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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Vacant

GENERAL COUNSEL

Milton J. Socolar

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Rollee H. Efros

Seymour Efros

Richard R. Pierson

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[B-198204]

Appropriations — Obligation — Contracts — Definite Commitment Required

Since Government agency did not mail acceptance of bid to contractor prior to expiration of period of availability for obligation of fiscal year 1979 appropriation, no "binding agreement" within meaning of 31 U.S.C. 200(a) (1976) arose in fiscal year 1979 which would provide basis for recording obligation against fiscal year 1979 appropriation and, therefore, fiscal year 1980 funds must be used.

Matter of: Department of the Treasury, Customs Service, May 1, 1980:

The Department of the Treasury, Customs Service, requests a decision regarding the propriety of recording an obligation in fiscal year 1979 (FY 79) where the document providing the basis for the obligation was misplaced due to an apparent distribution error and not discovered until the following fiscal year. A brief summary of the circumstances reported follows.

The obligation relates to a procurement for construction of certain employee residences. The project was identified as an FY 79 requirement, the project cost was included in Customs Financial Plan, and the project was approved on March 1, 1979. Invitation for bids (IFB) No. CS-79-42 was issued on August 9, 1979, and bids were opened on September 10, 1979. Gerrico Construction Inc. (Gerrico) submitted the low, responsive bid. During the week of September 17, 1979, the president of Gerrico was telephonically informed that his bid had been accepted and that award would be made to Gerrico. On September 22, 1979, Customs assigned FY 79 contract number Tc-79-54 to the Gerrico contract. On September 28, 1979, the contracting officer signed SF 23 (Construction Contract) which by reference incorporates the Gerrico signed bid. Upon signing the document, the contracting officer immediately relinquished control over it by placing it in the Customs distribution/mailing system. Due to an error, the document did not reach the Customs Accounting Division or the contractor in FY 79. The contractor's calls prompted an internal file search which disclosed the error. On October 18, 1979, the Customs Comptroller, at the request of the Procurement Officer, approved the obligation for FY 79.

On October 22, 1979, the contract document (SF 23) was mailed to Gerrico under cover of a letter entitled "Notice of Award." The purpose of this letter was to confirm the original telephonic notice of award and to transmit the misplaced written acceptance of the bid. Notwithstanding the Customs Comptroller's approval of the obligation of the FY 79 contract, the Accounting Division delayed action

based upon the late mailing. On November 21, 1979, the Director, Logistics Management Division, formally requested that the Director, Accounting Division of the Office of Financial Management and Program Evaluation, record the FY 79 obligation. On December 11, 1979, it was determined that a formal Comptroller General decision should be obtained prior to recording of the FY 79 obligation and that the FY 80 appropriation be charged in the interim.

Customs requests that in reaching our decision we consider: (1) the requirements for recording an obligation set forth in 31 U.S.C. § 200(a) (1976); (2) that the award was executed within the period of availability of the appropriation and the contracting officer relinquished control of it by placing it in the distribution/mailing system with the full intent of furnishing the document to the contractor in a timely manner; (3) if it is found that the signing of the contract award and relinquishing of control of it by the contracting officer on September 28, 1979, were insufficient to constitute a valid obligation of the Government, then the oral notification of award and the assigning of a contract number on September 22, 1979, would have constituted a valid Government obligation; (4) the amount of the contract ($198,388) is a significant part of the FY 79 Customs construction budget and use of FY 80 funds will result in cancellation of another needed construction project; and (5) this construction project is a planned acquisition, a bona fide FY 79 need, not a last-minute attempt at obligating FY 79 funds.

The applicable statute, 31 U.S.C. § 200(a), provides that after August 26, 1954, no amount shall be recorded as an obligation of the Government unless it is supported by documentary evidence of a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed. Before it can be concluded that there was a "binding agreement" for purposes of this statute, we have held that the following factors must be present:

1. Each bid must have been in writing.

2. The acceptance of each bid must have been communicated to the bidder in the same manner as the bid was made. If the bid was mailed, the contract must have been placed in the mails before the close of the fiscal year. If the bid was delivered other than by mail, the contract must have been delivered in like manner before the end of the fiscal year.

3. Each contract must have incorporated the terms and condi-

tions of the respective bid without qualification. Otherwise, it must be viewed as a counteroffer and there would be no binding agreement until accepted by the contractor.

35 Comp. Gen. 319, 321 (1955). Here, the record indicates that factors 1 and 3 are present; thus, our consideration is directed toward factor 2, particularly as it concerns communication of the Government's acceptance to the bidder.

In the circumstances, the "binding agreement in writing" required by 31 U.S.C. § 200(a) came into existence when the Government mailed SF 23 to Gerrico. *See* 35 Comp. Gen. 272 (1955) (based on theory of a common law rule in effect at least since *Adams* v. *Lindsell*, 1 B. & Ald. 681 (1818)). In general, an acceptance is mailed when it is placed within the control of postal authorities authorized to receive it; merely delivering it to a messenger with directions to mail it amounts to nothing until the messenger actually deposits it in the mail; here, mailing means handing the acceptance properly addressed and stamped to a postman and depositing it in a street mailbox or a letter chute in an office building. *Williston on Contracts*, 3rd ed. § 85.

It is well settled that the acceptance of a contractor's offer by the Government must be unconditional. See, *e.g.*, *Laurence Hall d/b/a Halcyon Days*, B–189697, February 1, 1978, 78–1 CPD 91. The key to the Government's unconditional acceptance, where the acceptance is mailed, is the release of control of the acceptance by actually dispatching it; in other words, here, the contract was formed and the obligation arose when the Government released control of the acceptance by placing it in the Post Office's custody. See *Kleen-Rite Corporation*, B–190160, July 3, 1978, 78–2 CPD 2.

Since the acceptance was not mailed until FY 80, we must conclude that the obligation did not arise until FY 80, requiring the use of FY 80 funds.

[B–198301]

Transportation—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.

Matter of: Department of the Interior—Inadvertent use of Travel Agents, May 1, 1980:

The Assistant Secretary for Policy, Budget and Administration of the United States Department of the Interior (Interior) requests an

exemption from our restrictions against the use of travel agents to procure official Government travel, see 4 Code of Federal Regulations (CFR), 52.3, for an Interior employee and another traveler whose travel is to be paid by Interior. The purpose of the exemption is to permit reimbursement for roundtrip air fare purchased from travel agents with personal funds. The travel involved transportation to Washington, D.C., in connection with a meeting with Secretary of the Interior Cecil D. Andrus concerning the Pacific Fishery Management Council Salmon Management Plan for 1980. The Assistant Secretary states that both travelers responsible for procuring the passenger transportation services from the travel agents were unaware of the requirement restricting the use of travel agencies. Furthermore, he states that Interior personnel are currently being advised of the restrictions on the use of travel agents for official Government travel, and he believes that equity and fairness dictate that an exemption should be authorized in this instance since the Government received the benefit of the transportation.

In our decision, B-103315, August 1, 1978, in response to a similar request by the Assistant Secretary of the Army (Manpower and Reserve Affairs) we held that members or civilian employees of the uniformed services who individually purchase official transportation from a travel agent with personal funds without prior approval by the administrative office can be reimbursed in an amount which does not exceed charges which would have been payable if the transportation had been purchased directly from the carrier. We did require that those granted the individual exemptions should be admonished that official Government travel ordinarily is purchased directly from the carrier in the absence of an advance administrative determination that group or charter fares sold by the travel agents will result in a lower cost to the Government and will not interfere with official business. Our decision has been incorporated in both the Military and Civilian Personnel volumes of the Joint Travel Regulations (JTR). *See* 1 JTR paragraph M2200, 2204 and 2 JTR paragraph C2207. *See also* 58 Comp. Gen. 710 (1979).

With respect to civilian employees of the United States, paragraph 1-3.4(b) of the Federal Travel Regulations (FTR) publishes provisions relating to the use of reduced fares offered by the carriers and by the travel agents. Subparagraph (1) provides for the use of the lower fares offered by the carriers when it can be determined prior to the start of the trip that such services are practical and economical to the Government. Subparagraph (2) authorizes the use of group or charter fares sold by travel agents when such use will not interfere with the performance of official business. An administrative determination is

required prior to the travel that the use of the reduced fares will result in a monetary savings to the Government, and will not interfere with the conduct of official business.

More specific guidance as to the use of travel agents is found in the General Services Administration (GSA) transportation audit regulations, specifically 41 CFR 101–41.203.1(a), which states that transportation services whether procured by the use of cash, the Government Transportation Request or otherwise, generally must be procured directly from carriers and that travel agencies may be used only to the extent permitted by the regulations of the General Accounting Office (GAO) (4 CFR 52.3) or GAO's specific exemption therefrom. Our regulations prohibit the use of travel agencies within North America, from the United States or its possessions to foreign countries, and between the United States and its possessions, and between and within its possessions. 4 CFR 52.3(a). However, both the GSA and GAO regulations are addressed to Federal agencies generally, not specifically to individual Government travelers whose travel procedures are found in the FTR or the JTR. Therefore, we are not prepared to say individual travelers on official Government business can be charged with notice of these provisions.

We believe that the same principle set out in our decision B–103315, *supra*, and 58 Comp. Gen. 710, is applicable to this case. A Government employee, unaware of the general prohibition against the use of travel agents, who inadvertently purchases transportation with personal funds from a travel agent, may be paid for travel costs which would have been properly chargeable had the requested service been obtained by the traveler directly from the carrier.

This is consistent with 4 CFR 52.3 which states regarding the use of travel agencies that:

> (c) No payment is to be made to a travel agency for charges in excess of those which would have been properly chargeable had the requested service been obtained by the traveler direct from the carrier or carriers involved.

This decision is also consistent with our reasoning in those transportation cases where a contract with a carrier to perform interstate transportation service on a Government bill of lading is unenforceable because the carrier lacks operating authority as required under the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* (1976). In such circumstances, since the Government has received the benefit of these services, we have authorized payment on a quantum merit basis. B–193727, May 18, 1979.

Therefore, we authorize payment of the travel vouchers in question consistent with this decision. Since the GSA is responsible for promulgating the FTR, we are sending that agency a copy of our decision in this matter for its consideration.

334-170 O - 81 - 2

The vouchers and supporting papers accompanying your request are returned.

[B-197824]

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 household good 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.

Matter of: Four Winds Van Lines, Inc., May 5, 1980:

The Certifying Officer of the U.S. Army Claims Service requests an advance decision pursuant to 31 U.S.C. 82d of the propriety of payment to a member of the service, Major Charles P. Ahnell, of amounts recovered from a carrier for damage in transit to the household goods of Major Ahnell.

Pursuant to permanent change of station the household goods, weighing 12,120 pounds, of Major Ahnell were picked up by Four Winds Van Lines, Inc. (Four Winds) on July 28, 1978, in Ann Arbor, Michigan, for transportation to Pittsburgh, Pennsylvania, under Government bill of lading (GBL) M-3310350. The GBL also authorized 90 days storage in transit. Major Ahnell declared a lump sum valuation of $30,000 on the carrier's commercial bill of lading No. 214-08-77.

The goods were transported to Pittsburgh, Pennsylvania, and placed in storage at George Transportation on July 29, 1978. On or about August 23, 1978, a fire at the warehouse completely destroyed the household goods. Notice of the loss was dispatched on August 25, 1978, to Four Winds by the Transportation Officer, U.S. Army Support Element, Oakdale, Pennsylvania.

On November 29, 1978, Major Ahnell filed a claim for $84,110.83 under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. 240-243, and an assignment to the Government of the rights of recovery of the owner was executed. The claim exceeded the maximum amount of $15,000 allowable under the Claims Act and the claim was, therefore, approved for the maximum. Payment was made to Major Ahnell on or about June 21, 1979.

A demand on the carrier for the full amount of $84,110.83 was executed by Major Ahnell on May 2, 1979, and was dispatched to Four Winds by the Army Claims Service. Four Winds sent a check for $7,272 in full and final settlement based on released valuation of 60 cents per pound per article ($.60 x 12,120 pounds). The Army Claims Service returned the check to Four Winds and claimed $30,000 on the

basis of the lump sum declared value on the commercial bill of lading. Four Winds again sent the check for $7,272 to the Army Claims Service stating that the Government bill of lading "specifically states that goods were released at $.60 per pound" and the shipper did not pay for additional valuation on his shipment. Under the description of articles on the GBL a notation states: "HOUSEHOLD GOODS/ REL VAL 60¢ PER LB PER ART."

The Army Claims Service forwarded the file to the United States Air Force Accounting Center for collection by setoff which was effected in the full amount of $30,000.

The tariff or special rate authority noted on the covering GBL is "GRT 1Y" which refers to Government Rate Tender I.C.C. No. 1–Y, a tender issued under authority of section 22 of the Interstate Commerce Act applicable to the services furnished by Four Winds under the GBL contract. Provision for declared or released valuation for shipments under GBLs is made in paragraph (j) and for shipments under commercial bills of lading is made in paragraph (k) of GRT 1–Y. Had the shipment moved under a commercial bill of lading the notation on the commercial bill of lading would have been effective to declare a valuation of $30,000 for the shipment.

The present shipment, however, moved under a GBL and is governed by the provisions of paragraph (j), subparagraph (A) of which provides that the shipment "* * * will be deemed released to a value of 60 cents per pound per article, unless otherwise specifically annotated on the Government Bill of Lading." The notation on the face of the GBL specifically states that the shipment is released to 60 cents per pound per article.

The terms of the commercial bill of lading do not form a part of the contract of carriage of a Government shipment under a GBL except to the extent that the terms are incorporated by reference. The terms of the commercial bill of lading are incorporated by reference under the terms and conditions on the reverse of the GBL except as formerly provided in 4 CFR 52 and now provided in 41 CFR 101–41. Subparagraph (b) of section 101–41.302–3 again provides that the GBL is subject to the same rules and conditions as govern shipments made on the usual commercial forms unless otherwise specifically provided or stated herein. And subparagraph (e) further provides that the shipment is made at the restricted or limited valuation at or under which the lowest rate is available, unless otherwise indicated on the face of the GBL. The lowest rate appears to be available at the 60-cent per pound valuation and the 60-cent per pound valuation is expressly stated on the face of the GBL. Therefore, the desire of the owner to provide for a higher released valuation was ineffective as a part of the

contract of carriage, and, if effective at all, is effective only as a separate contract between the owner and the carrier.

As a separate contract it would seem to be only a contract for insurance. The regulations of the Interstate Commerce Commission, 49 CFR section 1056.15(a), prohibit the carrier of household goods from selling insurance to shippers. Therefore, as a contract for insurance the declaration of excess valuation also fails because it is contrary to the Interstate Commerce law.

Accordingly the amount recovered from the carrier in excess of 60 cents per pound per article should be refunded to the carrier rather than being paid to the owner of the household goods.

[B-195773, B-195773.2]

Contracts — Awards — Discount Considered — Multiple-Award Discounts

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).

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Experience

Procuring activity, in the interest of furthering competition, should review experience requirements for qualification of maintenance personnel with view toward reducing number of years of experience or accepting equivalent education and training to fulfill portion of requirement.

Contracts — Negotiation — Evaluation Factors — Criteria — Experience

Contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determination when needs of agencies warrant comparative evaluation of those areas.

Contracts — Negotiation — Evaluation Factors — Criteria — Subjective Judgment Factor

Protest against use of subjective evaluation factors is denied because where evaluation factors are utilized in negotiated procurement, the use of such criteria and numerical scoring is merely an attempt to quantify what is subjective judgment about merits of various proposals.

Matter of: Interscience Systems, Inc.; Cencom Systems, Inc., May 8, 1980:

Interscience Systems, Inc. (Interscience), and Cencom Systems, Inc. (Cencom), protested request for proposals (RFP) No. WA79-D169

issued by the Environmental Protection Agency (EPA) as being unfair and prejudicial to offerors on various grounds.

The RFP was for numerous items of automatic data processing equipment to expand EPA's National Computer Center at Research Triangle Park, North Carolina. The RFP also invited proposals for maintenance on the existing system and the newly acquired items.

The RFP requested offers on the following subsections with separate prices for each:

Subsection 2.1—Central Processing Systems Expansion (CPSE)

Subsection 2.2—Disk Storage Subsystems

Subsection 2.3—Tape Subsystems

Subsection 2.4—Printing Subsystems

Subsection 2.5—Maintenance on Government-Owned Univac Equipment

Subsections 2.2, 2.3 and 2.4 are for items which are plug compatible with the Sperry Univac (Univac) CPSE and subsection 2.5 is for maintenance on currently owned Univac equipment.

On March 3, 1980, EPA made award to Univac of all subsections of the RFP, except subsection 2.4, notwithstanding the pendency of the protest because of urgency under section 1-2.407-8(b)(4) of the Federal Procurement Regulations (1964 ed. amend. 68). Subsection 2.4, which was for a laser printer, IBM Model 3800 or equal, was deleted by amendment 7 to the RFP and was awarded to IBM based on its General Services Administration (GSA) schedule contract prices.

Interscience and Cencom contend that the manner in which the RFP was structured precluded any meaningful competition because certain items included in the solicitation were sole source to Univac and because discounts for multiple awards were permitted.

The protesters argue that subsections 2.2 and 2.3, the disk storage and tape subsystems, were and are available from numerous firms and that viable competition exists for these items. However, subsection 2.1, the CPSE, is alleged to be a sole-source item to Univac. Interscience and Cencom argue that EPA should have been aware of this fact and broken out subsection 2.1 as a sole-source item and negotiated directly with Univac for the item while competing the remainder. The same reasoning applies to subsection 2.5, the maintenance of existing Government-owned Univac equipment.

The protesters contend that by allowing offerors to quote multiple-award discounts, EPA defeated the alleged purpose of prohibiting "all or none" offers. The RFP's instructions provided as follows:

(a) Offerors may propose on one or more subsections of the Statement of Work * * *. However, although offerors may propose a lower price if awarded

two or more subsections, all-or-none offers are not acceptable and will not be evaluated.

Both Interscience and Cencom argue that a sole-source supplier can unbalance its bid by bidding high on the items which are sole source and low on the competitive items and through the use of the multiple-award discount remain low for the overall procurement. Interscience posits the following example:

> The undiscounted Univac list price for purchase and maintenance for all five subsections (with the exception of Section 2.4) is approximately $14.5 million for a 60 month systems life without giving effect to present value calculations. The undiscounted INTERSCIENCE list price on an equivalent basis for Sections 2.2 and 2.3 is under $4.5 million.
>
> Of the total Univac price of $14.5 million, approximately $6.0 million relates to Sections 2.2 and 2.3 and $8.5 million relates to Sections 2.1 and 2.5.
>
> If Univac offered individual discounts on each section plus a discount for bidding all five sections—all such discounts totaling 42 percent—the net Univac bid would be $8.4 million.
>
> If INTERSCIENCE bid Sections 2.2 and 2.3 *ENTIRELY FREE OF CHARGE* to EPA, it would have $8.5 million (the Univac list price for the other sections of the RFP) added to its bid for EPA's cost comparison purposes and would *LOSE THE AWARD* by $100,000!

The protesters allege that the combining of the sole-source items (2.1 and 2.5) with the other subsections for which there is competition and the allowance of the multiple-award discounts were continuing attempts by EPA to assure that Univac won any competition. The protesters state that the factual background of the procurement reveals EPA's intent.

