contractor to become operational, LSI could be ready within "two to three weeks;"

(3) Based on information obtained by LSI the reported adverse side effects are either speculative or nonexistent;

(4) Since the Army has already awarded a contract for "caretaker" services at approximately $47,000 per month, it is not appropriate to consider the cost of that service as a reason for denying a recompetition of phase III.

ANALYSIS

Applying the above criteria for deciding whether to recommend a recompetition of the remaining phase III work, we conclude that, on balance, the recommendation would not be appropriate.

First, there is no indication, in our view, that the discussion shortcoming here was made other than in good faith under the negotiation regulation in question.

Second, there is no question that substantial performance has been accomplished under the contract and that substantial costs would be involved in any partial termination of the contract. Apart from the $500,000 in termination costs, there would be several additional months of caretaker costs at approximately $47,000 per month to be incurred (assuming LSI's monthly cost figure for the service is correct) in the event Rockwell's contract is ended; on this score, LSI apparently assumes that the Army is not intending to terminate the current caretaker contract as soon as possible after phase III is complete—an assumption which does not square with the position implicit in the Army's April 8 and May 23 statements. Moreover, we are unable to assume that LSI's proposed price under a revised solicitation would contain the same pricing advantage over competitors that the company possessed under the orginal solicitation given the differences in the solicitations.

Thus, even if we accept LSI's argument that the reported adverse side effects to the economy of Philadelphia and the operations of the

Treasury are not accurate, we consider the above analysis precludes our recommending the requested recompetition.

However, by letter of today we are advising the Secretary of the Army of our concern with the Army's failure to point out deficiencies in the protester's proposal in view of the closeness of the revised numerical rankings of the offerors and the potential 2.1 million dollar cost saving theoretically available under any award to the protester. We are also requesting that the Secretary advise us of the action taken to prevent a recurrence of the above situation.

[B-195366]

Travel Expenses—Actual Expenses—High Cost Areas—Undesignated—Retroactive Reimbursement

The Per Diem, Travel and Transportation Allowance Committee (for uniformed service personnel) and the General Services Administration (for civilian employees) may issue regulations permitting reimbursement to travelers on an actual expense basis based on unusual circumstances when due to the infrequency of travel to a given location consideration was not given to designating that locality as within a high cost geographical area. Authorization or approval of actual expense reimbursement should be predicated upon advice from the Committee or the Administration, as appropriate, that the locality was not considered for inclusion in the list due to lack of information with respect thereto and will be applicable only to the specific travel under consideration.

Travel Expenses—Actual Expenses—Reimbursement Basis—Criteria—Unusual Circumstances—Undesignated High Cost Areas

Where travel is to an area that is not designated as a high cost geographical area but where the choice of accommodations is limited or the costs of accommodations are inflated because of conventions, sports events, natural disasters. or other causes which reduce the number of units available, such events may be considered as unusual circumstances of the travel assignment which would permit payment of expenses to an employee or member on an actual expense basis depending upon the circumstances of each case and the necessity and nature of the travel.

Travel Expenses—Actual Expenses—Predetermined Rates in High Cost Areas—Retroactive Area Designation—Prohibition—Unusual Circumstances Notwithstanding

General designation of a high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953).

Matter of: Unusual circumstances of travel—Payment of actual expenses, June 26, 1980:

The Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) has requested a decision on payment of military and

civilian travel allowances on an actual expense basis under unusual duty assignments. Specifically, we have been asked the following questions:

(1) Where travel on temporary duty is to a place not designated as a high cost geographical area and the prescribed per diem on the lodging plus basis is inadequate due to the lack of availability of lower priced accommodations in the immediate area of the TDY, may such circumstances be considered to be unusual thereby warranting authorizing payment of actual expenses for unusual circumstances of the travel assignment?

(2) Where travel is to an area that is not designated as a high cost geographical area but where the choice of accommodations is limited or the costs of accommodations are inflated because of conventions, sports events, natural disasters, or other causes which reduce the number of units available below the normal levels, may such events be considered as unusual circumstances of the travel assignment which would permit payment of expenses to an employee on an actual expense basis?

(3) May the designation of a high rate geographical area be made retroactively when the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known?

In answer to question (1), applicable regulations may be changed to permit use of the authority to pay actual expenses in unusual circumstances so as to permit payment on that basis when travel is performed to localities which have not been designated as high cost geographical areas because of the infrequency of travel to those areas. Question (2) is answered affirmatively since, under established criteria unusual circumstances at the location of temporary duty have been demonstrated. The answer to question (3) is in the negative under the general rule that regulations may not be altered retroactively.

The Assistant Secretary points out that although more than 90 locations have been designated as high cost geographical areas, cases continue to arise in which travel is required to an area which could be designated as a high cost area but because of a lack of experience in travel to that place such a designation has not been made.

The issues presented in questions (1) and (2) were in essence addressed in 55 Comp. Gen 609 (1976). While that decision only dealt with civilian employees' entitlements under 5 U.S.C. 5702)(c), as amended by Public Law 94–22, 89 Stat. 84, the reasoning therein is

equally applicable to members of the uniformed services whose travel entitlements in this regard are governed by 37 U.S.C. 404(d).

Public Law 94–296 amended 37 U.S.C. 404(d) relating to travel to a high cost area to the same extent that Public Law 94–22 amended 5 U.S.C. 5702(c). Further, authority for travel involving "unusual circumstances," was contained in the 1975 amendments enacted in Public Law No. 94–22 and Public Law No. 94–296. Under both laws the regulating authority (the General Services Administration, in case of civilians, and the Secretaries concerned, in case of the uniformed services) may prescribe the conditions for reimbursing actual expenses when the per diem allowances are inadequate due to unusual circumstances of the travel assignment. We stated in 55 Comp. Gen. 609, *supra*, in this connection:

> * * * nothing in the law or its legislative history would preclude the General Services Administration from appropriately modifying the travel regulations by changing the criteria for or citing additional examples of unusual circumstances, either on its own initiative or at the request of an agency.

Because of the similarity of the laws and regulations, the quoted statement is applicable to regulations issued by the Secretaries concerned in the case of the uniformed services.

In 42 Comp. Gen. 440 we held that a system similar to the high cost geographical area system which is now authorized by law could not be implemented by regulation under the authority to pay actual expenses in unusual circumstances. We said that general inflation in costs could not be the basis for holding that travel was performed under unusual conditions. In other words, Congress has fixed a limit on per diem and that limit may not be exceeded because inflation has made per diem inadequate to cover costs of travel in certain areas. It is the prerogative of Congress to establish such a limit and once established it must be enforced.

Since that time Congress enacted the high cost geographical area authority thus permitting the executive to fix reimbursement at higher rates for employees who are required to travel to areas when, because of inflation or otherwise, the costs have risen above that which may ordinarily be covered by the maximum per diem authorized.

When this new authority is viewed in light of the authority which the regulatory authorities have—as stated in 55 Comp. Gen. 609– it appears that authorization of actual expense reimbursement under the unusual circumstance authority would be proper—under appropriate regulations—when for some reason a high cost geographical area has not been included on the list contained in the regulations or when, due to the absence of current information, the maximum actual expense reimbursement for a certain location is substantially below that re-

quired to cover costs necessarily incurred. The Congress has provided for covering the costs of employees traveling to high cost areas and it must be presumed that the regulatory agencies can properly implement this authority. When circumstances are such that a high cost geographical area cannot be timely identified, the situation may be viewed as unusual and the authority relating to unusual circumstances may be applied.

If regulations are issued they should require the General Services Administration for civilian travel and the Per Diem, Travel and Transportation Allowance Committee for travel by members of the uniformed services to verify in each case that the locality involved had not been considered for inclusion in the list of high cost geographical areas. If facts were not available to the order-writing official prior to travel to permit a request for authorization the Administration or Committee as appropriate could approve reimbursement on a retroactive basis as is currently authorized in the regulations covering the payment of actual expenses in unusual circumstances.

The regulations may be amended to cover the unusual circumstances such as travel to an area where a natural disaster or other cause reduces the number of available units or where costs of food or accommodations are inflated due to a special occurrence at the TDY site and such rates would not be so inflated during normal times. Such unusual circumstances should be considered on a case-by-case basis and judged against the necessity and nature of the travel at the particular time.

Questions one and two are answered accordingly.

We have long and consistently adhered to the rule that when regulations are properly issued, rights thereunder become fixed and, although such regulations may be amended prospectively to increase or decrease rights given thereby, they may not be amended retroactively except to correct obvious errors. 32 Comp. Gen. 315 (1953); 32 *id.* 527 (1953); 33 *id.* 174 (1954); 40 *id.* 242 (1960); and 47 *id.* 127 (1967). Compare 33 Comp. Gen. 505 (1954), and *Friedlander* v. *United States*, 120 Ct. Cl. 4 (1951). Therefore, question number three is answered in the negative.

[B–196404]

Appropriations—Defense Department—Military Interdepartmental Procurement Requests (MIPRs)—Economy Act Applicability

It remains the opinion of this Office that a Military Interdepartmental Procurement Request (MIPRs) is placed pursuant to section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686. Consequently, to the extent the Corps of Engi-

neers (Corps) is otherwise authorized to recover supervision and administrative expenses incurred in performing MIPR for Air Force, the Corps should be reimbursed from appropriations current when the costs were incurred or when the Corps entered into a contract with a third party to execute the MIPR. See 31 U.S.C. 686–1; 34 Comp. Gen. 418 (1955).

