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COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

DEPUTY COMPTROLLER GENERAL OF THE UNITED STATES

Robert F. Keller

GENERAL COUNSEL

Milton J. Socolar

DEPUTY GENERAL COUNSEL

Harry R. Van Cleve

ASSOCIATE GENERAL COUNSELS

F. Henry Barclay, Jr.

Seymour Efros

John J. Higgins

Richard R. Pierson

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[B-194912, B-195507]

Environmental Protection and Improvement—Grants-in-Aid—Waste Treatment—Recovery of Costs—Percentage Limitation—Reduction Authority

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

Appropriations — Defense Department — Sewage Treatment — Percentage Limitation—Capital Costs

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

Sewers—Services Charges—Increases—Agreement Modification

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

Contracts—Modification—Additional Work or Quantities

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

Matter of: Federal Facility Contributions to Capital Costs of Sewage Treatment Projects, October 4, 1979:

We have received a number of requests from concerned Congressmen and from the Department of the Navy for a decision which

would settle a long-standing controversy about the responsibility for funding the costs of constructing an upgraded sewage treatment plant in the Hampton Roads Sanitation District (HRSD), Virginia Beach, Virginia. Subsequently, we received a similar request from the Principal Deputy Assistant Secretary of the Navy (Logistics) and from two additional Members of the Congress to resolve the same question concerning the Honouliuli Wastewater Treatment and Disposal System, Honolulu, Hawaii (Honolulu). This decision responds to both requests.

The Navy has been receiving sewage disposal service at both locations pursuant to contracts which provide that the contractor is responsible for providing, at its own expense, all facilities necessary to provide such service. The Navy, in turn, has been paying the standard rate charged to all users of the system.[1] As a result of Title III of the Federal Water Pollution Control Act as amended (FWPCA), 33 U.S.C. § 1251 *et seq.*, it was necessary to improve and upgrade a great many municipal wastewater treatment systems. Section 2 of Pub. L. No. 92–500, October 18, 1972, (the FWPCA amendments of 1972, 86 Stat. 816) authorized a program of construction grants to cover 75 percent of the costs of upgrading projects approved by the Administrator of the Environmental Protection Agency (EPA).

The problem arises because in 1975 the EPA Administrator decided to exclude from grant participation any portion of a project which would serve a Federal facility. (Our first holding is concerned with the propriety of that determination.) The sewage service providers then turned to the Navy to make up the "shortfall" in the Federal funds.

The question of the authority of Federal installations to make the requested capital contribution was first presented to this Office in 1977 by the Department of the Air Force. The Air Force, as was true of the Navy and other Department of Defense (DOD) components, had no independent authority comparable to EPA's, to make construction grants to States and localities for improvements to wastewater treatment plants. The Air Force contended that the capital improvements in question could be financed only through a general rate increase applicable to all users without further consideration. It could not terminate or negotiate its existing utility contracts to make a lump-sum payment for these additional costs unless it received an additional benefit (consideration) over and above the improved sewage services which the contractor was required to provide under the contract anyway. We concurred in the Air Force position. B–189395, April 27, 1978.

[1] There are additional factors involved in the Honolulu situation which will be considered separately, *infra*, under that heading.

The Congress has attempted to break the funding impasse by specifically authorizing and appropriating funds for "sewer connections" in named locales, including the naval bases within the HRSD and in the Honolulu district. Nevertheless, the Navy claims that it still cannot pay the Navy's share of the upgraded sewage projects. It contends that a modification of its existing contract for sewer services would be required and that, in accordance with the above-mentioned comptroller General decision to the Air Force and general contract principles, it cannot agree to such a modification without consideration. What the Navy is insisting on is a reduced rate which takes into account the capital contributions of the Navy. The contractors object because they say that that would discriminate against their non-Federal users by giving Navy preferential treatment in the rates. We are informed by the Navy that in the absence of agreement with HRSD, the appropriation for the NPWC, Norfolk, for municipal sewer connection has not been obligated. Meanwhile, the contractors contend that they are rapidly exhausting their resources. If the additional construction funds are not provided in the very near future, they will be forced to cut off service to the Navy. Their only alternative is to borrow the money and pass on the increased costs to all users which they feel would be inequitable.

For the reasons discussed below, we find that:

(1) EPA is not authorized to exclude a portion of an otherwise eligible project solely because that portion would serve a Federal facility; and

(2) There is no need for Navy to amend its contracts with the providers of sewer services in either area (and therefore no further consideration is needed) provided that the contribution merely replaces the amount that would have been provided by EPA but for its restrictive funding policy. Its authority to pay for 75 percent of the portion of the construction costs attributable to the Navy's use of the sewer system is separate and independent of its authority to enter into sewer service arrangements. However, we do not believe that the Congress intended to subsidize providers for 100 percent of the costs of any portion of the services provided. Therefore, if Navy contributes 100 percent of the costs attributable to its percentage of use of the facility, it must receive a corresponding reduction in its service rates or some other adequate consideration.

EPA's Funding Policy

Section 202(a)(1) of the FWPCA, 33 U.S.C. § 1282(a)(1), provides that:

> The amount of any grant for treatment works made under this Act from funds authorized for any fiscal year beginning after June 30, 1971, shall be 75

per centum of the cost of construction thereof (as approved by the Administrator). * * *

EPA's implementing regulations, final regulations at 43 Fed. Reg. 44065 (1978) (40 CFR § 35.925–16) state:

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A "major activity" includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

The Agency's Program Guidance Memorandum No. 62, December 29, 1975, subsequently retitled Program Requirements Memorandum No. 75–35, provides the following guidance for EPA grant funding determinations:

As an example, in a $10,000,000 actual construction project for which the Federal facility share has been agreed upon as 20 percent of the total project cost, the allowable cost and construction grant funding would be as follows:

Total joint project cost	$10,000,000	
Federal facility share	2,000,000	(20%)
Maximum allowable cost	$8,000,000	
Grant	0.75	(75%)
EPA grant funding	$6,000,000	

Consistent with our usual policy, we requested the Administrator's comments regarding the matters before us, including his authority for EPA's Federal facility funding policy. In a reply, dated July 3, 1979, the Director of EPA's Municipal Construction Division stated the following:

In accordance with Section 202(a)(1) of the Act, the Administrator has determined that only that portion of the treatment works, based upon volume, serving residential, commercial and industrial users will be eligible for grant participation. Major Federal facility users located outside the Washington, D.C. Beltway, are excluded from grant participation (40 CFR 35.925–16).

For budget and State allotment purposes, under Section 205 of the Act, the States and EPA estimate the cost of constructing all needed publically [sic] owned treatment works. This data, and subsequent grant allotments to the States, do not include any major Federal facility needs.

Prior to the enactment of PL 92–500, construction grants for municipal wastewater treatment works could include Federal needs where the requirement for the project was due in part to a Federal institution or Federal construction activity which resulted in an influx of federally connected personnel and, in turn, increased the applicant's requirement for wastewater treatment works. The policy was based upon Section 8(c) of PL 84–660 and promulgated at 40 CFR 35.815–2 and 35.830.0.

The enactment of PL 92–500 brought about a change in the Federal facility funding policy. A special funding provision for Federal facilities, similar to Section 8(c) of PL 84–660, is *not* found in Section 205 of PL 92–500. The new provisions of PL 92–500 pertaining to regional planning, user charges, industrial cost recovery and State allotment do not allow for a preferential funding policy for any specific user of a municipal wastewater treatment system, such as a major Federal facility.

* * * * * * *

The Environmental Protection Agency (EPA) determined, in 1975, that the EPA funds allotted to the individual States under the construction grants program, authorized by the Federal Water Pollution Control Act (the Act), would not be used to construct or improve the portion of a municipal wastewater treatment works servicing a major Federal facility. This policy, promulgated by regulation at 40 CFR 35.925–16, is authorized by Sections 202(a), 204 and 313 of the Act, is supported by other statutes which require that funds appropriated for each department or agency must be used solely for the purposes of that department or agency, and was established in lieu of defining a major Federal facility to be an industrial user, as authorized by Section 502(18) of the Act. If a Federal facility had been defined to be an industrial user (Standard Industrial Classification Division J, Major Group 97), the capital cost recovery provisions of Section 204(b)(1)(B) of the Act would have been applicable.

In June and November of 1975, the Department of Defense (DOD) requested the Office of Management and Budget (OMB) to review EPA's policy regarding Federal agency participation in municipal wastewater treatment works. OMB responded in support of the EPA policy: "Therefore, we believe that the current funding system should continue, whereby the facilities to treat DOD wastewater will be financed by appropriations specifically provided by the Congress. While this timing problem and the lack of complete certainty about appropriaotions [sic] does not make it a simple process to join a municipal project, nevertheless, the use of EPA funds to provide the Federal share of a given facility will result in fewer new wastewater treatment facilities in the States."

Subsequent DOD implementing memoranda, and assurances to EPA, on the point were that "the DOD share of joint facilities will be appropriated through normal processes, just as if the installation had gone it alone."

* * * * * * *

The continuing reluctance on the part of some major Federal facilities to adhere to EPA policy and regulations, OMB decisions and agreements, and DOD implementing memorandum is having a severe, adverse impact on water quality, contrary to the provisions of the Federal Water Pollution Control Act and Executive Order 12088. In some cases, this reluctance continues in spite of the fact that the Federal facility capital share of a municipal treatment works has been appropriated by the Congress for that specific purpose.

Subsequently, a meeting was held with EPA officials, including the cognizant EPA Assistant General Counsel. From the discussion, it appears that EPA bases its authority to reduce the project by the Federal facility share and then authorize a 75 percent grant for the remainder, on the broad approval authority of the FWPCA in section 202(a)(1).

Title II of the Act provides for Federal grants to State, local and regional agencies for the construction of waste treatment works from funds allocated to each State under section 205 of the Act. (33 U.S.C. § 1285). Section 202(a)(1) states that for grants made from funds authorized in fiscal year 1972 and thereafter, the grant amount *shall be* 75 percent of the cost of the construction project, which is to be approved by the Administrator of EPA. Under section 203(a), 33 U.S.C. § 1283(a), a grant applicant submits to the Administrator for his approval, plans, specifications, and estimates for each proposed project. Approval "shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." Section 204 (33 U.S.C. § 1284) describes the conditions and limitations which the Administrator must take into consideration in making determinations prior to grant approval. There is no condition

or limitation pertaining to Federal facilities which would be users of proposed treatment works.

In *Manatee County, Florida* v. *Train*, 583 F.2d 179, 183 (5th Cir. 1978), the U.S. Court of Appeals affirmed a district court order to EPA to increase the county's Federal grant from 33 percent to 75 percent of the project's cost of construction. In doing so the court stated that—

> * * * § 1281(g)(1) says that the Administrator is "authorized" to make grants for construction of publicly owned treatment works. Section 1283(a) requires applicants for a grant to submit plans "to the Administrator for his approval," and § 1284 details the factors which the Administrator is to examine before approving the project. Thus, the Administrator has some discretion in initially approving a state project. It is at this stage that the EPA should prevent projects that are "impossible" or are otherwise inconsistent with the Act's purpose of improving water quality.
>
> Once the Administrator approves the project, however, the percentage amount of the federal share is set by law, without any discretion left in the Administrator. * * *

In 53 Comp. Gen. 547 (1974), in connection with implementation of Pub. L. No. 92–500, we answered the question, "Does EPA have any flexibility as to grant percentages?", as follows:

> Having reviewed the statute and its legislative history, we cannot agree with EPA. First, the plain language of the statute clearly mandates that the grant "shall be" 75 percent of the cost of construction. Second, the Conference Report at page 110 (SCP 293) clearly states that the Federal grant "shall be 75 percentum of the cost of construction *in every case*." [Italic supplied.] Third, the requirement of 75 percent Federal funding in all cases was recognized by the President in his veto message of October 17, 1972 (SCP 137, 138), and by the former EPA Administrator in a letter dated October 11, 1972, to the Office of Management and Budget recommending enactment of the then bill (SCP 143, 152). Thus, while EPA has put forth several reasons why it believes it may be in the best interests of the Federal Government, of the State in which the project is to be placed and of the grantee for the Federal share of the grant to be less than 75 percent of the project cost, it is our opinion that EPA does not have the authority to make any grants in a lesser amount.

Our current review of the statute and its legislative history reveals no congressional intention to reduce a 75 percent grant for a proposed treatment project because it would serve a Federal facility. Taking the example given in PRM No. 75–35 of a $10 million construction project with an agreed Federal facility share of 20 percent, the grant applicant received $6 million, or 60 percent of the $10 million cost, instead of $7.5 million, 75 percent of the total cost. We understand that consistent with PRM No. 75–35, a sewer district in circumstances similar to that given in the example would ordinarily request a $6 million grant and not $7.5 million. This, however, provides no proper basis for considering that there are two projects, one costing $8 million and another $2 million (20 percent Federal facility use) when in fact only one facility costing $10 million will be built. The approval of a 75 percent grant on an $8 million cost basis, although the plant project which is otherwise unobjectionable will cost $10 million to

construct, is an attempt to circumvent the requirement for a 75 percent grant for the approved cost of construction. While such an approach has been justified on the basis that it "saves" EPA grant funds, it is not authorized by the Act. In this respect, the comments made on the floor of the House of Representatives by the Honorable John D. Dingell about the conference report on S. 2770, which was enacted as Pub. L. No. 92–500, are pertinent:

> [I]t should be emphasized, as the conferees have on page 110 of their report, that section 202(a) of the bill does not give EPA discretion to provide less than the full 75 percent Federal share for waste treatment works that are "approved by the Administrator." If funds are not adequate for this purpose, then EPA has an obligation to tell Congress and request sufficient funds for this purpose. 118 Cong. Rec. 33758 (1972).

Accordingly, we are of the opinion that there is no proper basis in the Act for limiting EPA approval of proposed wastewater treatment plants to that portion of the construction cost not encompassing or attributable to Federal facility use. The Administrator, in approving 75 percent construction grants, must do so for the total otherwise unobjectionable plant construction cost. This means that under the Act, a Federal facility is responsible like other users in the particular district or locality, only for a portion of the 25 percent local share for which there is no Federal grant.

Although, as mentioned earlier, the Congress has attempted to relieve the funding impasse by specifically authorizing and appropriating military construction funds to permit a Federal facility to share in the cost of waste treatment works construction at designated sites, we do not consider that the provision in the FWPCA requiring a 75 percent Federal share for grants to upgrade such treatment works has been amended or repealed. We believe that the congressional sanction of the use of military construction appropriations to compensate for the problems caused by EPA's funding policy is a temporary expedient. Although the legislative history is sparse on this point, there is nothing to suggest an intent to repeal or modify the existing requirements for full 75 percent participation in grants made pursuant to section 202(a)(1) of the FWPCA. See *T.V.A.* v. *Hill*, 437 U.S. 153 (1978).

While we sympathize with EPA's desire to stretch its available grant funds to cover as many new treatment plants as possible, this cannot be done by shifting a part of its funding responsibility to other Federal agencies. We therefore recommend that EPA amend its regulations to eliminate the exclusion of project costs attributable to major Federal facility use.

By letter of today, we are advising the Administrator of EPA of our recommendations.

This decision contains recommendation for corrective action to be taken. Therefore, 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.

Military Construction Appropriation for HRSD

Section 201 of the Military Construction Authorization Act, 1978, Pub. L. No. 95–82, August 1, 1977, 91 Stat. 358, 363, authorizes $4,150,000 in construction funds for the "Navy Public Works Center, Norfolk, Virginia." S. Rep. No. 95–125, 95th Cong., 1st Sess. 44 (1977) on S. 1474 which was enacted as Pub. L. No. 95–82, refers to this authorization for the Public Works Center as being for "Municipal Sewer Connection." The project data sheet submitted by the Navy (DD form 1391c) in explanation of the authorization request, described the project as follows:

> Municipal Sewer Connection. The Norfolk Naval Base Complex presently conveys its sewage and industrial waste to the Hampton Roads Sanitation District (HRSD) collection system with the majority of the wastewater treated at the District's Army Base Treatment Plant. This plant only provides primary treatment prior to discharge of effluent to the Elizabeth River. The HRSD must upgrade its treatment facilities to a minimum of secondary treatment to meet water quality standards. This project provides funds for the Navy's proportionate share of the cost for modification to the Army Base Treatment Plant as specified by EPA.

We are informed by the Navy that in the absence of agreement with HRSD, the appropriation for the NPWC, Norfolk municipal sewer connection has not been obligated. As mentioned earlier, Navy relies on our decision, *Department of Air Force—Sewage Utility Contracts*, B–189395, April 27, 1978, as precluding renegotiation of its contract with HRSD to permit it to contribute the Federal share of the construction costs excluded by EPA without some additional consideration or benefit, such as a lower services rate based on the Navy's contribution to HRSD's capital costs. HRSD will not accept this proposal. It feels that it is entitled to 75 percent of its construction costs, regardless of which Federal pocket it comes from. It thus regards the Navy contribution as a supplementary grant, for which no further consideration is required.

Ordinarily, we would not regard the $4,150,000 appropriated to Navy for construction within the HRSD as grant funds. Authority to make grants must be specifically provided in the legislation and should not be assumed. In this case, however, the events giving rise to the

making of this appropriation (see discussion of congressional intent in next section) tends to support HRSD's characterization of a 75 percent contribution from the Navy as a supplementary grant. We therefore do not think that our decision, B–189395, *supra*, is applicable in the present circumstances. In that decision, the Air Force had not obtained specific authorizations and appropriations to make the requested capital contributions. The only authority it would have had to use its Operation and Maintenance funds for that purpose would have been a provision in its utility contracts requiring all users to contribute to the costs of upgraded services. Since modification of its existing contracts to provide for such a contribution would have been necessary, the Air Force properly applied ordinary contract principles and declined to agree to such a modification without obtaining additional benefits for the Government.

In the instant case, no modification of the existing contract is necessary. The Navy has been given independent authority by the Congress to make the requested capital contribution and the necessary funds to implement it. It need not draw on O&M funds available to pay service charges to fund these capital costs; the appropriation was made to its military construction account and would be available even if no service contract were presently in effect.