In June of 1978, EPA requested a Delegation of Procurement Authority (DPA) from the GSA to negotiate sole source with Univac to extend the current Univac support contract from February 1979 to September 1982. Also requested was permission to procure additional equipment necessary to expand the EPA ADP Center's capacity.

By letter of August 31, 1978, GSA summarized its position with regard to the EPA request and advised that EPA could extend the current Univac contract until February 1979, that GSA was suspending consideration of the request to extend the contract until September 1982, and that:

> You will, as soon as possible, publish a notice in the Commerce Business Daily stating your desire to acquire, subject to the availability of funds, the ADPE listed in your August 18, 1978, letter. The synopsis will list each component required by make, model number, nomenclature and quantity, and will solicit from vendors letters of interest in competing on a make/model or plug compatible equivalent basis. Those items for which no interest is expressed may then be acquired on a sole source basis. Any items which precipitate affirmative response will be acquired only after an appropriate competitive solicitation.

Notwithstanding the above condition, the protests allege, EPA included sole-source subsections 2.1 and 2.5 in the competitive RFP to the detriment of the peripheral equipment manufacturers who could have competed for the disk and tape subsystems.

In response to the protests, EPA states that it expected competition and received expressions of interest on all subsections of the RFP and that by utilizing the multiple-award-discount provision it sought to assure the lowest system cost to the Government. By employing the discount provisions, EPA contends that it was able to take advantage of economies of scale, particularly in the area of the maintenance, required to be furnished on each subsection.

We do not know upon what EPA based its belief that competition was expected on subsections 2.1 and 2.5 prior to receipt of proposals since the agency has only made a general statement as to that expectation. However, the responses to the RFP clearly support the noncompetitive allegations of the protesters. Univac proposed on all subsections except 2.4. Cencom submitted a proposal on subsection 2.2, which was found technically unacceptable. The only other response received by EPA was a letter prior to the closing date for receipt of proposals from a third-party broker of computer equipment. The letter requested a relaxation of the specifications so that it could propose used Univac equipment for a portion of subsection 2.1. EPA made no change in the specifications and did not respond to the letter. Moreover, the RFP required that all items offered must be new equipment of a current production model.

We believe at that point in time it should have been clear to EPA that no competition existed for subsections 2.1 and 2.5. EPA's subsequent actions show it was aware of the situation because following the receipt of initial proposals, on October 26, 1979, EPA placed a notice in the Commerce Business Daily that subsections 2.2 and 2.3 would be competed under a new RFP. During this same timeframe, EPA made award to IBM for the laser printer as the only offeror for that item and began negotiations with Univac looking toward an award of subsections 2.1 and 2.5.

In a supplemental contracting officer's statement regarding the protest, EPA advised that "As the negotiations went forward, it became apparent that EPA could not conclude an acceptable agreement * * *." Thereafter, amendment 7 to the RFP was issued to all prospective offerors extending the due date for receipt of proposals to January 4, 1980, on the four remaining subsections. Again, only Univac responded to subsections 2.1 and 2.5

EPA has cited numerous past decisions of our Office dealing with the acceptability of group or multiple-award discounts (e.g., *Moir Ranch and Construction Company; Mulino Construction Company, Inc.*, B–191616, June 8, 1978, 78–1 CPD 423) ; however, none of those cases involve the commingling of sole-source items with items on which competition exists in the same procurement.

While EPA states that by prohibiting all or none offers it sought to make the procurement competitive, we find that including the allowability of multiple-award discounts in this case without any prohibition against unbalanced bids could have led to the same result. Notwithstanding EPA's contention that the inclusion of the multiple-award discounts would assure the lowest cost to the Government, we have recognized that competition and lower cost can be better achieved by negotiating contracts for sole-source items and soliciting competitively for other items without any restriction concerning all or none bids or, in this case, multiple-award discounts. *Martin & Turner Supply Company*, 54 Comp. Gen. 395 (1974), 74-2 CPD 267, and B-153257, May 14, 1964.

Therefore, giving consideration to the prior-quoted GSA letter of August 31, 1978, and our past decisions, we believe the Univac contract was improperly awarded since it was apparent that Univac was an effective sole source for subsections 2.1 and 2.5 of the RFP. Moreover, Univac was probably aware of its sole-source position as to the two subsections. Without competition, either actual or expected, or cost and pricing data, there was no assurance that reasonable prices were obtained.

Therefore, based on our holding regarding the lack of competition for subsections 2.1 and 2.5, and the effect the multiple-award discounts had on subsections 2.2 and 2.3, we recommend that Univac's contract be terminated under Article XXV of the contract which permits the Government to discontinue rental payments on 30 days' notice. Subsections 2.2 and 2.3 should be recompeted in a separate procurement. Sole-source negotiations should be commenced with Univac for subsections 2.1 and 2.5. This action will make the procurement consistent with the intent of the GSA August 31, 1978, letter. While normally this action would render moot the additional bases of protest set forth by Cencom, we will comment on the issues as they may reoccur in any recompetition.

Cencom questions the experience requirements maintenance personnel must meet in order to be acceptable under the RFP. The RFP requires the on-site maintenance supervisor to have 10 years' experience including 2 years' supervisory experience and the hardware specialist to possess 6 years' experience. Cencom argues that while these requirements may be necessary for the maintenance of the mainframe computer (subsection 2.1), to require the same experience qualifications for maintenance of the equipment being procured under subsections 2.2 and 2.3 is excessive and detrimental to competition. Cencom contends that an offeror for subsection 2.1 can utilize the same main-

tenance personnel to meet the requirements of subsections 2.2 and 2.3 at no additional cost.

Cencom further states that the use of years of experience as the sole criterion in determining the qualifications of maintenance personnel is improper as it gives no credit for education or training. Only Univac, according to Cencom, could comply with the maintenance requirements and this structuring of the RFP requirements was an attempt by EPA to assure that Univac would continue to have sole responsibility for the maintenance of all equipment (mainframe and peripherals) at the Computer Center.

EPA has responded by stating that maintenance is a critical element of the contract to insure a minimum of system downtime so that EPA can fulfill its mission requirement and meet the needs of the user community. The use of the number of years of experience was the least restrictive common denominator for specifying EPA's minimum needs regarding qualifications of maintenance personnel.

The determination of the Government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials, who are most familiar with the conditions under which the supplies or services have been or are to be used. Therefore, our Office will not question agency decisions in those respects unless clearly shown to be erroneous. *Tyco*, B–194763, B–195072, August 16, 1979, 79–2 CPD 126. While not deciding the issue, we believe, in the interest of furthering competition, EPA should review the experience requirements with a view to reducing them regarding the 2.2 and 2.3 subsections or accepting equivalent education and training to fulfill a portion of the requirement.

Finally, Cencom has protested that the evaluation criteria contained in the RFP are ambiguous and subjective and an offeror did not know how its proposal would be evaluated and the importance which EPA placed on cost versus technical in the award selection.

The RFP, as initially issued, appears to have been deficient because it only stated that award would be based on "price and other factors" without stating how price related to the determination of which proposal would be "most advantageous to the Government." However, amendment 5 to the RFP contained answers to questions posed by offerors and, in response to a question regarding the evaluation criteria, EPA noted that price would be dominant in the selection of technically acceptable offerors for award. We find this to have been sufficient to advise offerors of the importance EPA placed on price vis-a-vis technical.

Concerning the allegation that the criteria were ambiguous, Cencom

cites as an example that experience was to be point scored in the technical evaluation and also considered in determining an offeror's responsibility. We have recognized that contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determination when the needs of those agencies warrant a comparative evaluation of those areas. *Design Concepts, Inc.*, B–184754, December 24, 1975, 75–2 CPD 410. Accordingly, we have no objection to the use of experience factors in this manner.

With regard to the subjectiveness of the criteria, this is always the case where evaluation factors are utilized in a negotiated procurement and the use of such criteria and numerical scoring is merely an attempt to quantify what is a subjective judgment about the merits of various proposals. *Interactive Sciences Corporation*, B–192807, February 23, 1979, 79–1 CPD 128.

Accordingly, the joint protests are sustained and the separate Cencom protest is denied.

By letter of today, we are advising the Administrator of the Environmental Protection Agency of our recommendation.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

[B–196286]

Contracts — Specifications — Tests — Benchmark — Requirements — Status to Protest

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.

Contracts — Specifications — Tests — Benchmark — 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.

Contracts—Specifications—Restrictive—Minimum Needs Requirement—Administrative Determination—Reasonableness

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.

Matter of: ADP Network Services, Inc., May 12, 1980:

ADP Network Services, Inc. (ADP), protests the proposed procurement by the Small Business Administration (SBA) of teleprocessing services under the Teleprocessing Services Program's Multiple Award Schedule Contracts.

Under this program, user agencies which have received approval from the General Services Administration (GSA), as SBA has here, may place orders for teleprocessing services against schedule contracts after the user agency (1) evaluates the technical service features of those vendors with schedule contracts, (2) eliminates from consideration those that do not meet its requirements, and (3) selects the vendor's schedule contract offering the lowest system life cost, price and other factors considered.

The SBA issued a notice of mandatory requirements and ADP responded; SBA notified ADP that all mandatory requirements had been met and advised ADP that a benchmark would be held. On September 13, 1979, benchmark materials were transmitted to ADP and ADP was advised that its benchmark would be performed on October 5, 1979. On September 24, 1979, SBA and ADP participated in an informational conference concerning the benchmark package and that day ADP filed a protest with the contracting officer. On September 28, 1979, the contracting officer advised ADP that benchmarks would proceed as scheduled. Four days later, ADP protested here.

ADP essentially requests: (1) the elimination of all unnecessary proprietary code from the benchmark; (2) the postponement of 30 days to allow competing vendors to develop functional equivalents for all incumbent vendor proprietary code that cannot be eliminated or documented; (3) elimination of all benchmark requirements that are not mandatory; and (4) permission for vendor personnel to attend the benchmark to assist SBA personnel in case they are unfamiliar with the vendor's system.

In response, SBA contends that it has adhered to GSA guidance for

acquiring commercial teleprocessing services and it is not in violation of applicable regulations or decisions. SBA reports that the technical requirements do not include things not in the benchmark and there is nothing in the benchmark which could have caused ADP to fail, which were not deemed mandatory requirements. SBA argues that GSA regulations indicate that if a concern attempts to benchmark and fails, at least one retrial at a reasonable interval is to be provided; in the instant case, however, ADP chose not to avail itself of this GSA requirement. It is SBA's opinion that its determination to eliminate ADP from further consideration due to its failure to benchmark is consistent with our decisions and GSA regulations.

The incumbent contractor, Computer Sciences Corporation (CSC), notes that GSA guidelines provide that at least 20 calendar days be allowed for vendors who have already met the mandatory requirements to prepare for the benchmark demonstration and the protester was allowed 23 days; additionally, at least one retrial is allowed. Applying these principles to this protest, CSC argues that ADP would not have been disqualified if it were unable to complete the demonstration the first time. In CSC's view, ADP has not established that the SBA requirements are unduly restrictive and ADP has not shown that SBA was arbitrarily in the listing of its minimal needs. CSC also states that SBA's actions are reasonable because "ADP would not have been precluded from competing on a cost basis, assuming it had met the mandatory requirements, had it not successfully completed the benchmark."

At the outset, we must reject SBA's and CSC's contention that ADP's failure to attempt the benchmark when scheduled forecloses its further participation in the procurement. First, SBA's and CSC's belief that ADP or any vendor should have known that it was entitled to a second attempt to accomplish the benchmark is not supported. The GSA guidance both rely on for support, GSA Handbook, Teleprocessing Services Program, FPMR 101-36, October 1978, states with regard to benchmarks that:

> *Recommended practices.* The following practices are to assist selecting activities in organizing their benchmark efforts * * *. The primary consideration is to achieve a benchmark which is representative of the selecting activity's actual workload at minimum cost. These are suggested practices, not hard and fast rules. They are designed to convey concepts, specific details of application are left to the selecting activity.

Thus, in view of the nonmandatory nature of GSA's guidance, absent an express promise of a second benchmark attempt (*Tymshare, Inc.*, B-192987, August 28, 1979, 79-2 CPD 158), no vendor would be entitled to a second attempt as a matter of right. Here, the record does not indicate that SBA expressly guaranteed ADP a second attempt.

Second, in view of the relative cost associated with benchmarking ($20,000 to $40,000) as compared to the projected value of the procurement ($400.000), it would not be reasonable to require a vendor to attempt a benchmark which it knew it could not successfully accomplish. Such a requirement would not tend to maximize competition.

Third, if ADP had objections to the benchmark and participated without protest, a subsequent protest to our Office might have been untimely. *See, e.g., Comshare, Inc.*, B–192927, December 5, 1978, 78–2 CPD 387 (failure to protest within 10 days of receipt of benchmark package or, at the very latest, within 10 days of the actual benchmark test); *Tymshare, Inc.*, B–190822, September 5, 1978, 78–2 CPD 167 (failure to protest within 10 days of notice that agency would not change benchmark as requested by protester); *Information International, Inc.*, B–191013, May 31, 1978, 78–1 CPD 406 (failure to protest within 10 days of notice of agency's failure to correct benchmark package as requested by protester).

Accordingly, we will not summarily deny ADP's protest; instead, we will consider the merits of ADP's specific objections to the benchmark package.

ADP objects to benchmark request I.A.—"[e]xecute the runstream in Exhibit 1A"—because that runstream is an undocumented proprietary runstream of the incumbent; it includes the INFONET (a CSC component) system variable #V, a capability not required by SBA's notice of mandatory requirement. Other than SBA's general denial of any improprieties, the record contains no SBA explanation or rebuttal. CSC, however, did respond to this objection by explaining that the runstream is written in standard General Program Subsystem (GPS) command language, fully documented by INFONET and is similar to a number of other widely used command languages. In CSC's view, the narrative included in the benchmark package fully describes the functions to be performed.

We have reviewed the factual dispute concerning whether the benchmark narrative fully describes the functions to be performed by Exhibit 1A. We conclude that the benchmark narrative is not self-documenting and requires knowledge of how the INFONET system functions as well as the INFONET system documentation. In particular, we find the following: (1) line 50 is confusing because it has no apparent function; and (2) there is a special feature (lines 51–60, and line 30) in the benchmark requirement that is not apparent from SBA's notice of mandatory requirements. Accordingly, this aspect of ADP's protest has merit.

ADP also objects to the benchmark requirements I.D.3, "[s]et and internal variable," because internal variables are not required by SBA's notice, and I.D.5, "[i]nterrupt the COBOL program and set

#V8 to 0610 and begin execution with a Go statement," because system variables are not required by SBA's notice and the "Go" statement is INFONET-specific. ADP notes that the program WP1.CT includes the INFONET-specific characteristic of setting a system variable (#V0) for testing outside of the program; further, the Job Code Language (JCL) tests the system variable #V0 after execution; and system variable #V8 is set by the JCL prior to executing program E2. In ADP's view, there is no requirement in the SBA notice for setting and testing system variables and these characteristics are incumbent-specific granting INFONET an unfair competitive advantage.

In reply, CSC explains that (1) system variables such as #V0 and #V8 are common to a number of time-sharing systems and are not specific to INFONET, (2) SBA's notice requires user addressable variables such as the return or condition code, and (3) it is evident that in order to fulfill the requirement for "prompting, testing and branching" that the value entered by the user must be placed in an area which is addressable and that the contents of this area reflects the value entered—in other words, a variable. CSC contends that the requirement for variables addressable at the command level is obvious.

We have reviewed this factual dispute also. In our view, the requirement for variables addressable at the command level is not obvious. However, we believe it is inferred from the "prompting, testing and branching" requirement which would be meaningless without such variables. However, there is no express requirement for the capability to query a system-controlled variable like "#V0." That requirement could be met by most major time-sharing vendors, but not all vendors' systems would permit the system variable to be read directly as the benchmark required. Accordingly, we believe that this portion of the requirements and objectives of this portion of the benchmark should be better explained by SBA and SBA's mandatory requirements and benchmark requirements should be made consistent.

Next, CSC explains that the "Go" statement is used to resume a program after it has been interrupted, a concept universal among computer systems, and ADP should have had no problem with this function since its command language contains two commands which accomplish the same function: CONTINUE and REENTER. In CSC's view, the lack of documentation is immaterial because the runstream is straightforward and self-variables are also easily achieved by setting return codes and by reading the values from a file.

We conclude that the runstream is not self-documenting because the capabilities and functions of the commands are not apparent on their face. Initially, offerors would need the documentation linking file

names used in the runstream to the benchmark programs. In addition, the runstream requires a program written in proprietary language and analysis of that program's functions would require an expert in that language. In that regard, the benchmark instructions are useless; they lack clarity and sufficient detail to adequately explain what is expected. Therefore, this aspect of the benchmark should be revised.

ADP objects to two other benchmark requirements: (1) "Exhibit 4E"—on the ground that it is an undocumented proprietary JCL runstream that tests a return code whereas only COBOL is required to test a return code by the SBA notice; and (2) "Exhibit 5B, 5C and 5D"—on the ground that these programs represent approximately 1,400 lines of proprietary ALADIN code, requiring conversion of an entire system in order to benchmark, but the documentation supplied is insufficient in system logic, flow and detail, thus not satisfying GSA requirements relative to converting proprietary code.

In response to (1) above, CSC again notes that the GPS command language is fully documented and is similar to command languages implemented by other vendors; also, the ability to set a return code from either COBOL or a command is required by the SBA notice and emphasized in a letter of clarification. Neither SBA nor CSC specifically responded to (2) above.

Our concern is whether exhibits 4E, 5B, 5C and 5D constitute an undue burden of converting undocumented code. These exhibits are all written in proprietary code; thus, a nonincumbent contractor must start from scratch when attempting to execute these programs. The task is much more difficult than conversion from standard languages and the documentation supplied is minimal when compared to the task. There is no documentation on the internal logic of the programs or of their relationship to one another. There is no sample outputs to use in the task; further, example reports are not correlated to exhibits. There should have been complete sample output and test data for every program used in the benchmark. Finally, the benchmark is structured so that the greatest expense is directed toward areas that count the least. Accordingly, we find this aspect of ADP's protest to be meritorious.

ADP also objects to the following five benchmark requirements for the primary reason that they provide the incumbent an undue advantage: (1) "read files from cassette or floppy disk"—specific hardware interface requirements are restrictive; (2) "reformat"—this is a proprietary ALADIN procedure; (3) "number types"—the incumbent's system does this but the requirement is not in the SBA notice; (4) "display Data Base name, pages of overflow"—overflow pages are a feature of the incumbent's ALADIN system, which is not common to other systems; and (5) "blind benchmark"—SBA personnel are not

familiar with nonincumbent vendors' equipment to the same degree as incumbent's and any incumbent bias cannot be prebented or detected.

In response, CSC notes that: (1) SBA's notice calls for the ability to access data residing on a data cassette device and ADP's command "Read" performs the function of transferring data from a paper-type device to another file; (2) SBA supplied a complete description of the input file format and a listing of the reformatted output file; the inclusion of the ALADIN language program listing does not prevent the vendor from reformatting the data; and (3) the number of tapes assigned to a user becomes an important item in determining the resources consumed by the user for billing purposes. Neither CSC nor SBA expressly responded to ADP's items (4) and (5) above.