Appropriations — Obligation — Interdepartmental Services — Military Interdepartmental Procurement Requests (MIPRs)

Even if MIPR is deemed authorized by 10 U.S.C. 2308 and 2309 (1976), rather than section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686, the allotment of funds by Air Force to Corps of Engineers (Corps) for use in executing MIPR does not constitute an obligation until the Corps either enters into contract with a third party to execute the MIPR or incurs costs in administering the contract. See Defense Acquisition Regulation (DAR) 5–1108.2, .3.

Appropriations—Reimbursement—Interdepartmental Services—Military Interdepartmental Procurement Requests (MIPRs—Administrative and Supervision Cost Recovery

In view of regulation providing that a procuring department should bear, without reimbursement therefor, the administrative costs incident to its procurement of supplies for another Department, the Air Force (AF) and the Corps of Engineers should consider whether any reimbursement is due the Corps for administrative and supervision expenses incurred in performing MIPR placed by AF. See DAR 5–1113.

Matter of: Obligation of Funds Under Military Interdepartmental Procurement Requests, June 26, 1980:

This decision is in response to an inquiry from R. T. Geiger, Disbursing Officer for the Fort Worth District, Army Corps of Engineers (Corps) as to whether he may certify a voucher for payment. He asks in effect whether current supervision and administration (S&A) expenses, associated with a Military Interdepartmental Procurement Request (MIPR) from Tinker Air Force Base, should be reimbursed from appropriations current when the costs were incurred or from the appropriation obligated when the Corps entered into a contract with a third party to execute the MIPR. Mr. Geiger's letter states:

The Fort Worth District is in receipt of a MIPR from Tinker Air Force Base. Corps S&A costs are initially charged to the Corps Revolving Fund, 96X4902, and then sold to the customer on a Corps-wide predetermined standard rate. Other related labor costs and costs such as reproduction are also initially charged to 96X4902 and then sold to the customer on the basis of the actual expense. The customer identifies within the MIPR those funds which will be cited for his request and which will ultimately receive the S&A expense. The Air Force has directed that 5763080 funds be cited for FY 79 S&A expense, Inclosure 2. Air Force rationale is furnished within Inclosure 3.

The 5763080 funds are available for obligation by the Air Force for three years and for obligational adjustments for an additional two years. The Air Force direction could prolong the use of such funds beyond normal periods of availability and result in MIPRs receiving treatment similar to project orders. However, 34 Comptroller General 418 states that MIPRs should be treated as Economy Act Orders. Obligation adjustments continue to be processed against original contract funds and these adjustments are not in question. What is in question is

the S&A costs which represent inhouse charges which are properly charged against current appropriations.

We have been informally advised that when a MIPR is accepted by the Corps, the Corps enters into contracts with third parties to fulfill the requesting agency's needs. The role of the Corps is to supervise the particular procurement involved and the S&A costs are those associated with the Corps' supervision of the contract. In the present case, the MIPR from the Air Force was accepted on February 25, 1976, and the Corps entered into the contract for its execution on the same day.

As Mr. Geiger's letter points out, this Office has previously held that in the absence of any other controlling statute, MIPRs will be considered as being issued under authority of section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686 (1976). 34 Comp. Gen. 418 (1955). When a transaction governed solely by the Economy Act is recorded as an obligation against appropriations whose period of availability expires at a fixed time, then 31 U.S.C. § 686–1 requires the deobligation of those appropriations when their period of availability for obligation expires, to the extent that the performing agency has not incurred valid obligations under the agreement (for example where the performing agency is providing the work or service itself, to the extent it has not performed the work or rendered the service). 31 Comp. Gen. 83 (1951).

However, if the MIPR transaction is governed by some provision of law other than the Economy Act, then the requirement of 31 U.S.C. § 686–1 to deobligate would not apply. B–193005, October 2, 1978. The Air Force believes that the authority to issue MIPRs is not the Economy Act, but 10 U.S.C. §§ 2308 and 2309 (1976) (formerly section 10 of the Armed Services Procurement Act of 1947) and, therefore, that they are not subject to the deobligation requirement of 31 U.S.C. § 686–1.

In 34 Comp. Gen. 418 at 422–423 (1955) we stated:

Military interdepartmental procurement orders. It is further contended by representatives of your Department that military interdepartmental procurement orders (hereinafter referred to as MIPR's) are issued under provisions of law peculiar to the Department of Defense rather than under the provisions of section 601 of the Economy Act. Reference is made to the National Security Act of 1947, as amended, section 10 of the Armed Services Procurement Act (41 U.S.C. § 159) and section 638 of the Department of Defense Appropriation Act, 1953 (41 U.S.C. § 162).

While the term "including government agencies" was inserted in the proposed section 1311(a)(1) [31 U.S.C. § 200(a)(1) (1976)] to permit MIPR's, among other interagency agreements, to be recorded as obligations, it was not intended thereby to permit such funds to remain available indefinitely to the procuring agency for the execution of procurement contracts. To the contrary, it was intended to remove any doubt that such orders, as other orders issued under section 601 of the Economy Act, could be recorded as obligations but the procuring

agency was to have no longer period to execute the procurement contracts than the agency issuing the orders would have had if it had done the procuring. The provisions of law relied upon by your Department, which are cited above, are viewed as having been enacted merely to require the military departments to exercise authority they already had to consolidate procurement requirements. This could have been accomplished by the military departments under section 601 of the Economy Act prior to the enactment of those provisions of law. Such provisions of law extended the existing authority of the military departments to the Secretary of Defense and directed that procurement requirements be consolidated to the extent deemed feasible. We thus feel that we are constrained to hold that MIPR's are issued under section 601 of the Economy Act, as amended, and, therefore, are subject to the provisions of section 1210 of the General Appropriation Act, 1951 [31 U.S.C. § 686-1, *supra*].

Thus we specifically rejected the argument now made by the Air Force that a MIPR is placed pursuant to 10 U.S.C. §§ 2308 and 2309.

In any event, even if this transaction were governed by sections 2308 and 2309, the allotment of funds under those sections from one agency to another is not alone a basis for obligating the funds and, in circumstances like these, prior year funds would not remain available for obligation under those statutes any more than they would under the Economy Act.

Section 10 of the Armed Services Procurement Act of 1947 (1947 Act) (approved February 19, 1948, ch. 65, 62 Stat. 25), the source of the provisions now codified as 10 U.S.C. §§ 2308 and 2309, provided that—

In order to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services required by such agencies, subject to the limitations contained in section 7 of this Act, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency heads or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. Appropriations available to any such agency shall be available for obligation for procurement as provided for in such appropriations by any other agency through administrative allotments in such amount as may be authorized by the head of the allotting agency without transfer of funds on the books of the Treasury Department. Disbursing officers of the allotting agency may make disbursements chargeable to such allotments upon vouchers certified by officers or civilian employees of the procuring agency.

This provision originated as an amendment by the Senate Armed Services Committee to section 10 of H.R. 1366, 80th Congress. In explaining it, the Committee report states:

This paragraph insures in detail the facilitating of joint and cross procurement between the services. In order effectively to permit one agency to procure for another, or to permit both agencies to procure jointly, it permits the delegation of authority and assignment between agencies of procurement responsibilities. This paragraph accomplishes this objective and further permits a contracting officer in one department to make actual obligations against allotments of funds made administratively by other departments for whom purchases are being made. The decisions and determinations required by section 7 of the bill will normally be made by the head of the agency actually doing the buying. It is expected that joint procurement may require an agency head doing the buying to make such

determinations and decisions, based on information submitted by the agency for which the materials are purchased. S. Rep. No. 571, 80th Cong. 1st Sess., 1948 U.S. Code Cong. Serv. 1069.

In discussing the effect of this amendment in the House, Representative Anderson, floor leader on H.R. 1366 explained:

Seventh. A very important change which should have far-reaching effects in facilitating the efficient procurement of supplies for all of the armed services is contained in section 10 of the bill. Originally this section, as it appeared in the bill when it passed the House, provided merely that the provisions of H.R. 1366 would apply to purchases made by an agency for its own use or otherwise. The intent of the language "or otherwise" was to permit cross procurement and joint procurement. The Senate has expanded this section in such a manner as to spell out in detail effective means by which these objectives may be achieved in actual practice. Section 10 now permits agency heads to enter into mutual agreements whereby, to take a specific example, the Secretary of the Army can assign or delegate the procurement responsibility of his agency to a procurement officer of the Navy charged with the procurement of a particular item which the Army desires to obtain. In such a case the appropriations available to the Army for the purchase of that particular item can be made available for obligation by the Navy procurement officer. This may be accomplished under section 10 by means of administrative allotments between the agencies, in such amounts as may be authorized by the head of the allotting agency, without transfer of funds on the books of the Treasury Department. In actual practice, in the hypothetical example which we assumed a moment ago, the Army then will requisition of the Navy the item which they desire. The Army's bookkeepers then set up an administrative allotment to the Navy of the necessary funds to cover the purchases in question. There will be no necessity for a transfer for funds between the departments. Payment will be made by an Army disbursing officer who is authorized under this section to make disbursements chargeable to such administrative allotments upon vouchers certified by the Navy procuring officer. 95 Cong. Rec. 1155–1156 (1948).