As we understand it, HRSD is asking only for the EPA "shortfall;" *i.e.*, 75 percent of the costs of the project attributable to Navy use of the facility. The remaining 25 percent will be funded in the same manner as the 25 percent non-Federal share for the rest of the project. The non-Federal share of the costs will be passed on proportionately to all users, including the Navy, as part of the service rate. If Navy contributes only the Federal share which would have been contributed by EPA but for its funding policy, we see no basis for Navy's allegations that the utility rate discriminates against a Federal installation because it doesn't recognize its capital contribution. Had EPA furnished the full 75 percent Federal share, Navy would not claim that the rates were discriminatory. The present appropriation merely provides another funding source for part of the same Federal contribution. There is no windfall to the facility and no corresponding drain on Federal funds, viewed as a single source. We therefore believe that Navy is free to use its appropriation to cover 75 percent of the costs attributable to the Navy of the sewage treatment project at HRSD.

Military Construction Appropriation for Honolulu

Section 201 of the Military Construction Authorization Act, 1977, Pub. L. No. 94–431, September 30, 1976, 90 Stat. 1349, 1352,

authorized $12,836,000 for Naval Air Station (NAS), Barbers Point, Hawaii. The Military Construction Project Data form DD 1391, stated in pertinent part as follows:

> Municipal Sewer Connection. Present on-base sewage treatment facilities at NAS Barbers Point and at Iroquois Point Housing Area provided only primary treatment with chlorination prior to discharge in a shallow water outfall in violation of existing water quality standards. This item constructs collection lines, pump stations and includes the connection charge to connect the Navy's facilities into the $90 million Honoliuli [sic] Regional System * * *. The existing treatment plants will be demolished.

The form lists a connection charge of $9,039,000 which includes a prorated portion of the Honuliuli sewer treatment plant.

The Military Construction Appropriation Act, 1977, Pub. L. No. 94–367, July 16, 1976, 90 Stat. 993, made an appropriation of $549,935,000 for the Navy, "as currently authorized in military public works or military construction Acts * * * to remain available until expended."

Navy contract No. N62742–69–C–0020 provides for sewer service for certain naval facilities already included in the present Honolulu system. With respect to these services, the issues are similar to those involved in the HRSD situation, with one important exception. According to the Principal Deputy Assistant Secretary of the Navy, Honolulu is insisting that the Navy contribute 100 percent (rather than 75 percent) of the Navy's share of the capital costs and "has refused to consider any basis for charges other than the user charges provided in Ordinance 4611."

The Navy is willing to make the 100 percent payment but has been attempting, unsucessfully, to negotiate a separate user charge schedule that reflects all the costs associated with the operation and maintenance of the Navy's portion of the system. It does not wish to contribute to the non-Federal share of the costs of construction and of operation and maintenance of the remainder of the system. It regards this special rate as reasonable consideration for its 100 percent contribution. Without this rate adjustment, the Navy believes it would be subjected to discrimination because it would be paying more money for its sewer service than any other customer.

We do not think that the requirement to participate in the ordinance user charge discriminates against the Government, per se, even though a portion of the charges involves a capital contribution for the non-Federal share of the project costs. While the Navy evidently regards a reduction in its service rate as the most acceptable consideration, other compensating benefits which do not involve a reduction in rates could be negotiated as well. For example, we note that the Navy wishes the Honolulu plant to serve several Navy facilities which

are not part of the current system, and which are not covered in its existing contract with Honolulu. Extension of service to these additional facilities might also provide the additional consideration necessary to support a 100 percent Government contribution.

Although it is not entirely clear from the legislative language and its history, we do not think that the Congress intended the appropriation for the Honolulu district to do more than compensate for the shortfall resulting from EPA's funding policies. It is true that there are more dollars earmarked for the Honolulu treatment plant than are required to pay only 75 percent of the Navy's share of the costs. It is also true that neither the Navy budget submission nor the Committee reports themselves refer to the EPA funding policy. We are relying instead on the history of this funding authorization—the fact that prior to EPA's announced funding policy, there were no independent appropriations made for a Federal facility's share of the costs of upgrading sewer treatment works to meet FWPCA standards, plus the fact that the Office of Management and Budget by letter of December 12, 1975, advised DOD that the problems caused by the EPA grant funding policy "are already on their way toward solutions." Navy was encouraged to seek specific appropriations for each wastewater treatment facility project affected by the policy where the lack of funding was having an adverse effect on service to Navy installations.

We are reluctant, in the absence of any evidence in the legislative history, to conclude that the Congress intended, through the mechanism of a military construction appropriation, to alter so significantly the cost sharing percentages established in existing law or to create an entirely new "grant" program with 100 percent Federal funding for wastewater treatment plants. Therefore, we conclude that any contribution of capital costs by the Navy, over and above the 75 percent share which the Government would have assumed but for the EPA funding policy, must be offset by a corresponding benefit to the Government.

In summary, while we do not believe that EPA's funding policy is authorized by law, the Congress has chosen to make up the shortfall in construction grant support of wastewater treatment facilities by specifically appropriating funds to cover the Navy's share of the costs. If Navy contributes no more than 75 percent of the costs attributable to its use of a treatment system, no further consideration to offset this contribution is necessary. If it is required to or chooses to contribute more than 75 percent of the costs, it should insist on an additional benefit to the Government. The exact nature of such consideration is a matter for negotiation between the parties.

[B-194948]

Pay—After Expiration of Enlistment—Confinement, etc. Periods—Review of Court-Martial Pending—Parole Status—Acquittal Effect

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

Set-Off—Pay, etc. Due Military Personnel—Private Employment Earnings—Members in Parole Status

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

Matter of: Mr. David G. Saulter, October 4, 1979:

This action is in response to a request for advance decision from the disbursing officer, Marine Corps Finance Center, on several questions regarding the legality of crediting pay and allowances to the account of former Marine Corps Sergeant David G. Saulter. This matter has been assigned Control No. DO-MC-1319 by the Department of Defense Military Pay and Allowance Committee.

The reported facts are that Mr. Saulter was arraigned on August 7, 1975, and tried by General court-martial on August 22, 1975, he was found guilty and sentenced to be confined at hard labor for 2 years, to forfeit all pay and allowances, to be reduced to the pay grade of E-1 and to be discharged from the service with a bad conduct discharge. On September 19, 1975, that sentence was approved by the convening authority.

On January 9, 1976, while serving the confinement portion of his sentence, the member's enlistment expired. Subsequently, Mr. Saulter was transferred to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, to serve out the remainder of his period of confinement. While there, he applied for parole, and on December 10, 1976, he was released and sent home in an "Adjudged Parole" status, pending completion of appellate review of his case. That parole status ended August 20, 1977, and he was immediately placed in an indefinite excess leave status awaiting completion of appellate review. On September 28, 1978, the finding of guilty and the sentence imposed were

set aside and all rights, privileges and property of which he was deprived by virtue of such findings were restored to him. Mr. Saulter was honorably discharged from the service on December 15, 1978, without being returned to a duty status, and received pay and allowances through December 10, 1976, the date of inception of his parole period.

Based on the foregoing, the following specific questions are asked:

a. Is Mr. Saulter entitled to pay and allowances for the period of "Adjudged Parole"?

b. If the answer to the above question is in the affirmative, is there any provision to recoup a difference between his military pay and allowances and his civilian pay entitlements?

c. If it is determined that he is not entitled to pay and allowances for the period of "Adjudged Parole," on what day would payment commence for the leave Mr. Saulter accrued through the date he was released on parole?

It is a rule of long standing that the pay and allowances of an enlisted person whose term of service expires while he is in confinement awaiting trial by court-martial or appellate review of his conviction terminate on the date of the expiration of his term of enlistment and do not accrue to him while subject to military control and in confinement thereafter, unless he is acquitted. In that event, the individual is considered to have been held for the convenience of the Government and entitled to military pay and allowances until he is discharged. 30 Comp. Gen. 449 (1951); 37 *id.* 228 (1957). This rule is subject to modification in those cases where an enlisted member, sentenced by a court-martial to dishonorable or a bad conduct discharge, and who is retained in the service after the expiration of his enlistment, is released from confinement and restored to duty pending completion of appellate review. In such a case, the enlisted member is entitled to pay and allowances while performing duty after restoration to duty, even though upon appellate review the sentence of dishonorable or bad conduct discharge is ordered executed. See 33 Comp. Gen. 281 (1953) and 37 *id.* 228, *supra.*

Section 952 of title 10, United States Code, authorizes the Secretaries of the several services to provide a system of parole for offenders who are confined in military correctional facilities as a result of court-martial convictions and who were at the time of their offenses subject to the authority of that Secretary.

Secretary of the Navy Instruction 5815.3D, dated February 7, 1977, issued pursuant to that authority, in part establishes the rules under which Navy and Marine Corps prisoners may be paroled. The term "parole," as used therein, is defined in paragraph 105 as being:

A form of conditional release from confinement in a military correctional facility granted to carefully selected individuals to help them * * * make the transition from controlled living in confinement to a life of normal liberty in a civilian community.

If an individual is granted parole, he is to be issued a "Certificate of Parole," Form NAVSO 1640/4 (Rev. 5–76). Contained on the reverse side of that form is an agreement which the prospective parolee must consent to by his signature. Listed among the agreement items are such statements as: (a) he will go to his parole destination without delay; (b) he will immediately report to his probation officer; (c) he will remain within the limits of his parole destination unless given written permission by his probation officer to go elsewhere; (d) he will report monthly to his probation officer; and (f) he will not associate with persons of bad or questionable reputation. The agreement also contains the statement that the parolee further agrees that violation of any of these or other conditions stated therein will subject him to apprehension and return to confinement.

It is evident from the foregoing that an individual enjoys more freedom of action in a parole status than he would under the constraints of actual confinement. However, when these limitations on freedom are considered in terms of the authority by which the military can and does exercise constraints over the parolee, we believe a distinction between confinement and parole is without essential difference in this case. If an individual is permitted to act without supervision and control, if he is under no obligation to, for example, military authority, and if he is unfettered as to time, location or style of living, only then could it be said that the military had no control over him. However, so long as restraints can be and are exercised by military authority, it is our view that parole is not of sufficient character to divorce itself from the restraint of confinement for pay and allowance purposes. Compare the recent decision of the Court of Claims in the case of *Cowden* v. *United States*, Ct. Cl. No. 242–78, decided June 13, 1979, wherein it was held that an individual who was court-martialed, convicted, confined beyond his term of service and then paroled, and where his conviction was overturned on appeal, was entitled to military pay and allowances for the entire time after the expiration of his term of service, including his period of parole.

Therefore, it is our view that Mr. Saulter is entitled to pay and allowances from December 11, 1976, to August 20, 1977, the period of his parole, and in addition, payment for leave accrued prior to that latter date, not to exceed 60 days, if otherwise correct. 37 U.S.C. 501 (1976).

On the question of setoff of civilian earnings during his parole time, Instruction 5815.3D specifically provides in paragraph 1005 that unless an employment waiver is granted, "no prisoner will be released on parole until satisfactory evidence has been furnished that the parolee will be engaged in a reputable business or occupation." Since the involuntary securing of gainful employment is established as a pre-

requisite of parole, it is our view that it would be improper to set off civilian earnings for any parole period where the same period subsequently becomes a period of entitlement to military pay and allowances, in the absence of a statute so authorizing. The only exception to this would be if the parolee engaged in Federal civilian employment which has long been viewed as incompatible with military service. 46 Comp. Gen. 400 (1966), and 49 *id.* 444 (1970). If that is the case, the Federal civilian salary should be set off against the military pay and allowances due for the same period.

The questions are answered accordingly.

[B–194241]

Leaves of Absence — Lump-Sum Payments — Status — Period of Payment Not Service

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

Officers and Employees—Reemployment or Reinstatement Rights

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

Matter of: James L. Davis, Jr.—Social Security Administration Administrative Law Judge—Within-Grade Salary Increase—Credit for Annual Leave, October 9, 1979:

This decision is in response to a claim by James L. Davis, Jr., Administrative Law Judge (ALJ), Department of Health, Education, and Welfare (HEW), Social Security Administration (SSA), for a within-grade salary increase and credit for annual leave on his service computation date.

The claimant alleges he is entitled to backpay because he was not given the benefit of the highest previous rate rule when temporary GS–14 Black Lung Hearing Examiners, who were given permanent GS–13 ALJ positions, continued in the Black Lung program. He also believes that he should have been advanced to step 4 in GS–14 earlier than he was because he should have been given service credit for 5½ weeks, the period covered by a lump-sum payment for annual leave in a prior GS–14 position with the Selective Service System when he was separated in a reduction-in-force action effective June 30, 1973. In addition, he alleges he should have been employed by HEW prior to the date he was actually employed because he had reemployment rights. No action will be taken by us in connection with that part of

the claim based on the highest previous rate rule since HEW has advised that it will make certain pay adjustments as explained below. The remaining parts of the claim are disallowed for the reasons set forth after the explanation of the HEW action.

Our Office has previously considered similar claims of SSA Administrative Law Judges in our decision of June 11, 1979, *Milton Morvitz, et al.*, B-192562. That decision concerned ALJs who had served as temporary GS-14 Black Lung Hearing Examiners. They had been given permanent GS-13 positions pursuant to Pub. L. No. 92-603 (42 U.S. Code 1305 note) but continued to hear Black Lung cases and were later appointed to new GS-14 Administrative Law Judge positions as authorized by Pub. L. No. 94-202, 42 U.S.C. 1383. We held that the ALJs were not entitled to retroactive pay based on application of the highest previous rate rule because its use is discretionary and the rate in GS-13 of each employee was properly set in accordance with the agency's regulations. We also held that the ALJs should be given credit for the time spent in GS-14 Black Lung Hearing Examiner positions toward within-grade increases in their GS-14 ALJ temporary positions. The basis for this holding was that although the employees had been given permanent GS-13 positions, they were immediately placed on leave without pay in GS-13 and reassigned to the new GS-14 positions and such action did not start new waiting periods.

The record indicates that ALJ Davis received a within-grade increase on October 15, 1972, from GS-14, step 2, to GS-14, step 3, while employed as a General Attorney, GS-905-14, with the Selective Service System, Atlanta, Georgia. He was separated from his Selective Service position by a reduction in force effective June 30, 1973. He received severance pay and a lump-sum payment for 174 hours of accrued annual leave and 8 hours for a holiday. ALJ Davis was then employed on March 4, 1974, by the Office of Hearings and Appeals, HEW, under an excepted appointment, not to exceed December 31, 1974, as a GS-935-14, step 3, Administrative Law Judge (temporary), under the authority of Pub. L. No. 93-192, 87 Stat. 746 (1973), 42 U.S.C. 421 notes. His appointment was extended several times by subsequent legislation.

ALJ Davis received a within-grade increase to GS-14, step 4, on June 23, 1974, and a subsequent increase to GS-14, step 5, effective June 20, 1976. It was later determined by HEW that this increase was in error because it was felt that the employees who had been given permanent GS-13 positions and temporary GS-14 ALJ positions received an equivalent increase in pay under the provisions of 5 U.S.C. § 5335(a)(A) (1976), and were required to begin new waiting periods.

Thus, ALJ Davis' within-grade increase was canceled on September 3, 1976.

As stated above, our decision in *Milton Morvitz, et al.* held that employees who received permanent GS–13 positions but continued to hear cases in the Black Lung program as temporary GS–14 ALJs were in fact reassigned and, therefore, entitled to credit for all the time spent in grade GS–14 toward an in-grade raise. Based on this decision, HEW has advised that ALJ Davis will now be entitled to a within-grade increase effective June 20, 1976, and action will be taken to make the necessary correction in his record to show that fact. The HEW also advises that any subsequent records that may be affected by the change will also be corrected, and ALJ Davis will receive the payments due him as a result of these corrections. It should be pointed out, however, that HEW waived the portion of ALJ Davis' payment from June 20 to September 3, 1976, under the provisions of 5 U.S.C. § 5584 (1976). That provision provides that the Comptroller General may waive a claim, the collection of which would be against equity and good conscience and not in the best interests of the United States. The authority under that statute has been delegated to the head of an agency in some circumstances. 4 C.F.R. § 91.4(b) (1978). Thus, ALJ Davis would not be entitled to payment at the rate for GS–14, step 5, for the period covering the waiver since he has previously been paid at that rate.

ALJ Davis also claims credit for his paid annual leave on his service computation date. Such entitlement, if allowed, would entitle him to within-grade increases prior to the dates they were actually made. The authority for lump-sum payments of annual leave is contained in 5 U.S.C. § 5551 (Supp. III, 1973) which provides, in pertinent part, as follows:

> (a) An employee * * * who is separated from the service * * * 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. *The lump-sum payment is considered pay for taxation purposes only.* [Italic supplied.]

We have long held that the employee's right to a lump-sum payment of annual leave accrues to the employee at the time of separation from service and that the period covered by a lump-sum leave payment is not counted as civilian Federal service. *John L. Swigert, Jr.*, B–191713, May 22, 1978; 26 Comp. Gen. 102, 106 (1946); 24 *id.* 526 (1945); FPM Supp. 990–2, Book 550, subchapter S2–3a. Note also that the plain language of the statute states that the lump-sum payment is considered pay for taxation purposes only. Therefore, the period covered by the lump-sum payment for unused annual leave may not be considered service to advance the granting of a step increase to ALJ Davis.

Finally, ALJ Davis also alleges that he should have been employed at an earlier date by HEW. However, HEW states that it is not aware of any obligation to employ him earlier nor is there any evidence of arbitrary action with respect to his employment. Appointing officers are given great discretion in filling vacancies in the competitive service. 5 C.F.R. § 330.101 (1978). Further, Civil Service Commission (now Office of Personnel Management) Regulations provide that an employee may appeal an alleged violation of reemployment rights to it within a reasonable time. See 5 C.F.R. §§ 330.202, 330.203. Thus, ALJ Davis could have protested to the Civil Service Commission any alleged violation of reemployment rights at the time of his employment by HEW in 1974. Since there is no evidence of any determination by the Commission that he should have been employed at an earlier date by HEW, there is no basis for granting any service credit during ALJ Davis' break in service or pay adjustment.

[B–193684]

Bidders — Qualifications — Experience — Service Contracts — Elevator Maintenance, etc.

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

Matter of: Suburban Elevator Company, Inc., October 11, 1979:

Suburban Elevator Company, Inc. (Suburban) protests the proposed award of a contract by the General Services Administration (GSA) to State Elevator Company, Inc. (State), under invitation for bids (IFB) No. 03C8116301 for elevator maintenance services at the Social Security Payment Center in Philadelphia, Pennsylvania. The IFB was a total small business set-aside. Suburban maintains that State is nonresponsible because it does not meet certain definitive responsibility criteria contained in the IFB relating to a bidder's experience.