We have carefully examined the arguments regarding these five objections and note at the outset that none of these items would prevent ADP from competing. ADP could satisfy all the requirements from a functional or performance standpoint. While certain system adjustments may be necessary on ADP's part, there is no showing that the SBA requirements are in excess of its minimum needs. Although the incumbent probably had an advantage, there is no showing that CSC obtained that advantage through unfair Government action or preference. Further, we have no basis to conclude that these requirements were unreasonable. See *Informatics, Inc.*, B–190203, March 20, 1978, 78–1 CPD 215, *affirmed sub nom.*, 57 Comp. Gen. 615 (1978), 78–2 CPD 84. Accordingly, this aspect of ADP's protest is denied.

In conclusion, the protest is sustained in part and denied in part. By letter of today, we are forwarding our recommendations for corrective action to the Administrator of SBA.

[B–195969]

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.

Transportation—Dependents—Overseas Employees—Children—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 "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.

Officers and 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.

Transportation—Dependents—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.

Matter of: Ernest P. Gianotti—Education Allowance—Transportation Expenses—Divided Custody of Minor Children, May 15, 1980:

The issues presented relate to the allowability of travel and transportation expenses and education allowances for the children of an employee stationed outside the continental United States in the light of a divorce decree providing that custody of the children shall be divided equally between the employee and his former wife.

For the reasons stated at length below, we have concluded, based upon the facts of this case, that the employee as a new appointee may be allowed travel and transportation expenses for his children under 5 U.S.C. § 5722 and education allowances for his children under 5 U.S.C. § 5924. The period of entitlement for each child begins with the time when the facts and the intent of the parties show that the child became a member of the employee's household at the overseas duty station. The employee may not be allowed the expenses or allowances for "visitation travel" when the child actually resides elsewhere.

BACKGROUND

This decision is issued in response to a letter from Mr. Dennis J. Hubscher, an authorized certifying officer for the Department of the Interior, requesting an advance decision on the propriety of payment of transportation expenses and an education allowance for the children of Mr. Ernest F. Gianotti, Associate Justice, High Court, Trust Territory of the Pacific Islands (TTPI).

Mr. Gianotti was appointed to the position of Associate Justice effective December 15, 1977, and was authorized travel and relocation expenses to his first duty station in the TTPI. At the time of his appointment, Mr. Gianotti had equal custody of two minor daughters under a divorce decree dated May 30, 1974. At the time this claim was filed the divorce decree provided in pertinent part that Mr. Gianotti was granted the physical care, custody and control of the children from the 1st day of December 1974, until the 1st day of June 1975, and like periods each year thereafter, at the family home in Great Falls, Montana. His former wife was granted physical custody of the children at the family home for the other 6 months of each year. The decree prohibited either of the parties from removing either of the children from Cascade County, Montana, without the prior written consent of the other party, or an order of a court having jurisdiction to make such an order.

The record shows that in August 1978 Mr. Gianotti was authorized an educational allowance for his older daughter, Christine, who attended Hawaii Preparatory Academy during the 1978–1979 school year. In June of 1979, Christine traveled from Hawaii to Truk, TTPI, to spend the summer with her father. In that same month Mr. Gianotti's younger daughter, Lisa, traveled to TTPI from Montana, where she had resided with her mother throughout the 1978–1979 school year. At that time, in view of the terms of the custody decree, a question was raised concerning Mr. Gianotti's entitlement to an education allowance for Christine for the 1978–1979 school year as well as to travel expenses for Lisa.

EDUCATION ALLOWANCE

Pursuant to the statutory authority contained in section 5924(4) of title 5, United States Code, an education allowance may be granted to an employee in a foreign area. In accordance with the implementing regulations contained in section 270 of the Standardized Regulations (Government Civilians, Foreign Areas) the purpose of the education allowance is to assist in defraying those costs necessary to obtain educational services which are ordinarily provided without charge by the public schools in the United States; plus, in those cases where adequate schools are not available at the employee's post, the costs of room and board and periodic transportation between such posts and the nearest locality where an adequate school is available.

Our primary concern in the present case is with Mr. Gianotti's eligibility for the education allowance for his children in circumstances where, incident to a divorce decree, he has had only a divided right to their custody.

An education allowance may be provided for children meeting the following definition established in subsection 271.h of the Standardized Regulations:

"Child" means a dependent who is one of the children defined in section 040m (2) and (4) and who is eligible for education at the elementary or secondary school level (grades K–12) except that such child must have attained the age of four years and must not have reached his/her 21st birthday.

The referenced definition of eligible "children" in section 040m reads as follows:

m. "Family" means one or more of the following relatives of an employee residing at his post, * * *:

* * * * * * *

(2) Children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support. The term shall include, in addition to natural offspring, step and adopted children and those under legal guardianship of the employee or the spouse when such children are expected to be under such legal guardianship at least until they reach 21 years of age and when dependent upon and normally residing with the guardian. (See subchapters 270 and 280 on education allowances and educational travel.)

In our decision in 52 Comp. Gen. 878 (1973), we discussed the effect of a divorce decree, under which joint custody is awarded to both parents, on the employee's entitlement to a separate maintenance allowance. The question was raised as to whether, inasmuch as both divorced parents remain in the same legal relationship to the children with respect to custody as before the divorce, entitlement to allowances and other benefits under Government regulations of an employee-parent with joint legal custody would also remain the same. We concluded in part that the definition of "children" presented in section 040m(2) of the Standardized Regulations is sufficiently broad to include children whose custody, incident to a divorce decree, has been placed jointly in the employee and his former spouse.

In the present case, however, we address the clearly distinguishable circumstances where the court entered an order which divided or alternated the custody of the Gianotti children between their parents. That is, the custody of the children was not jointly in both parents, but rather the children were given first to one and then to the other parent for specified periods under conditions also prescribed by the court.

In view of the various factors which may affect the desirability of an order for divided custody, it is evident that the trial court has discretion as to whether it will divide custody, and that decision must depend upon the facts of the particular case. See 92 A.L.R. 2d 695, 699 (1963). Just as surely, the entitlement to certain expenses and allowances provided for the children of a Federal employee, as a parent with only a divided right to custody of those children, must be determined based upon the facts of the particular case. Thus, for example,

in our decision in B–129962, November 17, 1976, a Foreign Service Officer contended that the Government's failure to pay for visitation travel of a divorced officer's dependents when he lacks legal custody but nevertheless supports them was unfair. We held that 5 U.S.C. § 5924, as implemented by the State Department Standardized Regulations, authorized travel and educational allowances for family members residing at the officer's post, but made no provision for "visitation travel" to the employee's post by his dependent children residing elsewhere.

It is also important to note, recalling the express purpose of the education allowance, that even where an employee's eligibility can be satisfactorily established, the selection of a school is not an unfettered prerogative of the employee. As a result, section 272.2 of the Standardized Regulations introduces the rates which apply for the education allowance, stating in part as follows:

> Rates of education allowance are provided for "school at post," "school away from post" and "home study." Where a local school is adequate, the "school at post" and the "school away from post" rates are identical. In this circumstance, the rate for "school away from post" does not reflect the costs of attending a boarding school but simply indicates the allowance available for an employee who desires to send his/her child away to school despite the availability of an adequate local school. Where a local school is inadequate, an allowance rate is established to assist with the costs of attending the nearest and, transportation considered, least expensive adequate boarding school. * * *

In accordance with section 271e., of the Standardized Regulations a "school away from post" means an elementary or secondary school so far beyond daily commuting distance of the employee's post as to necessitate board and room in connection with attendance. Allowable expenses in connection with a qualifying child's attendance at a school away from post are set forth in the following provisions of subsection 277.2 (July 1, 1979) of the Standardized Regulations:

> 277.2 *School away from Post (Sec. 271e)*
>
> a. Items listed in section 277.1a. through d.;
>
> b. Room and board; limited to $250 per month for up to 10 months when child does not reside in school dormitory but instead uses private boarding facilities;
>
> c. Periodic transportation of the child between the post and the school, not to exceed trips indicated by school's vacation closing calendar or necessary weekend trips if boarding is on a 5-day basis.

Subsection 271a. of the Standardized Regulations defines an "Education allowance" as an allowance to assist an employee in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his service in a foreign area in providing adequate elementary and secondary education for his children. Accordingly, upon determining an employee's eligibility for an education allowance, it remains the responsibility of the authorizing officials

to determine the type and extent of the qualifying employee's entitlement under the governing regulations.

TRAVEL AND TRANSPORTATION EXPENSES

Mr. Gianotti's claim for reimbursement for the transportation expenses of his two minor children in traveling to Truk, TTPI, is subject to a significantly different analysis. Under section 5722 of title 5, United States Code, Mr. Gianotti may be reimbursed for the transportation expenses of his immediate family from the place of actual residence at the time of his appointment to the place of employment outside the continental United States, and these expenses on his return from his post of duty outside the continental United States to the place of his actual residence at the time of his appointment.

Implementing regulations contained in the Federal Travel Regulations (FPMR 101–7) (May 1973) (FTR) require in paragraph 2–1.5a(2) that the maximum time for beginning allowable travel and transportation—except in circumstances not pertinent here—shall not exceed 2 years from the effective date of the employee's appointment, or, in the case of Mr. Gianotti's immediate family, December 15, 1979.

In addition, paragraph 2–1.4d of the FTR (FPMR Temp. Reg. A–11, Supp. 4, April 29, 1977) defines "immediate family" as follows:

> d. *Immediate family.*
>
> (1) Any of the following named members of the employee's household at the time he reports for duty at his new permanent duty station or performs authorized or approved overseas tour renewal agreement travel or separation travel:
>
> (a) Spouse;
>
> (b) Children of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support (The term "children" shall include natural offspring; stepchildren; adopted children; and grandchildren, legal minor wards, or other dependent children who are under legal guardianship of the employee or employee's spouse.);
>
> (c) Dependent parents (including step- and legally adoptive parents) of the employee or employee's spouse (See (2), below, for dependent status criteria.); and—
>
> (d) Dependent brothers and sisters (including step- and legally adoptive brothers and sisters) of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support. (See (2), below, for dependent status criteria.)
>
> (2) Generally, the individuals named in 2–1.4d(1) (c) and (d) shall be considered dependents of the employee if they receive at least 51 percent of their support from the employee or employee's spouse; however, this percentage of support criteria shall not be the decisive factor in all cases. These individuals may also be considered dependents for the purposes of this chapter if they are members of the employee's household and, in addition to their own income, receive support (less than 51 percent) from the employee or employee's spouse without which they would be unable to maintain a reasonable standard of living.

The operative effect of the "immediate family" requirement on the transportation expense entitlement under the Federal Travel Regulations was the subject of our decision in B–187241, July 5, 1977. There,

we directly addressed the issue of transportation expenses of minor children. Following a presentation of our decision in 52 Comp. Gen. 878, *supra*, we reasoned further as follows:

> We recognize that in modern divorce proceedings, as here, the employee-father should, wherever possible, share in the legal custody and upbringing of a child or children of the marriage. Further, it is noted that the welfare of the minor children being of utmost importance, and particularly where the children are attending school, it is not always feasible for them to spend an equal amount of time in the households of both the mother and the father. However, in order for an individual to be covered by the definition of "immediate family" as it appears in the regulations and consequently entitled to the transportation allowance being claimed, it is necessary for that person to be one of the named individuals *and a member of the household of the employee.*
>
> With respect to the term "household," such term is not defined in the regulations. We have stated that the term is one of uncertain meaning and that persons may be members of the same household even though they are not living under the same roof. [Citations omitted]
>
> * * * * * * *
>
> However, the facts in this case show that the children actually reside with their mother approximately 11 months of each year and although the employee has joint custody of said children, rather than a permissive right to visit the minors, plans for them to visit at his residence in Juneau for one month during the summer, and is financially responsible for the support of his children, the period of time during which they actually live with the claimant is not of sufficient duration to warrant a determination that the children are in fact "members of the employee's household." [Citations omitted]

As a result, recalling our decision in B–129962, November 17, 1976, *supra*, we believe that the length of time which Mr. Gianotti's children actually lived with their father at the overseas station, and the intent which characterized these periods spent with their father, are integral evidentiary facts which must be considered in the determination of the individual entitlements to travel and transportation expenses. Here again, it is the facts of this particular case which must support Mr. Gianotti's claim for travel and transportation expenses for his daughters under 5 U.S.C. § 5722, and the implementing regulations.

ADMINISTRATIVE DEVELOPMENT

In connection with our further development of Mr. Gianotti's claim, we have been advised that he now has custody of both daughters. Specifically, appropriate decrees were entered giving Mr. Gianotti full custody of his daughter Christine effective August 27, 1979, and full custody of his daughter Lisa effective November 30, 1979. In addition, the following listing has been provided which indicates the daughters' whereabouts from December 1977 to the present:

December 15, 1977, to May 31, 1978—Both daughters in Montana
June 1979 to September 1979—Both daughters in Saipan
September 2, 1978, to June 1979—Lisa in Montana, Christine at H.P.A.
June 1979 to September 1979—Both daughters in Saipan
September 1979 to Present—Christine at H.P.A.
September 1979 to December 9, 1979—Lisa in Montana
December 10, 1979, to January 10, 1980—Lisa in Saipan
January 10, 1980, to Present—Lisa at H.P.A.

Based upon these findings, and in conjunction with the legal analyses noted earlier, the following allowances and expenses may be certified for payment in regard to each of Mr. Gianotti's daughters.

CONCLUSION: CHRISTINE

Christine's residence in Montana during the period from December 15, 1977—the effective date of Mr. Gianotti's appointment as Associate Justice, High Court, TTPI—through May 31, 1978, creates no entitlement in Mr. Gianotti for an education allowance and in fact no such allowance is claimed.

Christine's travel on or about June 1, 1978, from the Gianotti family home in Montana—the place of actual residence at the time of Mr. Gianotti's appointment as Associate Justice—to Truk, TTPI—Mr. Gianotti's overseas duty station—may be reimbursed pursuant to section 5722 of title 5, United States Code.

Although Christine actually resided with her father in Truk for only 3 months over the summer—leaving for school at Hawaii Preparatory Academy on or about September 1, 1978—the facts support a finding that it was the intent of the parties that she remain with her father for an extended period to include her attending school. As we noted earlier, we believe that persons may be members of the same household even though they are not living under the same roof. The situation here, where Christine would have been residing with her father but for her attendance at a school away from post, is a good example of our extended construction of the concept of "member of the household of the employee." Thus, in the circumstances presented the record supports the determination that when she traveled to Truk in June of 1978 Christine became a "member of Mr. Gianotti's household" within the meaning of paragraph 2–1.4d of the FTR and our decision B–187241, July 5, 1977, *supra.* This conclusion is further supported by the fact that from and after June 1, 1978, Christine was either residing with her father at his overseas duty station or attending school away from that post. Accordingly, Christine's travel to Truk in June of 1978 is reimbursable pursuant to 5 U.S.C. § 5722 (1976).

In view of the findings noted above, Christine's matriculation at Hawaii Preparatory Academy from September 1978 to June 1979 entitles Mr. Gianotti to an education allowance under the provisions of 5 U.S.C. § 5924(4) (1976) and implementing regulations contained in section 270 of the Standardized Regulations. Under the facts of this case we conclude that the definition of "children" presented in section 040m(2) of the Standardized Regulations is sufficiently broad to in-

clude a child such as Christine whose custody, incident to a divorce decree, has been divided equally between the employee and his former spouse.

We note, however, that at this point the applicable divorce decree allowed flexibility for either spouse to remove the children from Montana, provided prior written consent of the other party, or a court order was obtained. On this point the record contains a photostated copy of an undated, handwritten note, signed by one "A. McCracken," which extends permission for Christine Gianotti "to attend H.P.A. her senior year." While we do not question the authenticity of this document, we do not find that it is sufficient to comply with the nondiscretionary consent requirement ordered by the court. In the circumstances presented by Mr. Gianotti's claim we feel that an affidavit of the former spouse is required to sufficiently establish compliance with the court order's requirements. See 52 Comp. Gen. 878, 881, *supra*,

Presuming that this affidavit will be provided, it would clearly support the contention that Christine was primarily residing with Mr. Gianotti as his dependent child within the meaning of section 271h., and section 040m(2) of the Standardized Regulations. As a result, Mr. Gianotti would be entitled to receive an education allowance pursuant to section 270 of the Standardized Regulations, incorporating definitions and entitlements contained in sections 271 a., b., c., and e.; 271.1; and 277.2 of those regulations.

One caveat should be noted in regard to Mr. Gianotti's education allowance for Christine which is based on the "school away from post" standards defined in subsection 271e., of section 270 of the Standardized Regulations. As we noted earlier, in those cases where adequate schools are not available at the employee's post, the "school away from post" provisions of section 277.2 of the Standardized Regulations provide, in subsection 277.2(c), for periodic transportation of the child between the post and the school. As a result, the "educational travel" provisions of section 280 of the Standardized Regulations—which are granted in lieu of an education allowance—are not applicable to Christine's case. And, in fact, section 276.2 would appear to clearly preclude the payment of both educational travel and an education allowance where the child attends school in the United States (which under section 040a of the regulations includes Hawaii) by providing as follows:

> An education allowance shall not be paid for a child in the United States * * * (3) for the 12-month period immediately following his/her arrival in the U.S. under educational travel authority (Sec. 280) nor for any period thereafter during which he/she continues to be educated in the United States.

Christine's travel from school in Hawaii to her father's location post in Saipan in June of 1979, as well as her return to Hawaii Preparatory

Academy in September 1979, are provided for and included in the "school away from post" education allowance to which Mr. Gianotti is entitled under section 277.2 of the Standardized Regulations. Similarly, Christine's matriculation at Hawaii Preparatory Academy from September 1979, to the present time is also covered by the education allowance entitlement under section 277.2, of the Standardized Regulations.

CONCLUSION: LISA

As in Christine's case, Lisa's residence in Montana during the period from December 15, 1977, through May 31, 1978, creates no allowance entitlement for Mr. Gianotti and, as we have noted, no such allowance is claimed.

Lisa's travel from the family home in Montana to Truk, TTPI, in June of 1978, was not reimbursable under 5 U.S.C. § 5722 (1976). In view of her return to Montana in September 1978, after a 3-month summer visit, the record does not support any intention on the part of the parents that Lisa would reside with her father as a member of his household within the meaning of paragraph 2–1.4d of the FTR and our decision B–187241, July 5, 1977, *supra*. We believe Lisa's travel in June of 1978 was primarily for the purpose of a summer visit, and this is evidenced by the fact that Lisa returned to the family home in Montana where she resided with her mother and attended public schools for the ensuing 9-month period.

In conjunction with these findings we must conclude that although 5 U.S.C. § 5924, as implemented by the Standardized Regulations, authorized educational allowances for qualifying dependents residing at an employee's post, there is no provision for educational allowances for an employee's dependents who reside elsewhere. See B–129962, November 17, 1976, *supra*. This conclusion is made especially clear by the following "special rule" in regard to education allowances for a child in the United States contained in section 276.2 of the Standardized Regulations:

> **An education allowance shall not be paid for a child in the United States (1) who is residing with his/her mother, father, or legal guardian. * * ***

Therefore, since Lisa resided with her mother at the family home in Montana and attended public schools from September 1978 through June 1979, Mr. Gianotti is not entitled to an education allowance for Lisa during this period.