When the Congress codified the laws relating to the Armed Services, section 10 of the 1947 Act was codified into 10 U.S.C. §§ 2308 and 2309 which provide:

2308. Assignment and delegation of procurement functions and responsibilities

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

2309. Allocation of appropriations

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbursing officer of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency.

No substantive changes to section 10 of the 1947 Act were intended by this rewording. See section 49(a) of the Act of June 3, 1956,

ch. 1041, 70A Stat. 640 and S. Rep. No. 2561, 84th Cong., 2d Sess., 19–21, 147 (1956).

Thus, by enactment of section 10 of the 1947 Act, the Congress authorized centralized procurement within an agency and joint procurement by agencies. To accomplish joint procurements, it authorized the allotment of funds by the requesting agency to the procuring agency for obligation by the procuring agency. The procuring agency acts only as a delegate, or agent, of the requesting agency so that, as between the two, there is no basis for the obligation of the funds when the agencies agree to this arrangement nor when the funds are allotted.

Under section 10, obligation of the requesting agency's appropriations should occur when the procuring agency takes some action causing the funds to become obligated. Specifically, obligation of the allotted funds does not take place until the procuring agency either enters into a contract with a third party for the supplies requested or incurs costs in administering the contract. (See, in this connection DAR 5–1108.2, 3, making it clear that acceptance of a MIPR by the procuring agency does not obligate the funds and that fiscal year funds cited in a MIPR will lapse if the procuring agency has not executed a contract or otherwise obligated them before the end of the fiscal year.) To the extent costs are not incurred by the procuring agency or contracts are not entered into during the period of availability for obligation of the allotted funds, the funds would revert to the appropriation's successor account. Beyond this, sections 2308 and 2309 of title 10 do not provide an independent basis for agencies to enter into reimbursable agreements.

In sum, we are aware of nothing that would cause us to overrule our decision in 34 Comp. Gen. 418 (1955) that MIPRs are placed pursuant to the Economy Act. Even if MIPRs were placed pursuant to 10 U.S.C. §§ 2308 and 2309 (and the requirements of these provisions complied with) the result in these circumstances would be the same as if they were placed pursuant to the Economy Act. Accordingly, the Corps S&A expenses should be paid from appropriations current at the time they arise.

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Where proposal in competitive range was found informationally inadequate, so that contracting agency could not determine extent of offeror's compliance with requirements, contracting agency should have discussed inadequacies with offeror, especially since solicitation did not specifically call for missing information but merely contained general request for information ---- 548

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Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A–76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted 465

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Protest that awardee's proposal should not have been accepted by agency because awardee's initial proposal and its acknowledgment of amendment to solicitation were submitted late is untimely and will not be considered on merits where this basis of protest was known to protester more than 10 days before filing of protest. Section 20.2(b)(2) of GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980)---- 474

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Although it is not clear that protest of restriction to locations in central business district of Benton Harbor, Michigan, in solicitation for lease of office space is timely, protest will be considered as raising a significant issue since it concerns agency's implementation of Executive Order (E.O.) 12072, 43 Fed. Reg. 36869 (1978) dealing with preference for location of Federal facilities in urban areas---- 409

Timeliness
Significant issue exception

Although protest issue based upon contention that President of United States exceeded his authority by issuing national policy giving first consideration to locating Federal facilities in centralized community business areas when filling space needs in urban areas is untimely, this issue will be considered on merits because it is an issue which we consider to be significant to procurement practices and procedures. Section 20.2(c) of GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980)---- 474

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To delay award
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Where record does not establish that protest of agency's refusal to waive first article testing was filed only to delay award until protester's first article was approved under prior contract for same item, agency is not precluded from considering waiver for protester when first article approval is granted under prior contract while protest is pending---- 512

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Where solicitation requires bid and evaluation on basis of replacing fire hydrants by tapping existing water mains under pressure when agency actually will permit many "dry" replacements, stated requirements exceed Government's actual needs and restricted competition. GAO therefore recommends termination of existing contract and resolicitation and bid evaluation on basis of Government's best estimate of "wet" and "dry" replacements ---------- 378
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Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. ——— (B–195773, Aug. 11, 1980) ---------- 438
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Leasing agency has primary responsibility for setting forth minimum needs, including location of facility. GAO will not object to agency's choice of location unless that choice lacks reasonable basis ---------- 409
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Leasing agency has primary responsibility for setting forth minimum needs, including location of facility, and GAO will not object to agency's choice of location unless choice lacks reasonable basis. Where GSA preference for central business district was based on Federal policy giving first consideration to leasing space in centralized community business area, and GSA coordinated procurement with officials of using agency, we cannot find that GSA's preference for central business district space was without reasonable basis. Therefore, protest on this basis is denied--- 474
Minimum needs requirement
Administrative determination
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Protester's objections—to five minor benchmark requirements on ground that they provide incumbent contractor undue advantage—are without merit, since (1) these items do not prohibit protester from competing, (2) there is no showing that requirements are in excess of agency's minimum needs or unreasonable, and (3) there is no showing that incumbent gained any advantage through unfair Government action or preference ---------- 444

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Benchmark
Requirements
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Agency and incumbent contractor argue that merits of protest regarding benchmark should not be considered since protester did not participate in benchmark and since at least one retrial would have been held if required. General Accounting Office will consider merits of protest because (1) neither regulatory guidance nor express agency commitment guaranteed any participant a second benchmark attempt, (2) competition is not maximized by forcing vendor to attempt benchmark it cannot complete successfully, and (3) protester's participation in benchmark, which it believed to be defective, might have resulted in subsequent untimely protest---------- 444

Structure
Propriety

Protester contends that (1) benchmark narrative does not fully describe complete functions to be performed, (2) system-controlled variables tested in benchmark are not set out in mandatory requirements, (3) one runstream is not documented having nonincumbent offerors guessing how to accomplish it, and (4) converting relatively large amount of undocumented proprietary code is an undue restrictive burden. Contentions are meritorious. Recommendation is made that appropriate corrective action be taken---------- 444

First article
Waiver
Approval of same item pending protest on later procurement

Where record does not establish that protest of agency's refusal to waive first article testing was filed only to delay award until protester's first article was approved under prior contract for same item, agency is not precluded from considering waiver for protester when first article approval is granted under prior contract while protest is pending------ 512

Time for establishing eligibility

Information in support of waiver of first article testing may be submitted after bid opening, regardless of invitation for bids provision requiring its submission with bid, because such information relates to bidder's responsibility which may be established after bid opening. Where bidder, prior to award, obtained first article approval for same item under prior contract, agency is not required to evaluate bid on basis of furnishing another first article, and agency should consider prior approval in determining whether to waive first article testing under solicitation which is subject of protest---------- 512

Termination
Convenience of Government
Erroneous awards

Where solicitation requires bid and evaluation on basis of replacing fire hydrants by tapping existing water mains under pressure when agency actually will permit many "dry" replacements, stated requirements exceed Government's actual needs and restricted competition. GAO therefore recommends termination of existing contract and resolicitation and bid evaluation on basis of Government's best estimate of "wet" and "dry" replacements---------- 378

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Judgments, decrees, etc.
Interest
Patent infringement suit
"Delay compensation" Page

Judgment against United States for patent infringement may include interest as "delay compensation" since infringement is viewed as a taking by eminent domain and 28 U.S.C. 1498 authorizes "reasonable and entire compensation." However, since determination of delay compensation is a judicial function, it may not be awarded administratively by General Accounting Office but is payable only where it has been expressly awarded by Court of Claims 380

Res judicata
Judgment based on stipulation
Subsequent claim

Where judgment of Court of Claims against United States in patent infringement suit was based on compromise stipulation under which plaintiff agreed to accept stipulated sum "in full settlement of all claims set forth in the petition," terms of judgment preclude allowance of claim for additional amount as "delay compensation" 380

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Protest that disclosure of contractor's negotiated cost and manpower estimates to perform current contract in RFP for next contract period violated exemption 4 of Freedom of Information Act and Trade Secrets Act and placed contractor at competitive disadvantage in procurement is denied. In view of need for judicial determination of conduct violative of Trade Secrets Act, extraordinary remedy of cancellation of ongoing competitive procurement and directing agency to award, in effect, sole-source contract is not appropriate 467

CUSTOMS
Services in foreign airports
Recovery of costs
Treasury Enforcement Communications System

Where Customs Service receives no advantage from conducting passenger preclearance activity on foreign soil *vis a vis* conducting passenger clearance activities within the United States and preclearance activity was initiated at airlines request, results in substantial cost savings to airlines and permits airlines to better use their resources, record supports determination that airlines are primary beneficiaries of preclearance service. Therefore, under authority of 31 U.S.C. 483a, Customs may continue to assess user charge against airlines and recover that portion of its costs (including Treasury Enforcement Communications System) that are increased by its conducting passenger preclearance on foreign soil. 48 Comp. Gen. 24, modified (clarified) 389

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Leave payments
Lump-sum leave payment Page
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DEFENSE ACQUISITION REGULATION
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DEPARTMENTS AND ESTABLISHMENTS
Adjudicative proceedings
Public intervenors
Financial assistance
In deciding whether intervenor in proceedings should receive financial assistance, agency should examine income and expenses and net assets of applicant to determine whether applicant can afford to participate without assistance. If intervenor has insufficient resources to participate in proceeding, agency may provide full or partial assistance from appropriated funds. However, fact that intervenor would be forced to choose among various public activities, and could not afford to participate in all of them, does not, without more, make participant unable to finance own participation. Agency may not use appropriated funds to assist such participant 424
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Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A-76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted 465
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General Services Administration's authority. (*See* **GENERAL SERVICES ADMINISTRATION, Services for other agencies, etc., Expired agencies**)

DEPARTMENTS AND ESTABLISHMENTS—Continued

Services between

Certifying officers acting for two agencies. (*See* **CERTIFYING OFFICERS, Responsibility, Interagency services**)

Debt collection

Referral to General Accounting Office Page

In dispute between General Services Administration (GSA) and Air Force over Air Force claim for reimbursement, Air Force withheld Standard Level User Charge payment owed to GSA in order to collect unrelated debt. Inter-agency claims are not to be collected by offset but should be submitted to General Accounting Office for adjudication 505

Overseas services

State Department authority. (*See* **STATE DEPARTMENT, Authority, Services for other agencies overseas**)

Reimbursement

Appropriation availability

Department of State is authorized by 22 U.S.C. 846 to administer housing pool on behalf of agencies which have leased or wish to lease housing to be used by employees of various agencies involved in pool and may pay rent on behalf of agencies involved directly from its own appropriations to be reimbursed by agency users on the basis of their share of total costs of State's operation of housing pool (including any operating, maintenance and utility costs paid by State) 403

Costs

Loan *v.* transfer

Equipment, supplies, etc.