The IFB specifications contain the following provisions relating to the qualifications of a successful bidder:

1–1 *SCOPE:*

* * * in order to qualify to the General Services Administration, in addition to the other requirements herein provided, [the bidder] must be prepared upon demand to prove to the satisfaction of GSA, that he has maintained, for a minimum period of three (3) years, equipment similar to types of equipment covered by this contract.

* * * * * * *

1–2 *MANNER AND TIME OF CONDUCTING THE WORK:*

* * * The Contractor and maintenance personnel who will maintain the elevators must be especially trained and have adequate experience in the maintenance of these particular types of elevators. The contractor will be required to furnish proof of this training and experience to the satisfaction of the Government. * * *

The IFB "Schedule of Requirements" also provides that: "SUCCESSFUL BIDDER WILL BE REQUIRED TO FURNISH A CERTIFICATE OF PROFICIENCY OF TRAINING ON THIS TYPE OF EQUIPMENT."

Finally the solicitation states:

Offers will be considered only from responsible organizations or individuals now or recently engaged in the performance of building service contracts comparable to those described in the attached schedule.

Suburban asserts that State is nonresponsible because it has never maintained Haughton Model 5ELC elevators controlled by a Haughton Model 1092 Integrated Circuitry Supervisory System (IC) nor has it maintained similar equipment for at least 3 years. Suburban contends that the equipment at the Social Security Payment Center is "generations" ahead of any equipment ever maintained by State.

GSA argues that a bidder, to be found responsible under the cited provisions, must comply with either paragraph 1–1 or 1–2 of the specifications, but not both. GSA contends that State satisfies the experience requirement of paragraph 1–1 because it has maintained elevators similar to those at the Payment Center. In this regard, GSA indicates that State has serviced elevators at the U.S. Naval Hospital in Philadelphia and the Norristown State Hospital which, in GSA's opinion, have the same operational "philosophy" as those at the Payment Center.

We do not agree with GSA's interpretation of the IFB. Although the four requirements spread throughout the solicitation are confusing, they clearly require a firm to show *both* that it has maintained similar equipment for 3 years (paragraph 1–1) and that it and its personnel have been especially trained on the type of elevator to be maintained under the contract (paragraph 1–2 and "Schedule of Requirements"). (It is not completely clear whether the "CERTIFICATE OF PROFICIENCY OF TRAINING" required by the IFB will satisfy the requirement of paragraph 1–2 which requires proof of training on the "particular types" of elevator to be maintained or whether other proof would be needed.) Nothing in the solicitation, however, supports GSA's view that the requirements of paragraphs 1–1 and 1–2 are intended to represent alternative criteria. In fact, paragraph 1–1 states that it is to be applied "in addition to the other requirements herein provided * * *."

Consequently, we believe GSA should reexamine the question of State's responsibility, since there is nothing in the record which indicates that State has offered the certification or any other evidence of training. Neither does the record indicate that State had provided GSA with evidence of *3 years* of experience as required by paragraph 1-1. If State is unable to supply such evidence to GSA's satisfaction, the matter should be referred to the Small Business Administration, which has conclusive authority to determine the responsibility of small business. 15 U.S.C. § 637 (1976 and Supp. I 1977); *J. Baranello and Sons*, 58 Comp. Gen. 509 (1979), 79-1 CPD 322; *U.S. Eagle, Inc., et al.*, B-193773, August 2, 1979, 79-2 CPD 73. Alternatively, if GSA did not intend to impose two distinct responsibility criteria, it would appear that the IFB is unduly restrictive of competition. In that event, the IFB should be canceled and the requirement resolicited under clear specifications which set forth only GSA's minimum needs. *Haughton Elevator Division, Reliance Electric Company*, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

[B-193874]

General Accounting Office—Jurisdiction—Contracts—Small Business Matters—Procurement Under 8(a) Program—Scope of Review

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

Contracts—Architect, Engineering, etc., Services—Contractor Selection Base—"Brooks Bill" Application—Small Business Concerns—Procurement Under 8(a) Program

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

Matter of: Vector Engineering, Inc., October 11, 1979:

Vector Engineering, Inc. (Vector), protests the award of a contract by the Department of Commerce (Commerce) under request for proposals (RFP) No. NA79SAM0618 VA. The contract was advertised in the Commerce Business Daily (CBD) of December 14, 1978, as a 100% 8(a) set-aside for architect and engineering (A&E) services for the technical support of the National Oceanographic and Atmospheric Administration's (NOAA's) facilities construction program.

The CBD notice stated:

R—ENGINEERING ANALYSIS, SPECIALIZED CONSULTATION, COST ESTIMATES AND RELATED A & E SERVICES, for support of NOAA's con-

struction of facilities program. 100% set aside for 8A Certified Firms. * * * Request RFP NA79SAM0618VA in writing to the following address with *due date 5:00 p.m. EST, 12-18-78;* Department of Commerce Procurement Office, Washington, D.C. 20230, Attn: Rm. 6518, NA79SAM0618 * * *.

Vector protested to Commerce on the grounds that an 8(a) set-aside was inconsistent with the requirement that contracts for A&E services be negotiated in accordance with the specific criteria set forth in the Brooks Bill, 40 U.S.C. § 541 *et seq.* (1976), and that Commerce did not have delegated authority from the Small Business Administration (SBA) to solicit 8(a) contractors. Commerce agreed with the latter contention and SBA nominated 8(a) firms for the contract without regard to the CBD advertisement or the requirements of the Brooks Bill. Vector has since withdrawn this objection to the proposed award.

As its basis for protest to our Office, Vector contends that the general criteria used to establish eligibility for participation in the 8(a) program, established by section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) *et seq.* (1976), are inconsistent with the specific criteria in the Brooks Bill and therefore that the SBA cannot lawfully authorize an 8(a) set-aside for A&E services. We disagree.

The position of Commerce and SBA, as indicated by the record, is that SBA has independent statutory authority pursuant to section 8(a) to contract with Federal agencies and to subcontract with socially and economically disadvantaged business concerns, and that the Brooks Bill does not apply to contracts negotiated pursuant to SBA's 8(a) authority.

We note at the outset the general rule that in view of the broad discretion accorded SBA under 8(a) to enter into contracts with procuring agencies for the purpose of letting subcontracts, this Office will not review decisions to set aside procurements under the 8(a) program absent a showing of fraud on the part of Government officials or such willful disregard of the facts by Government officials as to necessarily imply bad faith. *Automation Information Data Systems, Inc.*, B-185055, June 15, 1976, 76-1 CPD 377. We will review such set-aside decisions, however, where the question is whether relevant rules and regulations have been followed by the agencies involved. *Delphi Industries, Inc.—request for reconsideration*, B-193212, January 30, 1979, 79-1 CPD 70. Accordingly, we believe that our review is appropriate in the instant case.

Prior to 1978, section 8(a) of the Small Business Act authorized SBA to enter into contracts with Federal agencies for the purchase of equipment, supplies, materials or services. SBA was empowered by 8(a) to let subcontracts to small business concerns and others to perform such contracts. SBA, by administrative regulation at 13 C.F.R. § 124 *et seq.* (1978), used the 8(a) authority to channel Federal

contracts to socially or economically disadvantaged small business concerns.

The 1978 amendments to section 8(a), Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757, were designed in part to give a statutory basis to the 8(a) program. *See generally* S. Rep. No. 95-1070, 95th Cong., 2d Sess. 13, reprinted in 1978 *U.S. Code Cong. & Ad. News* 3835, 3848. While SBA's authority to channel Federal contracts by regulation to socially and economically disadvantaged business concerns had been upheld in *Ray Baille Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied* 415 U.S. 914 (1974), Congress felt that by exercising direct legislative control over the 8(a) program it could insure that the program would more readily attain its goal of developing strong and viable disadvantaged small businesses. S. Rep. No. 95-1070, *supra*, at 14; 1978 *U.S. Code Cong. & Ad. News* at 3848. Congress also expressed concern that the 8(a) program needed to focus on the development of minority businesses in the "more sophisticated kinds of industries including manufacturing, construction and professional services." S. Rep. No. 95-1070, *supra*, at 11; 1978 *U.S. Code Cong. & Ad. News* at 3845.

The 1978 amendments to section 8(a) thus reflect a pervasive Federal policy of encouraging and fostering business ownership by socially and economically disadvantaged persons and promoting the viability of such businesses by providing contract, financial, technical and management assistance.

Pursuant to Pub. L. No. 95-507, *supra*, the SBA is given broad statutory authority to enter into contracts with Federal agencies and to let subcontracts to socially and economically disadvantaged business concerns to attain the social policies now set forth in § 631. The amendments to 15 U.S.C. § 637(a)(1) in section 202 of the 1978 statute, 92 Stat. 1761, provide:

> It shall be the duty of the Administration [SBA] and it is hereby empowered, *whenever it determines such action is necessary or appropriate*—
>
> (A) to enter into contracts with the United States Government and any department, agency or officer thereof obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible *to perform any specific Government procurement contract* to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. * * *
>
> (C) to arrange for the performance of such procurement contracts by *negotiating or otherwise letting subcontracts* to socially and economically disadvantaged small business concerns for construction work, services * * * *as may be necessary to enable the Administration to perform such contracts.* [Italic supplied.]

The thrust of SBA's 8(a) program is in large measure to insulate participants from the constraints of price competition with estab-

lished firms. Price, therefore, is not a factor in the selection of an 8(a) firm for a subcontract award by SBA, 13 C.F.R. 124.8–2 (1979), and SBA often provides its subcontractors with additional funds (business development expenses) over and above the contract price which it will obtain under its contract with the purchasing activity. *Kings Point Manufacturing Company, Inc.*, 54 Comp. Gen. 913 (1975), 75–1 CPD 264. Thus normal competitive procurement practices would, of necessity, be required to give way to achieve the legislatively stated goal "to promote economic viability" of firms participating in the 8(a) program.

However, the Brooks Bill selection procedure is itself a special deviation from the traditional method of procurement in that competence, not price, is a basic selection criterion. In this respect, we do not equate "economic or social disadvantage" with the lack of professional competence, and therefore we see no inconsistency between the Brooks Bill selection procedures and the 8(a) program. Indeed at the time the bill was debated in the Senate, it was the view of the bill's supporters that this selection criterion would enhance the opportunities for smaller firms to obtain Government contracts for A&E services because the emphasis on low price was removed. 118 Cong. Rec. 36180 *et seq.*, October 14, 1972.

In B–129709, October 14, 1976, we considered the legality of small business set-asides for A&E services generally in relation to the Brooks Bill, stating:

> It is clear that the Brooks Bill, which makes no reference to small business set-asides, manifests a Congressional intent that A&E services be acquired through competition that will produce the highest professional qualifications and competence. As a result, * * * some procuring agencies believe that set-asides would be incompatible with the Brooks Bill. Other agencies, however, believe that the Bill and the Small Business Act can be read together so as to permit set-asides.
>
> * * * * * * *
>
> It is a basic principle of statutory construction that statutes are presumed to be consistent with each other. 73 Am. Jur. 2d, Statutes § 254; 54 Comp. Gen. 944 (1975); * * *. Although a small business set-aside of an A&E procurement might preclude award to a firm that would be found to be the most highly qualified in an unrestricted procurement, we think the setting aside of an appropriate number of A&E procurements for small businesses and the awarding of a contract to the most highly qualified small business firm would not be inconsistent with the thrust of the Brooks Bill, which is to secure award of A&E contracts on the basis of technical excellence without regard to competitive pricing.

We believe that the 8(a) program should be similarly viewed, i.e., it is not inconsistent with the Brooks Bill to procure A&E services under the SBA 8(a) program.

In this regard, we also note that the Brooks Bill defines the term "agency head" to mean the "Secretary, Administrator, or head of a department, agency or bureau of the Federal Government," 40 U.S.C. 541(2), a definition which would include the Administrator, SBA.

15 U.S.C. 533(a). The Brooks Bill also declares it to "be the policy of the Federal Government * * * to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification" and prescribes the procedures to be followed by an *agency head* in the selection of A&E firms to achieve the desired result. We see nothing in the 1978 amendments to the Small Business Act (15 U.S.C. 631 note) which would exempt the Administrator, SBA, from the constraints of the Brooks Bill in the award of a contract for A&E services. Therefore, contrary to the Commerce and SBA position, within the limitations of eligibility for participation in the 8(a) program, and to the extent the degree of competition required by 40 U.S.C. § 543 for selection of a firm for negotiation is reasonably available, award should be made on the basis of the criteria of the Brooks Bill and its implementing regulations. In our opinion, this conclusion recognizes the independent statutory authority of the Administrator to establish the 8(a) program, *Ray Baille Trash Hauling, Inc.* v. *Kleppe*, *supra*, yet remains consistent and harmonious with the basic policies established in the Brooks Bill.

In summary, we believe that the selection of an A&E under the 8(a) program, in compliance with the *special* statutory mandate for the selection of A&E contractors is not inconsistent with the basic premise upon which the 8(a) program is founded—to assist socially and economically disadvantaged persons achieve a competitive position in the market place. 13 C.F.R. 124.8–1(b) (1979). The statutory selection criteria for A&E contractors is not found in any other procurement statute and thus reflects what we believe to be a special procurement policy which was not intended to be limited without a specific statutory exception or other evidence of Congressional intent. *Cf.* 37 Comp. Gen. 271, *supra;* 38 *id.* 326 (1958); 49 *id.* 219 (1969). In this respect, there is no evidence, either in the Small Business Act itself or in the legislative history that the Congress intended to abrogate the Brooks Bill selection criteria in the procurement of professional A&E services under the 8(a) program. Thus, except in those instances where the Congress has clearly *mandated* a contrary result, e.g., *Boyer, Biskup, Bonge, Noll, and Scott & Associates, Inc.*, 55 Comp. Gen. 765 (1976), 76–1 CPD 110 (case involving the award of an A&E contract without regard to the Brooks Bill under authority of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1976)), the award of a contract for A&E services must, in our view, be governed by the policy expressed in the Brooks Bill even though the zone of competition eligible for the award may be legally limited by other considerations.

The protest is denied.

[B-195205]

Officers and Employees—Transfers—Service Agreements—Failure to Fulfill—Absent Without Leave Status

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

Matter of: Leon C. Shelley—Relocation Expenses—Service Agreement—Creditable Service, October 11, 1979:

Mr. H. Larry Jordan, an authorized certifying officer at the National Finance Center, U.S. Department of Agriculture, has requested our decision whether Mr. Leo C. Shelley, a former employee of the Soil Conservation Service, U.S. Department of Agriculture, may be reimbursed for certain travel and relocation expenses in connection with his official change of duty station in June 1977. Our decision is that Mr. Shelley may not be reimbursed because he did not fulfill the 12 months Government service agreement mandated by 5 U.S.C. § 5724 (i) (1976).

On May 10, 1977, Mr. Shelley was authorized to change his official station from Coeur d'Alene, Idaho, to Meridian, Idaho. At that time, Mr. Shelley signed a service agreement in which he agreed to remain in Government service for a period of 12 months following the effective date of his transfer, unless he was separated for reasons beyond his control and acceptable to the Soil Conservation Service. The effective date of Mr. Shelley's transfer was June 5, 1977. In a letter dated July 31, 1977, Mr. Shelley announced his intention to apply for disability retirement as soon as possible, and according to the administrative record, he entered a sick leave status on August 7, 1977, pending the outcome of his application for disability retirement.

Mr. Shelley exhausted his accrued sick and annual leave and he was authorized by the agency to enter a leave without pay status beginning November 28, 1977. The disability retirement request was denied by the Civil Service Commission on April 11, 1978, and the agency requested Mr. Shelley to report back to work. However, when Mr. Shelley stated that he was appealing the adverse determination on his disability retirement application, the agency rescinded this request and authorized an extension of leave without pay for Mr. Shelley through June 1, 1978. In addition, the agency advised Mr. Shelley that it would not grant him any additional period of leave without

pay until he provided certain evidence concerning the status of his appeal.

The agency was informed by letter from the Civil Service Commission dated May 23, 1978, that Mr. Shelley's request for reconsideration of the determination on his disability retirement application had been denied. In view of this and since Mr. Shelley had not replied to the request for supporting materials, the agency by letter of May 25, 1978, directed him to report for duty on June 2, 1978. The agency further advised Mr. Shelley that if he failed to report for duty he would be placed in an absent without leave status which would result in the initiation of appropriate adverse action proceedings. Mr. Shelley requested, by letter dated May 26, 1978, an extension of leave without pay from June 1, 1978, to July 1, 1978. The agency denied this request based on the conditions set forth in its May 25, 1978 correspondence, and again ordered Mr. Shelley to report for duty on June 2, 1978, or be placed in an absent without leave status.

Mr. Shelley did not report for duty on June 2, 1978. As a result, by letter dated July 17, 1978, the agency informed Mr. Shelley that it was initiating a proposal for adverse action to remove him from employment for failure to report to duty as directed. Mr. Shelley subsequently responded to this correspondence by resigning his position with the Soil Conservation Service effective August 1, 1978.

Under the provisions of 5 U.S.C. § 5724(i) an agency may pay specified travel and relocation expenses when an employee is transferred within the continental United States only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless the employee is separated for reasons beyond his control that are acceptable to the agency concerned. The statute further provides that if the employee violates the service agreement, the money spent by the United States for the expenses and allowances is recoverable from the employee as a debt due the United States. In the present case, the controlling issue is the computation of creditable service for purposes of fulfilling the mandate provided in 5 U.S.C. § 5724(i) for 12 months of Government service.

The effective date of Mr. Shelley's transfer was June 5, 1977. Thus, to comply with the statutory requirements relating to reimbursement for travel and relocation expenses, Mr. Shelley was required to remain in Government service through June 4, 1978, unless separated under conditions which are not applicable here. The record shows that after periods of authorized sick and annual leave, followed by extended periods of authorized leave without pay, Mr. Shelley refused to report for duty on and after June 2, 1978, and was placed in the status of "absent without leave" until his resignation on August 1, 1978.

The certifying officer sent the agency a copy of our decision B–184948, November 18, 1975. In that decision we evaluated a particular situation where a transferred employee executed a service agreement by which he agreed to remain in the Government service for 12 months subsequent to reporting at his new duty station. After reporting, the employee was granted leave without pay which was later extended, at his request, beyond the expiration of the agreed period of service. Although the employee was thereafter separated for abandoning his position, this Office held that the employee was not liable for repayment of a travel advance to the extent that relocation expenses incurred by him incident to the transfer were proper and payable since time in a leave without pay status is considered Government service within the meaning of 5 U.S.C. § 5724(i). In so holding we adhered to our earlier decision in 45 Comp. Gen. 680 (1966) that an employee on leave without pay remains in the Government service within the meaning of 5 U.S.C. § 5724(i) notwithstanding the reasons which the agency deemed sufficient to justify placing him in that status. Notwithstanding our prior decision the agency felt that the employee breached his agreement and requested our decision whether Mr. Shelley's voucher is payable.