Lisa's travel to Saipan in June 1979 is subject to the same analysis as applied to her travel to Truk in June 1978. Here again, Lisa's return to the family home in Montana in September 1979 serves to character-

ize her trip to Saipan as a summer visit with her father. Thus the record does not support any intention on the part of the parents that Lisa would reside with her father as a member of his household within the meaning of paragraph 2–1.4d of the FTR and our decision B–187241, July 5, 1977, *supra.* Therefore, Lisa's travel from the family home in Montana in June 1979 was not reimbursable under the travel and transportation expense entitlement provided by 5 U.S.C. § 5722 (1976).

In connection with the court's decree giving Mr. Gianotti full custody of Lisa effective November 30, 1979, the expanded record shows that Lisa traveled to Saipan to join her father on December 10, 1979. Thus, in the circumstances presented, Lisa's travel from the family home in Montana—the place of actual residence at the time of Mr. Gianotti's appointment as Associate Justice effective December 15, 1977—to Saipan (TTPI)—Mr. Gianotti's overseas duty station—may be reimbursed pursuant to section 5722 of title 5, United States Code. At this point, the facts clearly support the intention of all of the parties involved that Lisa was joining her father for the purpose of residing at his overseas duty station as a dependent member of his household within the meaning of paragraph 2–1.4d of the FTR and our decision B–187241, July 5, 1977, *supra.* Also, Lisa's travel on December 10, 1979, when viewed with Mr. Gianotti's effective date of appointment of December 15, 1977, satisfies the regulatory requirement—contained in paragraph 2–1.5a(2) of the FTR—that the maximum time for beginning allowable travel and transportation shall not exceed 2 years from the effective date of the employee's appointment.

The expanded record further shows that Lisa traveled from her home in Saipan on January 10, 1980, to attend Hawaii Preparatory Academy. At this point Mr. Gianotti's entitlement to an education allowance for his daughter Lisa is subject to essentially the same legal analysis as that presented above in the case of daughter Christine. In short, the fact that Lisa remained in Saipan for only a month before traveling to a "school away from post" does not affect her status as a member of Mr. Gianotti's household, nor does that fact affect Mr. Gianotti's entitlement to both travel and transportation expenses for Lisa under 5 U.S.C. § 5722, and an education allowance for Lisa under 5 U.S.C. § 5924. The fact remains that, in the circumstances presented, Lisa's arrival in Saipan in December 1979 was for the purpose of residing with—as opposed to visiting—her father as a member of his household. Therefore, Mr. Gianotti is entitled to an education allowance for his daughter Lisa commencing in January 1980, and subject to the legal analysis provided above in the case of daughter Christine.

[B-198237]

Travel Expenses — Private Parties — Attendants — Handicapped Employees

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).

Matter of: Alex Zazow—Attendant for Handicapped Employee—Travel Expenses on Permanent Change of Station, May 15, 1980:

Kenyon I. Dugger, Jr., an authorized certifying officer for the Internal Revenue Service (IRS), has requested a decision as to whether transportation and per diem expenses may be reimbursed for the services of an attendant accompanying Mr. Alex Zazow, a handicapped IRS employee, to his new post of duty and on a house-hunting trip.

Mr. Zazow is blind and requires the assistance of a companion when traveling to an unfamiliar area. The report states that Mr. Zazow was authorized to effect a change in his post of duty from Baileys Crossroads, Virginia, to Denver, Colorado, under Form 4253, Authorization for Moving Expense, No. TPS-79-8, which provided for transportation to the new post of duty and also a house-hunting trip in connection with the official change of station. The authorization was for payment of these expenses to Mr. Zazow as a single employee. In August 1979, Mr. Zazow filed a travel voucher claiming reimbursement for travel expenses incurred in effecting his change of post of duty and for a house-hunting trip for both himself and the attendant who accompanied him. The IRS disallowed the expenses of the attendant because Mr. Zazow's relocation orders did not specify an attendant to accompany him, and IRS regulations only address payment of expenses for an attendant when accompanying a handicapped employee to and from temporary duty stations.

In our decision in *H. W. Schulz*, B-187492, May 26, 1977, we allowed travel expenses incurred by an attendant for a handicapped consultant in connection with temporary duty travel. While noting that the Federal Travel Regulations (FTR) (FPMR 101-7) (May 1973) do not specifically provide for reimbusement of the travel expenses of an attendant for a handicapped person, we reasoned as follows:

Within the Federal Government there is a commitment to employ the handicapped and to prohibit discrimination because of physical handicap. See 5 U.S.C. 7153 (1970) and the Federal Personnel Manual, chapter 306, subchapter 4. Congressional intent favoring employment of the handicapped is also evidenced in the Rehabilitation Act of 1973, Public Law 93-112, 87 Stat. 355 (1973), and the

Rehabilitation Act Amendments of 1974, Public Law 93-516, 88 Stat. 1617 (1973), which are codified in title 29, United States Code, chapter 16 (Supp. V, 1975).

Section 792 of title 29, United States Code, established the Architectural and Transportation Barriers Compliance Board which has the responsibility to insure the accessibility by the handicapped to Federally occupied or funded buildings and facilities and to determine to what extent transportation barriers impede the mobility of handicapped persons. The Board has advised our Office that:

> "* * * it would be a frustration of the underlying legislative intent to provide greater employment opportunities to the disabled and to identify and eliminate discriminatory practices if the handicapped employees in these cases were made to bear the expenses actually necessary for them to execute their employment."

After careful consideration, we conclude that when an agency determines that a handicapped employee, who is unable to travel without an attendant, should perform official travel, the travel expenses of an attendant are "necessary travel expenses" incident to the employee's travel. Such necessary travel expenses may include transportation expenses and per diem.* * *

In a companion case issued on the same day, *John F. Collins*, 56 Comp. Gen. 661 (1977), we held that requiring a handicapped employee to bear the additional expense of an escort would cause him to suffer a financial loss as a result of traveling on official business, and in the future might prevent the employee from conducting official business, thereby resulting in the agency's loss of the employee's services. Thus, denying the attendant's travel expenses could frustrate Government policies with regard to employment of the physically handicapped. Although the *Schulz* case did not involve a claim for per diem for the attendant, our *Collins* decision directly addressed such an entitlement and stated our conclusion that there is "no reason to distinguish between transportation expenses and per diem expenses incurred by an attendant for a handicapped employee. Both are 'necessary travel expenses' incident to the official travel of the employee and may be allowed." 56 Comp. Gen. 661, 662, *supra.*

We likewise see no reason to distinguish between temporary duty and permanent change of station for the purpose of reimbursing the expenses of an attendant of a handicapped employee. Accordingly, we conclude that Mr. Zazow's reclaim voucher for the necessary travel expenses incurred by his attendant incident to officially approved change of station travel may be certified for payment, if otherwise correct.

In addition, the certifying officer has asked this Office how to determine the per diem rate for the two individuals under the lodgings-plus method contained in para. 1-7.3 of the FTR. In this case, the attendant was a friend. In view of this his per diem rate should be the single rate both for the house-hunting trip and the relocation travel, not the ¾ rate for a family member. The two individuals consistently shared lodging expenses under the travel authorization. Therefore, in

determining per diem rates, the lodging expenses should be divided equally between Mr. Zazow and the attendant.

[B–197485]

Statutes of Limitation—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.

Matter of: Charles V. Waldron, May 16, 1980:

This decision is the result of an appeal by Mr. Charles V. Waldron, a former chief petty officer in the Navy, to an action taken by our Claims Division, which informed him that his claim for retired and disability severance pay could not be considered because it has not been timely filed. For the following reasons we must conclude that Mr. Waldron's claim cannot be considered because it is barred by the time limitations of the act of October 9, 1940, 54 Stat. 1061, as amended by Public Law 93–604, approved January 2, 1975, 88 Stat. 1965, 31 U.S.C. 71a (1976).

Chief Petty Officer Charles V. Waldron, USN, Retired, was transferred to the Temporary Disability Retired List (TDRL) on August 31, 1963. He was paid retired pay commencing September 1, 1963, through May 30, 1964. On June 1, 1964, his retired pay was suspended because his whereabouts were unknown. Mr. Waldron was discharged from the TDRL with entitlement to severance pay on September 30, 1968. By letter dated July 29, 1978, he filed a claim with the Navy for retired pay for the period June 1, 1964, through September 30, 1968, and for the severance pay due on his discharge from the TDRL on September 30, 1968. The Navy forwarded the claim as doubtful to our Claims Division because of the period of time which elapsed since the claim first accrued. By letter dated December 14, 1978, Mr. Waldron was informed that his claim was barred under the provisions of the above-cited act.

That act, as codified in 31 U.S.C. 71a(1), provides in part as follows:

(1) Every claim or demand * * * against the United States cognizable by the General Accounting Office under sections 71 and 236 of this title shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within 6 years after the date such claim first accrued: Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

Mr. Waldron's claim for retired pay began to accrue in 1964, when the payments authorized by 10 U.S.C. 1202 and 1401 were suspended because his whereabouts were unknown. His claim for severance pay under 10 U.S.C. 1203 and 1212 accrued in 1968, when he was discharged from the TDRL with severance pay and payment was not made because his whereabouts were still unknown. His claim was filed in the Claims Division of this Office on November 23, 1978, more than 10 years from the date it accrued, and considerably longer than the 6-year limitation set forth in 31 U.S.C. 71a, and as a result was barred from consideration by this Office.

Counsel for Mr. Waldron has advanced the view that the last proviso in 31 U.S.C. 71a, relating to an individual serving in the military or naval forces during the time of war or when war intervenes within 5 years after a claim accrues, who may present his claim within 5 years after peace is established, should be controlling in this case. In this regard, counsel has cited authority to show that the Vietnam conflict should be considered a war within the meaning used in the statute and if this view is adopted, Mr. Waldron's claim would have been filed within 5 years of the date peace was established.

We need not discuss whether the Vietnam conflict is to be considered a war for the purposes of the statute since it is our view that the last proviso of 31 U.S.C. 71a(1) is not for application on the basis of the facts in Mr. Waldron's case.

The statute refers to "any person serving in the military or naval forces of the United States." We construe "serving" as referring to serving on active duty. Furthermore, the provision was enacted simply to protect the interests of soldiers and sailors whose military status in time of war might interfere with their freedom of action to file a claim with our Office. *See* B–194474, October 24, 1979. In other words, if an individual serving in the armed services had a claim which accrued during war or his claim accrued and subsequently war broke out, such individual is granted additional time following the establishment of peace to file a claim because of the potential inability to file because of his duties in wartime.

Mr. Waldron's case is different from those which could be considered under the war-time proviso. When Mr. Waldron's claim arose he was not on active duty; he was in fact in a retired status on the temporary disability retired list. The commencement of the Vietnam conflict had no bearing whatever on his ability to file a claim with this Office. This is applicable to his claims for both retired pay and severance pay.

We would also like to point out that the limitation prescribed in the statute, upon consideration of claims by this Office, is not a mere statute

of limitation but is a condition precedent to the right to have claims considered by the General Accounting Office. Compare *Bartlesville Zinc Company* v. *Mellon*, 56 F. 2d 154 (1932) and *Carpenter* v. *United States*, 56 F. 2d 828 (1932). Further, in the absence of specific statutory exemption, we have no authority of dispensation in matters involving the act, and legally we may make no exceptions to its provisions.

Accordingly, whatever the reason for Mr. Waldron's failure to file a timely claim with this Office, we have no authority to consider it, and we must sustain the action of our Claims Division.

[B-198361]

General Accounting Office—Jurisdiction—Contracts—In-House Performance *v.* Contracting Out—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.

Matter of: Direct Delivery Systems, May 16, 1980:

The Department of the Army has requested an expedited decision from our Office on a jurisdictional question incident to a protest by Direct Delivery Systems challenging a cost comparison which led to a determination by the Army to perform certain functions in-house rather than by contract. The cost comparison was conducted under the guidance of Office of Management and Budget Circular No. A-76 (A-76), Revised March 29, 1979. Direct Delivery Systems' challenge to the propriety of the cost evaluation has been both filed with our Office as a protest and appealed under cost evaluation review procedures newly established by the Army. For the reasons stated below, Direct Delivery Systems' protest is dismissed without prejudice and may be reinstated after completion of the Army's review.

The new edition of A-76 referred to above, published at 44 Fed. Reg. 20556, April 5, 1979, establishes a more comprehensive and systematic cost evaluation scheme to be used in governmental make-or-buy decisions than that prescribed by prior editions of the circular and also requires that agencies establish an administrative review procedure to protect the rights of affected parties and provide for the expeditious determination of appeals. The Army established its review procedure in Department of the Army Circular No. 235-1, dated February 1, 1980, which provides for the appointment of a three-member

board to perform an independent and objective study of challenges by affected parties to A–76 cost studies and issue a written decision within 30 days.

Generally, the outcome of the make-or-buy decision is determined by a comparison of the costs of Government performance (in-house) with the costs of contractor performance (contracting out). The cost of contracting out is determined by the responses of potential contractors to a solicitation for the services in question; the cost of performance using Government employees is estimated. Essentially, if the cost of contracting out is lower, then a contract is awarded to the lowest cost acceptable offeror and the affected Government employees may be reassigned or released; conversely, if the evaluation shows the cost of in-house performances to be lower, then the solicitation is canceled and action taken to retain or hire the employees necessary to perform the function. Direct Delivery Systems is the incumbent contractor for a portion of the work called for by the solicitation which an A–76 cost evaluation showed could be performed in-house at lower cost.

We review A–76 cost evaluations to assure that bidders are not induced to prepare and submit bids only to have them arbitrarily rejected as the result of an erroneous cost evaluation. *Crown Laundry and Dry Cleaners, Inc.*, B–194505, July 18, 1979, 79–2 CPD 38; *Jets, Inc.*, 59 Comp. Gen. 263 (1980), 80–1 CPD 152. We believe that where, as here, a relatively speedy review procedure is formally included as part of the administrative decision-making process, the administrative decision is not final until that review procedure has been exhausted, *cf. Sanders Company Plumbing and Heating*, 59 Comp. Gen. 243 (1980), 80–1 CPD 99, and a protest filed with our Office prior to this final decision would be premature. *Constantine N. Polites & Co.*, B–189214, October 18, 1979, 79–2 CPD 267. Therefore, we will no longer consider protests challenging A–76 cost evaluations unless the administrative appeal process, if available, has been exhausted.

We reach this result mindful that prior decisions of our Office might have implied a contrary result. See *Jets, Inc., supra; Tri-States Service Company*, B–195642, January 8, 1980, 80–1 CPD 22; *Amex Systems, Inc.*, B–195684, November 29, 1979, 79–2 CPD 379. However, we distinguish these cases on the basis that the implementation of the revised A–76 had been delayed by section 814 of the Department of Defense Appropriation Authorization Act, 1979, Pub. L. 95–485, 92 Stat. 1611, 1625, and no formal administrative review process was available in any of these cases.

Accordingly, the protest is dismissed but may be reopened after completion of the Army's review.

[B-197436]

Contracts — Data, Rights, etc. — Disclosure — Timely Protest Requirement

Protest against disclosure of confidential data in request for proposals (RFP) filed prior to closing date for receipt of proposals is timely as protest against solicitation impropriety under 4 C.F.R. 20.2(b)(1) (1980).

Contracts — Data, Rights, etc. — Disclosure — Requests for Proposals—Denial of Disclosure

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.

Matter of: ARO, Inc., May 19, 1980:

ARO, Inc. (ARO), has protested the alleged unauthorized disclosure of privileged and confidential manpower and cost data by the Arnold Engineering Development Center (AEDC), Arnold Air Force Station, Tennessee.

ARO is the incumbent contractor for the operation and maintenance of the aerodynamic and propulsion test facilities at AEDC. Under its contract, ARO is required to submit reports of its estimates of the manpower and costs required to perform the contract.

AEDC, on November 16, 1979, issued draft request for proposals (RFP) No. F40600-80-R-0001 in preparation for conducting a competitive procurement for the operation of the AEDC facilities for fiscal years 1981-1985. Included in the RFP as attachment 3 to section "M" was a reproduction of ARO's estimate, dated October 11, 1979, for fiscal year 1980 of manpower and costs to perform the contract. On December 13 and 14, 1979, 21 companies attended an industry briefing conducted by AEDC.

On February 22, 1980, AEDC issued a competitive RFP bearing the above-noted number and setting the closing date for receipt of initial proposals as May 27, 1980.

ARO contends that the release of this privileged and confidential commercial and financial data has placed ARO at a competitive disadvantage because it permits competitors to determine the manner in which ARO allocates its resources in performance of the contract. ARO argues that the release of this data violates the Freedom of Information Act (FOIA) (5 U.S.C. § 522 (1976)) and the Trade Secrets Act (18 U.S.C. § 1905 (1976)). As a remedy, ARO requests that our Office recommend withdrawal of the RFP and exercise of the option in ARO's contract for a year in the expectation that the data

will be stale in a year and a new RFP would permit viable, realistic competition.

Initially, AEDC argues that ARO's protest was untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1980)). AEDC states that ARO had 10 working days to file its protest from November 16, 1979, the issuance date of the draft RFP and the date on which the basis of the protest was known or should have been known (4 C.F.R. § 20.2(b)(2) (1980)).

ARO responds that it was protesting an impropriety contained in the solicitation and, therefore, a timely protest could be filed until the closing date for receipt of proposals, May 27, 1980 (4 C.F.R. § 20.2(b)(1) (1980)).

We find the protest to be timely filed. Our Office has held that the disclosure of proprietary or confidential information in a solicitation constitutes an impropriety in a solicitation for the purposes of our timeliness requirements and a filing prior to the closing date for receipt of proposals is timely. *Applied Control Technology*, B-190719, September 11, 1978, 78-2 CPD 183; and *Francis & Jackson, Associates*, 57 Comp. Gen. 244 (1978), 78-1 CPD 79.

As stated above, ARO contends that the release of attachment M-3 violates exemption 4 of the FOIA which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure. Further, ARO argues that the actions of AEDC have violated the mandate of the Trade Secrets Act that no Government office or employee should disclose:

> * * * information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association * * *.

The data contained in attachment M-3 lists the tasks and subtasks set forth in the Statement of Work in ARO's contract and gives the negotiated estimate for labor, material and costs for each task and subtask. It also shows the estimated allocation of General and Administrative (G&A) expense to the contract.

The Air Force's position is that attachment M-3 is a carbon copy of Supplemental Agreement P00099 to ARO's present contract and that when this data was incorporated in ARO's contract, it entered the public domain and its subsequent use in the RFP was not improper.

Further, the Air Force points to our Office's decision regarding a protest of the 1977 award to ARO (*Burns & Roe Tennessee, Inc.*, B-189462, July 21, 1978, 78-2 CPD 57; *affirmed* August 3, 1979, 79-2 CPD 77) to show the release of the data is not harmful to ARO. In the 1977 procurement, the same type of data was contained in the RFP

and we stated that the manning estimates contained in the RFP were "in the grossest sense" and could only be viewed as a starting point for anyone not familiar with the operation of AEDC.

While we do not view the statement in the prior decision as dispositive here, since it was dicta in the case, release of the data not having been in issue, we believe it reasonably could have led the Air Force to release the data in connection with this procurement.

The Air Force, as noted above, maintains that its release of the ARO data was not prohibited by any law and was done pursuant to an entirely proper objective—assuring the widest possible competition for the AEDC operation and maintenance contract. We believe that this Air Force position has substantial merit.