Loans of supplies, equipment and materials may be made on a nonreimbursed basis if for a temporary period and the borrowing agency agrees to assume costs incurred by reason of the loan. However, as further stated in 38 Comp. Gen. 558 (1959), transfers which are or may become permanent must be made on a reimbursable basis in order to comply with section 601 of the Economy Act of 1932 366

Debt collection by General Accounting Office. (*See* **DEPARTMENTS AND ESTABLISHMENTS, Services between, Debt collection, Referral to General Accounting Office**)

Maintenance, etc. costs

Excess real property

General Services Administration (GSA) regulations make GSA responsible for cost to agencies of maintaining excess real property, beginning one year after it becomes excess. FPMR 101-47.402-2(b). Air Force spent $197,546 to maintain property. GSA says it is liable to reimburse only $56,000 because it offered to pay only that amount and because it lacked funds to pay more. GSA is liable for full amount but we will not require GSA to seek deficiency appropriation for intragovernmental payment. GSA should budget for these expenses or change its regulation 505

DEPARTMENTS AND ESTABLISHMENTS—Continued
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Merit Systems Protection Board services
Travel expenses of hearing officers Page

Merit Systems Protection Board ordered all hearings conducted by its hearing officers to be conducted in Board's field offices instead of home areas of appellants. Due to resulting inconvenience, both employing agencies and employees and their unions offered to reimburse Board for travel expenses of hearing officers if hearings were moved to home areas. Board may not accept reimbursement from other agencies or augment its appropriations by accepting donations from employees or unions..... 415

Written agreement requirement
Loan of personnel

Section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686(a), does not require that all interdepartmental loans of employees be made on a reimbursable basis. On the contrary, as we held in 13 Comp. Gen. 234 (1934), such loans of services must be reimbursed only where so provided by prior written agreement between the agencies involved. This rule was neither nullified nor modified by our recent decisions in 56 Comp. Gen. 275 (1977) and 57 Comp. Gen. 674 (1978) which hold only that a loaning agency must recover its actual costs, including significant indirect costs, where reimbursement has been agreed upon in a prior writing..... 366

EDUCATION
Children of overseas employees

New appointee was hired for position in Trust Territory of the Pacific Islands. Custody of his children was divided equally between employee and his former wife. He many receive education allowance authorized by Standardized Regulations (Government Civilians, Foreign Areas) for children meeting defined criteria presented in the Standardized Regulations for periods beginning when each child became a member of his household at the overseas post. This decision modifies (amplifies) 52 Comp. Gen. 878..... 450

ENERGY
Energy Research and Development Administration
Employees
Agency excepted from competitive service and General Schedule
Effect
Extended details

Employee of Atomic Energy Commission (AEC) and its successor, Energy Research and Development Administration (ERDA), appeals disallowance of claim based on *Turner-Caldwell* decisions for retroactive promotion and backpay. Claim is denied as AEC and ERDA, the employing agencies, were excepted from competitive service as well as from General Schedule and thus were not subject to the detail provisions of subchapter 8, chapter 300 of the Federal Personnel Manual. For this reason and because AEC and ERDA did not have a nondiscretionary agency policy limiting details or requiring temporary promotion after a specified period of detail, the remedy of retroactive temporary promotion with backpay is not available..... 384

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Appropriations
Availability
Contracts
Cost overruns Page

Where Environmental Protection Agency initially elected to charge no-year "R & D" appropriation with expenditures for cost-plus-fixed-fee contract, continued use of the same appropriation to the exclusion of any other is required for payment of cost overrun arising from adjustment of overhead rates to cover actual indirect costs which exceeded the estimated provisional rates provided for in the contract ---------- 518

Public intervenors

In deciding whether intervenor in proceedings should receive financial assistance, agency should examine income and expenses and net assets of applicant to determine whether applicant can afford to participate without assistance. If intervenor has insufficient resources to participate in proceeding, agency may provide full or partial assistance from appropriated funds. However, fact that intervenor would be forced to choose among various public activities, and could not afford to participate in all of them, does not, without more, make participant unable to finance own participation. Agency may not use appropriated funds to assist such participant ---------- 424

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.

Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers permit multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. ——— (B-195773, Aug. 11, 1980) ---------- 438

EXECUTIVE ORDERS
Authority
Basis

Although it is not clear that protest of restriction to locations in central business district of Benton Harbor, Michigan, in solicitation for lease of office space is timely, protest will be considered as raising a significant issue since it concerns agency's implementation of Executive Order (E.O.) 12072, 43 Fed Reg. 36869 (1978) dealing with preference for location of Federal facilities in urban areas ---------- 409

FEDERAL EMPLOYEES PART-TIME CAREER EMPLOYMENT ACT
Military leave
Entitlement

An employee holding an appointment in the civil service as a part-time career employee pursuant to the Federal Employees Part-Time Career Employment Act, 5 U.S.C. 3401-3408 (Supp. II, 1978), and as a member of the Washington Air National Guard is required to perform annual training. He is not entitled to military leave since legislative history of the Military Leave Act indicates that part-time employees are to be excluded from benefits ---------- 365

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977
Compliance
Grant, etc. agreements *v.* procurement contract Page
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FEDERAL PROPERTY AND ADMINISRATIVE SERVICES ACT
Procurement policies
President's authority
Space needs
Urban areas
Central business district preference
Protest that President of United States exceeded his authority to prescribe procurement policies under section 205(a) of Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481, *et seq.* (1976)) is denied. Section 201 of act establishes Government policy to promote economy and efficiency, and, even though direct effect of policy established by President (giving first consideration to locating Federal facilities in centralized community business areas when filling Federal space needs in urban areas) will be to increase cost to Government in present procurement, long-term effect of such policy might be to promote economy and efficiency throughout Government ---- 474

FEDERAL PROPERTY MANAGEMENT REGULATIONS
Excess real property
Maintenance
Cost liability
To holding agency
General Services Administration
General Services Administration (GSA) regulations make GSA responsible for cost to agencies of maintaining excess real property, beginning one year after it becomes excess. FPMR 101-47.402-2(b). Air Force spent $197,546 to maintain property. GSA says it is liable to reimburse only $56,000 because it offered to pay only that amount and because it lacked funds to pay more. GSA is liable for full amount but we will not require GSA to seek deficiency appropriation for intragovernmental payment. GSA should budget for these expenses or change its regulation ---- 505
Proposed revision, etc.
Definition of "urban area"
Purpose
Urban development preference policy
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FEES
Services to public
Inspectional services
Customs' services in foreign airports Page

Where Customs Service receives no advantage from conducting passenger preclearance activity on foreign soil *vis a vis* conducting passenger clearance activities within the United States and preclearance activity was initiated at airlines request, results in substantial cost savings to airlines and permits airlines to better use their resources, record supports determination that airlines are primary beneficiaries of preclearance service. Therefore, under authority of 31 U.S.C. 483a, Customs may continue to assess user charge against airlines and recover that portion of its costs (including Treasury Enforcement Communications System) that are increased by its conducting passenger preclearance on foreign soil. 48 Comp. Gen. 24, modified (clarified)---------- 389

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES
Education for dependents
New appointee

New appointee was hired for position in Trust Territory of the Pacific Islands. Custody of his children was divided equally between employee and his former wife. He may receive education allowance authorized by Standardized Regulations (Government Civilians, Foreign Areas) for children meeting defined criteria presented in the Standardized Regulations for periods beginning when each child became a member of his household at the overseas post. This decision modifies (amplifies) 52 Comp. Gen. 878---------- 450

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Limitations on liability

Payment by the United States of a portion of insurance premiums, to protect Australia against financial liability in a joint project, is permissible when it is a condition which Australia exacts in return for its participation. Agreement should provide that the United States assumes no liability beyond the amount of insurance coverage---------- 369

FREEDOM OF INFORMATION ACT
Disclosure requests
Contract protester

Grounds of protest concerning failure of all initial proposal evaluators to evaluate final proposals, procuring agency's refusal to release documents bearing on evaluation of proposals, and procuring agency's alleged bias against small concerns are without merit since: (1) final proposed evaluation did not contradict solicitation; (2) procuring agency, not General Accounting Office, determines releasability of documents; and (3) procuring agency's position that bias in evaluation did not exist is supported by record---------- 548