In view of the reasoning in our prior decisions we conclude that those periods during which Mr. Shelley was in an authorized leave without pay status constituted creditable service toward the fulfillment of his 12 months Government service agreement. However, we do not believe that the period from June 2, 1978, through June 4, 1978, during which Mr. Shelley was absent without leave is creditable Government service for the purpose of complying with the 12 months service agreement. While Mr. Shelley was "on the rolls" of the Soil Conservation Service on and after June 2, 1978, until his separation, as contemplated by our decision in 45 Comp. Gen. 680, *supra*, this fact alone is not sufficient to equate being "on the rolls" during a period of unauthorized absence with rendering creditable service within the meaning of 5 U.S.C. § 5724(i). In this connection we note that where an employee is in a leave without pay status he may be said to be creditably serving the agency for certain purposes and to the extent that the agency has authorized the period of leave without pay. However, where an employee absents himself from duty without any authorization, he may not be said to be creditably serving the agency for any purpose during that period of unauthorized absence, unless the absence is later excused in accordance with paragraph 1–6, chapter 630, of the Federal Personnel Manual (FPM), and S1–6, FPM Supplement 990–2.

Paragraphs 12–1, chapter 630 of the FPM and S12–1, Book 630, FPM Supplement 990–2, make a distinction between "absence without

leave" and "leave without pay." Both define leave without pay as a temporary nonpay status and absence from duty granted upon the employee's request. This covers only those hours which an employee would otherwise work or for which he would be paid. Both paragraphs state further that the permissive nature of leave without pay distinguishes it from absence without leave, which is a nonpay status resulting from an agency determination that it will not grant any type of leave (including leave without pay) for a period of absence for which the employee did not obtain advance authorization or for which his request for leave on the basis of alleged sickness has been denied. Paragraphs 1–6, chapter 630, FPM, and S1–6, FPM Supplement 990–2 define "absence without leave" as an absence from duty which is not authorized or approved or for which a leave request has been denied. They further provide that disciplinary action may be taken when considered appropriate. As a result, there is no legal authority to support the proposition that an employee who is absent without leave and is therefore not entitled to pay and is subject to disciplinary action for failing to perform his duties, may nevertheless be rendering creditable Government service within the meaning of 5 U.S.C. § 5724(i).

Accordingly, Mr. Shelley's time in an "absent without leave" status from June 2 through 4, 1978, may not be credited toward his fulfillment of his 12 months service agreement. In view of this it follows that Mr. Shelley did not fulfill the statutory requirement contained in 5 U.S.C. § 5724(i) to remain in Government service for 12 months after the effective date of his transfer, and he is not entitled to reimbursement for travel and relocation expenses provided under that statute.

[B–195167]

Debt Collections — Waiver — Civilian Employees — Relocation Expenses

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

Matter of: James A. Schultz—Forest Service—Waiver of overpayment of travel and relocation expenses, October 12, 1979:

Mr. David L. Olexer, an Authorized Certifying Officer for the Forest Service, U.S. Department of Agriculture (USDA), has asked this Office not to take exception to that agency's overpayment of

travel and relocation expenses in the case of Mr. James A. Schultz. For the reasons set forth below, we must deny the requested waiver action.

The issues presented for our resolution here involve the following pertinent facts. Mr. Schultz was authorized full transfer of station benefits upon his transfer of employment from the United States Postal Service (Postal Service), Des Moines, Iowa, to the Eastern Regional Office, Forest Service, Milwaukee, Wisconsin, effective July 15, 1978. Subsequent administrative review determined that Mr. Schultz was only entitled to reimbursements of $1,894.06 for his transfer as a new appointee to a manpower shortage position, not the amount of $7,774.17 paid to him. The resulting $5,880.11 difference represents an erroneous overpayment of travel and relocation expenses.

In support of the request for waiver in the present case the Forest Service urges our consideration of the following additional facts:

> The Forest Service, Eastern Region, Milwaukee, first became aware that U.S.P.S. [Postal Service] employees transferring in were not eligible for relocation benefits when Comptroller General Decision B–189778 dated December 4, 1978, was reviewed in February 1979. Our letter of commitment to Mr. Schultz, the travel authorization dated April 20, 1978, and the reimbursements were made in good faith. We believed that this employee transferring into the agency without a break in service within the Civil Service System was certainly eligible for reimbursement.
>
> Had the basic working manuals and regulations used on a daily basis by our employees presented any reasonable clue to a possible ineligibility by statute, we would have promptly referred the matter to our Regional Counsel for a legal interpretation. Unfortunately, none of the agencies concerned in this matter appear to have properly implemented the Statute through adequate instructions or guidance.

In reasoning that repayment of relocation benefits under the circumstances presented would be an extreme hardship to the employee and appear to be unconscionable, the Forest Service's submission concludes with the following recommendation:

> Your office, in the past, has determined not to take exception to payments made nor to require reimbursement under various hardship conditions. We ask that you not take exception to our agency's administrative decision in this case not to undertake action for repayment.

In our decision in *Matter of Postal Service Employees*, 58 Comp. Gen. 132 (1978) (B–189778, December 4, 1978), we held that an employee who transfers from the Postal Service to an Executive agency is not eligible for reimbursement of relocation expenses. While not stated therein that decision involved our first construction of 5 U.S.C. § 104, as amended by the Act of August 12, 1970, Pub. L. 91–375, § 6(c)(2), 84 Stat. 775. The amended statute excludes the Postal Service from the definition of "Executive agency" and, therefore, its employees who transfer to Executive agencies are considered analogous to new employees and not entitled to relocation expenses of transferred employees. In view of the original construction of 5 U.S.C. § 104, as amended, it is applicable to payments made before December 4, 1978, the date of 58 Comp. Gen. 132, *supra*. 39 Comp. Gen. 455 (1955).

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In view of the above under the applicable statutes and governing regulatory authority, Mr. Schultz was entitled only to reimbursement under 5 U.S.C. § 5723 in the total amount of $1,894.06. The resulting erroneous overpayment, in the amount of $5,880.11, constitutes a valid debt which Mr. Schultz owes to the account of the United States, and recovery is required absent any legal authority for waiver of the debt under the provisions of 5 U.S.C. § 5584, and absent grounds for compromise or termination of collection action by the Forest Service under the authority provided in 31 U.S.C. § 952(b). See *Matter of Dr. Brian J. Battersly*, B–180674, April 2, 1974, and B–180674, November 25, 1974.

Certain claims of the United States involving erroneous payments of pay may be waived under the following provisions of 5 U.S.C. § 5584:

> (a) A claim of the United States against a person arising out of an erroneous payment of pay or allowances, *other than travel and transportation expenses and allowances and relocation expenses payable under section 5724a of this title*, on or after July 1, 1960, to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part * * *. [Italic supplied.]

Clearly, the exercise of such statutory authority by the Comptroller General is specifically precluded in the consideration of Mr. Schultz's case because the overpayment in question involved "travel and transportation expenses and allowances and relocation expenses payable under section 5724a" of title 5 of the United States Code. See also 4 C.F.R. § 91.2(c) (1978). Therefore, there is no legal authority upon which Mr. Schultz's debt may be waived.

Under section 952(b) of the Federal Claims Collection Act of 1966, 31 U.S.C. 951, *et seq.*, the head of an agency is authorized to compromise a claim or to terminate or suspend collection action under certain prescribed conditions. However, where there is a present or prospective ability to pay on the debt such as Mr. Schultz's continued employment, collection must be attempted. See *Matter of Robert F. Granico*, B–189701, September 23, 1977, and cases cited therein. This is especially true in Mr. Schultz's case where he is employed by the Government and the overpayment may be collected by setoff pursuant to 5 U.S.C. § 5514. See 4 C.F.R. § 102.3 (1978).

It is unfortunate that Mr. Schultz as a shortage category employee was erroneously authorized allowances which are statutorily conferred only upon transferred employees, and that he was erroneously advised that he would be entitled to reimbursement for his travel and relocation expenses which were not properly allowable to him under applicable laws and regulations. However, it is a well-settled rule of law that the Government cannot be bound beyond the actual authority conferred upon its agents by statute or by regulations, and this is so

even though the agent may have been unaware of the limitations on his authority. See *Matter of M. Reza Fassihi*, 54 Comp. Gen. 747 (1975), and cases cited therein. The Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous, and any payments made on the basis of such erroneous advice or authorization are recoverable. *Matter of Joseph Pradarits*, 56 Comp. Gen. 131 (1976); *W. Penn. Horological Inst., Inc.* v. *United States*, 146 Ct. Cl. 540.

Accordingly, the overpayment to Mr. Schultz may not be waived and payments to him in excess of his authorized statutory entitlement should be recovered.

[B-195901]

Leaves of Absence—Annual and Sick Leave Act—Coverage—Temporary Commission Employees

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

Matter of: Employees of Temporary Commissions—Application of the Leave Act, October 12, 1979:

This is in response to a request from the Honorable Alan K. Campbell, Director, Office of Personnel Management (OPM), for a determination of the applicability of the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 *et seq.* (1976), to employees of certain temporary commissions.

The commissions involved are the National Transportation Policy Study Commission (NTPSC) and the National Alcohol Fuels Commission (NAFC). The following specific questions relating to the Commissions' employees have been raised:

(1) Do executive branch employees who transfer to either Commission without a break in service remain subject to the leave system in chapter 63 of title 5, United States Code?

(2) Are other employees of the Commissions subject to the leave system in chapter 63?

(3) If the reply to either (1) or (2) is negative, is the application of your decision required to be retroactive? May the coverage under the leave system be continued for a reasonable period of time while legislation is sought to provide such coverage?

The Director also states that he has similar questions relative to the National Commission on Air Quality (NCAQ).

In addition, we have been asked to consider the specific case of Dr. Edward J. Bentz, Jr., currently employed as a member of the staff of NTPSC, who was offered a position with NAFC at a pay rate equal to an Executive Schedule (ES) level II.

Section 154(a) (1) of the Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, 90 Stat. 425 (1976), 23 U.S.C. 101 note, established the

NTPSC. The Commission is comprised of 19 members, 6 appointed by the President of the Senate from the membership of the Senate, 6 by the Speaker of the House from the membership of the House, and 7 public members appointed by the President.

The Commission is authorized to appoint and fix the compensation of a Staff Director, and such additional personnel as may be necessary to enable it to carry out its functions. The Director and personnel are exempted by the Act from the provisions covering appointments in the competitive service (5 U.S.C. § 3301 *et seq.* (1976)), and without regard to the provisions of title 5 relating to classification and General Schedule pay rates (5 U.S.C. §§ 5101 *et seq.* and 5331 *et seq.* (1976)). However, no employee other than the Staff Director can receive compensation in excess of the maximum rate for GS–18 of the General Schedule. The Staff Director is to be compensated as an ES–II.

The NAFC was established by section 170(a)(1) of the Federal-Aid Highway Act of 1978, Pub. L. No. 95–599, 92 Stat. 2689 (1978). The NCAQ was established by section 313 of the Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685, 785 (1977), 42 U.S.C. 7623. Since all three Commissions are analogous in most respects, we need only consider the employees of NTPSC as representative of the group.

The OPM has stated that, normally, the Leave Act applies only to employees of executive agencies, and there is no clearly settled definition of executive agency with respect to commissions composed of both legislative and executive officials. The OPM also says that because the legislation is silent as to the executive or legislative status of NTPSC, and because of its mixed composition, the question arises whether it comes within the definition of an executive agency and whether it's employees are, therefore, subject to the leave system under chapter 63 of title 5.

In B–194074, March 26, 1979, this Office considered the status of NCAQ, and determined that it was a legislative branch agency. The similarities between that Commission and NTPSC and NAFC could lead us to the same conclusion with regard to them. However, we do not feel that it is necessary to designate those two Commissions as legislative or executive in order to reach a necessary determination.

The Court of Claims in *Sauer* v. *United States*, 354 F.2d 302 (Ct. Cl. 1965), held that an employee of the judicial branch was covered by the Leave Act because it applies to all civilian officers and employees of the United States, with exceptions that were not applicable. Our Office has followed this rationale in a case involving a judicial employee. B–191044, November 28, 1978. Further, the Annual and Sick Leave Act was amended and clarified in 1978, Pub. L. No. 95–519, 92 Stat. 1819, to exclude from the Leave Act an officer in the legislative

or judicial branch who is appointed by the President. Thus, all three branches of the Federal Government are included in the Leave Act.

The employees of the Commission also come under the provisions of the Leave Act by definition. Title 5 of the United States Code, section 6301(2)(A), states that an employee means an employee as defined by section 2105 of title 5. That section states in pertinent part:

> (a) For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—
> (1) appointed in the civil service by one of the following acting in an official capacity—
> (A) the President;
> (B) a Member or Members of Congress, or the Congress;
>
> * * * * * * *
>
> (D) an individual who is an employee under this section;
>
> * * * * * * *
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The Commission is made up of Members of Congress and members of the public appointed by the President. The Commission in turn appoints a Staff Director and such other personnel as may be necessary to enable it to carry out its functions. The employees of the Commission come within the purview of the definition of an employee because they are appointed by the Commission, which is composed of Members of Congress and members of the public appointed by the President, or an employee of the Commission with delegated authority to make appointments. They are also engaged in the performance of a Federal function, preparation of a report to Congress and the President, and are subject to supervision of the Commission or an employee whom it has appointed.

The employees of the Commissions receive administrative support from the General Services Administration, an executive agency, and each has a different appropriation from which to draw separate and apart from Congress. Thus, the employees do not come within the definition of "congressional employees" in 5 U.S.C. § 2107 (1976), and, therefore, are not subject to an exception for employees of Congress which would exclude them from the provisions of the Leave Act. 5 U.S.C. § 6301(2)(B)(vi) (1976). Nor do any of the other exceptions in the Act apply.

We, therefore, conclude that the employees of the Commissions are subject to the leave system in chapter 63 of title 5, United States Code. Your first two specific questions are answered in the affirmative; therefore, we need not consider your third question.

Dr. Bentz' annual and sick leave entitlement should be handled in accordance with the above.

[B-193943]

Transportation—Household Effects—Military Personnel—"Do It Yourself" Movement—Vehicle Ownership

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

Matter of: Airman Andrew G. Way, USAF, October 15, 1979:

The question involved in this case is whether an armed services member may use a borrowed vehicle, rather than a vehicle the member owns, and still qualify for the incentive payment under the "do-it-yourself" household goods shipment program. The answer is yes.

The question was presented by the Accounting and Finance Officer, Castle Air Force Base, California, concerning an incentive payment claimed by Airman Andrew G. Way, USAF, and has been assigned Control No. 79-1 by the Per Diem, Travel and Transportation Allowance Committee.

Pursuant to valid station transfer orders, Airman Way moved with his family from Chula Vista, California, to Merced, California. Prior to the move, he received counseling regarding the incentive payments available through the "do-it-yourself" shipment provisions of the Joint Travel Regulations and was authorized, in accordance with those provisions, to move his household goods by the use of a borrowed pickup truck. Upon submission of his voucher for reimbursement, however, Airman Way was refused the incentive payment on the ground that the provisions of the "do-it-yourself" program apply only when the member uses either a rental vehicle or one which he himself owns.

The "do-it-yourself" household goods shipment program for members of the Armed Forces was authorized pursuant to section 747 of the Department of Defense Appropriation Act, 1976, Public Law 94-212, 90 Stat. 153, 176, and 37 U.S.C. 406 (1976). Implementing regulations can be found in Volume 1, Joint Travel Regulations (1 JTR), chapter 8, part H (change 289, March 1, 1977).

It appears that the program was instituted with a two-fold purpose: (1) to conserve Government funds by limiting incentive payments to 75 percent of what it would have cost the Government to ship member's goods, and (2) to provide a convenience and extra income to members choosing this method. See 1 JTR, paragraph M8400.

The program is based on an incentive principle, members receiving payments upon election, incident to transfer orders, to move their

household goods by other than Government means. Paragraph M8400 of the JTR provides that such allowances are available for movement of household goods by "privately owned or rental vehicle," which is the same language used by section 747 of Public Law 94–212. The Finance and Accounting Officer questions whether the incentive payment may be made in this case because Appendix J, 1 JTR, defines "privately owned motor vehicle" as one "owned by the member," and if that definition is strictly applied, members moving household goods via borrowed vehicle do not qualify for incentive payments.

The Per Diem, Travel and Transportation Allowance Committee (PDTATAC), which was responsible for preparing 1 JTR, chapter 8, part H, interprets the term "privately owned," as used in paragraph M8400 as not intended to require ownership of the vehicle by the member. Rather, in their opinion, the term was used to distinguish the vehicle in question from a commercial or rental vehicle.

We agree with the Committee's interpretation. A contrary interpretation would be inconsistent with the purposes of the program. A greater allowable benefit to members should result in a greater incentive for members to "do-it-yourself" and, ultimately, in reduced Government liability for payment of shipment costs. Disqualification of members using borrowed privately owned vehicles would, conversely, be in the best interest of neither the members nor the Government.

Concern has been expressed regarding the possibility of increased Government liability for automobile accidents if members are permitted to drive third party vehicles on Air Force installations. We note in this regard that existing Air Force regulations require that Air Force members have "adequate" insurance coverage, and today's decision in no way advocates relaxation of this requirement. While we recognize that enforcement of applicable insurance regulations may become more difficult under the limited circumstances represented by the present case, such an administrative burden is insufficent, in our opinion, to warrant exclusion of Airman Way and other similarly situated members from participation in the "do-it-yourself" program.

Accordingly, Airman Way should be paid the applicable allowances incident to shipment of his household goods under the "do-it-yourself" program.

[B–195302]

Travel Expenses — Air Travel — Foreign Air Carriers — Prohibition—Availability of American Carriers

A service member may execute a justification certificate regarding "unavailability" of United States-flag air carriers, and paragraph M2150–3(1), 1 JTR, defines United States-flag air carrier passenger service "unavailable" if a traveler, en route, has to wait 6 hours or more to transfer to a United States-flag air carrier to proceed to destination. However, it does not apply to a service member

waiting to begin travel but not "en route" from origin airport to destination and does not apply if only military reduced rate seats are unavailable when other seats are available. So service member executing such a justification certificate as the basis for United States-flag air carrier "unavailability" when it does not apply may not be reimbursed for travel performed on a foreign-flag air carrier.