Moreover, the relief sought from us by ARO is relief which this Office should not provide. Initially, we point out that the basic objective of the FOIA is disclosure, not withholding of information. *Chrysler Corporation* v. *Brown*, 441 U.S. 281 (1979). The courts permit a "reverse FOIA" action only when it can be shown that the information falls within one of the FOIA exemptions and is also "not in accordance with law" as stated in 5 U.S.C. § 706(2)(A). The type of action is based on the Administrative Procedure Act (5 U.S.C. § 702). See *Chrysler*, *supra*, and *Burroughs Corporation* v. *Brown*, Civil Action No. 78-520-A (E.D. Va., January 3, 1980).

ARO places great reliance on the recent decision in *Burroughs*, *supra*, in support of its position that the release was improper. *Burroughs* held that data of a similar nature to the ARO data released by the Air Force, submitted by a contractor pursuant to its contractual obligations in connection with its equal employment opportunity undertakings, should not be released under exemption 4 of FOIA and the Trade Secrets Act. *Burroughs* thus was an action to prevent release of the data. In fact, all of the cases cited by ARO are actions brought to *prevent* the release of data. None involves situations where the data has already been made public, and we could only conjecture what relief a court might grant when presented by these facts or what corrective action might be ordered.

The remedy requested by ARO is extraordinary in that it would terminate an ongoing competitive procurement undertaken pursuant to statutory mandate (10 U.S.C. § 2304(g) (1976)) and direct the Air Force in effect to make a sole-source award to ARO. We do not find this an appropriate remedy for our Office to provide.

Moreover, based on *Chrysler*, *supra*, to reach the result requested by ARO would require a determination that the action of specific officials of the Air Force violated the Trade Secrets Act. Any such

finding of violation of a criminal statute ought to be made by a court of competent jurisdiction, not by our Office.

Accordingly, the protest is denied.

[B-196823, B-183828]

Pay — Retired — Reduction — 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.

Matter of: Commander Alfred H. Gaehler, USN, Retired, May 20, 1980:

This action is in response to correspondence from Commander Alfred H. Gaehler, USN, Retired, concerning his entitlement to refund of certain deductions made from his military retired pay.

The file reflects that for the major portion of his post-retirement years, Commander Gaehler was employed by the Federal Government in a civilian capacity. Since he was a retired Regular officer of the Navy, his military retired pay became subject to the limitations contained in the Dual Compensation Act, 5 U.S.C. 5532, and his retired pay was reduced accordingly.

Commander Gaehler questions the legality of that reduction. He states that he is a resident of the State of California, a community property state, and asserts that one-half of his military retired pay belongs to his wife. He contends that since only one-half of his retired pay is his, the dual compensation reduction is for application only to that portion.

Commander Gaehler refers to certain court actions regarding the division of property under the California community property laws. The court decisions referred to in his letter and the news article attached held that in the division of property upon the dissolution of marriage under California community property law, anticipated pension or retirement benefits should in most instances be taken into account. Those decisions are not directly applicable to the situation here. Here there is no dissolution of a marriage or contingent pension benefit. The question involves the retiree's entitlement to retired pay. It has been recognized that Federal law is supreme and must control when there is a conflict between it and State law. *Wissner* v. *Wissner*, 338 U.S. 655 (1950). This principle was recently applied by the Su-

preme Court in a case involving the propriety of considering a contingent Railroad Retirement benefit in the division of community property. The court prohibited consideration of such benefit based upon the supremacy of Federal law. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979). Also recognized in that decision was the control that may be exercised by Congress over the payment of pension or retirement benefits.

Subsection (b) of 5 U.S.C. 5532 provides:

> (b) A retired officer of a regular component of a uniformed service who holds a [civilian] position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay shall be reduced * * *.

It is evident from that provision that a retired officer of a Regular component employed in a civilian capacity with the Federal Government is not entitled to receive retired pay at the same rate as he would be entitled if he were not so employed. On the question of the constitutionality of such distinction, see *Puglisi* v. *United States*, 215 Ct. Cl. 86 (1977), *cert. denied*, 435 U.S. 968 (1978). The Congress has limited the amount of retired pay to be paid retired Regulars who are employed in Federal positions. This law must govern over any provision of State law which might otherwise defeat its purpose.

Therefore, 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. Thus, because of the limitations imposed by 5 U.S.C. 5532(b), Commander Gaehler's retired pay entitlement is actually less than it would otherwise be. This reduced amount represents his maximum retired pay entitlement under Federal law.

Accordingly, he is not entitled to any additional amount predicated on the fact that he resides in a State which has a community property law.

[B-193734]

General Services Administration—Services For Other Agencies, etc.—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.

Matter of: Authority of the General Services Administration to certify for payment claims against expired agencies, May 21, 1980:

The General Services Administration (GSA) has asked for guidelines concerning its authority to certify for payment claims that are debts of Federal agencies which have expired. In this regard, it suggests it be allowed to continue to certify claims or legal debts as part of its service of closing out the routine affairs of defunct agencies. GSA states that its authority to perform this function is section 601 of the Economy Act of 1932, as amended, 31 U.S.C. § 686. For the reasons indicated below, we agree that GSA can certify for payment claims that are debts of an expired Federal agency so long as the agency, prior to its expiration, has authorized GSA, in writing, to carry out this function and the debt was incurred before expiration.

Pursuant to agreements entered into under the Economy Act, 31 U.S.C. § 686, GSA frequently provides administrative support services to Government agencies (for purposes of this case, the term "agency" includes Federal departments, independent establishments, commissions, etc.). These services include the audit and certification for payment of agency obligations. See 55 Comp. Gen. 388, 389 (1975). GSA also carries out certain "close-out" functions on behalf of expired agencies. These functions include the certification for payment of valid claims against an agency, based on obligations incurred prior to the agency's expiration but not presented for payment until after its expiration. GSA has been providing this service for a number of years. Prior to the time that GSA undertook this service, at least some of the post-expiration claims were settled by the General Accounting Office. See 33 Comp. Gen. 384, 386 (1954); 14 *id.* 490, 491 (1934); 3 *id.* 123, 124 (1923).

At first glance, it would appear that 31 U.S.C. § 82b is an obstacle to GSA undertaking the above-described closeout function. That section provides, in part:

> * * * disbursing officers under the executive branch of the Government shall (1) disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the department, establishment, or agency concerned, or by an officer or employee thereof duly authorized in writing by such head to certify such vouchers.

We have held that this section requires that a certifying officer be an officer or employee of the agency whose funds are to be disbursed. 44 Comp. Gen. 100, 101 (1964). We have found this requirement is met where the agency whose funds are being disbursed designates an employee of another agency to act as its certifying officer. *Id.*, at 101. However, these principles were formulated in instances in which one agency performed administrative functions for a still existing agency. We never directly considered whether an agency can contract to have

another agency undertake its certification responsibilities after its expiration.

On the other hand, it has been our longstanding rule that after an agency expires, the services of all its members and employees terminate and neither its members nor employees can undertake activities on its behalf for the purpose of concluding the agency's affairs or otherwise. B–182081, January 26, 1977; 14 Comp. Gen. 738, 739 (1935). Accordingly, it would appear that a GSA employee designated to serve as a certifying officer of a functioning agency could not continue to act in that capacity after that agency's expiration. Thus, if GSA certifying officers may lawfully certify for payment debts of expired agencies, they must do so as GSA employees.

The act of which 31 U.S.C. § 82b is a part, in great measure, was intended to meet the urgent need of the Government to fix definitely the responsibilities of disbursing and certifying officers. See S. Rept. No. 916, 77th Cong. 1st Sess. 4 (1941). We acknowledge that the phrase in section 82b, "vouchers duly certified by the head of the department, establishment or agency concerned," was understood as referring to existing departments, establishments or agencies, the proper certification of whose vouchers enabled a disbursing officer to disburse monies. However, there is no evidence that the Congress intended to limit the section's coverage to functioning agencies. It is quite possible that in enacting section 82b, the Congress neither considered nor contemplated situations in which one agency would certify for payment claims against an expired agency.

Accordingly, we find nothing in section 82b or its legislative history to prevent our viewing the "department, establishment or agency concerned" as the agency actually performing the certification in instances in which the agency whose funds are being disbursed no longer exists. We think this view is consistent with section 82b and our decisions because an agency which has expired can no longer be considered the "department, establishment or agency concerned." Moreover, to interpret the phrase "department, establishment, or agency concerned" as referring solely to the agency whose funds are being disbursed even when that agency no longer exists would, under our decisions, preclude the payment of the agency's accounts, a result we are sure the Congress did not intend.

Therefore, for the purposes of section 82b, GSA becomes the "agency concerned" after the expiration of the agency for which it performs administrative services. Thus, GSA certifying officers can continue to certify the agency's vouchers after the agency has expired.

GSA has no independent authority to certify the vouchers of other agencies. Therefore, our conclusion is limited to instances in which

an agency, as part of a written Economy Act agreement, has authorized GSA to continue the function of certifying its vouchers for payment after it expires.

Further, the vouchers must represent obligations properly incurred prior to the agency's expiration. As a practical matter, we understand that GSA certifying officers would merely be performing the essentially ministerial function of insuring that a claimant had fulfilled its obligation to the Government and was thus entitled to be paid.

[B-195501]

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

Protest based upon alleged impropriety in solicitation (failure to define central business district and preference to be accorded to location therein) which was apparent prior to date set for receipt of initial proposals is untimely since not filed in General Accounting Office (GAO) prior to closing date for receipt of initial proposals and will not be considered on merits. Section 20.2(b)(1) of GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980).

Contracts—Protests—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).

Federal Property and Administrative 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 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.

Contracts — Specifications — Restrictive — Justification — Public Policy Considerations

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.

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.

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

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 protestor 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).

Contracts—Negotiation—Responsiveness—Concept Not Applicable to Negotiated Procurements

Protest alleging that awardee's proposal for leasing contract is "nonresponsive" in several respects is denied since procurement was negotiated and, therefore, these deficiencies were merely factors to be taken into account by contracting agency in evaluation of proposal.

Leases — Repairs and Improvements — Limitations — Economy Act — Applicability Determination — Direct *v.* Indirect Government Payments

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.

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.

Matter of: Charles Hensler and Helen Kreeger, May 23, 1980:

The partnership of Charles Hensler and Helen Kreeger (Hensler/Kreeger) has protested the award of a contract by the General Services Administration (GSA) to the partnership of E. Perin Scott and John E. Scott, Jr. (Scott), pursuant to solicitation for offers (SFO) No. GS–05B–13032. The contract is for the lease of a building to house the Social Security Administration (SSA) office in Madison, Indiana.

To the extent the protest is timely, we find it to be without merit.

The SFO, issued September 15, 1978, solicited offers for 5,400 square feet of general office space and requested that offers be submitted by

October 2, 1978. The SFO cover page stated in a prominent place: "Location: Madison, Indiana, within the city limits with preference for the Central Business District." This statement was repeated in Schedule AA entitled "General Space Requirements." The Hensler/Kreeger offer and an offer made by M. P. Humbert were received on October 2. The Scott offer was not received until October 16. An undated addendum (Addendum No. 1) reduced the requirement to 4,790 square feet and extended the date for receipt of offers to February 9, 1979. Addendum No. 1 was acknowledged by Hensler/Kreeger on February 27, by Scott on February 21 and by Humbert on February 8. On May 22, 1979, a telegram was sent to all three offerors requesting best and final offers no later than June 1, 1979. Scott and Humbert submitted final offers on May 25, 1979. Hensler/Kreeger's final offer was submitted on May 24, 1979, but only offered 4,055 square feet of office space. On June 12, 1979, GSA notified Hensler/Kreeger that its offer was nonresponsive because it only offered 4,055 square feet, and GSA allowed Hensler/Kreeger an opportunity to submit a responsive offer. An offer to lease 4,790 square feet was received from Hensler/Kreeger by GSA on June 18. On July 2, 1979, award was made to Scott even though the Hensler/Kreeger offer was lower by approximately $6,000 per year. Hensler/Kreeger received notification that its offer was rejected on July 5, 1979, and protested to our Office on July 19, 1979.

PROTEST ISSUES

The protester raises several grounds of protest, summarized briefly as follows:

1. GSA's stated preference for a location in the central business district is criticized because:

a. While this preference was based upon Executive Order 12072, 43 Fed. Reg. 36869 (1968) (E.O. 12072), which sets forth a national urban policy giving first consideration to centralized community business areas when filling Federal space needs in urban areas, GSA misconstrued the national urban policy statement of E.O. 12072 and erroneously applied it to the present procurement for office space needed to serve a predominantly rural area.

b. The solicitation was deficient because it failed to define or describe the boundaries of the central business district of Madison. Since Madison has two central business districts and the Hensler/Kreeger property is within one of them, the Hensler/Kreeger offer should have been selected for award because it was lower in

price than the Scott offer. At best, the solicitation was ambiguous in this regard.

c. Application of E.O. 12072's national urban policy to the present procurement was improper because E.O. 12072 is invalid since it exceeds the authority vested in the President to prescribe procurement policies under section 205(a) of the Federal Property and Administrative Services Act of 1949. 40 U.S.C. § 486(a) (1976).

d. GSA's rejection of Hensler/Kreeger's offer on the basis that the property was not located in Madison's central business district was improper because the central business district preference was not listed in the SFO as a factor for evaluation and award. Therefore, the preference should have been used as a tie-breaker and considered only in the event that suitable space was offered by more than one offeror at virtually identical prices. Alternatively, if the preference could have been considered as an award factor, the SFO was deficient for failing to advise offerors of the relative importance of the central business district preference.

2. The contract awarded to Scott is not valid because the offer was made by the partnership of John Scott, Sr. and E. Perin Scott, but John Scott, Sr. died before GSA accepted the offer.

3. Scott's offer was submitted to GSA after the due date for receipt of offers and, therefore, should not have been considered for award by GSA.

4. Scott's offer was nonresponsive to the requirements of the SFO in several respects. First, Scott's building is surrounded by high curbs and, therefore, fails to meet the minimum standards published by the American National Standard Institute, Inc., for use by the physically handicapped which were incorporated into the SFO. Second, the Scott offer should not have been accepted because the space offered by Scott was retail commercial ground floor space which, under the award factors listed, GSA should have weighed as a factor against Scott's offer as part of the award decision. Third, the space proposed by Scott "may constitute a fire hazard" because it is located next to a paint store. Fourth, Addendum No. 1 requested offers "for a 5 year lease with 3 years firm and an alternate offer of 5 years, 1 year firm," but Scott crossed out that portion of the addendum regarding the alternate offer of 5 years with 1 year firm.

5. The contract awarded to Scott is invalid because it violates provisions of the Economy Act of 1932, 40 U.S.C. § 278a (1976), setting limits on the amount of money the Government may spend for alterations, modifications, and repairs of leased space and on the annual rental which may be paid for leased property.

CENTRAL BUSINESS DISTRICT PREFERENCE
(Issues 1a, 1b, 1c, and 1d)

Protest Issue 1b is a matter which should have been apparent to the protester prior to the date set for receipt of initial proposals. Since this issue was not filed with either the agency or our Office until after the date set for receipt of initial proposals, it was untimely filed under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), and will not be considered on the merits. *Somervell & Associates, Ltd.*, B–192426, August 18, 1978, 78–2 CPD 132. Similarly, insofar as Issue 1d is based on the alleged failure of the SFO to give the relative importance of central business district preference, that issue is untimely and will not be considered further.

Regarding Issue 1c, the solicitation contained no reference to E.O. 12072 or its stated policy of giving first consideration to locating Federal facilities in centralized community business areas when filling Federal space needs in urban areas. The fact that the preference for a central business district location was based upon E.O. 12072's national urban policy was raised for the first time in GSA's report on this protest dated October 29, 1979. Hensler/Kreeger's protest challenging the President's authority to issue such a policy was raised in its comments on the report and conference on this protest held on December 11, 1979. These comments were filed in our Office on December 21, 1979, and, therefore, this aspect of the protest was also untimely filed since section 20.2(b)(2) of our Bid Protest Procedures requires a protest to be filed within 10 days after the basis for the protest is known. However, since this issue presents a direct challenge to the President's authority to issue a national policy whch affects GSA's acquisition of facilities for Federal agencies, we will consider the merits of Issue 1c under section 20.2(c) of our Procedures as involving an issue significant to procurement practices or procedures. *Edw. Kocharian & Company, Inc.*, 58 Comp. Gen. 214 (1979), 79–1 CPD 20.

We see no merit in Hensler/Kreeger's argument that the President exceeded the authority granted to him under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 481, *et seq.*, when he formulated the national urban policy in E.O. 12072. See *Fairplain Development Company, et al.*, 59 Comp. Gen. 409 (1980), 80–1 CPD 293, where we found no basis to question the President's authority.

Regarding Issues 1a and 1d, GSA admits that the SFO's stated preference for a location in the central business district was an attempt to implement the national urban policy formulated by the President in E.O. 12072. Under GSA's interpretation of this policy, the SSA office which is presently housed in the Hensler/Kreeger property

within the Madison city limits, an urban area, would have to be relocated to a building within the central business district of Madison as long as a suitable location could be found in the central business district at a reasonable price. Though GSA concedes that the subject solicitation did not attempt to describe the boundaries of Madison's central business district, GSA believes that it is clear that the Hensler/Kreeger property is outside of the central business district. GSA contends that Hensler/Kreeger knew that its property could not qualify as within the central business district but wanted to be considered anyway. GSA acquiesced in Hensler/Kreeger's desire to have its location considered for award, but only in the event that a suitable central business district location were not offered would award be made to any offeror which was not located in the central business district. Accordingly, offers were restricted to the city limits of Madison and the central business district requirement was stated as a mere preference. GSA says it consulted with SSA officials in deciding to relocate the SSA office and contacted local officials (including the Mayor of Madison and the Madison Chamber of Commerce) before determining the boundaries of the central business district. GSA argues that the preference for a central business district location was made very clear in the SFO and that the preference did not have to be included in the "Award Factors" section since that section specifically stated that the award factors listed would be considered in addition to the "conformity of space offered to the specific requirements of this solicitation."

The protester attempts to show that Madison has two central business districts—an old, downtown area (where the Scott building is located) and a new, shopping/business mall which is just 1—1½ miles away from the downtown area (where Hensler/Kreeger's building is located). In support of this argument, Hensler/Kreeger has submitted several letters from reliable local officials (including the Governor of Indiana, Madison City Council members, and SSA office employees). These letters also express the opinion that the SSA office could better serve its function at the present Hensler/Kreeger location since most of the SSA clients live in surrounding rural areas to which Hensler/Kreeger's property is more accessible. The protester states that only 2.7 percent of the SSA office's clients actually live in the old, downtown area of Madison, Madison's population is only 14,000, and, therefore, concludes that, since the SSA office serves a primarily rural area, the national urban policy of E.O. 12072 has no application to this procurement. Hensler/Kreeger also asserts that GSA's Commissioner of the Public Buildings Service, in a directive issued on September 5, 1978, specifically exempted SSA branch and district offices from

the policy of E.O. 12072 because their service areas are clearly defined sectors of city, suburban, or rural communities.