GENERAL ACCOUNTING OFFICE

Decisions

Overruled or modified

Prospective application Page

Employee was transferred back to former duty station and was reimbursed expenses of selling former residence there even though he did not contract to sell former residence until after he had been notified of retransfer. Under *Beryl C. Tividad*, B–182572, October 9, 1975, he may retain amount reimbursed. However, *Tividad* is overruled prospectively. Hereafter, transferred employee is under same obligation to avoid unnecessary expenses as an employee whose transfer is canceled and is entitled to only those real estate expenses which he has incurred prior to notice of retransfer and those which cannot be avoided. B–173783.141, Oct. 9, 1975, also overruled 502

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Cost comparison

Exhaustion of administrative remedies

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A–76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted 465

Small business matters

Nonresponsibility determination

Scope of GAO review

Under 15 U.S.C. 637(b)(7), Small Business Administration (SBA) has authority to conclusively determine that small business concern is responsible. General Accounting Office (GAO) generally will not review SBA determination to require issuance of COC or to reopen a case where COC has been denied absent *prima facie* showing of fraud or willful disregard of facts. Since SBA was provided opportunity to determine matter and agency properly made award, it is not appropriate for GAO to consider small business concern's responsibility 417

Procurement under 8(a) program

Scope of review

In light of broad discretion afforded Small Business Administration (SBA) under "8(a)" program General Accounting Office reviews SBA actions in such procurements to determine that regulations were followed, but does not disturb judgmental decisions absent showing of bad faith or fraud. Where contracting agency acts on behalf of SBA in evaluating proposals and recommending contractor to SBA under 8(a) program, agency's actions will be reviewed under criteria applicable to SBA actions 522

Patent infringement

Delayed payment of judgment

Judgment against United States for patent infringement may include interest as "delay compensation" since infringement is viewed as a taking by eminent domain and 28 U.S.C. 1498 authorizes "reasonable and entire

GENERAL ACCOUNTING OFFICE—Continued
Jurisdiction—Continued
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compensation." However, since determination of delay compensation is a judicial function, it may not be awarded administratively by General Accounting Office but is payable only where it has been expressly awarded by Court of Claims ---- 380
Policy determinations
General Accounting Office (GAO) will not normally review agency compliance with Executive Branch policies under Bid Protest Procedures but will consider protest which contends such policies are contrary to applicable procurement statutes and regulations ---- 409
Recommendations
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Procurement deficiencies
Correction
Given closeness of scoring and inadequate negotiating approach, offeror having "best buy" for three phases of decontamination and cleanup contract is in doubt ---- 548
Resolicitation under revised specifications
Termination of awarded contract, etc.
Where solicitation requires bid and evaluation on basis of replacing fire hydrants by tapping existing water mains under pressure when agency actually will permit many "dry" replacements, stated requirements exceed Government's actual needs and restricted competition. GAO therefore recommends termination of existing contract and resolicitation and bid evaluation on basis of Government's best estimate of "wet" and "dry" replacements ---- 378
Procurement for expansion of computer system, wherein two of five items are sole source, and request for proposals, while prohibiting all or none offers, permits multiple-award discounts without any prohibition against unbalanced offers, is improper and recommendation is made that contract awarded be terminated and sole-source items be negotiated and competitive items be recompeted. This decision is modified by 59 Comp. Gen. ——— (B–195773, Aug. 11, 1980) ---- 438
GENERAL SERVICES ADMINISTRATION
Motor pool vehicles
Liability for damages
Requisitioning agency v. GSA
Regulation authorizing GSA to recover expenses connected with repair of vehicles damaged in accidents while used to provide interagency motor pool service is proper under 40 U.S.C. 491 (Act) since it is part of the cost of establishing, operating, or maintaining a motor vehicle pool or system. Furthermore, one purpose of Act was establishment of procedures insuring safe operation of motor vehicle on Government business. Charging agency for losses caused by employee misconduct or improper operation of vehicle might help to promote vehicular safety, since it is agency, not GSA, which has direct control over employee using vehicle ---- 515

GENERAL SERVICES ADMINISTRATION—Continued

Services for other agencies, etc.

Excess real property

Maintenance costs

Liability to holding agencies Page

General Services Administration (GSA) regulations make GSA responsible for cost to agencies to maintaining excess real property, beginning one year after it becomes excess. FPMR 101–47.402–2(b). Air Force spent $197,546 to maintain property. GSA says it is liable to reimburse only $56,000 because it offered to pay only that amount and because it lacked funds to pay more. GSA is liable for full amount but we will not require GSA to seek deficiency appropriation for intragovernmental payment. GSA should budget for these expenses or change its regulation 505

Expired agencies

Post-expiration claims

Certification for payment authority

General Services Administration (GSA) may certify for payment claims and debts of an expired Federal agency so long as agency and GSA have specific written agreement for this service prior to the agency's expiration, and obligation for payment also arose prior to agency's expiration. Under 31 U.S.C. 82b GSA would become "agency concerned" for purpose of certifying vouchers pertaining to obligations of expired agency. 44 Comp. Gen. 100, modified 471

Space assignment

Including leasing

Urban location restriction

Legality

As Rural Development Act of 1972, 42 U.S.C. 3122(b) (1976) defines "rural area" as any community with population of less than 50,000 which is not immediately adjacent to city with population of 50,000 or more and General Services Administration (GSA) defines "urban area" for purposes of E.O. 12072 as any incorporated community with population of 10,000 or more, solicitation restricting offers for leased office space to buildings in central business district of city of 16,481 is compatible with both requirements and is within the authority of GSA under sections 490(e) and 490(h)(1) of 40 U.S. Code (Federal Property and Administrative Services Act of 1949) 409

Central district preference

Protest that President of United States exceeded his authority to prescribe procurement policies under section 205(a) of Federal Property and Administrative Services Act of 1949 (40 U.S.C. 481, *et seq.* (1976)) is denied. Section 201 of act establishes Government policy to promote economy and efficiency, and, even though direct effect of policy established by President (giving first consideration to locating Federal facilities in centralized community business areas when filling Federal space needs in urban areas) will be to increase cost to Government in present procurement, long-term effect of such policy might be to promote economy and efficiency throughout Government 474

GENERAL SERVICES ADMINISTRATION—Continued
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Liability of GSA for damages to agency property Page
Government Printing Office (GPO) may not reduce Standard Level User Charge (SLUC) payments to General Services Administration (GSA) by amount of loss suffered by GPO when its supplies were damaged by water leaking through roof while stored at a GSA Stores Depot. In authorizing SLUC payments Congress intended to generate revenue and not to create a landlord-tenant relationship with all the attendant legal rights and duties 515
Teleprocessing Services Program (TSP)
Multiple Award Schedule Contracts (MASC)
Minimum needs requirement
User agency determination
Agency and incumbent contractor argue that merits of protest regarding benchmark should not be considered since protester did not participate in benchmark and since at least one retrial would have been held if required. General Accounting Office will consider merits of protest because (1) neither regulatory guidance nor express agency commitment guaranteed any participant a second benchmark attempt, (2) competition is not maximized by forcing vendor to attempt benchmark it cannot complete successfully, and (3) protester's participation in benchmark, which it believed to be defective, might have resulted in subsequent untimely protest 444

HUSBAND AND WIFE
Divorce
Children
Divided (alternating) custody
New appointee was hired for position in Trust Territory of the Pacific Islands. Custody of his children was divided equally between employee and his former wife. He may receive education allowance authorized by Standardized Regulations (Government Civilians, Foreign Areas) for children meeting defined criteria presented in the Standardized Regulations for periods beginning when each child became a member of his household at the oversea post. This decision modifies (amplifies) 52 Comp. Gen. 878 450

JOINT TRAVEL REGULATIONS (*See* **REGULATIONS, Travel, Joint**)

LEASES
Rent
Limitation
Fair market value determination
Protest that rental to be paid by Government exceeds 15 percent of fair market value of leased premises and, therefore, violates Economy Act (40 U.S.C. 278a (1976)) is denied where our *in camera* review of GSA "Analysis of Values Statement (Leased Space)" provides no basis to conclude that net rental exceeded Economy Act limitation on rent .. 474

LEASES—Continued
Repairs and improvements
Limitations
Economy Act
Applicability determination
Direct *v.* indirect Government payments Page

The 25-percent limitation on alterations, improvements, and repairs contained in Economy Act (40 U.S.C. 278a (1976)) is for application only where Government is to pay directly for alterations, improvements, and repairs of leased premises. In present case, Government only pays such costs indirectly insofar as lessor uses rent received under lease to amortize costs of alterations, improvements, and repairs to rented premises. Therefore, 25-percent limitation is not for application ---------- 474

Specifications
Administrative determination

Leasing agency has primary responsibility for setting forth minimum needs, including location of facility. GAO will not object to agency's choice of location unless that choice lacks reasonable basis ---------- 409

Leasing agency has primary responsibility for setting forth minimum needs, including location of facility, and GAO will not object to agency's choice of location unless choice lacks reasonable basis. Where GSA preference for central business district was based on Federal policy giving first consideration to leasing space in centralized community business area, and GSA coordinated procurement with officials of using agency, we cannot find that GSA's preference for central business district space was without reasonable basis. Therefore, protest on this basis is denied --- 474