Matter of: Lieutenant Commander David J. Creahan, Jr., USN, October 17, 1979:

This action is the result of Lieutenant Commander David J. Creahan's appeal from our Claims Division's settlement dated August 22, 1978, which denied reimbursement of transoceanic travel he and his dependents performed on a foreign-flag air carrier incident to a permanent change of station. The disallowance of the claim is sustained.

The main issue in this case is whether the exhaustion of low cost military rate seats on a United States-flag air carrier renders the passenger service on that carrier "unavailable" for travel under Volume 1 of the Joint Travel Regulations (1 JTR), even though there remain for sale other commercial seats on that carrier. We find that the presence or absence of military rate seats has nothing to do with "unavailability" of passenger service under 1 JTR. The incidental issues of whether a traveler can execute a justification certificate for use of a foreign-flag air carrier and whether a JTR time delay provision is applicable in this case for determining passenger service "unavailability" are also raised. Regarding those issues, we find that a traveler can execute a justification certificate, that the JTR provision was inapplicable, and that the Claims Division settlement that there may be no reimbursement for the use of a foreign-flag air carrier is correct.

Commander Creahan was transferred from Pensacola, Florida, to Subic Bay, Republic of the Philippines. His orders directed the use of Government air transportation for the transoceanic travel and were modified the day he left Pensacola, June 30, 1977, to authorize circuitous travel for his personal convenience. Before departure Commander Creahan had tried to arrange Government air transportation to Hawaii with a 3-day delay and thence to the Philippines, but the final arrangements for this circuitous travel via Hawaii had not been made by the day of departure. However, at this time direct Government air transportation was available to the Philippines. During his travel from Pensacola to the aerial port of departure in California, he learned that the circuitous travel via Hawaii would require an 8-day delay rather than a 3-day delay in Hawaii as requested. This arrangement was unacceptable to him, and apparently by this time, the direct Government air transportation that was available earlier had filled up. However, Commander Creahan's orders were again modified to allow travel via United States-flag air carriers with reimbursement limited in accordance with paragraph M4159–5, 1 JTR.

On the same day his orders were modified allowing commercial air travel, Commander Creahan purchased tickets on Philippine Airlines, a foreign-flag air carrier, for his travel from San Francisco to Manila. He departed for Manila the same day he purchased the tickets and later justified this travel on a foreign-flag air carrier by executing a justification certificate which stated, "American flag carrier (Pan Am) would not have been available due to being booked up for a period of 5 days."

Commander Creahan is authorized to execute a justification certificate explaining the necessity for use of a foreign-flag air carrier. See paragraph M2152, 1 JTR, and 4 C.F.R. section 52.2 (1978). However, he has misconstrued in two respects the JTR provision defining "unavailability" of United States-flag air carriers, which states the circumstances under which use of foreign-flag air carriers is justified.

Commander Cheahan argues that paragraph M2150–3, item 1, 1 JTR, which provides that passenger service by a United States-flag air carrier will be considered to be "unavailable" when "the traveler, while en route, has to wait 6 hours or more to transfer to a certificated air carrier to proceed to the intended destination" defines Pan Am "unavailable" because the air carrier was booked up for 5 days. The first respect that he misconstrued this provision is in believing that it applied at all. "En route" under the JTR provision is "addressed to air travel en route from origin airport to destination, or elapsed travel-time. The guidelines establish no policy regarding the initiation of travel or the timing of arrival, and provide no guidance in determining the length of time an employee should delay his departure at origin * * * to facilitate his use of certificated air carrier service." 56 Comp. Gen. 216, 217 (1977). Merely being in a travel status is not sufficient to satisfy the "en route" requirement of the JTR provision. This JTR provision was intended primarily to avoid having passengers wait more than 6 hours at an airport after they had begun their air transportation in order to catch a connecting flight that would continue their air transportation on to the intended destination.

The JTR provision (1 JTR, para. M2150–3, item 6, change 298, Dec. 1, 1977) that could apply to Commander Creahan's situation, i.e., time delay in waiting for a United States-flag air carrier after the passenger is ready to begin air transportation but before air transportation has actually begun that would make the carrier "unavailable" states a 48-hour rule rather than the 6-hour rule quoted above. However, neither JTR provision actually did apply to Commander Creahan because the term "passenger service" in both provisions cannot be confined to military rate seats, as misconstrued by Commander Creahan.

Commander Creahan's statement of August 3, 1977, relates "* * * I contacted Pan Am for booking. However, I could not get 5 military rate seats on any of 4 consecutive Pan Am flights during the time I wanted to depart because their military allotment of seats was full."

Any commercial seats that had not been sold on any of the initial Pan Am flights Commander Creahan inquired about would have been available passenger service on United States–flag air carriers, and Commander Creahan has not claimed that this kind of passenger service was unavailable. As a letter to Commander Creahan dated February 6, 1978, from the Navy Regional Finance Center explained, "You are advised that when commercial carrier is authorized subject to reimbursement, there is no requirement to use military rate seats. Regulations require the use of the least costly available scheduled commercial air service over the direct route between the origin and destination." Paragraph M2150–2, 1 JTR, provides: "* * * Passenger or freight service by a certificated air carrier is considered 'available' if the carrier can perform the commercial foreign air transportation required and if the service will accomplish the mission." Therefore, even though Commander Creahan is authorized to justify United States-flag air carrier "unavailability," he has not done so in this instance because he has not shown commercial passenger service to have been unavailable.

In confining his search for passenger service on United States-flag air carriers to military rate seats, Commander Creahan apparently was attempting to minimize his cost (and consequent Government reimbursement). There are several kinds of military rate seat arrangements that are less expensive than commercial fares. However, the JTR, in implementation of section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. 1517, prescribing very limited exceptions for the mandatory use of United States-flag air carriers, is not primarily concerned with minimizing cost of air transportation but with utilizing United States-flag air carriers for air transportation in order to produce revenue for the carriers regardless of costs. See *Cost Considerations for Department of Defense Employees under Fly America Act*, B–138942, November 6, 1978. The Department of Defense has made elaborate arrangements described in the previously cited decision to alleviate the cost of transporting its employees overseas by air. However, when these arrangements (the low cost military rate seats that were available when Commander Creahan departed on travel from Pensacola) cannot be utilized because of the personal convenience of the traveler (Commander Creahan's attempt to schedule travel via Hawaii with a layover), the commercial arrangements of United States-flag air carriers must be

utilized by travelers even though reimbursement to the traveler is limited by regulation to the lower cost seats.

It is unfortunate that Commander Creahan chose to travel by a foreign-flag air carrier when there was available to him the higher cost commercial passenger service of a United States-flag air carrier. However, because he did so in these circumstances, he may not be reimbursed for that portion of his and his dependents' travel.

[B-195546]

Military Personnel—Dependents—Certificates of Dependency—Filing Requirements

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

Matter of: Recertification of dependency certificates, October 17, 1979:

The Assistant Secretary of the Army (Installations, Logistics and Financial Management) requests a decision regarding the acceptability of a change in procedures for recertification of dependency certificates for entitlement to basic allowance for quarters (BAQ) by members of the Army Reserves. He proposes using computer-generated listings in place of the current form and that recertification be allowed for a period exceeding 1 year where annual training cannot be programmed within 12 months of the prior training period. We have no objection to the proposed procedures.

The request was presented in a letter dated July 18, 1979, and was assigned Department of Defense Military Pay and Allowance Control Number SS-A-1332.

The submission refers to the annual recertification of dependency certificates by Army members receiving BAQ with dependents required by 51 Comp. Gen. 231 (1971). That decision was modified by 54 Comp. Gen. 92 (1974) to provide in lieu of such annual requirement for recertification of primary dependents only each time an active Army member makes a permanent change of station and for verification of entitlement by Army installations through the use of a periodic computer-generated listing provided by the Joint Uniform Military Pay System (JUMPS-Army).

The discussion further states that:

The initial submission and annual recertification of the BAQ entitlement for members of the Selected Reserves currently is accomplished annually based upon the DA Form 3298, Authorization to Start and Stop BAQ Credit and contact with the member. The form is filed in the member's Personal Financial Records (PFR)

folder maintained by the unit. Recertification is indicated by the member's signature and date on the DA Form 3298. Under concepts being tested at Fort McCoy, Wisconsin, the member's PFR is located at and maintained by the Finance Office (FO) at Fort McCoy. As the units serviced by Fort McCoy FO are located in 3 different states, the member is not readily available to accomplish the recertification. In this respect the Commander, U.S. Army Forces Command (FORSCOM) has requested a deviation from the recertification requirements specified in 51 CG 231, citing 54 CG 92 as a precedence.

Under proposed FORSCOM procedures, the recertification would be accomplished during or within 30 days following the annual training performed by units of the Reserve Components. The recertification process would involve the use of a computer-generated listing * * *. The listing would be produced by a mechanized system which will be used to pay the members for annual training and would identify every member who would receive BAQ. The member would sign and date opposite his/her name on the listing to indicate recertification of entitlement. Recertification by members performing individual or fragmented annual training (other than with unit) will be accomplished by means of a form letter * * *. The DA Form 3298 on file in the PFR will be annotated by FO personnel to reflect the recertification with the listing or form letter filed in the FO as supporting documentation. A new DA Form 3298 will be completed by the member, when a change in dependent status occurs.

There is further indication that under this concept, it is conceivable that not all recertification would be on an annual basis due to variances in the schedule for performing annual training, e.g., a unit performing training in May 1979 may not be scheduled for training again before August 1980. Although this deviation is requested for the system concepts tested at Fort McCoy, expansion throughout the Army Reserve components is a possibility.

Since the proposed system is not authorized by previous decisions, and 54 Comp. Gen. 92, *supra*, specifically related to the active Army, a decision is requested as to the following questions:

1. May the recertification of entitlement to BAQ be accomplished by the use of a computer-generated listing?

2. May the period of the recertification exceed one year for members of the Army Reserve Components?

The importance of these certifications lies in the support they provide for the credit claimed by disbursing officers for dependency payments made during the periods involved and this support covers the continued existence of the dependent and the dependency status. Consequently, recertifications are important to the proper audit of disbursing officers' accounts. See 32 Comp. Gen. 232 (1952), 38 *id.* 369 (1958), and 51 Comp. Gen. 231.

It appears that the proposed system of having reservists accomplish the recertification of entitlement to BAQ by the use of a computer-generated listing and extending the period for recertification to exceed 1 year in those cases where the scheduled 2 weeks for performing annual training cannot be programmed within 12 months of the prior training period still provide reasonable assurance that changes in status do not go undetected.

In implementing this system, however, the Army should be aware that there is a basic inconsistency between the proposed procedures as

contained in the submission and a pay system design for Reserve and National Guard drill pay that the Army previously submitted for informal evaluation by our Office. The inconsistency arises in that under the concepts being tested at Fort McCoy, the member's Personal Financial Records (PFR) folder containing the DA Form 3298, Authorization to Start and Stop BAQ Credit, is located and maintained at the Finance Office at Fort McCoy. However, the design documentation for the Reserve Components Pay System indicates that the same PFR folder is located at each Reserve unit.

The Army pay system design previously submitted for approval is only for drill pay of Reserve and National Guard members and does not cover the annual training pay and other aspects of the reservist's pay system design such as the BAQ recertification. However, should the Army expand the Fort McCoy experiment, the Army would have to make some changes in the system design for drill pay we are currently evaluating. The Army has not told us what those changes will be. We will follow up on this inconsistency during our evaluation of the drill pay system design.

Within the aforesaid limitations, questions 1 and 2 are answered in the affirmative, and 51 Comp. Gen. 231 is modified accordingly.

[B-193879]

Travel Allowances—Military Personnel—Junior Enlisted Service Members—Increases—Effective Date

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

Matter of: Junior enlisted service members' travel allowances, October 18, 1979:

The issue in this case is what is the appropriate effective date of junior enlisted service members' increased travel and transportation allowances—the effective date of authorizing regulations, the effective date of the act appropriating the money for the allowances, or the first day of the fiscal year. We hold that it is the effective date of the authorizing regulations.

The question was presented by letter from the Principal Deputy Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations), and has been assigned control number 78-45 by the Per Diem, Travel and Transportation Allowance Committee.

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The Department of Defense Appropriation Act, 1979, Public Law 95–457, 92 Stat. 1231, contains funds appropriated by Congress for extension of certain travel and transportation entitlements to junior enlisted members, i.e., members in grade E–4 who have 2 years' service or less and members in lower grades. Although the services had the statutory authority under 37 U.S.C. chapter 7 (1976) and 10 U.S.C. § 2634 (1976) to authorize the travel and transportation allowances for junior enlisted members, they were effectively precluded from doing so until the entitlements had been funded by Congress. Because of uncertainties as to whether such funding would be provided and the extent of the additional funding, regulations could not be amended until the appropriation had been finally approved even though the appropriation once approved would provide funds for the increased allowances adequate for the whole fiscal year. The appropriation was approved by the President on October 13, 1978, and the new regulations were approved October 17, 1978.

We are now asked whether we would object to amending the regulations to change the effective date of the entitlements from October 17, 1978, to: (1) October 1, 1978, the commencement of the fiscal year to which the Department of Defense Appropriation Act, 1979, applies; (2) October 13, 1978, the date the Appropriation Act was approved by the President; or (3) any other date other than October 17, 1978.

While the Appropriation Act made funds available which could be used for junior enlisted travel, that act did not provide the authority to extend the allowances to junior enlisted members. That authority already existed under 37 U.S.C. chapter 7 (particularly §§ 404, 405, 406, 407, 409, 411) and 10 U.S.C. § 2634. It is understandable why the services chose to wait before exercising that authority until the funds had been approved to fund the additional entitlements. However, it was not until the legal authority was exercised by issuing the regulations prescribing the allowances that the entitlements became effective. Indeed, the additional funds are not specifically identified in the Appropriation Act nor is the junior enlisted program referred to there. Therefore, the effective date of the Appropriation Act is not the effective date of the entitlement. Rather, the entitlements accrued only upon finalization of the implementing statutory regulations on October 17, 1978. See Volume 1, Joint Travel Regulations, change 311, with applicable provisions effective October 17, 1978.

While regulations may be amended prospectively to increase or decrease rights under them, they may not be amended retroactively in the absence of obvious error. See 32 Comp. Gen. 315 (1953); 47 *id.* 127 (1967); and 56 *id.* 1014 (1977). No such error exists in this case. Accordingly, we conclude that, because the implementing regulations are controlling and did not take effect prior to October 17, 1978, we would be required to object to retroactively amending them to make them effective prior to that date.

[B-194479]

Contracts — Specifications — Qualified Products — Status — Repackaging Effect

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

Contracts — Specifications — Qualified Products — Packaging Requirements

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

Bidders — Qualifications — Qualified Products Procurement — Bidder *v.* Product Qualification

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

Contracts — Specifications — Qualified Products — Requirement — Erroneous — Repackaging of Qualified Product

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

Bids—Competitive System—Qualified Products Use

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

Matter of: Methods Research Products Company, October 19, 1979:

Methods Research Products Company (MRP) has protested the rejection of its low bid on certain items under invitation for bids (IFB) No. 6PR-W-J0437-W6-F issued by the General Services Administration (GSA) for "adhesive" requirements from April 1, 1979,

through March 31, 1980. GSA rejected the bid because of what it considered to be MRP's failure to satisfy the requirements of the "Qualified Products List" (QPL) clause of the IFB. For the reasons set forth below, we sustain the protest.

The QPL clause of the IFB reads as follows:

(a) With respect to products described in this solicitation as requiring qualification, awards will be made only for such products as have, prior to the time set for receipt of offers, been tested and approved for inclusion in the qualified products list identified below. Manufacturers who wish to have a product tested for qualification are urged to communicate with the office designated below. Manufacturers having products not yet listed, but which have been qualified, are requested to submit evidence of such qualification with their offers, so that they may be given consideration.

Item Number	Qualified Products List	Direct Communication to
GROUP I	MMM-A-121	NAV. SHIP ENG. CTR DEPT OF NAVY
GROUP II	MMM-A-139	NAV. AIR SYSTEMS COMMAND, WA. DC. 20360

(b) The offeror shall insert, in the spaces provided below, the manufacturer's name and product designation, and the QPL test or qualification reference number of each qualified product offered. If the offeror is a qualified distributor, he also shall insert his product designation. Any offer which does not identify the qualified product offered will be rejected.

Item Number	Manufacturer	QPL Test or Reference Number	Offeror's/Distributor Product Designation
*	* *	*	* * *

See Paragraph (b), above

(c) Products delivered under a contract resulting from this solicitation shall be in either (1) the manufacturer's container showing the manufacturer's identifying label or markings or (2) if the name of a distributor of the product is listed (or has been found eligible for listing) in the applicable qualified products list identified under (a), above, in the distributor's containers showing the distributor's identifying label or markings.

MRP says that prior to bid opening it requested the Naval Ship Engineering Center—the activity designated in the IFB to respond to QPL questions—to add MRP to QPL-MMM-A-121 as an "authorized repackager of H. B. Fuller's approved adhesive SC-849." Although MRP did not receive a formal Navy reply until after bid opening, MRP submitted a bid under the apparent understanding that it could repackage the Fuller adhesive in MRP's own containers marked with the Fuller brand name. Thus, MRP's bid for the items described by QPL MMM-A-121 shows the following insertions in paragraph "b" of the QPL clause: "[Manufacturer] H. B. Fuller[:] [product Designation] SC 849[;] [QPL test No.] MMM-A-121[;] [Distributor's Product Designation] SC 849." And, in the "Produc-

tion and Inspection Points" clause of its bid, MRP listed H. B. Fuller's address as the "production point" and listed MRP's address as the "inspection point."

The contracting officer reports events subsequent to the opening of bids, as follows:

After bid opening and before award was made, Steven Industries [the second low bidder] by letter dated January 23, 1979, to the contracting officer * * * protested against any award to the apparent low bidder, Methods Research Products Company. Steven Industries [Steven] contended that the H. B. Fuller Company, whose material was being offered by Methods Research, did not package this material in the size containers required in the solicitation. They further stated that Methods Research was not conforming to the requirements of [the QPL clause] and should not be considered for award.