Section 101–18.100(c) of the Federal Property Management Regulations (FPMR) (1978), regarding the leasing of property, provides that competition be obtained to the maximum extent practical among those locations meeting minimum Government requirements. We have held that the leasing agency has the primary responsibility for setting forth its minimum needs, including the location of the facility, and we will not object unless its determination lacks a reasonable basis. *Dr. Edward Weiner*, B–190730, September 26, 1978, 78–2 CPD 230.

We cannot conclude that GSA's decision to restrict the solicitation to offers of space within the city limits, where it had been located since at least 1972, with a preference for the central business district, was without a reasonable basis. The preference was the result of the President's national urban policy which we have concluded was a proper exercise of the authority delegated to the President under section 205(a) of the Federal Property and Administrative Services Act. Therefore, this aspect of the protest is denied.

Executive Order 12072 provides, in part, that:

> 1–103 Except where such selection is otherwise prohibited, the process for meeting Federal space needs in urban areas shall give first consideration to a centralized community business area and adjacent areas of similar character, including other specific areas which may be recommended by local officials.

Accordingly, the issue of whether to locate a Federal facility in the centralized community business area need only be considered in connection with Federal space needs in *urban areas*. Although the services of the Madison SSA office are provided to a very large, predominantly rural area and Madison itself only has a population of 14,000, we believe the central business district preference was properly for application in the procurement because, even though E.O. 12072 does not define "urban area," Madison would be considered an "urban area" under the definition employed in the Federal Urban Land-Use Act, 40 U.S.C. § 535 (1976), and the SSA office had long been located in Madison. Therefore, it was proper to conclude that there was a Federal space need in an urban area under E.O. 12072.[1]

Since the SSA office had been housed in the Hensler/Kreeger building previously and had operated in a most efficient manner from that location, we infer that the urban location suited the needs of SSA very well. We note also that Hensler/Kreeger apparently never voiced any opposition to restricting the competition to offers within the city lim-

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[1] For a discussion of the term "urban area" as used in E.O. 12072 and the requirements of the Rural Development Act of 1972, 42 U.S.C. § 3122(b) (1976), see our decision in *Fairplain Development Company, et al.*, 59 Comp. Gen. 409 (1980), 80–1 CPD 293.

its of Madison. Additionally, GSA did consult with some local officials and coordinated its efforts with SSA officials before determining to relocate to the old, downtown business area of Madison. We conclude that the present need for office space was truly "urban" in nature and that E.O. 12072 was for application. We also note that the September 5, 1979, implementing directive issued by the Commissioner of the Public Buildings Service did not automatically exempt SSA branch and district offices from the national urban policy as argued by the protester, but, rather, it allowed such offices to be exempted at the discretion of GSA and using agency officials.

We also think that GSA's determination that the Hensler/Kreeger property was not within the central business district and, therefore, not entitled to the preference was reasonable. GSA did attempt to ascertain from local officials where the central business district was located. Furthermore, it appears that Hensler/Kreeger was aware that GSA did not believe the Hensler/Kreeger property to be in the central business district, but that GSA acquiesced in Hensler/Kreeger's request that its property be considered. Scott also provided an aerial photograph to us which clearly shows that the Hensler/Kreeger property is located near the city limits rather than at the center of the town. Moreover, we think that it was not necessary for the preference to have been expressed as an award factor since the preference was stated prominently on the cover page and in Schedule AA, and Hensler/Kreeger was thereby put on notice that the preference would be considered in addition to the listed award factors in connection with "conformity of the space offered to the specific requirements" of the solicitation. In this connection, we note that the protester was aware of the preference provision and considered it an evaluation factor, *albeit*, as a "tie-breaker." We are not persuaded that the preference was to be used only as a tie-breaker, since nothing in the SFO so indicates. It is our view that the preference was just one of many factors to be considered by GSA in determining whether the space offered met the requirements of the solicitation and the needs of SSA. For the above reasons, the protest is denied on this point.

DEATH OF PARTNER (Issue 2)

The original Scott offer (received by GSA on October 2, 1978) was made by the partnership of John E. Scott and E. Perin Scott. It was signed by E. Perin Scott alone in his capacity as partner. Addendum No. 1 was acknowledged on February 21, 1979, in the name of Scott Realty Company, by E. Perin Scott, again in his capacity as partner.

A search of records at the Circuit Court of the County of Jefferson, Indiana, conducted by the protester on September 4, 1979, revealed that John E. Scott died sometime in March 1979. The Letters Testamentary sent us by the protester show that John E. Scott, Jr., and E. Perin Scott were sworn in by the court as executors and authorized to administer the estate of John E. Scott on March 26, 1979. The final offer on behalf of the Scott Realty Company was made by E. Perin Scott on May 25, 1979, and was not accepted by GSA until July 2, 1979. Hensler/Kreeger contends that Scott's contract was not valid since one of the partners of the Scott Realty Company died before GSA accepted the Scott offer. We do not agree and find that the Scott contract was not invalid because of the death of John E. Scott before GSA accepted the Scott offer.

Ordinarily, the death of a partner dissolves the partnership, unless the partnership agreement provides for the continuance of the partnership after the death of a partner. *See* 35 Comp. Gen. 529 (1956) and cases cited therein. In the present case, it appears that there was no written partnership agreement. However, this would not have prevented the surviving partner from carrying out the contractual obligations of the partnership, including the obligation to perform under this lease if GSA accepted John E. Scott's and E. Perin Scott's offer. Under Indiana law, a partnership is not terminated on dissolution but continues until the winding up of partnership affairs is completed, surviving partners may bind the partnership after dissolution by completing transactions which are unfinished at dissolution, and dissolution upon death of a partner does not discharge existing liabilities of a deceased partner regarding obligations incurred while he was a partner. Burns Indiana Stat. Ann. tit. 23, § 4–1–30 to § 4–1–37 (1949). When a partnership is dissolved, each partner may have partnership property applied to discharge partnership liabilities. Burns Indiana Stat. Ann. tit. 23, § 4–1–38(1) (1949). In such circumstances, we have held that the death of a partner in the period between the offer by the partnership and the acceptance by the Government does not discharge the partnership's obligation created by offering on a Government solicitation. *See* 35 Comp. Gen. 529, 531, *supra*. This is particularly so in the present case since the surviving partner and the son of the deceased were jointly appointed as executors to administer the deceased partner's estate, the deceased partner's son was willing to step into the shoes of the deceased and continue the partnership, award was made to the partnership comprised of the surviving partner and the son of the deceased partner, and the surviving partner and son of the deceased were willing and able to perform under the contract awarded.

ACCEPTANCE OF LATE OFFER (Issue 3)

The protester contends that GSA should not have awarded the contract to Scott because Scott was late in submitting both its initial offer and is acknowledgment of Addendum No. 1 to GSA. The record shows that Hensler/Kreeger was aware of this basis for its protest by October 17, 1978, when a letter inquiring about Scott's late offer was sent from Hensler/Kreeger to a United States Senator who forwarded the inquiry to GSA for its response. GSA responded to the Senator by letter of November 20, 1978, and explained that as a matter of policy offers were accepted by GSA in leasing procurements up to the time of award. Hensler/Kreeger did not protest to our Office until July 19, 1979. This protest issue was untimely filed under section 20.2(b) (2) of our Bid Protest Procedures because Hensler/Kreeger was aware of this basis for protest more than 10 days before the protest was filed with either the agency or our Office. Therefore, we will not consider this issue on its merits.

RESPONSIVENESS OF SCOTT OFFER (Issue 4)

Hensler/Kreeger alleges that the award to Scott was improper since Scott's offer was nonresponsive to the SFO in several respects. The protester contends that the Scott property does not have ramps for the handicapped as required by the SFO. The protester also contends that the Scott property is a "fire-trap" primarily because it is allegedly located next to a paint store. Hensler/Kreeger also argues that Scott's offer should have been rejected since it offered retail commercial ground floor space.

Scott has responded that its property does have ramps for the handicapped, that there is a finance company between Scott's space and the paint store, and that it has sufficiently altered the space offered so that it cannot be considered retail commercial ground floor space.

GSA has taken the position that Scott's property either meets the SFO's requirements or Scott will have to alter the property to meet the requirements at its own expense.

The protester has the burden of proving its case. In the present case, the conflicting statements of the parties are the only evidence on these points. The protester has not substantiated its case. *Fire & Technical Equipment Corp.*, B–191766, June 6, 1978, 78–1 CPD 415. Moreover, even if all of the above allegations were proven to be correct, they would not be grounds for automatically rejecting Scott's offer, but rather they would be factors to be taken into account by GSA during evaluation of offers since the term "nonresponsiveness" is inappropriate in a negotiated leasing procurement such as the present

case. 51 Comp. Gen. 565, 570 (1972). We agree that GSA could require Scott to correct any inadequacies which were contrary to the terms of the contract negotiated.

Finally, Hensler/Kreeger argues that Scott's offer was "nonresponsive" since Addendum No. 1 requested offers for a 5-year lease with 3 years firm and alternate offers for a 5-year lease with 1 year firm, but Scott only made an offer for a 5-year lease with 3 years firm. This argument fails because the SFO requested, but did not require, offers for alternate leasing arrangements. Moreover, we note that Hensler/Kreeger itself only made an offer on the 5-year lease with 3 years firm. Accordingly, Hensler/Kreeger was not prejudiced in any way by acceptance of Scott's offer.

ECONOMY ACT OF 1932 (Issue 5)

A conference was held on this protest on December 11, 1979. At that conference counsel for Scott argued that our Office should not recommend that GSA terminate Scott's contract, even if we were to find improprieties in the procurement, because Scott had already expended great sums of money on alteration of its premises to meet the terms of the contract. (We note that the Government will indirectly pay these costs to Scott since Scott has amortized the alteration costs over the 3 firm years of the lease.) In support of this argument, Scott stated that $19,000 had already been spent on alterations, $36,000 was already committed, and that, by occupancy, Scott would have expended approximately $60,000 preparing for this contract. Thus, Scott argued that the Government would be liable for substantial damages if it wrongfully terminated the contract.

Hearing this, counsel for Hensler/Kreeger indicated that it believed that the contract with Scott probably violated the Economy Act of 1932 and requested that GSA make available to it a copy of GSA Form 387, "Analysis of Values Statement (Leased Space)," concerning this award. GSA agreed to make this information available to our Office for our *in camera* review only since the information is confidential in nature. Subsequently, in its comments on the conference submitted on December 21, 1979, Hensler/Kreeger charged that the contract awarded to Scott violated the Economy Act limitations on annual rental which may be paid and on the amount which may be paid for alterations, improvements, and repairs of rented premises.

At the outset, we believe this protest issue to have been untimely filed since this basis of protest should have been known to Hensler/Kreeger upon receipt of the agency report on the protest, dated October 29, 1979, but the protest on this issue was first filed in our

Office on December 21, 1979, with the protester's comments on the report and conference. Since more than 10 days had elapsed between the time the protester should have been aware of the basis of its protest and the filing of the protest on that basis, the protest on that issue is untimely under section 20.2(b)(2) of our Procedures. However, since the protester is alleging that GSA will be expending appropriated funds in violation of statutory prohibitions, we consider this issue to be worthy of comment. Due to the confidential nature of the information contained in GSA's "Analysis of Values Statement (Leased Space)" our discussion of that analysis is necessarily limited.

The Economy Act sets two limitations on Government spending concerning rental of space for Government purposes. In accord with 40 U.S.C. § 278a, the Government is prohibited from spending for rent each year more than 15 percent of the fair market value of the rented premises as of the date of the lease. This section also limits the amount which may be expended by the Government for alterations, improvements, and repairs of rented premises to no more than 25 percent of the rental for the first year of the lease. However, the 25-percent limitation on alterations, improvements, and repairs contained in the Economy Act only applies where the Government is to pay directly for the cost of alterations, repairs, and improvements to leased premises. 30 Comp. Gen. 58, 60 (1950). Since, in the present case, the Government will only pay for the costs of alterations, improvements, and repairs of the rented premises indirectly insofar as the lessor uses the rent received under the lease to amortize such expenses, the 25-percent limitation of the Economy Act is not for application in this case. Therefore, we need only consider that portion of the protester's argument which alleges that the rental to be paid by the Government under this lease exceeds 15 percent of the fair market value of the rented property.

The protester bases its argument upon a fair market value for the entire Scott building of $56,147 (all figures rounded to nearest dollar). This value represents the assessed cash value of the building according to the Office of Madison Township Assessor. Hensler/Kreeger estimates that the space leased to the Government under Scott's contract is about 22 percent of the space of the building and, therefore, calculates the fair market value of the leased space to be $14,036. Based upon this fair market value estimate, the protester calculates that the Economy Act rental ceiling (15 percent of the fair market value) is $2,105. The protester contends that the net rental (gross rental less value of services and utilities provided) is $5,791, or more than the double ceiling allowed under the Economy Act.

Hensler/Kreeger's estimate of the fair market value of the rented space is based on assessed cash value which, we suppose, is used for tax

purposes. While we understand that the protester is making a good-faith effort to approximate the fair market value, we do not agree that the assessed cash value is necessarily equal to the fair market value. We have examined GSA's appraisal of the leased premises and find no basis to object to the appraisal values stated therein. Therefore, we will use the fair market value stated by GSA on Form 387 for purposes of this decision.

The Scott contract provides for a gross annual rent of $31,135, which includes annual charges for cleaning services and utilities and maintenance. The term "rent" as used in the Economy Act limitation means the net rent after deducting the value of any special services provided by the lessor as part of the total rental consideration. *See* 29 Comp. Gen. 299 (1950). Subtracting the value of these services from the rental total of $31,135, using GSA's appraised fair market value, and taking 15 percent of that figure to arrive at the Economy Act limitation on rental, we cannot conclude that the net rental exceeded the Economy Act limitation on rent. Therefore, we have no basis to sustain the protest on this point.

CONCLUSION

The protest is denied in part and dismissed in part.

[B-194807]

Quarters Allowance—Basic Allowance for Quarters (BAQ)—Termination—Members Without Dependents—Sea or Field Duty Over 30 Days—Temporary or Permanent

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.

Station Allowances—Military Personnel—Temporary Lodgings—Entitlement—Members Without Dependents—After Extended Sea or Field Duty

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.

Matter of: BAQ and TLA for members on sea or field duty, May 27, 1980:

The Commandant of the Marine Corps has requested our decision on several questions concerning the entitlement to basic allowance for quarters (BAQ) and temporary lodging allowances (TLA) of members who are assigned to temporary additional duty away from their permanent stations in Hawaii. The request has been assigned Control Number 79–12 by the Per Diem, Travel and Transportation Allowance Committee.

Background

The Marine Corps' questions arise because of the provision in 37 U.S.C. 403(c) which requires that BAQ be terminated for members without dependents while they are on field duty or sea duty for a period of 3 months or more.

The Marine Corps advises that it has a program under which members permanently stationed in Hawaii are assigned to temporary additional duty in connection with unit deployment. Members so assigned are away from their permanent station for as long as 7 months, and many, while absent, serve on sea duty or field duty for 3 months or more.

At the commencement of deployment, those members living in Government bachelor housing are dispossessed of their quarters in order to make the space available for assignment to other members who, while the deployed members are away, initially arrive for permanent duty or return with another unit completing deployment. Those members residing in private housing who have no dependents for BAQ and who deploy under orders contemplating field or sea duty of 3 months or more are also compelled to vacate their permanent quarters incident to deployment in most instances, because they anticipate losing entitlement to BAQ with which to maintain their quarters during the deployment.

Upon return to their permanent station, both categories of members who were required to surrender their permanent quarters incident to deployment must frequently occupy temporary lodging facilities from commercial sources while seeking permanent quarters on the local economy or awaiting assignment or reassignment to Government quarters.

In view of these circumstances the Marine Corps presents several options which would authorize either a continuation of BAQ entitlement or entitlement to TLA.

Questions

The first question is whether the prohibition contained in 37 U.S.C. 403(c) (1976) against the payment of BAQ to members without dependents while on field or sea duty applies to temporary as well as to permanent assignments. For the following reasons, we hold that it does apply to both.

Section 403(c), in requiring termination of BAQ for members without dependents while on field or sea duty, makes the exception that "[f]or purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty." However, it makes no distinction between temporary and permanent duty. Thus, it is the length of the assignment that is crucial—not whether the assignment is permanent or temporary. We have specifically held that a member assigned to temporary additional duty on board ship for 3 months or more loses his entitlement to BAQ during that period. *Matter of Lieutenant William R. Miller, USCGR*, 59 Comp. Gen. 192 (1980).

In view of the answer to the first question, a second question is asked. That is, may the loss of entitlement to basic allowance for quarters or the termination of assignment to Government quarters be considered a reason beyond the control of a member that makes it necessary for him to vacate his permanent quarters incident to commencement of a temporary additional duty assignment contemplating field or sea duty of 3 months or more for the purpose of paying him TLA under the existing regulations incident to his return from the assignment?

The Marine Corps explains that members without dependents must give up their permanent housing when they begin temporary additional duty away from their permanent stations. When these members return to their permanent stations at the end of their temporary additional duty, they have no permanent quarters to return to, and thus they must often stay in hotels while awaiting assignment to Government quarters or looking for private housing.

Temporary lodging allowance is authorized under 37 U.S.C. 405 (1976) which is a broadly worded statute authorizing the Secretaries concerned to pay a per diem—

> considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including the cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska, whether or not he is in a travel status.

The Joint Travel Regulations (1 JTR), para. M4303–1, item 2, contain the Secretaries' regulations providing for TLA—

whenever the overseas commander designated by the Service concerned determines that, for reasons beyond the control of the member, it has become necessary for a member once established in permanent quarters in the vicinity of the members' duty station to vacate such permanent quarters, permanently or temporarily and utilize hotel or hotel-like accommodations in the vicinity of his permanent duty station while seeking other permanent quarters or pending reoccupancy of the permanent quarters formerly occupied, as the case may be; * * *

The Marine Corps asks whether members in the described situations may be considered to have vacated their permanent quarters for reasons beyond their control and are thus eligible for TLA under 1 JTR, M4303–1, item 2, when they return to their permanent stations.

The situation described by the Marine Corps seems to fall within the provisions of paragraph M4303–1, item 2. In addition we note that the situation of a member returning from temporary duty in the situation described is similar to that of a member upon initial reporting at a new duty station pending assignment to quarters or completion of arrangements for permanent accommodations when Government quarters are not available. Thus, we would not object to payment of TLA in the situations described by the Marine Corps.

The last question to be answered is whether the allowable payment of TLA would be different if the member concerned were entitled to BAQ during part of his temporary additional duty assignment or if, after relinquishing his quarters on the basis of his orders contemplating sea or field duty of 3 months or more, his entitlement to BAQ continued throughout his absence because the field duty or sea duty did not eventuate as contemplated?

Temporary lodging allowance is intended to reimburse a member whenever the service concerned determines that, for reasons beyond his control, it is necessary for him to vacate his permanent quarters. Therefore, in the circumstances described by the Marine Corps, we would not object to payment of TLA if it can be established that the member had to relinquish his quarters because in view of his deployment he reasonably expected that he would lose his BAQ entitlement. It is our view that the fact that because of unanticipated circumstances the member actually did not lose, or only partially lost, BAQ entitlement need not prevent him from being paid TLA.

While as is indicated above we would not object to payment of TLA under current regulations in the described circumstances, the services may find it prudent to revise the regulations to specifically cover these circumstances.