LEAVES OF ABSENCE
Annual
Recredit on restoration after unjustified removal
Current accrued leave over maximum

Employee was restored to duty following wrongful separation. Lump-sum leave payment was deducted from backpay and he was recreditied with annual leave. Erroneous lump-sum payment is subject to waiver under 5 U.S.C. 5584, but waiver is not appropriate in this case since there was no net indebtedness. See 57 Comp. Gen. 554 (1978); 56 *id.* 587 (1977). Prior cases to the contrary, 55 Comp. Gen. 48 (1975) and B–175061, March 27, 1972, will no longer be followed ---------- 395

Civilians on military duty
Entitlement
Part-time, intermittent and temporary employees

An employee holding an appointment in the civil service as a part-time career employee pursuant to the Federal Employees Part-time Career Employment Act, 5 U.S.C. 3401—3408 (Supp. II, 1978), and as a member of the Washington Air National Guard is required to perform annual training. He is not entitled to military leave since legislative history of the Military Leave Act indicates that part-time employees are to be excluded from benefits ---------- 365

LEAVES OF ABSENCE—Continued

Lump-sum payments

Rate at which payable

Increases

Prevailing rate employees Page

A prevailing rate employee is on the rolls on the date a wage increase is ordered into effect but separates before the effective date of the increase. The period covered by his accrued annual leave extends beyond the effective date of the increase. He is entitled to receive his lump-sum annual leave payment, authorized under 5 U.S.C. 5551(a), paid at the higher rate for the period extending beyond the effective date of the increase. 54 Comp. Gen. 655 (1975), distinguished---------- 494

A prevailing rate employee who separates after a wage survey is ordered but before the date the order granting the wage increase is issued and his accrued annual leave extends beyond the effective date of the increase is entitled to have his lump-sum leave payment paid at the higher rate for the period extending beyond the effective date of the increase, as long as the order granting the new wage rate is issued prior to the effective date set by 5 U.S.C. 5344(a)---------- 494

Removal, suspension, etc. of employee

Refund on reinstatement

Employee who was restored to duty following wrongful separation must have lump-sum leave payment deducted from backpay award. 57 Comp. Gen. 464 (1978). There is no authority to permit employee to elect option of retaining lump-sum payment and cancelling annual leave. 55 Comp. Gen. 48 and B-175061, March 27, 1972, overruled---------- 395

Military

Civilians on military duty. (*See* **LEAVES OF ABSENCE, Civilians on military duty)**

MERIT SYSTEMS PROTECTION BOARD

Appropriations

Reimbursement

Travel expenses of hearing officers. (*See* **DEPARTMENTS AND ESTABLISHMENS, Services between, Reimbursement, Merit Systems Protection Board services)**

MILEAGE

Military personnel

Travel by privately owned automobile

Advantageous to Government

Temporary duty

Member of the Marine Corps travelled from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member travelled without written temporary duty travel orders issued in advance. Although 37 U.S.C. 404 requires travel to be authorized by written orders, the fact that the travel was required by the member's duty assignment and that his travel was subsequently approved in writing by competent authority as being advantageous to the Government is sufficient to authorize his travel and entitle him to reimbursement under 37 U.S.C. 404---------- 397

Interstation travel *v.* travel within limits of duty station

Member of the Marine Corps travelled by privately owned vehicle from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member's travel is interstation travel, and therefore payment of his travel allowance is governed by 37 U.S.C. 404 (1976), and the implementing regulations---------- 397

MILITARY PERSONNEL
Allowances
Basic allowance for quarters (BAQ). (*See* **QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ)**)
Dislocation allowance
Members with dependents. (*See* **TRANSPORTATION, Dependents, Military personnel, Dislocation allowance**)
Members without dependents
What constitutes
Regulation change approved by GAO Page
An amendment of the Joint Travel Regulations permitting treatment of a member with dependents who are authorized to travel with him to his new permanent station but who, in fact, do not travel to the new station, as a member without dependents for purposes of receiving dislocation allowance is not prohibited by 37 U.S.C. 407. 48 Comp. Gen. 782 (1969) and similar decisions will no longer be followed ---------- 376
Household effects
Transportation. (*See* **TRANSPORTATION, Household effects, Military personnel**)
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Travel expenses. (*See* **TRAVEL EXPENSES, Military personnel**)

OFFICE OF MANAGEMENT AND BUDGET
Circulars
No. A–76
Revision
Effective date
Cost comparison
Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A–76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted ---------- 465

OFFICERS AND EMPLOYEES
Details. (*See* **DETAILS**)
Handicapped
Attendants
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Attendants, Handicapped employees**)
Travel expenses. (*See* **TRAVEL EXPENSES, Private parties, Attendants, Handicapped employees**)
Overseas
Dependents
Education
Travel expenses
Employee's entitlement to education allowances under 5 U.S.C. 5924(4) and transportation expenses under 5 U.S.C. 5722 for his minor children whose custody has been divided between the employee and his former spouse is predicated on affirmative finding—satisfactorily established here—that children are "residing" at the parent-employee's overseas post and not merely engaged in "visitation travel" to the parent-employee's post while actually residing elsewhere. 52 Comp. Gen. 878, modified (amplified) ---------- 450

OFFICERS AND EMPLOYEES—Continued

Prevailing rate employees

Compensation

Negotiated agreements. (*See* **COMPENSATION, Prevailing rate employees, Negotiated agreements**)

Promotions

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

Temporary

Detailed employees

Agency excepted from competitive service and General Schedule effect Page

Employee of Atomic Energy Commission (AEC) and its successor, Energy Research and Development Administration (ERDA), appeals disallowance of claim based on *Turner-Caldwell* decisions for retroactive promotion and backpay. Claim is denied as AEC and ERDA, the employing agencies, were excepted from competitive service as well as from General Schedule and thus were not subject to the detail provisions of subchapter 8, chapter 300 of the Federal Personnel Manual. For this reason and because AEC and ERDA did not have a nondiscretionary agency policy limiting details or requiring temporary promotion after a specified period of detail, the remedy of retroactive temporary promotion with backpay is not available 384

Relocation expenses

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

Suits against

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

Transfers

Relocation expenses

Real estate expenses

Retransfer of employee

To former station

Employee was transferred back to former duty station and was reimbursed expenses of selling former residence there even though he did not contract to sell former residence until after he had been notified of retransfer. Under *Beryl C. Tividad*, B-182572, October 9, 1975, he may retain amount reimbursed. However, *Tividad* is overruled prospectively. Hereafter, transferred employee is under same obligation to avoid unnecessary expenses as an employee whose transfer is canceled and is entitled to only those real estate expenses which he has incurred prior to notice of retransfer and those which cannot be avoided. B-173783.141, Oct. 9, 1975, also overruled 502

What constitutes "permanent change of station"

Temporary position description

Not controlling for reimbursement purpose

Employee received change-of-station travel orders to Guam, where he purchased a residence. Residence purchase expenses are reimbursable as 14-month period that employee was stationed in Guam may be considered as meeting the requirement of 5 U.S.C. 5724 and Federal Travel Regulations para. 2-1.2a(1) that the transfer be for permanent duty, even though classification report categorized position as a "temporary assignment" 374

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

ORDERS
Retroactive
Travel orders Page
Member of the Marine Corps travelled from his home in Springfield, Virginia, to Quantico, Virgina, in order to perform temporary duty. Member travelled without written temporary duty travel orders issued in advance. Although 37 U.S.C. 404 requires travel to be authorized by written orders, the fact that the travel was required by the member's duty assignment and that his travel was subsequently approved in writing by competent authority as being advantageous to the Government is sufficient to authorize his travel and entitle him to reimbursement under 37 U.S.C. 404 ---------- 397

PARTNERSHIP
Death of partner
Contract award to surviving partner(s)
Submission of offer for Government contract by partnership creates obligation which is not revoked by death of one partner prior to acceptance of offer by Government where, under applicable State law, partnership liabilities were not discharged upon death of partner, remaining partner had right to wind up partnership affairs, and son of deceased partner and surviving partner in capacity as executors of deceased partner's estate were willing and able to perform under contract awarded ---- 474

PATENTS
Infringement
Delayed payment of judgment
"Delay compensation"
Judgment against United States for patent infringement may include interest as "delay compensation" since infringement is viewed as a taking by eminent domain and 28 U.S.C. 1498 authorizes "reasonable and entire compensation." However, since determination of delay compensation is a judicial function, it may not be awarded administratively by General Accounting Office but is payable only where it has been expressly awarded by Court of Claims ---------- 380

PAY
Retired
Civilian employment
State law effect
Community property states
The Dual Compensation Provisions in 5 U.S.C. 5532 reduce the retired pay entitlements of retired officers of Regular components who are employed in civilian positions with the Federal Government. The fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual compensation reduction since Federal law controls payment of such pay ---------- 470

PAYMENTS
Advance
Prohibition
Exceptions
Grants Page

Since agency is authorized to provide assistance to needy intervenors, as explained in General Accounting Office decisions, under Federal Grant and Cooperative Agreement Act of 1977 agency may properly characterize this assistance as grant. If so characterized, prohibition against advance funding contained in 31 U.S.C. 529 does not apply provided adequate fiscal controls to protect Government's interests are utilized. 56 Comp. Gen. 111 (1976) and B-139703, September 22, 1976, distinguished 424

PERSONAL SERVICES
Private contract *v.* Government personnel
Justification

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A-76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted 465