The contracting officer requested plant facility surveys be performed by the appropriate Regional Quality Control Divisions on both Methods Research Products Company and Steven Industries, with the specific request that it be confirmed whether the material being offered would be supplied in the manufacturer's original containers as required by [the QPL clause] page 10, of the solicitation. The Plant Facilities Report * * * completed by the GSA, Region 2, Quality Control Division, confirmed that Methods Research Products Company was receiving the material from the H. B. Fuller Company in 55 gallon drums and repackaging it in the protestor's own containers.

The Plant Facilities Report * * * completed by GSA, Region 2, Quality Control Division, * * * confirmed that Steven was offering material that would be furnished in the manufacturer's original containers. Clifton Adhesives, whose material was being offered by Steven for Group I of the solicitation, is on the QPL for material in accordance with MMM-A-121. [The Plant Facilities report also noted that H. B. Fuller Company had authorized MRP to repackage the material so long as the "quality of the material is maintained and * * * the proper labeling exists."]

By letter dated February 28, 1979, * * * the contracting officer [then] advised the protestor that their offer could not be considered for award. It was pointed out that their bid did not qualify as being responsive since it did not meet * * * [paragraph (c) of the QPL clause] of the solicitation, requiring that products be furnished in either the manufacturer's containers or by a distributor listed on the applicable qualified products list.

Because of this analysis the contracting officer awarded a contract for the items in question to Steven on February 28, 1979.

After bid opening, MRP received a formal reply from the Navy Ship Engineering Center concerning its previous QPL inquiries. The letter reads:

* * * There are no provisions for listing repackagers on qualified products lists. Defense Standardization Manual DOD 4120.3-M dated August 1978 states the following:

* * * * * * *

4-202.3 *Furnishing Products Not Requiring Additional Listings.* A supplier, to be eligible for award of contract to furnish a qualified product manufactured by a firm other than the supplier and marked with the brand designation of the manufacturer, is required to state in his bid the name of the actual manufacturer and address of the plant where the product was manufactured, the brand designation, and the qualification test reference. *Additional listing of the product on the QPL is required only when the product is rebranded with the brand designation of a distributor (sec 4-202.2). In either case, the responsibility for continued conformance of a qualified product with the requirements of the specification remain with the manufacturer whether the product is furnished by him or his distributor.*

*If * * * the only change made by the distributor in the approved product is to repackage it in smaller containers marked with the manufacturer's brand designation, it would not affect the qualified status of the product.*" [Italic supplied.]

MRP's grounds of protest may be stated, as follows:

(1) MRP followed Navy's instructions as to the appropriate QPL requirements for a distributor-repackager who intends to mark the supplied product with the manufacturer's brand designation and, therefore, inserted only qualified products listing information concerning the qualified brand name product to be supplied; thus, it was improper for GSA to reject MRP's bid which only conformed to the advice furnished by the Navy—the agency which the IFB instructed bidders to contact in regard to QPL matters.

(2) On a previous GSA solicitation (6PR-W-J0254-WF-F) in which the same QPL clause was present, MRP was awarded the contract even though it bid with the intent of repackaging the required items in its own containers, as here, thus showing a conflict in GSA's approach.

(3) Even though GSA states the purpose of the "container" requirements of the QPL clause is to ensure the "integrity" of the item—thus suggesting that an "un-qualified" distributor can alter the product or contaminate it in repackaging—a qualified distributor or manufacturer could also alter or contaminate the product. In any event, the manufacturer of MRP's distributed product lists MRP as a qualified distributor and repackager.

(4) The Navy's statement that repackaging in smaller containers marked with the manufacturer's brand designation would not affect the qualified status of the offered product shows that MRP's bidding intent was proper.

GSA-Navy Replies

GSA and the Naval Sea Systems Command have responded to the above-numbered grounds of protest, as follows:

GSA

(1), (3), (4) The purpose of requiring that qualified products must be delivered in the manufacturer's containers or in the distributor's containers providing the distributor's product is also qualified is to ensure product integrity and to prevent problems which previously developed under 1960's procurements when bidders obtained products from QPL manufacturers and repackaged them.

Distributors may qualify under GSA's QPL clause (found in the General Services Administration Procurement Regulations (GSPR) at 41 C.F.R. § 5A-1.1101-70 (1978)) by either obtaining qualification of their own product or by offering a qualified product which the manufacturer has packaged in its own containers. MRP did not elect either qualifying option but, instead, chose to offer a

repackaged product in its own containers—an approach which does not qualify under the GSA clause.

Although the Department of Defense (DOD) does allow the repackaging of a product in nonmanufacturers' containers under DOD regulations, GSA, as the issuing activity for the procurement, must follow its own regulations in this case notwithstanding the conflicting DOD approach. Moreover, since the clause affected bidders' prices—as shown in a letter received from the awardee after bid opening—it would be unfair not to enforce the requirements of paragraph (c) of the QPL clause. Nevertheless, GSA is working with the DOD to resolve the inconsistency so that this situation does not recur. (GAO understands that the only agreement resulting from the GSA–DOD attempts to "resolve the inconsistency" was a joint decision that the Navy would inform bidders to contact GSA if inquiries similar to MRP's questions are received in the future.)

(2) On the prior solicitation referenced by MRP only two bids were received, neither of which was on the QPL for the material. Since a demand existed for that material, GSA had no choice but to award to a firm that was not on the QPL.

Naval Sea Systems Command

(1) & (4) There is no inconsistency between the regulations contained in the Defense Standardization Manual regarding QPL distributors and the GSA clause simply because the manual does not address the question "whether a supplier other than a QPL manufacturer or QPL distributor can offer supplies packaged in its own containers." The Navy never told MRP that MRP could "offer QPL products * * * in its own containers" or that MRP was "qualified to perform the contract." Consequently, MRP was not misled by Navy's advice.

Analysis

FPR § 1–1.1101 (1964 ed., FPR circ. 1) provides that "(a) Whenever qualified products are to be procured only bids or proposals offering products which have been qualified prior to the opening of advertised bids shall be considered for award." In conformity with this requirement, paragraph (b) of the above QPL clause, after calling for insertion of the manufacturer's name and product designation, and distributor's name and product designation if applicable, states only that an offer "which does not identify the qualified product will be rejected." This clause does not, in itself, require the rejection of a qualified product bid by a non-QPL distributor. Nevertheless, it is clear that paragraph (c) of the above QPL clause effectively requires the rejec-

tion of a non-QPL distributor's bid unless the qualified product offered is to be packaged by the manufacturer.

In interpreting a similar QPL clause involved in a prior GSA procurement, we rejected GSA's argument that only QPL manufacturers or QPL distributors would be authorized—under paragraph (b) of the QPL clause—to bid in QPL procurements. As we said in our letter, B–174350, June 16, 1972, to the Administrator of GSA:

> It is clear that neither the provisions of the IFB nor the Federal Procurement Regulations require rejection of a bid from an unlisted bidder. Furthermore, we think any such requirement would be unduly restrictive of competition. In this respect, we have recognized that the use of a qualified products list, while proper in certain circumstances, is inherently restrictive of competition, 36 Comp. Gen. 809 (1957), and we have objected to the improper use of the QPL requirement. 43 Comp. Gen. 223 (1963) and cases cited. We have also stated that:
>
> "* * * Since the best interests of the Government require maintenance of full and free competition commensurate with the Government's need, we are of the opinion that while regulations implementing the use of qualified products lists should be interpreted to insure procurement of products meeting the Government's needs they should not be interpreted in such a manner as to place unnecessary restrictions on competition." 51 Comp. Gen. 47, 49 (1971).
>
> We have uniformly held that a bid offering a product that either is not listed on the QPL or cannot be identified from the information in the bid itself as a QPL product is nonresponsive to an IFB containing a QPL requirement. 51 Comp. Gen. 415 (1972). However, the February 16 letter cites our decision in B–171536(1), August 6, 1971, to support finding the Air and Tool bid nonresponsive. In that case, the IFB contained language identical with that in Paragraph 6(b) of the instant solicitation, and we said that since the protestor was not listed on the QPL as a manufacturer or authorized distributor, its bid was properly rejected pursuant to the provisions of the IFB. However, the facts of that case reveal that the protestor planned to assemble the finished product from component parts to be acquired from a QPL manufacturer. This final assembly process had not been part of the QPL qualifying test. Under those circumstances, it was clear that the protestor was neither the QPL listed manufacturer, as was claimed, nor an authorized distributor of a QPL product. In view of the preceding discussion, any language in that case suggesting that a bid offering a QPL product is nonresponsive if the bidder is not listed on the QPL must be regarded as limited to the circumstances therein.
>
> In the instant case, it is evident from the face of the bid that Air and Tool offered a QPL product and correctly designated a QPL manufacturer and plant. It appears that the bid was an offer to provide the exact item called for in the invitation, and had it been accepted, Air and Tool would have been bound to perform in accordance with all the provisions of the IFB. Accordingly, we cannot agree with the administrative conclusion as to the [non]responsiveness of the Air and Tool bid.

The situation involved here is somewhat different from the circumstances of B–174350 in that GSA is excluding MRP's bid under authority of paragraph (c) rather than paragraph (b) of GSA's QPL clause only on the grounds that the QPL product bid would not be packaged by the QPL manufacturer. Nevertheless, some of the observations quoted from the letter are helpful in analyzing MRP's exclusion.

The supposition on which paragraph (c) rests is GSA's apparent notion that repackaging is a final assembly or manufacturing process *per se*; therefore, the rationale of B–171536(1), *supra*, which upheld the rejection of a bid offering a product assembled from components of a qualified product, is for application.

Generally, we do not think that mere packaging or repackaging constitutes assembly or manufacturing. In considering the meaning of "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a–d (1976), for example, we concluded that the "process of packaging or packing previously manufactured end articles to be used by the Government, or the placing of such articles into storage containers which do not serve a special function in the actual use of the article by the Government, should not be regarded as an additional 'manufacturing' or 'assembly' process." 46 Comp. Gen. 784, 790 (1967). We see no reason why this analysis should not apply here.

The essential needs of the Government are for the end item being procured rather than for the containers, so that the QPL status of the qualified product should not generally be regarded as being affected by a nonmanufacturing step such as repackaging. Nevertheless, it is clear that paragraph (c) of the QPL clause erroneously purports to establish a general rule that repackaging is a manufacturing or assembling process.

Although we do not have information as to the steps involved in repackaging adhesive or the nature and extent of any chemical changes experienced by the adhesive during the repackaging process, it is our informal understanding that care must be taken to avoid contamination of the repackaged product. Nevertheless, we doubt whether the care required would convert a repackaging process into a manufacturing or assembling process of the kind noted in B–171536(1), *supra*. Consequently, we reject the above supposition.

In any event, GSA's professed concern about the quality of repackaging is contradicted by the packaging requirements of the IFB which merely required that the adhesives be packaged in accordance with "normal commercial practices" without reference to the applicable Federal Specification against which products were tested under QPL procedures. Under the IFB, therefore, packaging does not relate to the QPL status of the offered products. Thus, both QPL manufacturers and distributors may deviate from any packaging requirements of the applicable Federal Specification so long as the adhesive is packaged in accordance with "normal commercial practice."

From a practical standpoint, moreover, we fail to see why GSA does not accept the apparent DOD position which stresses the responsibility of the QPL manufacturer for the integrity of its qualified product when bid by a distributor. This position would seem to constitute adequate protection against defective repackaging by a distributor of a qualified product in that if the manufacturer tolerated defective repackaging it would jeopardize its QPL status. Further, to the extent that GSA reasonably finds that a concern does not have the capacity to effectively repackage in accordance with "normal com-

mercial practice" or has a prior history of unsatisfactory repackaging, the finding would serve as a basis for deciding that the concern is not responsible.

Finally, although GSA alludes generally to "problems" involving repackaging which gave rise to paragraph (c), there is nothing in the record which explains what these "problems" were or the extent of these "problems." Further, there is no evidence in the record supporting the current validity of the repackaging restriction of clause (c) even if there may have been some justification—which is not contained in the present record—for the original restriction adopted in 1968. On this point, GSA admits that the packaging requirements of paragraph (c) are waived when bids are not received from distributors who offer QPL products packaged by manufacturers. To the extent that waivers of paragraph (c) are granted, and in the absence of any information that the waivers resulted in a pattern of defectively repackaged items furnished under QPL contracts, these circumstances further undercut, as a practical matter, the reasonableness of the GSA regulation. Moreover, it is clear that the clause as apparently used now covers all QPL requirements even as to items for which there is no conceivable possibility for "contamination" in the repackaging process such as the pneumatic hammers procurement involved in B-174350, June 16, 1972.

Conclusion

There is no question that paragraph (c) effectively either increases the cost of products to the Government (when a non-QPL supplier is forced to pay for "special order" packaging from a QPL manufacturer) or restricts competition by requiring the rejection of a bid from a non-QPL repackager-distributor even though the repackager-distributor is otherwise committed in its bid to supply a QPL product. GSA has affirmed the increased pricing effect caused by the paragraph in its March 13, 1979, letter to MRP which rejected the company's protest. The letter reads:

> It has been verified by GSA's Quality Assurance Inspector, Region 2, that Steven Industries, the awardee of the contract, is supplying the material in accordance with Federal Specification MMM-A-121 in the manufacturer's original containers for all sizes. *If Steven Industries were permitted to buy the material in drums from their supplier and repackage in the required container sizes, as you are offering to do, it is obvious they could have bid lower prices on these items.* [Italic supplied.]

Steven has affirmed the restrictive effect of the paragraph on non-QPL suppliers—such as MRP—whose manufacturers do not special package QPL products for a given solicitation. As Steven recited in its January 23 letter of protest to GSA:

> * * * Methods Research is not on the QPL list for specification MMM-A-121. Their supplier, H. B. Fuller, does not package the material in the size containers requested in the solicitation.

It is beyond question that the validity of any requirement which necessarily tends to result in the submission of higher bids, or restricts competition, depends on whether the restriction is reasonable and serves a bona fide need of the Government. See *Rotair Industries; D. Moody & Co., Inc.*, 58 Comp. Gen. 149 (1978), 78-2 CPD 410; 42 *id.* 1 (1962); 17 *id.* 585 (1938).

Based on the present record and our above views, we consider that paragraph (c) unreasonably increases the cost of products to the Government or restricts competition and, therefore, is inconsistent with the statutory requirement (41 U.S.C. § 253(a) (1976)) for "full and free competition."

Notwithstanding our analysis, the facts remain that paragraph (c) clearly conveyed the restriction intended and that Steven says it bid higher than it otherwise would have bid because of the restriction; also, it is unclear whether other companies decided not to bid because of the paragraph. Because of this conclusion, we are recommending that GSA rebid the requirement in question without paragraph (c) and with an appropriately reworded paragraph (b) which makes it clear that a non-QPL manufacturer or distributor can bid provided the bidder offers a qualified product. In the event a bidder other than Steven submits a bid lower than the current contract price, Steven's contract should be terminated and award made to the successful bidder. In the event Steven is the successful bidder at a price lower than its contract price, the currrent contract should be appropriately amended.

We are bringing this decision and our recommended action to the attention of the Administrator of GSA under the authority of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Protest sustained.

[B-192018]

Courts — Reporters — Federal Courts — "Penalty Mail" Use — Reimbursement — Official Business Requirement

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

Courts — Reporters — Federal Courts — "Penalty Mail" Use — Propriety — Official Business Requirement

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

Matter of: Use of Penalty Mail by Court Reporters in Mailing Official Court Correspondence, October 22, 1979:

The Administrative Office of the United States Courts (Administrative Office) requests our decision on whether the United States court reporters (court reporters) can use the "penalty mail" privilege for the mailing of court documents. The penalty mail privilege includes the use, pursuant to 39 U.S.C. § 3202 (1976), of envelopes preprinted with the words "Postage and Fees Paid," followed by the name of the Government agency and an identifying number. Postal Service Manual, § 137.24. It is used to send official Government mail without prepayment of postage. Official mail of departments and agencies must also carry the legend "Official Business," and must specify the penalty for unlawful use (39 U.S.C. § 3203(a)). Hence, it is referred to as "penalty mail."

A Government agency which uses penalty mail must pay the costs of the postage from its appropriations, 39 U.S.C. § 3205 (1976). In this case, the use of penalty mail by the court reporters, if permitted, would be charged against the appropriations of the Administrative Office. Because the penalty mail indicia are preprinted on envelopes at agency expense, and the reporters are apparently provided with the preprinted envelopes by the Administrative Office, this request raises the additional questions, even assuming that the reporters are entitled to mail without bearing the cost of postage, whether they must pay for the printing and the envelopes.

We find that the court reporters may be permitted to use the penalty mail privilege in the mailing of official matter, not connected with their fee-generating activities, but only if they reimburse the Administrative Office for all associated costs. For mailings in connection with their fee-generating activities, the court reporters may not use penalty mail on any basis.

We have received submissions from the Administrative Office, the United States Court Reporters Association, and the United States Postal Service (Postal Service) supporting their respective views on this matter. Each submission is primarily concerned with the relationship between two statutes, the so-called Court Reporters Act, 28 U.S.C. § 753 (1976), and 39 U.S.C. § 3202 (1976), dealing with penalty mail.

The pertinent excerpt from 39 U.S.C. § 3202, relating to the use of penalty mail, is as follows:

(a) * * * there may be transmitted as penalty mail—
(1) official mail of—
(A) officers of the Government of the United States other than Members of Congress;

* * * * * * *

(c) This section does not apply to officers who receive a fixed allowance as compensation for their services including expenses of postage.

The pertinent provisions of the Court Reporters Act are as follows:

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: * * * [various specified judicial proceedings].

* * * * * * *

* * * Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

* * * * * * *

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

* * * * * * *

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. *All supplies shall be furnished by the reporter at his own expense.*

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. * * * [Italic supplied.]

The Court Reporters Act establishes the Federal court reporting system, which is unique with regard to the compensation of Federal employees. Under the Act, for each Federal judicial district one or more official salaried court reporters are to be appointed. The court reporters are officers and employees of the court and their work is under the supervisory control of the judiciary. They are compensated by a yearly salary for attending and recording official proceedings, preparing transcripts for judges, and filing copies of transcripts with the clerk of the court. However, unlike other Federal employees, the official court reporter is allowed by statute also to be an independent entrepreneur, deriving income in addition to salary from the sale of transcripts to litigants. It is because of this latter status that the Act also requires that the reporter must furnish all of his own supplies. See, *e.g.*, *Computer-Aided Transcription Program in the Federal Courts*, B–185484, May 25, 1977.