[B–139703]

Appropriations—Availability—Attorney Fees

Federal Bureau of Investigation (FBI) Agents and paid FBI informant may be reimbursed from FBI salaries and expenses appropriation for payment of

attorneys fees assessed against them in their individual capacities in a civil action, providing it is administratively determined that the employees' obligation was incurred in the accomplishment of the official business for which the appropriation was made.

Matter of: Reimbursement of Attorney Fees Assessed Against Individual Employees, May 28, 1980:

The Assistant Attorney General, Civil Division, Department of Justice, has requested our opinion on whether Government funds may be used to pay attorney fees assessed against three Federal Bureau of Investigation (FBI) agents and an FBI informant (Federal defendants) in their individual capacities in a suit for damages. We hold that Government funds may be used to reimburse the employees for attorneys fees assessed against them, subject to the qualifications discussed below.

The agents and the informant are defendants in the case of *Hampton* v. *Hanrahan* (Civil Action No. 70–C–1384, N.D. Ill.), an action for money damages brought against them and against State law enforcement officers arising from a raid on an apartment occupied by members of the Black Panther Party. The Department of Justice (DOJ) has been providing legal representation to the Federal defendants based on its determination that the suit arose out of actions within the scope of their employment.

The raid occurred on the morning of December 4, 1969, when police officers of the "Special Prosecution Unit" of the State's Attorney's Office, Cook County, Illinois, entered a Chicago apartment occupied by Party members. The officers were acting pursuant to a warrant issued by the Cook County Circuit Court, authorizing them to search for and seize illegal weapons. Shortly after the officers entered the apartment, gun fire erupted, killing two occupants and wounding others. The police seized unregistered and other illegally held weapons, and arrested the surviving occupants on State criminal charges. Cook County grand jury indictments against the survivors were ultimately dismissed.

The surviving occupants of the apartment and the legal representatives of the two deceased occupants brought suit against the Federal defendants, basing their claims on the laws conferring a right of action for violation of civil rights (42 U.S.C. §§ 1983, 1985(3), and 1986), the Constitution, and the Illinois wrongful death statute. The exact nature of the Federal defendants' actions in connection with the raid is currently being litigated. However, the defendants' petition for a writ of certiorari and the Court of Appeals opinion indicate that the case against the Federal defendants is partly based upon the fact that the FBI had had since the 1950s, a program under which it had been

conducting covert actions against various domestic organizations. In 1967, the program was expanded to include groups such as the Black Panther Party. The Federal defendants are the men who, on the day of the raid, were the Special Agent-in-Charge of the Chicago office of the FBI, the supervisor of the Racial Matters Squad of the FBI Chicago office, a Special Agent of the FBI assigned to the Racial Matters Squad, and a paid FBI informant.

The complaint charged some or all of the Federal defendants with intentionally or negligently depriving the occupants of the apartment of their civil rights by participating in the planning and execution of the raid; by conspiring to bring about the malicious prosecution of the plaintiffs' on the State criminal charges or failing to prevent it by conspiring to obstruct justice; by denying the plaintiffs their Constitutional right to counsel; and by impeding vindication of some plaintiffs on the State charges. In addition, the Federal defendants were charged under State law with the wrongful death of the two deceased occupants of the apartment. *Hampton* v. *Hanrahan*, 600 F. 2d. 600, 607 (7th Cir. 1979).

The action was tried in the United States District Court for the Northern District of Illinois before a jury in 1976 and 1977. The trial court directed verdicts in favor of the defendants, and an appeal was taken. The Court of Appeals reversed the District Court's decision, holding that the plaintiffs had established a *prima facie* case, and therefore that their evidence should have been allowed to be considered by the jury. The Court then remanded the case to the District Court for a new trial.

The Court also granted plaintiffs' request for an award of attorneys' fees for their appellate work, inviting plaintiffs to submit a statement of the fees requested. The Court said nothing then about whether payment was expected to come from the Federal defendants individually or from the Government. 600 F. 2d 600, *supra.*

The award of attorneys' fees to the plaintiffs was made under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), which allows awards of costs, including reasonable attorneys' fees, to the prevailing party in an action for violation of civil rights. The Federal defendants then filed a petition for a writ of *certiorari* in the Supreme Court, one of the grounds of which is that the Court of Appeals erred in awarding attorneys' fees to the appellants because they are not "prevailing parties" within the meaning of 42 U.S.C. § 1988.

The DOJ also asked us at that time whether it could properly include the attorneys' fees assessed against the defendants when certifying for payment from the judgment appropriation the award of costs in favor of the plaintiffs under 28 U.S.C. §§ 2412 and 2414. (Letter

dated June 25, 1979.) We responded that an opinion from us would be premature because the defendants were seeking *certiorari;* the question would be moot if the Supreme Court overturned the award of attorneys' fees. B–139703, December 28, 1979.

Meanwhile, the Court of Appeals, having heard the parties on the issue of the amount of fees and the way they should be allocated among the defendants, awarded plaintiffs $99,910. Apparently the Federal defendants argued that any award against them of attorneys' fees should be paid by the United States because in its Order, the Court said it agreed with them that any award against them was to be collected from the Federal defendants, "in their official capacity rather than in their personal capacities, in the absence of a finding of bad faith." Order, December 12, 1979, p. 13. The Order assessed the Federal defendants for one-third of the total award.

The DOJ, as a result has renewed its request to us. It intends to argue to the Court of Appeals that 42 U.S.C. § 1988 does not allow an award of attorneys' fees against the United States. This position, according to the Assistant Attorney General may conflict with the individual interests of the Federal defendants. If the Department's view that 42 U.S.C. § 1988 does not waive the sovereign immunity of the United States prevails, then the burden of paying the court's award of attorneys' fees may fall upon the defendants individually. Therefore, the defendants will have to obtain private counsel to represent their interests, unless we hold that the Government may reimburse the defendants for the attorneys' fees awarded by the court.

The question the Department now poses is thus different from the initial one. The issue the Department now presents (at this point completely hypothetical) is whether Government funds could be used to reimburse the defendants in the event they personally have to pay the award of attorneys' fees. This could happen if the Court of Appeals assesses the fees against them in their individual capacities because, as a matter of law, it agrees with DOJ that it could not assess the fees against the United States and that assessment of the defendants in their official capacities is, in effect, assessment against the United States. As the submission suggests, and as additionally indicated informally by a DOJ attorney representing the Federal defendants individually, the Department now needs an opinion before the related issue being appealed to the Supreme Court is decided, because if it cannot reimburse the defendants it represents they may wish to hire private counsel to assert their interests, in opposition to the Department's position.

It would appear that the action against the defendants arose by reason of the performance of their duties as employees of the FBI.

(One defendant was a paid informant but for present purposes he may be regarded as having been an employee of the Bureau.) It has long been our view that the United States may bear expenses, including court-imposed sanctions, which a Government employee incurs because of an act done in the discharge of his official duties. 44 Comp. Gen. 312, 314; 31 *id.* 246; 15 Comp. Dec. 621.

This conclusion reflects the broader principle that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or incident to the accomplishment of the object or for which the appropriation was made, except as to expenditures in contravention of law, or for some purpose for which other appropriations have been made specifically available. See 44 Comp. Gen. 312, 314; 38 *id.* 782, 785; 32 *id.* 326. Hence, funds appropriated for the FBI's expenses could be used to pay an award of attorneys' fees made against the defendants individually, providing it is administratively determined that the defendants' obligation arose as a result of the performance of their duties as employees of the FBI.

Payment would be proper as long as the actions giving rise to the obligation constitute officially authorized conduct. The Government will not reimburse an employee for an obligation resulting from conduct which, though performed while the employee was carrying out his assigned duties, was not actually part of them. For example, we held that the Office of Price Stabilization could not pay the fine of an employee who double parked while he was performing his job—making deliveries—since double parking was not part of his official duties. 31 Comp. Gen. 246 (1952). On the other hand, in 44 Comp. Gen. 312 (1964), we held that FBI funds could be used to pay a contempt fine imposed upon an FBI agent when, in violation of a District Court order but in accordance with Justice Department regulations and specific instructions of the Attorney General, the agent refused to answer questions put to him during a judicial hearing.

The appropriation "Federal Bureau of Investigation, Salaries and Expenses," contained in the Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriation Act, 1980, Public Law 96–68, approved September 24, 1979, 93 Stat. 416, 420, provides funds for, among other things "* * * expenses necessary for the detection, investigation, and prosecution of crimes against the United States * * *."

FBI officials are in the best position to make the determination, in the first instance, of whether the attorneys' fees assessed against their employees were necessarily incurred incident to the accomplishment of FBI official businss for which the appropriation referred to above

was made and as part of the employees' authorized duties. This Office will not question such a determination if it is supported by substantial evidence.

[B-164371]

Leaves of Absence—Lump-Sum Payments—Rate at Which Payable—Increases—Prevailing Rate Employees

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.

Compensation—Wage Board Employees—Prevailing Rate Employees—Increases—Prospective—Separation After Wage Survey Date Effect

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).

Matter of: Prevailing Rate Employees, May 28, 1980:

The issue presented is whether prevailing rate employees who are being separated from employment are entitled to have their lump-sum annual leave payment include a wage increase when they are on the rolls on the date the order is issued granting that wage increase but are separated before the effective date of the increase, and the period covered by their accrued leave extends beyond the effective date of the increase. Also, we are asked to decide whether such employees are entitled to have their lump-sum annual leave payment include a wage increase when they separate prior to the date the order granting that wage increase is issued, but the period covered by their accrued leave extends beyond the effective date of the increase. For the reasons stated below employees in the first situation are entitled to have their lump-sum annual leave payment include the wage increase. Employees who fall under the second situation are also entitled to have their lump-sum annual leave payments include the wage increase if they separate after the date a wage survey is ordered, and the order granting the new wage rate is issued prior to the effective date of the increase.

These questions were presented in letter of April 24, 1979, from Assistant Secretary of the Army (Manpower and Reserve Affairs), and arise as a result of our decision in 54 Comp. Gen. 655 (1975). There we held that prevailing rate employees who separated prior to the date

the order granting a wage increase is issued may have their lump-sum leave payments retroactively adjusted only if they died or retired between the effective date of the increase and the date the order granting the increase was issued, and then only for services rendered during this period. We based our decision on the fact that any adjustment would have to be made when the order granting the new wage rate is issued and that, at the time, orders granting wage increases were usually issued after the statutory effective date of the increases.

We do not view the above decision as controlling the present situation. Rather, it should be limited to situations concerning the payment of retroactive wage increases governed by 5 U.S.C. § 5344(b). The present case concerns the payment of prospective wage increases, i.e., wage increases ordered into effect prior to their effective dates.

Although section 5344 is not controlling here because it is designed to deal with instances where the order granting the wage increase is issued *after* the effective date of such increase, it does influence the outcome. That section provides in part that:

> (a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.
> (b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—
> (1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or
> (2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.

Thus, as long as the order granting a wage increase is issued prior to the effective date mandated by section 5344(a), any salary changes or payments for lump-sum leave will be prospective payments and section 5344(b) will not apply.

We will first consider the situation where a prevailing rate employee separates between the time the order granting a wage increase is issued and the date the increase is to become effective. In 47 Comp. Gen. 773 (1968) we held that when a General Schedule civil service employee was to be separated from Government service, and was to receive a lump-sum payment for accrued annual leave, that payment should be adjusted to reflect a general salary increase which was granted prior to his separation but became effective during the period that would have benefited the employee had he remained on the rolls until exhausting his accrued annual leave. That decision was based on 5 U.S.C. § 5551(a) which provides, in pertinent part, as follows:

> An employee * * * who is separated from the service or elects to receive a lump-sum payment for leave * * * is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual

would have received had he remained in the service until expiration of the period of the annual or vacation leave. * * *

It is important to note that for the purpose of this section, "employee" includes both General Schedule and Wage Board (Prevailing Rate) employees.

In addition to the above statute, 47 Comp. Gen. 773 was also based on the rationale that the right of an employee to the lump-sum payment vests at the time of the employee's separation. Thus, the lump-sum payment is to be computed on the basis of the employee's rights at the time of separation under all applicable laws and regulations at that time which would have affected his compensation had he remained in the service for the period covered by his leave. *See also* 43 Comp. Gen. 440 (1963); 26 *id.* 102 (1946); and Federal Personnel Manual, Chapter 550, subchapter 2–3 (November 3, 1975). In effect, upon separation prior to the effective date of a wage increase an employee for salary purposes *only* is considered to be on the rolls of his agency until his accrued leave expires. Therefore, such an employee is entitled to any salary increases which he would have received had he remained in the service for the period covered by his leave. Thus, since in 47 Comp. Gen. 773 the order granting the wage increase was issued prior to the employee's retirement and would have been effective to increase his rate of compensation had he remained in the service until his annual leave was exhausted, the employee was entitled to be paid for his leave at the higher rate for any period covered by his lump-sum payment extending beyond the effective date of the increase.

In response to a submission similar to the one at hand we applied the above rationale to prevailing rate employees and allowed payment at the higher rate. *See* B–165201, October 2, 1968. Therefore, the first question is answered in the affirmative.

The second issue is whether prevailing rate employees are entitled to an adjustment of their lump-sum annual leave payments when they separate prior to the date the order granting a wage increase is issued but the period covered by their accrued leave extends beyond the effective date of the wage increase. We are limiting our consideration of this question to those cases, in which the order granting a wage increase is issued prior to its effective date, i.e., the effective date set by 5 U.S.C. § 5344(a). In 26 Comp. Gen. 102, 105 (1946) we considered a similar set of circumstances. There we held that an employee who separated prior to the date a statute authorizing a wage increase was passed would not be entitled to the benefit of a salary increase even though his unused leave would extend beyond the effective date of the increase. Our decision was based on the ground that at the time of the employee's separation the new salary rates were not authorized by

statute. In other words, the employee did not have a vested right to the increase at the time of his separation.

As can be gleaned from the above, an employee who separates prior to the effective date of a wage increase must have a vested right to the increase before he becomes entitled to receive his lump-sum payment at the new rate. That is, at the time of an employee's separation the statutory mechanism for the wage increase must already have been enacted and the requirement for making the wage adjustment on the effective day of the increase must mandate action by the person or agency in charge of such adjustment. *See* 47 Comp. Gen. 773.

Prior to the enactment of 5 U.S.C. §§ 5341 *et seq.* (1976), governing the pay adjustments of prevailing rate employees, the executive branch had great discretion in establishing an administrative system governed by regulation for adjusting the pay of prevailing rate employees. This discretionary system, under which the executive branch was free to establish, change and amend wage adjustment procedures, was an administrative, as distinguished from a statutory, system, in that the resultant pay adjustment was discretionary with the executive branch and not controlled by legislative guidelines and standards. In contrast, the system presently in effect established under 5 U.S.C. 5341 *et seq.* has been narrowly defined by Congress so that the acts leading to a pay adjustment for prevailing rate employees performed by executive branch personnel are ministerial in nature leaving nothing to their discretion or judgment. With this in mind, we held in 54 Comp. Gen. 305 (1974) that the adjustment of wage rate of prevailing rate employees under 5 U.S.C. §§ 5341 *et seq.* may no longer be considered as granted administratively, but rather must be considered to be an increase in pay granted by statute. *See also* Federal Personnel Manual Letter No. 531–47, May 28, 1975.

Under 5 U.S.C. § 5343(b) the Office of Personnel Management is required to schedule full-scale wage surveys every 2 years and interim surveys between each 2 consecutive full-scale wage surveys. We have been informed that the surveys are ordered to be conducted at the same time every year. Also, under section 5344(a) the effective date of any wage increase has been established to be no later than the first day of the first pay period which begins on or after the 45th day following the date the wage survey is ordered to be made.

Thus, once a wage survey has been ordered to be made the employee can reasonably expect to receive a statutory wage increase within approximately 45 days of the order. Since a wage increase will be effective within 45 days after an order is given to conduct a wage survey it can be said that once the survey is ordered the employee would have a vested right in that increase if he were on the rolls on the effective date

of the increase. As in 47 Comp. Gen. 773, the actual amount of the increase may not be established, but the right to an increase in pay, in an amount to be determined, is in being.

Therefore, even though an employee separates prior to the date the order granting a wage increase is issued, he is entitled to receive his lump-sum annual leave payment at the higher rate if his separation occurs after the date a wage survey is ordered to be made and his annual leave extends beyond the effective date of increase, so long as the order granting the new wage rate is issued prior to the effective date mandated by section 5344(a). The employee, however, is only entitled to be paid at the higher rate for the amount of his leave extending beyond the effective date of the increase.

We realize that this decision does not provide any relief for the prevailing rate employee who separates before the effective date of the wage increase, and the order granting the new wage rate is issued after the effective date of the increase. However, this result is statutorily mandated. In such a case, the lump-sum annual leave payment would be covered by the retroactive adjustment provisions of 5 U.S.C. § 5344 (b), which prohibit any such adjustment.

Accordingly, a prevailing rate employee who is on the rolls on the date an order granting a wage increase is issued, but separates before the effective date of the increase, is entitled to receive his lump-sum annual leave payment at the higher rate for the period his leave extends beyond the effective date of the increase. Moreover, a prevailing rate employee who separates before the date of the order granting the wage increase is also entitled to receive his lump-sum annual leave payment at the higher rate for any leave extending beyond the effective date of the increase if he separates after a wage survey is ordered to be made, and the order granting the new wage rate is issued prior to the effective date set by section 5344(a).

[B-196243]

Contracts—Negotiation—Evaluation Factors—Factors Other Than Price—Relative Importance of Price

Where record does not justify contracting officer's finding that competing proposals are essentially equal, award to offeror on basis of lower estimated cost is improper departure from stated solicitation evaluation factors which place emphasis on technical merit.

Matter of: John Snow Public Health Group, Inc., May 28, 1980:

John Snow Public Health Group, Inc. (JSI), protests the award of a cost-plus-fixed-fee, requirements type contract for consultant technical assistance, to Analysis Management and Planning, Inc. (AMPI),

under request for proposals (RFP) No. HSA240-BCHS-164(9), issued by the Health Services Administration (HSA), Department of Health, Education and Welfare, now the Department of Health and Human Services (HHS), JSI contends that HSA improperly based the award upon the lowest estimated cost rather than the evaluation criteria in the RFP, and, alternately, that it neglected to perform the requisite cost analysis to determine whether the offerors' respective cost estimates were realistic.

The RFP sought proposals for technical assistance to be rendered during fiscal year 1980 to HEW Regions I and II regional staffs and Bureau of Community Health Services (BCHS) supported health care projects. Technical proposals were to comport with the requirements specified in the Technical Proposal Instructions, and were to be evaluated in accordance with certain evaluation criteria which were as follows:

> The technical proposals shall be evaluated in accordance with the following factors listed in their relative order of importance:
>
> 1. Personnel and Experience: 60
> 2. Problem and Approach: 30
> 3. Facilities: 10
>
> No factors other than those listed above will be used in the evaluation of the offeror's technical proposal.
>
> Award will be made to the offeror submitting the proposal determined to be most advantageous to the Government. *Cost will be considered secondary to technical merit in the award selection process.* [Italic supplied.]