PRINTING AND BINDING
Obligation of appropriation. (*See* **APPROPRIATIONS, Obligation, Printing and binding requisitions**)

PROPERTY
Private
Damage, loss, etc.
Carrier's liability
Released valuation

Amount recovered from carrier of household goods in excess of the released value of 60 cents per pound per article for total loss of household goods in transit should be refunded to carrier rather than paid to member since declaration of excess value by member on commercial bill of lading was not effective for shipment moving under Government bill of lading. 436

Public
Real. (*See* **REAL PROPERTY**)

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

PURCHASES
Purchase orders
Federal Supply Schedule
Prices
Procurement at lowest price requirement
Responsibility of FSS contractor

Agency may not justify purchase of other than lowest priced dictation system from Federal Supply Schedule (FSS) on basis of responsibility factors, since General Services Administration determines responsibility of FSS contractors when annual FSS contracts are awarded 368

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Termination
Members without dependents
Sea or field duty over 30 days
Temporary or permanent Page

The prohibition contained in 37 U.S.C. 403(c) against payment of basic allowance for quarters (BAQ) to members without dependents while on field or sea duty of 3 months or more applies to temporary as well as to permanent duty assignments 486

REAL PROPERTY
Excess Government property
Maintenance costs
Liability
Holding agency *v.* General Services Administration

General Services Administration (GSA) regulations make GSA responsible for cost to agencies of maintaining excess real property, beginning one year after it becomes excess. FPMR 101-47.402-2(b). Air Force spent $197,546 to maintain property. GSA says it is liable to reimburse only $56,000 because it offered to pay only that amount and because it lacked funds to pay more. GSA is liable for full amount but we will not require GSA to seek deficiency appropriation for intragovernmental payment. GSA should budget for these expenses or change its regulation 505

REGULATIONS
Amendment
Retroactive. (*See* **REGULATIONS, Retroactive**)
Joint Travel. (*See* **REGULATIONS, Travel, Joint**)
Retroactive
Amended regulations

General designation of a high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953) 559

Travel
Joint
Amendments
Military personnel
Travel within area of duty station reimbursement

The Joint Travel Regulations may be amended to expand the definition of the term "area" in para. M4500-2 to reflect the view that the area intended to be covered under 37 U.S.C. 408 for reimbursement for travel in the vicinity of a duty station is the normal commuting area of the station concerned. However, in implementing the proposed amendment an arbitrary mileage radius should not be established in setting up the local commuting areas of permanent and temporary duty stations 397

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Members unaccompanied by dependents Page

An amendment of the Joint Travel Regulations permitting treatment of a member with dependents who are authorized to travel with him to his new permanent station but who, in fact, do not travel to the new station, as a member without dependents for purposes of receiving dislocation allowance is not prohibited by 37 U.S.C. 407. 48 Comp. Gen. 782 (1969) and similar decisions will no longer be followed ---------- 376

Military personnel
Temporary lodgings allowance (TLA)
Entitlement guidelines

Temporary lodging allowance (TLA) may be paid under current regulations on return to permanent station of a member without dependents who must give up his permanent housing while on temporary duty away from his permanent station for extended periods. However, it may be prudent to amend the regulations to specifically provide guidelines for payments of TLA in this situation. TLA may be authorized regardless of whether the member actually loses entitlement to BAQ for the period of temporary duty, by being assigned to field or sea duty, provided it is clear that the member reasonably anticipated loss of BAQ under the temporary duty deployment and that is the reason the member relinquished his quarters ---------- 486

Travel agency use. (*See* **TRANSPORTATION, Travel agencies, Restriction on use, Applicable regulations**)

RELOCATION EXPENSES
Transfers
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

RURAL DEVELOPMENT ACT
Compliance
Leasing of office space
Location requirements
What constitutes rural area

As Rural Development Act of 1972, 42 U.S.C. 3122(b) (1976) defines "rural area" as any community with population of less than 50,000 which is not immediately adjacent to city with population of 50,000 or more and General Services Administration (GSA) defines "urban areas" for purposes of E.O. 12072 as any incorporated community with population of 10,000 or more, solicitation restricting offers for leased office space to buildings in central business district of city of 16,481 is compatible with both requirements and is within the authority of GSA under sections 490(e) and 490(h)(1) of 40 U.S. Code (Federal Property and Administrative Services Act of 1949) ---------- 409

SET-OFF
Authority
Interagency claims Page
In dispute between General Services Administration (GSA) and Air Force over Air Force claim for reimbursement, Air Force withheld Standard Level User Charge payment owed to GSA in order to collect unrelated debt. Inter-agency claims are not to be collected by offset but should be submitted to General Accounting Office for adjudication---- 505

SMALL BUSINESS ADMINISTRATION
Contracts
Contracting with other Govt. agencies
Subcontracting under "8(a)" program
Administrative discretion
Evaluation of proposals by procuring agency
In light of broad discretion afforded Small Business Administration (SBA) under "8(a)" program General Accounting Office reviews SBA actions in such procurements to determine that regulations were followed, but does not disturb judgmental decisions absent showing of bad faith or fraud. Where contracting agency acts on behalf of SBA in evaluating proposals and recommending contractor to SBA under 8(a) program, agency's actions will be reviewed under criteria applicable to SBA actions---- 522

STATE DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, State Department**)
Authority
Services for other agencies overseas
Housing pool administration
Department of State is authorized by 22 U.S.C. 846 to administer housing pool on behalf of agencies which have leased or wish to lease housing to be used by employees of various agencies involved in pool and may pay rent on behalf of agencies involved directly from its own appropriations to be reimbursed by agency users on the basis of their share of total costs of State's operation of housing pool (including any operating, maintenance and utility costs paid by State)---- 403

STATES
Federal-State conflict
Community property
Dual Compensation Act applicability
The Dual Compensation Provisions in 5 U.S.C. 5532 reduce the retired pay entitlements of retired officers of Regular components who are employed in civilian positions with the Federal Government. The fact that under a State community property law the spouse of the retiree is considered to be entitled to part of the retired pay does not permit that part of the member's retired pay to be excluded from dual compensation reduction since Federal law controls payment of such pay---- 470

STATION ALLOWANCES
Military personnel
Temporary lodgings
Entitlement
Members without dependents
After extended sea or field duty Page

Temporary lodging allowance (TLA) may be paid under current regulations on return to permanent station of a member without dependents who must give up his permanent housing while on temporary duty away from his permanent station for extended periods. However, it may be prudent to amend the regulations to specifically provide guidelines for payments of TLA in this situation. TLA may be authorized regardless of whether the member actually loses entitlement to BAQ for the period of temporary duty, by being assigned to field or sea duty, provided it is clear that the member reasonably anticipated loss of BAQ under the temporary duty deployment and that is the reason the member relinquished his quarters 486

STATUTES OF LIMITATION
Claims
Military matters and personnel
Military service suspension. (*See* **STATUTES OF LIMITATION, Military service suspension**)

Military service suspension
Active duty requirement

The exception to the 6-year statute of limitations, 31 U.S.C. 71a, tolling the running of the 6-year period for members of the armed forces in wartime, is applicable only to members on active duty and does not apply to the claim of a former Navy member for retired pay which first accrued while he was on the temporary disability retired list and for severance pay which first accrued when he was discharged from that list.. 463

SUBSISTENCE
Per diem
Actual expenses
High rate areas
Undesignated

The Per Diem, Travel and Transportation Allowance Committee (for uniformed service personnel) and the General Services Administration (for civilian employees) may issue regulations permitting reimbursement to travelers on an actual expense basis based on unusual circumstances when due to the infrequency of travel to a given location consideration was not given to designating that locality as within a high cost geographical area. Authorization or approval of actual expense reimbursement should be predicated upon advice from the Committee or the Administration, as appropriate, that the locality was not considered for inclusion in the list due to lack of information with respect thereto and will be applicable only to the specific travel under consideration 559

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Employee who is handicapped by blindness and cannot travel alone claims travel expenses and per diem entitlement for an attendant in connection with officially approved permanent change of station. Transportation expenses and per diem expenses incurred by attendant to handicapped employee may be allowed as necessary to the conduct of official business and consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. 56 Comp. Gen. 661 and B–187492, May 26, 1977, modified (amplified)---------- 461

TRANSPORTATION
Bills of lading
Notations
Carrier liability
Loss or damage of property
Amount recovered from carrier of household goods in excess of the released value of 60 cents per pound per article for total loss of houeshold goods in transit should be refunded to carrier rather than paid to member since declaration of excess value by member on commercial bill of lading was not effective for shipment moving under Government bill of lading--- 436
Dependents
Military personnel
Dislocation allowance
Actual movement of dependents requirement
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An amendment of the Joint Travel Regulations permitting treatment of a member with dependents who are authorized to travel with him to his new permanent station but who, in fact, do not travel to the new station, as a member without dependents for purposes of receiving dislocation allowance is not prohibited by 37 U.S.C. 407. 48 Comp. Gen. 782 (1979) and similar decisions will no longer be followed---------- 376
Overseas employees
Children
Attend colleges, schools, etc.
The entitlement to an education allowance pursuant to 5 U.S.C. 5924(4) and transportation expenses pursuant to 5 U.S.C. 5722 provided for the children of a Federal employee, as a parent with only a divided right to custody of those children, must be determined by employing agency based upon the facts of the particular case. Doubtful cases should be referred to this Office. 52 Comp. Gen. 878, modified (amplified)---------- 450
Parents divorced
Employee's transportation expenses for minor children whose custody has been divided between the employee and his former spouse are reimbursable pursuant to 5 U.S.C. 5722 when his children met definition of