All concerned parties agree that the court reporters are officers of the United States for purposes of the penalty mail provisions. The court reporters contend that, as Government officers, they are entitled to use the penalty mail privilege under 39 U.S.C. § 3202 at the expense of the Administrative Office. They assert that the term "supplies" in 28

U.S.C. § 753 does not include penalty mail and that the legislative history of that section shows an intent to grant them the use of the penalty mail privilege. They rely on the fact that, shortly after the enactment of 28 U.S.C. § 753, the Administrative Office determined that the reporters were entitled to use penalty mail.

The Administrative Office contends that court reporters may not use penalty mail but must provide for their own envelopes and printing costs, and pay the postage for the delivery of their correspondence, because of the requirement that court reporters furnish all supplies at their own expense. The Administrative Office further contends that court reporters, although officers of the United States under 39 U.S.C. § 3202(a), *supra*, are not entitled to the penalty mail privilege by virtue of the exception set forth in 39 U.S.C. § 3202(c), which says that the use of penalty mail is not available to officers who receive "a fixed allowance as compensation for their services including expenses of postage." The Administrative Office asserts in this regard that because court reporters receive both a salary for their official duties and a fixed per-page fee for the transcripts they produce and sell, the Congress intended that this income would compensate court reporters for all expenses, including postage.

The Postal Service disagrees that 39 U.S.C. § 3202(c) prevents the court reporters from using penalty mail. It concludes that the subsection 3202(c) exception to the use of penalty mail applies only to those officers who receive compensation *specifically earmarked* for postage expenses. Since the Court Reporters Act does not specifically provide an allowance for postal expenses, the Postal Service believes that the subsection 3202(c) exception does not apply to the court reporters. The Postal Service goes on to say that—

> There is a provision in the Court Reporter's Act, 28 U.S.C. Sec. 753, which might be considered as a similar exception to the penalty mail provisions. That provision, section 753(e), requires court reporters to furnish all of their supplies at their own expense. We defer to the judgment of the General Accounting Office on the interpretation of that provision. [Footnote omitted.]

At the outset, it seems clear that preprinted envelopes are "supplies" within the meaning of 28 U.S.C. § 753(e). Moreover, we agree with the Administrative Office's General Counsel that postage fees are also "supplies." We have always interpreted the term "supplies" broadly. In *Computer-Aided Transcription Program in the Federal Courts*, *supra*, we held that court reporters must fully reimburse the Administrative Office for the use of a computer system to aid in preparation of transcripts. Moreover, telephone service—an analogous kind of expense—has been regarded since 1945, apparently without dispute by the reporters, as a "supply" within 28 U.S.C. § 753(e). See Report of the Judicial Conference of Senior Circuit Judges, 9 (1945).

Hence, under the requirement that they provide supplies at their own expense, the reporters must pay for mailings unless 39 U.S.C. § 3202 in effect creates an exception from that requirement. Both the reporters and the Administrative Office ask, in this regard, whether the reporters are authorized to use the penalty mail privilege, apparently assuming that if they are, the cost would be borne by the Administrative Office. However, in our view, the essential question raised by the requirement of 28 U.S.C. § 753(e) that the reporters pay for their own supplies is not whether they may *use* penalty mail- the Postal Service, as discussed below, concludes that they may, for official non-fee-generating activities—but rather whether 39 U.S.C. § 3202 or any other law allows them to do so without reimbursing the United States. We believe that the language of the Court Reporters Act prevents the court reporters from mailing at Government expense.

The authority of agencies to allow their officers to use the mails for official Government business at no expense to themselves is not created by section 3202. Appropriations of Federal agencies are generally available, without specific statutory authority, for the expense of the use of the mails by their officers and employees for official purposes. Section 3202 establishes, not who may use the mails, but what conditions must be met for Federal agencies to use the penalty mail privilege, *i.e.*, to allow officers to use the mails for official business without the agency having to pay in advance for postage. (The relevant condition is that the mail be official mail of officers of the Government.)

Repeal of 39 U.S.C. § 3202, for example, would not prevent Government officers otherwise authorized to do so by their agencies from using the mails for official business, nor would it prevent the agencies from paying the associated postage. It would merely prevent the use of penalty mail, *i.e.*, official mail for which the postage has not been prepaid.

By requiring that they provide supplies at their own expense, 28 U.S.C. § 753(e), in effect, prevents court reporters from mailing at Government expense whereas, as discussed above, nothing in 39 U.S.C. § 3202 gives reporters (or any other officers of the Government) an independent right to use the mails for official business at Government expense. Consequently the reporters' contention that 39 U.S.C. § 3202 creates an exception to 28 U.S.C. § 753(e) is misplaced, and they must provide postage at their own expense.

For purposes of determining who must bear the costs of postage and mailing supplies, we see no basis for making a distinction, either between fee-generating and non-fee-generating activities of the re-

porters, or between different types of non-fee-generating activities. In *Computer-Aided Transcription Program* (B–185484), *supra*, we held that court reporters must reimburse the Administrative Office for use of a computer system to prepare the transcripts which they are required to provide to the courts free of charge. We said that the Court Reporters Act contemplates that—

> * * * such duties as preparing transcripts for judges and filing copies of transcripts with the clerk represent the reporters' statutory duties for which they are duly compensated by their yearly salary.

Thus, it is not only the fee-generating activities for which the reporters are required by 28 U.S.C. § 753(e) to provide all supplies at their own expense. Even as to their non-fee-generating activities, such as providing transcripts to judges, they must provide their own supplies.

The Director of the Administrative Office also asks, however (assuming we determine that use of penalty mail is "supplies") whether a distinction should be made between the use of penalty mail by court reporters for Government correspondence on the one hand and fee-generating correspondence on the other. The Director is not now raising the question of who should bear the expense of mailings but rather whether penalty mail may be used at all for non-official purposes.

We think this distinction is very valid. As the Postal Service points out, 39 U.S.C. § 3202, *supra*, permits use of penalty mail only for official business, as opposed to the private business of officers and employees of the Government. In fact, the penalty is imposed precisely for such private use. It is, of course, up to each agency to determine which of its outgoing mailings are official although, as indicated above, the Postal Service views mailings in connection with fee-generating activities as not official. Assuming that the Administrative Office determines that mailings in connection with reporters' fee-generating activities are not official business, we see no basis to allow the use of the penalty mail privilege for that purpose even though the reporters later reimburse the Administrative Office.

Conversely, the Postal Service has said that the non-fee-generating mail of the reporters concering their official duties is official mail under 39 U.S.C. § 3202(a)(1)(A). The reporters may be allowed by the Administrative Office in its discretion to use penalty mail for purposes which the Administrative Office agrees are official and non-fee-generating on a reimbursable basis, assuming that the Administrative Office can account adequately for the amounts to be reimbursed.

In view of the uncertainty over this issue and of the longstanding administrative interpretation allowing the use of penalty mail, this decision will have prospective application only.

[B-195025]

Travel Expenses—Illness—Automobile Return To Headquarters

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

Matter of: Richard L. Greene—Personal Injury—Return of Automobile to Permanent Duty Station, October 22, 1979:

This decision responds to the request of Richard L. Greene, an employee of the Department of Commerce, who appeals our Claims Division's denial of reimbursement for transporting his automobile.

The issue is whether an employee may be reimbursed the cost of transporting his privately owned vehicle (POV) back to his permanent duty station when he incurred the cost because he suffered bodily injury while on temporary duty preventing him from driving the vehicle.

Mr. Greene, stationed in Dallas, Texas, was authorized mileage for temporary duty travel by POV. While on temporary duty, he was in an automobile accident requiring his hospitalization in Salt Lake City, Utah, August 8-10, 1977. Because of his injuries he was unable to drive his POV, and he returned to Dallas by air transportation at Government expense. He paid a private firm $174.65 to return his POV to Dallas, and he claims reimbursement of this amount.

We have held in cases such as Mr. Greene's that there is no authority permitting reimbursement for the additional expense of transporting the POV to the duty station, since the Government has paid airfare for transporting the injured employee. 44 Comp. Gen. 783 (1965); B-176128, August 30, 1972.

Upon further consideration, we now overrule those decisions. Congress has provided in 5 U.S.C. § 5702(b) that, under regulations prescribed by the Administrator of General Services, an employee, incapacitated by illness or injury not due to his own misconduct while on official travel away from his duty station, is entitled to per diem and appropriate transportation expenses to his designated post of duty. The implementing regulations in para. 1-2.4 of the Federal Travel Regulations provide for transportation expenses to the post of duty without specifically describing the kind of expenses that may be paid by the Government to the incapacitated employee. In B-127109, April 6, 1956, we allowed the expenses of an ambulance and an attendant required for the return of the stricken employee to his

permanent duty station. This decision observed that the Act of April 26, 1950, 64 Stat. 89, from which 5 U.S.C. § 5702(b) is derived, was enacted:

> * * * to overcome in some measure inequities and hardships arising when an employee become ill or is injured while in a travel status and compelled to personally assume all expenses, including subsistence and transportation costs.

See Senate Report No. 1364, 81st Cong., 2d Sess., pages 1-2.

The two prior cases mentioned above disallowed the expenses of returning the employee's automobile to his post of duty on the ground that the statute only authorized the Government to provide for the return transportation of the employee himself. We now believe that this is too restrictive a view of the scope of 5 U.S.C. § 5702(b). Neither the statute nor the implementing regulations preclude payments for the expense of returning a POV, and the effect of disallowing such expenses is a hardship to the employee. Acordingly, where the employee is authorized to use a privately owned vehicle on official travel, we construe the term "appropriate transportation expenses" in 5 U.S.C. § 5702(b) to be broad enough to authorize payment of the expenses of returning the vehicle to the employee's headquarters.

In accordance with the foregoing, Mr. Greene may be reimbursed for the cost of transporting his POV from Salt Lake City to Dallas, Texas. Settlement will be made in due course.

[B-193439]

Station Allowances—Military Personnel—Temporary Lodgings—Concurrent Payment of Per Diem and Temporary Lodging Allowance

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

Matter of: Dual Lodging Costs, October 24, 1979:

The issue in this case is whether the Joint Travel Regulations (1 JTR) may be revised to authorize a member of the uniformed services to receive his portion of a temporary lodging allowance during a period of temporary duty away from his new permanent station, when he continues to incur his share of lodging expenses at the hotel or hotel-like accommodations where his family or baggage and personal

belongings are housed at his permanent station. For the following reasons such an amendment is authorized.

The question was presented by letter from the Acting Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) and was assigned Control No. 78–43 by the Per Diem, Travel and Transportation Allowance Committee.

Currently, a member with dependents ordered to a new permanent station located outside the United States may occupy temporary lodgings with those dependents while awaiting military quarters or while completing arrangements for housing on the local economy. Pursuant to 37 U.S.C. 405 (1976) and 1 JTR M4303–1, that member is entitled to a temporary lodging allowance (TLA) while occupying those temporary quarters. In certain instances shortly after arrival and while occupying temporary quarters, a member is ordered on temporary duty away from his new permanent station. The member receives a per diem in his own right for lodging, meals and incidentals for duty performed at the temporary duty station. 1 JTR M4205. However, he may continue to incur the same lodging costs for the temporary quarters occupied by his dependents at the new permanent station even while he is absent. He must pay his share of the lodging cost at the permanent station from personal funds because the maximum amount of TLA payable is based on the number of persons actually occupying hotel or hotel-like accommodations at the permanent station.

In other instances, a member without dependents leaves his personal belongings and baggage in the temporary quarters while performing temporary duty, simply because there is no place for them to be stored. In this case, he must pay for the temporary lodging costs at the permanent station from personal funds because the TLA is only payable if he occupies the premises.

It has been our longstanding view that a member of the uniformed services is not entitled to receive simultaneously TLA for himself and a travel per diem allowance. The reason for this is to prevent duplication of payments. In other words, a travel per diem allowance and TLA are authorized for the same general purpose of providing partial reimbursement for the more than normal expenses incurred at hotels and public restaurants. Concurrent payment of such allowances, therefore, would involve an improper and unauthorized duplication of payments. See: 47 Comp. Gen. 724 (1968); 41 *id.* 453 (1962); 40 *id.* 271 (1960).

In situations similar to the ones posed we have held that, as a general rule, where an individual in temporary duty status travels on official

Government business and maintains dual living accommodations, the individual is only entitled to reimbursement in the form of per diem for lodging expenses incurred at one point only on one calender day. See B–162641, November 27, 1967. In cases involving civilian employees an exception has been made and we have allowed reimbursement of rental for the maintenance of dual living accommodations provided that an appropriate official of the employing agency or department made a determination that the employee had no alternative but to incur duplicative costs. See: B–182600, August 13, 1975, and cases cited therein; compare *Matter of Merrill Eig*, B–184790, December 9, 1976.

This rationale was applied in a dual lodging situation involving military personnel. In *Matter of Lieutenant (junior grade) Hein F. Paetz*, B–188415, July 6, 1977, we were asked to consider whether a navy member was entitled to be reimbursed for room charges incurred in maintaining living quarters at two different locations on the same calendar day while on temporary duty status. In that case we stated that the regulations may be amended to authorize reimbursement in such situations if the costs of concurrent use of quarters at more than one temporary duty station were necessary expenses required by public business or military assignment, and are not expenses incurred by reason of personal choice and convenience.

This rationale appears applicable to the situations posed by the Assistant Secretary of the Air Force. In addition, the posed situations may be distinguished from those cases cited which preclude the payment of TLA and per diem on the same day. In the latter cases the overriding concern is with a member receiving duplicative payments. In the present situations, however, there is no such concern. Where a member with dependents is ordered on temporary duty away from his new permanent station the member cannot take those dependents with him and therefore must necessarily maintain dual living quarters. Under these circumstances the TLA, reduced by 50 percent since the member is no longer present, is paid to partially reimburse the member for the dependents' living expenses at the member's new duty station. At the same time the member is receiving a travel per diem allowance to cover his living expenses while on temporary duty. Thus, for the member to receive additional TLA for the living expenses he continues to incur at his permanent duty station and also receive a per diem to cover his expenses while on temporary duty would not amount to dual payments for essentially the same purpose. This is so since the member, by virtue of his military assignment, continues to incur different expenses for himself at both places. Using the rationale

in *Paetz*, *supra*, the cost of these quarters would be "necessary expenses" required by the member's military assignment, and would not be nonreimbursable expenses incurred by "personal choice or convenience."

To some extent this is also true with respect to a member without dependents who must leave his personal belongings and luggage due to lack of storage space in the temporary quarters at his new permanent station while away on temporary duty. Like the member with dependents the member without dependents would not be receiving TLA and per diem to cover the same expense. As we stated in *Paetz*, *supra*, the sole reason for maintaining living quarters at more than one duty station should not be for personal convenience but must be based on Government requirements related to the member's duty, such as last minute orders making it impossible or impractical for the member to move out of temporary quarters at the new duty station. In addition the necessity for retaining multiple quarters should be well documented.

Accordingly, the Joint Travel Regulations may be amended as requested by the Acting Assistant Secretary of the Air Force provided that in each case the maintenance of dual living accommodations is demonstrated to be required by virtue of the member's military assignment, rather than being permitted as a matter of personal choice and convenience.

[B-194215.2]

Contracts—Termination—Erroneous Award Remedy—Re-award of Contract Remainder—Extension of Contract Period—Propriety

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

Contracts—Awards—Erroneous—Anticipated Profits, etc. Claims

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

Matter of: Colonial Ford Truck Sales, Inc., October 26, 1979:

On February 13, 1979, Colonial Ford Truck Sales, Inc., protested the award to another firm by the Defense Construction Supply Center after the Center determined that Colonial was not a responsible bidder under solicitation No. DLA700-79-R-7009. As a result of the protest the agency referred the matter of Colonial's responsibility to the Small

Business Administration for possible issuance of a Certificate of Competency (COC) under the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. I 1977). We informed Colonial that if a COC were issued, the agency would terminate the contract previously awarded under the solicitation and make award to Colonial.

Colonial informs us that it has received a COC from the SBA and that it has accepted award of the contract for the 4 months remaining in the 1-year contract term. Colonial requests that we determine whether the agency acted properly "in attempting to force this company to accept a reduced contract that was improperly awarded in the first instance." Colonial asks that the agency award it a 1-year contract. In the alternative, Colonial claims $20,000 in profits it would have earned had it been awarded the contract for the additional 8 months as well as profits it will not earn because it is performing at its original bid price but for a reduced quantity.

The agency acted properly in offering Colonial an award for only the balance of the contract term. While it is unfortunate that the contract had been performed for 8 months before the responsibility matter could be resolved, the Government could not properly make an award that went beyond what was included in the original solicitation. *Cf.* 39 Comp. Gen. 566 (1960). Moreover, the Government did not force Colonial to accept a contract. Colonial was given the opportunity to reject or accept the award of a 4-month contract. We cannot grant Colonial's request that it receive a 1-year contract.

Regarding Colonial's request for anticipated profits, it is well established that anticipated profits are not recoverable against the Government even if a claimant is wrongfully denied a contract. *Harco Inc.—Reconsideration*, B–189045, October 4, 1977, 77–2 CPD 261.

[B–195259]

Appointments—Delay—Backpay—Entitlement

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

Matter of: David R. Homan—Claim for Backpay, October 29, 1979:

This decision is in response to a request from Mr. David R. Homan for reconsideration of our Claims Division's settlement of March 16, 1979, by which his claim for backpay based on delays in effecting his

appointment to a position with the Department of the Army was denied. Although the Civil Service Commission found that administractive errors had resulted in the Army's failure to include Mr. Homan as one of three applicants certified eligible for appointment, those errors do not provide a basis to retroactively effect his appointment and to award him backpay.

On January 30, 1976, Mr. Homan, seeking employment as an engineer, submitted a Standard Form 171 to the Denver Area Office of the Civil Service Commission (now Office of Personnel Management). On August 13, 1976, while away from his home, he received an Inquiry as to Availability which had originally been sent to his former adddress even though he had notified the Denver office of his move. Return was requested by August 16 but Mr. Homan's response was not received until August 19. As a result, he was excluded from consideration for the vacancy. On August 25, 1976, Mr. Homan wrote to the Civil Service Commission requesting an investigation into the circumstances surrounding his elimination as a candidate. On October 7, 1977, the Commission wrote to Mr. Homan stating that they had found he was "improperly denied consideration for a competitive civil service position through arbitrary and unfair procedures."