Two proposals—from AMPI and JSI, the incumbent—were received by the August 10, 1979 opening date and were forwarded for initial evaluation to the technical evaluation panel. The proposals were scored by the panel as follows:

Technical score (scale of 100):	*Proposed cost*
JSI:	
91	$359,066
AMPI:	
71	376,379

It is reported that, although JSI received the higher aggregate technical score (as well as the higher average score in each of the three evaluation categories) and submitted the lowest price, AMPI's proposal was deemed technically acceptable and within the competitive range. Telephone conversations were held with both offerors on September 20, 1979, for the purpose of discussing technical deficiencies noted in the original technical evaluations, and best and final offers were then submitted on September 25, as follows:

AMPI	$328,274
JSI	346,771

These modified proposals were reviewed by the evaluation panel and on September 28 the Chairman, citing six significant elements of the

JSI proposal, recommended that award be made to JSI on the basis of technical superiority.

Later on September 28, the contracting officer met with members of the evaluation panel, including the Chairman, to determine the margin of JSI's remaining superiority and was informed that, had the modified proposals been scored, JSI's rating would have increased to 96 or 97 and AMPI's to 85 or 86. On the basis of this information as well as her own examination of the proposals, the contracting officer determined that AMPI's proposal was as technically acceptable as JSI's. In the contracting officer's opinion, the remaining deficiencies in AMPI's proposal would likely be true of any non-incumbent contractor without recent experience in Regions I and II while much of JSI's superiority was attributable to factors not required by the RFP. Since the contracting officer deemed the proposals to be essentially equivalent on technical merit, she concluded that award to AMPI at an $18,000 lower estimated cost would be in the best interests of the Government. The contract was awarded to AMPI on September 28.

JSI asserts initially that since its proposal was clearly technically superior to AMPI's, as reflected in the point scores assigned the two proposals by the evaluation panel, award to AMPI was necessarily based on lower cost. Award on this basis, it argues, was improper because the RFP emphasized technical considerations in the evaluation while assigning only "secondary" importance to price. In support of its contention, JSI also cites Federal Procurement Regulation (FPR) § 1–3.805–2(n), which states that estimated costs should not be the controlling factor in cost-plus-fixed-fee contract awards since such estimates may not be indicative of actual final costs.

We have stated in a number of decisions that "once offerors are informed of the criteria against which their proposals are to be evaluated, it is incumbent upon the procuring agency to adhere to those criteria or inform all offerors of changes made in the evaluation scheme." *Telecommunications Management Corporation*, 57 Comp. Gen. 251 (1978), 78–1 CPD 80; *Genasys Corporation*, 56 Comp. Gen. 835, 838 (1977), 77–2 CPD 60. Under this standard, it would be improper to induce an offer representing the highest quality and then reject it in favor of a materially inferior offer on the basis of price. *Signatron, Inc.*, 54 Comp. Gen. 530 (1974), 74–2 CPD 386. This is not to say, however, that cost may never be considered under these circumstances. Indeed, even where it has been designated as a relatively unimportant evaluation factor, cost may become the determinative factor if source selection officials find that no proposal is clearly superior based upon other more significant criteria. *Bunker Ramo Corporation*, 56 Comp. Gen. 712 (1977), 77–1 CPD 427.

We note at this juncture that it is neither our function nor our practice to conduct a *de novo* review of technical proposals and make an independent determination of their relative merit. This is the function of the procuring agency. We will question a contracting official's conclusions regarding the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations. *E-Systems, Inc.*, B-191346, March 20, 1979, 79-1 CPD 192.

The HSA contracting officer's conclusion that the JSI and AMPI proposals were technically equal was based upon her observation that JSI's point score superiority was attributable to AMPI's lack of recent experience in Regions I and II, and to the inclusion in JSI's proposal of factors, such as current library and computer resources, which enhanced JSI's rating, but were not "required" by the RFP.

We do not believe the contracting officer's conclusions were reasonable in this respect. For example, while the RFP does not *require* the maintenance of a current library or the use of computer resources for this project, neither did it *require* the use of any other specific facilities, resources or subcontractors to perform the required tasks. In this regard, JSI proposed the use of a Puerto Rico based subcontractor to provide on-site technical assistance and training for the tasks which were to be performed in Puerto Rico and the Virgin Islands. That firm's experience in the health care field in a Spanish speaking "culturally acceptable" environment was recognized as an asset by the technical evaluators, but was discounted by the contracting officer for the most part because of the proposed cost ($12,500).

The technical evaluators also found portions of the AMPI technical proposal to be "unacceptable." For example, it was the technical evaluators' opinion that AMPI did not satisfactorily clarify its understanding of the "problems" in Puerto Rico, or that firm's understanding of the "programmatic" issues of Region I. Moreover, other areas of the AMPI proposal were judged only "marginally acceptable" by the review panel. On the other hand, no reservations were expressed regarding the JSI technical proposal after the receipt of best and final offers.

We believe that implicit in the language of the RFP that "cost will be considered secondary to technical merit," is an invitation to offerors to propose the use of methods, facilities, and resources which they believe will best accomplish the desired result, not necessarily at the lowest cost, but at a cost to the Government which is fair and reasonable. We also believe that the contracting officer recognized the technical merit of JSI's proposal by her conclusion that:

> The JSI and AMPI *cost* proposals are quite similar in their composition and given the fact that both are experienced in delivering like technical assistance

efforts, it can be concluded that both *cost* proposals are reasonable, realistic and probable. However, it can also be concluded * * * that AMPI offers the Chevrolet model required by the RFP, while JSI offers the more expensive Cadillac version. [Italic supplied.]

There is, therefore, no suggestion that the 5.6 percent higher JSI cost proposal was unreasonably high for that which was offered nor, in our view, does the record support a finding that the competing proposals were essentially equal. Thus, there appears to have been an improper departure from the stated evaluation factors, since ultimately technical merit and cost were given equivalent consideration in the evaluation. In our opinion, the contracting officer improperly awarded this contract to the lowest priced offeror, since notwithstanding her statement that the two proposals were "essentially equal," the record does not support her conclusion. *Charter Medical Services, Inc.*, B-188372, September 22, 1977, 77-2 CPD 214. In view of the foregoing, we do not believe it is necessary to consider the protester's alternative basis for protest, *i.e.*, that the contracting officer neglected to perform a cost analysis on the AMPI cost proposal. Nonetheless we point out that there is evidence on the record to show that a limited cost analysis was performed.

JSI has recognized that it may not be practical to provide any meaningful relief in this case because of the extent of the contract performance. See *Cohu, Inc.*, 57 Comp. Gen. 759 (1978), 78-2 CPD 175. Here, about two-thirds of the term of the contract has been completed, and we therefore do not believe it would be in the best interest of the Government to disturb the present award. Nonetheless, we are bringing the matter to the attention of the Secretary of Health and Human Services.

The protest is sustained.

[B-196908]

Officers and Employees—Transfers—Relocation Expenses—Real Estate Expenses—Retransfer of Employee—To Former Station

Employee was transferred back to former duty station and was reimbured 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.

Matter of: Warren L. Shipp—Real Estate Expenses, May 28, 1980:

We have been asked to determine whether an employee may be reimbursed real estate expenses in connection with the sale of his

residence at his former duty station where he contracted to sell that residence after he had been notified that he was to be retransferred to that same duty station.

Mr. W. Smallets, Finance and Accounting Officer, National Security Agency (NSA), has asked us whether Mr. Warren L. Shipp is entitled to real estate sale expenses. Mr. Shipp, an NSA employee, was transferred from Fort Meade, Maryland, to Princeton, New Jersey, in August 1978, and was authorized relocation expenses, including real estate transaction expenses. He was notified April 25, 1979, that he was to be transferred back to Fort Meade and he was retransferred to his former duty station in August 1979. On May 9, 1979, Mr. Shipp entered into a contract to sell his former Maryland residence and on August 8, 1979, he submitted a claim for expenses associated with the sale of that residence. His claim for real estate expenses was paid in the amount of $4,671.60. In the following week he submitted a claim for real estate expenses incurred in conjunction with the purchase of a residence in the Fort Meade area. The record does not indicate that Mr. Shipp's claim for real estate purchase expenses has been paid. Based on our holding in B–167141, July 23, 1969, Mr. Smallets asks whether Mr. Shipp should be required to reimburse the Government the $4,671.60 paid as real estate sale expenses.

Our decision in B–167141, July 23, 1969, involved an employee who entered into a contract for sale of his residence at his old station after he had been notified that he was being retransferred to his old duty station at Fort Meade. In holding that the retransferred employee was not entitled to residence sale expenses, we held that "* * * after the advisement of his transfer back to Fort Meade * * * [the claimant] could no longer reasonably predicate the sale of his residence on the [earlier] change of duty station from Fort Meade * * *."

The basis for that decision was repudiated in *Beryl C. Tividad*, B–182572, October 9, 1975, and in *Ray L. Boman*, B–173783.141, October 9, 1975. The holding in *Beryl C. Tividad* involved an employee who was granted a 1-year extension of time to complete the sale of her home at her former duty station in New Orleans. One month later, in August 1973, she was retransferred from Temple, Texas, to her former duty station. Four months thereafter she contracted to sell her old residence in New Orleans and also contracted to purchase a home in the same area. Based on paragraph 2–6.1e of the Federal Travel Regulations (FTR) (FPMR 101–7) pertaining to the 1-year time limitation for real estate transactions and setting forth the standards for extending that 1-year period, the agency involved disallowed the residence sale expenses on the ground that the sale of the employee's New Orleans residence did not reasonably relate to her transfer from New Orleans to Temple.

In that case we pointed out that 5 U.S.C. § 5724a, which provides for the reimbursement of real estate expenses, requires a finding that a transfer is in the interest of the Government. Once that finding is made, the authorization of the benefit is restricted only by the terms of the implementing regulations. The regulations pertaining to real estate transaction expenses require a determination that a sale is reasonably related to a transfer only when an extension of the 1-year settlement date limitation is sought and granted and when transfers involving short distances are made. They do not authorize or permit an administrative determination in all cases that a particular real estate transaction relates to a transfer. Therefore, we held that the employee was entitled to the reimbursement claimed since the right to be reimbursed for transfer-related expenses arises once it is determined that a transfer is in the interest of the Government. In effect, the *Tividad* and *Boman* cases overruled B–167141 and permitted reimbursement of real estate purchase and sale expenses incurred at the duty station to which the employee is retransferred without regard to a determination that the residence transaction reasonably related to the transfer.

In a related line of cases, we have considered the relocation expenses entitlement of employees who were given transfer orders and whose transfers were subsequently canceled. If the employee's duty station has not changed as a result of the canceled transfer, the employee is treated for reimbursement purposes as if the transfer had been completed and employee had been retransferred to his former duty station. *B. Lee Charlton*, B–189953, November 23, 1977, and *William E. Weir*, B–189900, January 3, 1978. He may be reimbursed expenses incurred in good faith during the time the transfer orders were in effect, if the expenses claimed would have been payable if the transfer had been consummated.

In the case of real estate expenses, we have recognized that an employee who entered into an enforceable contract to sell his residence at his duty station under transfer orders that were subsequently canceled may be reimbursed for real estate sale expenses even though settlement did not occur until after the transfer orders were canceled. B–177130, February 2, 1973. Where an employee's efforts to sell his residence have not progressed to the point of executing the sale, the extent to which real estate expenses are reimbursable may depend upon whether the employee has entered into a listing agreement that may be revoked without penalty. *Wm. E. Jackson, Jr.*, B–181321, November 19, 1974. If, under applicable state law, the arrangement with the real estate agent binds him to pay a brokerage fee in the event he unilaterally cancels the agreement, the employee may be reimbursed for brokerage fees limited to the amount payable if the employee had with-

drawn the property from sale. *Neil Gorter*, B-194448, December 11, 1979.

We are now of the view that the canceled transfer cases appropriately place the burden upon the employee to avoid unnecessary expenditures and ought to be extended to retransfer situations to the extent the employee has not substantially changed his position in reliance on the initial transfer. For this reason, the *Tividad* and *Boman* decisions are overruled. The new rule is that an employee who is transferred back to a former duty station is under the same obligation to avoid unnecessary expenses as an employee whose transfer is canceled. Therefore, once an employee is notified that he is being transferred back to his former duty station, the Government's obligation to reimburse real estate expenses is limited to the expenses already incurred and those which cannot be avoided.

Because adoption of the concept of avoidable expenses in the retransfer situation involves a changed construction of law, the *Tividad* and *Boman* cases are overruled prospectively only. See *George W. Lay*, 56 Comp. Gen. 561 (1977). Since Mr. Shipp was properly reimbursed for his selling expenses under those decisions, he is not required to refund the reimbursement he received to the Government. He may also be reimbursed for his purchase expenses if that has not yet been done.

[B-197646]

General Services Administration—Services For Other Agencies, etc.—Excess Real Property—Maintenance Costs—Liability to Holding Agencies

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.

Set-Off—Authority—Interagency Claims

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.

Matter of: Liability of General Services Administration for Cost of Maintaining Excess Real Property Held by Air Force, May 29, 1980:

This is in reference to the dispute between the General Services Administration (GSA) and the Air Force (AF) over reimbursement of

expenses incurred for the protection and maintenance of two parcels of Federal excess real property—the Matagorda Island Air Force Range and the associated Port O'Connor Dock Facility, Calhoun County, Texas. As explained below, we agree that GSA should reimburse the AF for the balance of the protection and maintenance costs incurred by AF. However, it would require a deficiency appropriation to do so and we see no purpose in requiring this action under the circumstances. Also, offset by a creditor agency against a debtor agency is not appropriate. AF should remit the balance owed to GSA for Standard Level User Charge fees.

The AF remained in possession of these installations after they were declared excess to AF requirements, and continued to provide protection and maintenance services for twelve months, as required of the holding agency by the terms of the Federal Property Management Regulations (FPMR). Beginning on October 1, 1977, GSA, as the disposal agency under the FPMR, became obligated to provide these services itself or to reimburse the AF for the cost of these services and on October 15, presented the AF with a proposed protection and maintenance agreement with an $18,000 maximum on the costs it would reimburse to the AF for the first quarter of fiscal year 1978 (FY 78). Since the AF expected that the level of protection and maintenance required by the FPMR would necessitate expenditures in excess of $18,000, the agreement was neither signed nor returned and identical agreements, covering the second and third quarters, were likewise disregarded.

The AF billed GSA $197,546 representing its actual costs for the protection and maintenance services provided during the first three quarters of FY 78. Due to inadequate funds, GSA denied any obligation to reimburse more than $54,000, representing the payment of $18,000 for each of the three quarters, as proposed by GSA originally. In an attempt to satisfy this debt, the AF withheld $197,546 owed GSA for third quarter FY 78 Standard Level User Charges (SLUC) for space occupied by the AF outside the National Capital Region. GSA has submitted the matter as a claim for the remaining $143,546 in SLUC charges. We here consider the propriety of the actions of both GSA and the AF.

As a preliminary matter, interagency claims are not to be collected, as the AF did, by offset. The AF must pay the SLUC charge due GSA. Disputed interagency bills should be submitted to this Office for settlement, as provided in the GAO Manual of Policies and Procedures for the Guidance of Federal Agencies (title 7, sec. 8.4(1)(c)).

Responsibility for the care and handling of Federal excess real property—property not needed by the agency holding it—is addressed in

section 202(b) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. § 483(b) (1976)) and the implementing Federal Property Management Regulation (FPMR), 41 C.F.R. 101–47.401 *et seq.* (1979). Under section 202(b), the agency in possession is required to perform the care and handling of its own excess property. Compare section 203(b), 40 U.S.C. § 484(b), under which GSA, as the agency responsible for disposing of surplus property—property not needed by any agency—is vested with discretion either to furnish the protection and maintenance services for the surplus property itself or to require the agency in possession (the holding agency) to perform this function. Despite this distinction in the statute between treatment of surplus and excess real property, GSA has adopted a policy of treating all care and handling responsibilities, for both surplus and excess real property, in the same manner. In this regard, FPMR section 101–47.402–1 provides in part that:

> The holding agency shall retain custody and accountability for excess and surplus real property * * * and shall perform the physical care, handling, protection, maintenance, and repairs of such property pending its transfer to another Federal agency or its disposal. * * *

The holding agency must bear the cost of providing care and handling services for a maximum of twelve months plus the period preceding the first day of the next succeeding fiscal year quarter. FPMR section 101–47.402–2(a). Thereafter, if the property has not yet been transferred to another agency or otherwise disposed of by the disposal agency, FPMR section 101–47.402–2(b) provides that:

> * * * the expense of physical care, handling, protection, maintenance, and repairs of such property from and after the expiration date of said period *shall be reimbursed to the holding agency by the disposal agency.* [Italic supplied.]

This is done even though, under the excess property statute, the holding agency is responsible for these costs insofar as they pertain to excess property. 40 U.S.C. § 483(b).

GSA has not denied its liability to the AF under the FPMR nor has it questioned the amount which the AF spent. It only disputes the amount which it is obligated to reimburse. Based upon its understanding that the regulations implicitly contemplate reimbursement of costs only to the extent of available resources, GSA believes that no agreement with the AF was necessary to limit its responsibility for costs. GSA contends that its quarterly obligation to the AF should not exceed $18,000 (a total of $54,000 for three quarters) both because it attempted to limit its liability to this amount and because "budget limitations precluded us from funding these costs at a higher level," so that, in GSA's view, "no additional funds are available for this purpose." The AF, on the other hand, has interpreted the regula-

tions to require reimbursement of actual protection and maintenance costs which it expended.

The general GSA policy governing reimbursable excess property expenses is embodied in FPMR section 101–47.401–1 which states:

> (a) * * * the management of excess real property and surplus real property, including related personal property, *shall provide only those minimum services necessary to preserve the Government's interest therein*, realizable value of the property considered. [Italic supplied.]

Although GSA, under its regulations, has assumed financial responsibility for excess property after 12 months, the applicable statute makes the care and maintenance of excess property the responsibility of the holding agency, without a time limit. 40 U.S.C. § 483(b). There is therefore no doubt that AF funds were available for the purpose for which they were expended. Accordingly, reimbursement of the AF by GSA is not required in order to prevent an improper expenditure.

This is not to say that GSA can avoid its self-imposed responsibility for care of Government property by pleading insufficient funding. We addressed this issue in a letter report to GSA, "Improvement Needed in Management of Protection and Maintenance Funding," LCD–78–336, July 31, 1978. The property which is the subject of this decision, the Matagorda Island Air Force Range and Dock, was among those discussed in that report. We said then:

> Since GSA has 12 to 15 months before it becomes financially responsible for the property, we believe that it should be able to anticipate the funding needs for the protection and maintenance for those properties remaining in its inventory and include an estimate for such costs in its budget.

We do not concede that GSA can negate the effect of its regulations by failing to budget or obligate sufficient funds to carry out its responsibilities. However, we see no useful purpose to be served by requiring, in effect, that GSA seek a deficiency appropriation merely to reimburse another Government agency in an intra-governmental transaction.

We have no general objection to GSA's practice under the cited regulations of establishing ceilings on reimbursable costs where the holding agency agrees to the proposed amount. Under these circumstances, the holding agency presumably will have determined either that the services required by the regulations can be furnished at the agreed amount or that it is capable of assuming any additional expenses. Where no agreement is adopted, however, so long as the holding agency furnishes only those services required by the regulations, GSA should budget for and reimburse the actual cost of these services. Alternatively, GSA can amend its regulation to make the holding agencies responsible for these costs, so that they can budget for them.

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