TRANSPORTATION—Continued
Dependents—Continued
Overseas employees—Continued
Children—Continued
Parents divorced—Continued

Page

"immediate family" as set forth in para. 2–1.4d of Federal Travel Regulations, and became "members of employee's household" consistent with decisions of this Office. Length of time which children actually live with parent-employee and discernible intent which characterizes these periods are integral evidentiary facts which must be considered in determining entitlement to travel expenses. 52 Comp. Gen. 878, modified (amplified) ---- 450

Employee's entitlement to education allowances under 5 U.S.C. 5924(4) and transportation expenses under 5 U.S.C. 5722 for his minor children whose custody has been divided between the employee and his former spouse is predicated on affirmative finding—satisfactorily established here—that children are "residing" at the parent-employee's overseas post and not merely engaged in "visitation travel" to the parent-employee's post while actually residing elsewhere. 52 Comp. Gen. 878, modified (amplified) ---- 450

Household effects
Military personnel
Advance shipments
Orders canceled, etc.
Payment of return expenses

Where members' permanent change-of-station orders are not timely issued when a ship is scheduled for overhaul and the regulations are amended to permit shipment of household effects before orders are issued, regulations may be further amended to authorize the return shipment of household effects if the ship overhaul is cancelled ---- 509

Prior to issuance of orders
Vessel overhaul scheduled

Circumstances—where members' permanent change-of-station orders are not timely issued (when a ship is scheduled for overhaul) because of delay in determining the overhaul port due to Government contract bidding requirements—may be considered unusual circumstances incident to military operations. Therefore, regulations may be amended to authorize transportation of household effects in such cases upon a statement of intent to change the ship's home port, but prior to issuance of orders ---- 509

Travel agencies
Restriction on use
Applicable regulations
Notice status
Individual Government travelers

Employee of Department of Interior and traveler whose transportation is reimbursable by that Department, unaware of regulation precluding use of travel agents, purchased airline tickets from travel agencies with personal funds. Reimbursement is permissible in an amount not exceeding cost of transportation if transportation had been purchased directly from carrier ---- 433

TRAVEL EXPENSES
Actual expenses
High cost areas
Undesignated
Retroactive reimbursement Page

The Per Diem, Travel and Transportation Allowance Committee (for uniformed service personnel) and the General Services Administration (for civilian employees) may issue regulations permitting reimbursement to travelers on an actual expense basis based on unusual circumstances when due to the infrequency of travel to a given location consideration was not given to designating that locality as within a high cost geographical area. Authorization or approval of actual expense reimbursement should be predicated upon advice from the Committee or the Administration, as appropriate, that the locality was not considered for inclusion in the list due to lack of information with respect thereto and will be applicable only to the specific travel under consideration..... 559

Predetermined rates in high cost areas
Retroactive area designation
Prohibition
Unusual circumstances notwithstanding

General designation of a high rate geographical area may not be made retroactively even though the existence of normal high costs sufficient to warrant such a designation was unknown to the Per Diem, Travel and Transportation Allowance Committee prior to the performance of travel in any individual case and such facts are thereafter made known. 32 Comp. Gen. 315 (1953)..... 559

Reimbursement basis
Criteria
Unusual circumstances
Undesignated high cost areas

Where travel is to an area that is not designated as a high cost geographical area but where the choice of accommodations is limited or the costs of accommodations are inflated because of conventions, sports events, natural disasters, or other causes which reduce the number of units available, such events may be considered as unusual circumstances of the travel assignment which would permit payment of expenses to an employee or member on an actual expense basis depending upon the circumstances of each case and the necessity and nature of the travel.. 559

Military personnel
Local travel
Criteria

Member of the Marine Corps travelled by privately owned vehicle from his home in Springfield, Virginia, to Quantico, Virginia, in order to perform temporary duty. Member's travel is interstation travel and therefore payment of his travel allowance is governed by 37 U.S.C. 404 (1976), and the implementing regulations..... 397

TRAVEL EXPENSES—Continued
Private parties
Attendants
Handicapped employees Page
Employee who is handicapped by blindness and cannot travel alone claims travel expenses and per diem entitlement for an attendant in connection with officially approved permanent change of station. Transportation expenses and per diem expenses incurred by attendant to handicapped employee may be allowed as necessary to the conduct of official business and consistent with explicit congressional intent to employ the handicapped and prohibit discrimination based on physical handicap. 56 Comp. Gen. 661 and B–187492, May 26, 1977, modified (amplified)---------- 461
Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Travel agencies. (*See* **TRANSPORTATION, Travel agencies**)

USER CHARGE
Statute
Applicability
Customs' services
Foreign airports
Where Customs Service receives no advantage from conducting passenger preclearance activity on foreign soil *vis a vis* conducting passenger clearance activities within the United States and preclearance activity was initiated at airlines request, results in substantial cost savings to airlines and permits airlines to better use their resources, record supports determination that airlines are primary beneficiaries of preclearance service. Therefore, under authority of 31 U.S.C. 483a, Customs may continue to assess user charge against airlines and recover that portion of its costs (including Treasury Enforcement Communications System) that are increased by its conducting passenger preclearance on foreign soil. 48 Comp. Gen. 24, modified (clarified)---------- 389

VEHICLES
Government
Motor pool vehicles
Damages. (*See* **VEHICLES, Government, Damages, Motor pool vehicles**)
Damages
Motor pool vehicles
Requisitioning agency liability
Regulation authorizing GSA to recover expenses connected with repair of vehicles damaged in accidents while used to provide interagency motor pool service is proper under 40 U.S.C. 491 (Act) since it is part of the cost of establishing, operating, or maintaining a motor vehicle pool or system. Furthermore, one purpose of Act was establishment of procedures insuring safe operation of motor vehicle on Government business. Charging agency for losses caused by employee misconduct or improper operation of vehicle might help to promote vehicular safety, since it is agency, not GSA, which has direct control over employee using vehicle---------- 515

WORDS AND PHRASES

"Limited technical competition" Page

In light of broad discretion afforded Small Business Administration (SBA) under "8(a)" program General Accounting Office reviews SBA actions in such procurements to determine that regulations were followed, but does not disturb judgmental decisions absent showing of bad faith or fraud. Where contracting agency acts on behalf of SBA in evaluating proposals and recommending contractor to SBA under 8(a) program, agency's actions will be reviewed under criteria applicable to SBA actions. 522

"Make or buy decisions"

Protest against propriety of cost evaluation performed under Office of Management and Budget Circular No. A-76 is dismissed until review under formal administrative procedure has been completed. General Accounting Office bid protest forum will no longer be available to protests against such cost evaluations until administrative remedy, if available, has been exhausted ---------- 465

"Military Interdepartmental Procurement Requests (MIPRs)"

It remains the opinion of this Office that a Military Interdepartmental Procurement Request (MIPRs) is placed pursuant to section 601 of the Economy Act of 1932, as amended, 31 U.S.C. 686. Consequently, to the extent the Corps of Engineers (Corps) is otherwise authorized to recover supervision and administrative expenses incurred in performing MIPR for Air Force, the Corps should be reimbursed from appropriations current when the costs were incurred or when the Corps entered into a contract with a third party to execute the MIPR. See 31 U.S.C. 686–1; 34 Comp. Gen. 418 (1955) ---------- 563

"Rural area"

As Rural Development Act of 1972, 42 U.S.C. 3122(b) (1976) defines "rural area" as any community with population of less than 50,000 which is not immediately adjacent to city with population of 50,000 or more and General Services Administration (GSA) defines "urban area" for purposes of E.O. 12072 as any incorporated community with population of 10,000 or more, solicitation restricting offers for leased office space to buildings in central business district of city of 16,481 is compatible with both requirements and is within the authority of GSA under sections 490(e) and 490(h)(1) of 40 U.S. Code (Federal Property and Administratives Services Act of 1949) ---------- 409

"School away from post"

The entitlement to an education allowance pursuant to 5 U.S.C. 5924(4) and transportation expenses pursuant to 5 U.S.C. 5722 provided for the children of a Federal employee, as a parent with only a divided right to custody of those children, must be determined by employing agency based upon the facts of the particular case. Doubtful cases should be referred to this Office. 52 Comp. Gen. 878, modified (amplified) ---- 450

"Urban area"

As Rural Development Act of 1972, 42 U.S.C. 3122(b) (1976) defines "rural areas" as any community with population of less than 50,000 which is not immediately adjacent to city with population of 50,000 or more and General Services Administration (GSA) defines "urban area" for purposes of E.O. 12072 as any incorporated community with population of 10,000 or more, solicitation restricting offers for leased office space to buildings in central business district of city of 16,481 is compatible with both requirements and is within the authority of GSA under sections 490(e) and 490(h)(1) of 40 U.S. Code (Federal Property and Administrative Services Act of 1949) ---------- 409

WORDS AND PHRASES—Continued

"Wages or compensation" Page

The term "wages or compensation" under section 15 of the Boulder Canyon Adjustment Act, 43 U.S.C. 618n, does not include commuting travel expenses, housing allowances, or similar fringe benefits. Such benefits neither come within the definition of wages or compensation nor are specifically provided for by Congress, as other expenses are, and therefore there is no legal basis for Boulder Canyon Project employees to be paid 527