Mr. Homan was ranked 7th on the certificate of 11 eligibles that Fort Carson used to fill the Supervisory General Engineer, GS–801–11 position. Upon investigation, the Civil Service Commission found that Fort Carson sent Inquiries as to Availability to the first 6 eligibles on the list on July 27, 1976, and allowed them 10 days, until August 6, 1976, to reply. After those persons failed to reply or declined further consideration, the other eligibles were sent Inquiries as to Availability on August 9, 1976, and were allowed only 7 days, until August 16, 1976, to reply. According to Fort Carson's usual practice, Mr. Homan, as an out-of–state candidate, should have been allowed 10 days to reply. Had this been the case, his reply would have been timely and he would have been one of the top three eligibles. Therefore, the Commission concluded that as of August 19 Mr. Homan was still a candidate and his removal from consideration violated the Commission's Rule of Three which provides that a selection for a vacancy shall be made from among the highest three eligibles. In addition, since he was a veteran and the actual appointee was not, the Commission found that Fort Carson violated the veteran preference rules.

The Commission directed Fort Carson to regularize the appointment by one of three methods and stated that the choice of which of the three to use was left to the agency's discretion. Fort Carson chose

to hire Mr. Homan for the position for which he had originally applied and he was appointed on January 4, 1978.

Mr. Homan requested a retroactive appointment to September 13, 1976, with backpay including within grade increases from that date to the day he was hired, and the sick and anual leave he would have accumulated during that period. The Armed Forces Command, Fort McPherson, Georgia, denied his request, as did our Claims Division, on the grounds that he had not undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act, 5 U.S.C. 5596 (1970). Mr. Homan claims that not only are the errors made by Fort Carson unjustified and unwarranted personnel actions, but that the 13-month delay in the Civil Service Commission's investigation was also unjustified and unwarranted.

In general, an appointment is effective from the date of acceptance and entrance on duty, but there are limited circumstances in which appointments to Federal employment may be made retroactively. As set forth at 42 U.S.C. 2000e–16(b), the Equal Employment Opportunity Act of 1972 gave the Civil Service Commission authority to order an agency to hire an employee with backpay if it determines that he was not selected on the basis of discrimination because of race, color, religion, sex or national origin. The remedy provided by that Act extends to applicants for employment as well as to employees.

Unlike the Equal Employment Opportunity Act, the Back Pay Act, 5 U.S.C. 5596, is applicable only to employees and provides a remedy for instances in which an employee is found to have undergone an unwarranted or unjustified personnel action which has resulted in the withdrawal or reduction of all or a part of his pay, allowances or differentials. Because the Back Pay Act applies only to employees, the instances in which appointments may be effected retroactively and backpay awarded are restricted to those in which an individual has a vested right to employment status by virtue of statute or regulation. For example, in B–158925, July 16, 1968, we held that an agency's refusal to reemploy a reservist violated his statutory right to reemployment under 5 U.S.C. 3551, entitling him to benefits under the Back Pay Act. Similarly, in 54 Comp. Gen. 1028 (1975) we held that a reemployed annuitant's reappointment with a break in service could be made effective a day earlier to eliminate a break in service. In that case, the agency had violated a mandatory policy requiring reappointments following retirement to be effected without a break in service.

We have also recognized that an individual who has been duly appointed to a Federal position but who is improperly restrained

from entering upon the performance of his duties is entitled to redress under the Back Pay Act. Our holding in B–175373, April 21, 1972, involved an individual who was initially advised that he had been selected for a position. He was wrongly informed that the offer of employment was being withdrawn and, upon reporting for duty on the date originally set, he was improperly restrained from entering upon duty. Based on the Civil Service Commission's determination that the individual was legally appointed as of the date he attempted to enter on duty and that the agency's action in preventing his entrance on duty was tantamount to an erroneous removal or discharge, we held that he was entitled to backpay from the date he properly should have been permitted to enter on duty.

In contrast, in cases where the official with appointment authority has not exercised his discretion to appoint an individual to a Federal position, there is no basis to appoint retroactively, even where the delay is due to administrative error. The holding in *Raymond J. DeLucia*, B–191378, January 8, 1979, involved an applicant for a position as Deputy U.S. Marshal who was first notified of his selection and given a reporting date. Through administrative error he was inadvertently notified that the offer of employment was withdrawn and, by the time the problem was resolved, his appointment had been delayed for almost 2 months. In holding that he was not entitled to backpay for that 2-month period prior to his actual appointment, we stated:

> * * * in the ordinary case the decision to appoint or promote an individual in the Federal service is left to the discretion of the employing agency, and we have held that in such case the agency's action in not hiring or promoting the individual on the date he expected or would have preferred, does not constitute an "unjustified or unwarranted personnel action" under the Back Pay Act. This is so even though it appears that the appointment or promotion may have been delayed through error or an unusually heavy agency workload in the processing of personnel actions, since the employee in such case has no vested right under law or regulation to be appointed or promoted in any event. * * *

Also see *Leonard Ross*, B–183440, August 12, 1975.

In Mr. Homan's case, there is no finding that the delay in effecting his appointment was the result of discrimination. Rather, the Civil Service Commission found that through administrative error, he was improperly eliminated from consideration under the Rule of Three and improperly passed over as a preference eligible. By way of corrective action, it offered the Army three options and left the choice between them to the discretion of the Army. As is shown by the fact that the Commission did not direct the Army to appoint Mr. Homan, he did not have a vested right to be appointed to the position in question. The Army's ultimate determination to appoint him to that posi-

tion does not alter the fact that it nonetheless retained discretion with regard to making the appointment. Since that discretion was not exercised until Mr. Homan was in fact appointed on January 4, 1978, there is no basis to retroactively effect his appointment and award him backpay.

Accordingly, the Claims Division's disallowance of Mr. Homan's claim is sustained.

[B-138942]

Travel Expenses — Air Travel — Foreign Air Carriers — Prohibition—Availability of American Carriers

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

Matter of: Department of Treasury — Fly America Act — Agency discretion in scheduling travel, October 30, 1979:

The Acting Assistant Secretary (Administration), Department of the Treasury, has asked whether the failure to use certificated U.S. air carrier service to the furthest practicable interchange point violates the Fly America Act, 49 U.S.C. § 1517, where such scheduling would require a person of the Jewish faith to travel on his Sabbath.

The problem is a recurring one. As an example, the Acting Assistant Secretary has referred to the difficulty experienced in connection with Mr. Mordecai S. Feinberg's participation in certain treaty negotiations in Malta. His attendance was regarded as essential to the negotiations, which initially were scheduled to begin on Monday. Because Mr. Feinberg is an observant Jew whose religion requires him to abstain from all travel from sundown Friday until dark on Saturday, his travel could not be scheduled by U.S. air carrier from Washington, D.C., to Rome, the furthest practicable interchange point, since service to Rome, with foreign air carrier connections to Malta, required departure before dark on Saturday. Although his travel could have been scheduled by U.S. air carrier to London departing Saturday night, with foreign air carrier connections to Malta, London is not the furthest practicable interchange point and Mr. Feinberg would have incurred a financial penalty for excess use of foreign air carrier service in accordance with 56 Comp. Gen. 209 (1977). In the particular instance cited, the treaty negotiations were delayed until Tuesday so that Mr. Feinberg could travel outside his Sabbath. However, because Mr. Feinberg's participation is essential to many international con-

ferences, we are asked whether he may use alternative U.S. air carrier service when scheduling strictly in accordance with the Fly America Act would interfere with his religious practices.

Under 49 U.S.C. § 1517 and in accordance with the availability criteria set forth in the Comptroller General's Guidelines, B–138942, March 12, 1976, we have held that a Government traveler is required to use U.S. air carrier service available at point of origin to the furthest practicable interchange point on a usually traveled route. 55 Comp. Gen. 1230 (1976). In the case of Mr. Feinberg's travel to Malta, both London and Rome are usual interchange points; however, travel by way of Rome involves a greater use of U.S. air carrier service. Since Rome is the furthest practicable interchange point, the Acting Assistant Secretary correctly determined that Mr. Feinberg's travel by way of London would have resulted in a reduction of revenues by U.S. air carriers in favor of foreign air carriers and, unless otherwise justified, would have involved a financial penalty.

The Guidelines state that an air carrier which can provide the service needed is considered available even though comparable or a different kind of service by a foreign air carrier costs less or is preferred by the traveler. Consistent with the Guidelines, decisions of this Office have held that neither considerations of cost nor the preferences or convenience of the traveler will justify the use of foreign air carriers. 57 Comp. Gen. 519 (1978), and *Robert A. Young*, B–192522, January 30, 1979.

The Guidelines, however, recognize an agency's authority to determine that certificated service otherwise available cannot provide the foreign air transportation needed or will not accomplish the agency's mission. An agency's determination that an air carrier cannot serve its transportation needs will not be questioned by this Office unless it is arbitrary or capricious. 57 Comp. Gen. 519, *supra*.

As evidenced by Mr. Feinberg's situation, there are circumstances in which the line between preference or convenience and accomplishment of the agency's mission is a thin one. In 59 Comp. Gen. 519, *supra*, we ruled that the ordinary hardship and inconvenience of changing flights in New York on trips between Washington and Europe did not make United States air carriers requiring New York connections unavailable. In that decision we specifically recognized that there are considerations surpassing mere preference and inconvenience that may warrant deviation from strict adherence to the Fly America Act scheduling principles. For example, we have stated that the concept of availability of United States air carrier service includes such basic assumptions as that reservations can be secured

and a reasonable degree of certainty that the service which the airline offers to provide will be provided without unreasonable risk to the traveler's safety. In the case of an individual traveling to the U.S. for medical treatment, we held it was appropriate to schedule her travel by foreign air carrier to reduce the number of travel connections and avoid possible delays. Given the medical necessity involved, we concurred with the agency's determination that her travel by foreign air carrier was necessary to accomplish the agency's mission—her safe and expeditious medical evacuation. *Richard H. Howarth*, B–193290, February 15, 1979.

The Acting Assistant Secretary suggests that the words "preference or convenience" should not apply to a situation in which an employee is required by his religion to abstain from travel. And, as evidenced by the fact that the treaty negotiations were rescheduled to begin one day later to accommodate Mr. Feinberg, it appears that the Department of Treasury in fact did consider Mr. Feinberg's conviction not to travel from Friday evening to Saturday night to be the dictate of his religious convictions and not merely a matter of his personal preference. Based on that same consideration, we believe that the Department properly could have determined that U.S. air carrier service by way of Rome departing before dark on Saturday could not meet the agency's mission—Mr. Feinberg's attendance at the negotiations on Monday.

We have not been told the specific dates of the negotiations in Malta and, therefore, we are unable to verify that in the example given, Mr. Feinberg should have been scheduled to travel Saturday night by way of London. Although the submission suggests that the Saturday night flight to London was the only available alternative, based on the Official Airline Guide, it appears that it may have been possible to travel via Rome by U.S. air carrier departing Thursday night or Friday morning. While such scheduling would have involved an earlier departure, up to 48 hours additional per diem is payable to facilitate use of certificated service. 56 Comp. Gen. 216 (1977). Moreover, connections to Malta can be made in Paris, which is a usual interchange point involving greater use of U.S. air carrier service. It is not clear that these alternatives were considered.

[B–194497]

Contracts — Protests — Timeliness — Solicitation Improprieties — Request for Quotations

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

Contracts — Options — Price Reduction — After Closing Date for Market Testing Solicitation

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

Contracts—Options—Advantage to Government

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

Contractors—Incumbent—Failure to Solicit—"Testing of Market" Solicitation

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

Matter of: Interscience Systems, Inc., October 30, 1979:

Interscience Systems, Inc. (Interscience) protests the purchase of certain computer equipment leased by the Environmental Protection Agency (EPA) from the Sperry-Univac Division of the Sperry Rand Corporation (Univac) under contract No. 68-01-1732. Specifically, Interscience complains that EPA's exercise of certain of the Univac contract purchase options was based on an improper evaluation of proposals furnished EPA in response to a market test initiated through EPA Request for Quotations (RFQ) GS-005-00067. The protester also believes the procedures followed violated Federal competitive procurement standards and were otherwise improper. For the reasons discussed below, we have concluded that Interscience was not entitled to award and that the exercise of the Univac contract option was proper.

The RFQ was issued on March 19, 1979, following EPA's receipt on March 15, 1979, of a "special purchase offer" from Univac. Univac offered to reduce by $2,028,135 the purchase option prices in Univac's contract for equipment installed at EPA's National Computer Center. Univac required EPA to exercise the option at the reduced price and on an "all or none" basis by the close of business on March 29, 1979.

EPA's contracting officer reports that subsequent to the receipt of Univac's price reduction:

An evaluation of the Univac offer indicated that approximately $4,000,000 could be saved, by purchase, over the estimated 5-year life cycle of the equipment. As a result, EPA requested a Delegation of Procurement Authority (DPA) from the General Services Administration (GSA) to purchase the equipment. GSA, by letter dated March 21, 1979 [confirming oral approval given March 15, 1979],

authorized EPA to procure the equipment competitively on a make/model or plug compatible basis. * * * The DPA, as a minimum, required EPA to solicit six specified firms in order to determine whether the Univac offer represented the lowest cost to the Government. The solicitation was to allow offerors to bid all or a portion of the equipment list and to provide that EPA would compute any partial list by adding GSA's schedule prices (or prices in the Univac contract, whichever are lower) to configure a complete equipment list to determine the lowest overall cost * * *.

Although described as an RFQ, the solicitation was referred to as a request for proposals in EPA's cover letter to potential suppliers, included evaluation and award criteria, and encompassed several equipment "subsystem groups" as well as "maintenance services." Prospective competitors were advised of EPA's "[intent] to purchase, subject to the availability of funds, the present Univac rental equipment and features" unless a more favorable proposal was forthcoming. March 23, 1979, was established as the closing date for receipt of proposals.

Proposals were received from Interscience and Amperif Corporation. The Amperif proposal was considerably higher in price than Interscience's. EPA first evaluated the Interscience proposal at $4,456,-368 and Univac's proposal at $4,850,000. However, because EPA believed award to Univac for anything less than the entire computer center system would require the Government to enter into a separate contract with Univac for system engineering support, EPA added a factor of $1,176,634 (based on Univac's commercial rates discounted for present value) to Interscience's evaluated costs. EPA then concluded it would be more advantageous for the Government to exercise the Univac option.

Interscience complains that the RFQ evaluation criteria were disregarded, that it had no notice that system engineering support was an evaluation factor, and that it could have provided such support had it been asked to do so. It also objects to a $38,000 cost factor for shipping, which it views as excessive, and to a factor representing continued rental of Univac equipment until Interscience's equipment could be installed. Interscience also believes its proposal was unfairly evaluated because EPA computed the cost of acquiring residual Univac equipment (not offered by Interscience) at the higher Univac contract option prices rather than at the reduced option prices.

Interscience further complains that EPA "designed" the procurement to justify what was "in fact, a sole-source award." In this regard, Interscience complains that EPA only allowed it 4 days to prepare and submit a proposal, required initial equipment deliveries within 30 days, based the evaluation factors on Univac's commercial pricing, and ignored other factors such as life-cycle maintenance costs which Interscience believes would show purchase of its equipment to be advantageous. Interscience points out that EPA failed to advertise

the procurement in the *Commerce Business Daily* (*CBD*) as required by the DPA, states that it learned from an unidentified source following submission of its proposal that it was low in price but that EPA intended to find a way to prevent it from receiving an award, and contends it was not accorded an adequate debriefing.

We agree with EPA that several of the issues Interscience raises are untimely. Our Bid Protest Procedures state that a protest based upon an alleged impropriety in a solicitation which is apparent prior to the closing date for receipt of proposals must be filed prior to that date. 4 C.F.R. § 20.2(b)(1) (1979). Interscience's concern that inadequate proposal preparation time was allowed, that delivery schedules were too tight, and that certain equipment rental charges and life-cycle maintenance costs listed in the RFQ should not have been assessed should have given rise to a protest prior to closing on March 23, 1979.

Regarding Interscience's complaint that the cost of acquiring necessary equipment not offered by Interscience was unfairly evaluated at Univac's higher contract option prices rather than at Univac's reduced prices, we point out that an offeror ordinarily is free to quote more favorable prices on an all or none basis if, as here, it chooses to do so. *General Fire Extinguisher Corporation*, 54 Comp. Gen. 416 (1974), 74-2 CPD 278. Univac chose to offer substantially reduced pricing on condition that the Government exercise its options to purchase all of the subject equipment at one time and therefore such pricing would not apply if a portion of the equipment were obtained from the protester.

Under the circumstances, we cannot object to this portion of EPA's evaluation because EPA had no basis for computing acquisition cost of the equipment not furnished by Interscience at anything other than the lower of Univac contract or GSA mandatory schedule pricing, as provided in GSA's DPA.

Further, the transportation charges, and by Interscience's admissions, the charges which Interscience believes should have been levied against Univac for maintenance, are inconsequential since in no event would they have affected the evaluation result which led to the decision to exercise the Univac purchase options. Also, Interscience was furnished a copy of the RFQ, and was not prejudiced by EPA's failure to publish a *CBD* notice. Moreover, the adequacy of Interscience's debriefing is a procurement matter which had no effect on the propriety of EPA's decision to exercise the Univac options.

The protester's remaining major concern is the propriety of the addition of the system engineering support cost factor to its evaluated costs. We find it unnecessary to resolve the issue, however, since we believe that in any event a proper evaluation would have shown the

exercise of the Univac options to be less costly than purchasing from Interscience. While Interscience's proposal was being evaluated, Univac reduced its purchase option price by an additional $500,000. EPA determined that this:

> revised offer, although not submitted under the RFQ, was considered to be late * * * [and] was not evaluated in making the [RFQ] source selection decision.

We disagree with EPA. In our view, the reduction should have been considered in determining the most advantageous method of satisfying EPA's requirements. Univac was not responding to a solicitation, Univac in fact had not been solicited, there had been no *CBD* announcement, and there was no late proposal clause applicable to Univac. Under the circumstances, we do not believe the concept of lateness applies here and do not believe that the Government should have been precluded from considering the offered reduction.

In so holding, we recognize that we would not reach the same result were the market test formally advertised. Obviously, to permit a contractor to modify its option price after it has had the opportunity to see, through a public bid opening, what pricing competition it faced, would be inherently unfair. *See* B–173504, September 12, 1972.

However, we see no such unfairness or compromise of the integrity of the competitive procurement system where a market test is conducted as a negotiated procurement, pricing is not exposed, and the contractor whose option prices are being tested is not invited to participate and may not know of the testing, and, indeed, is not otherwise provided an opportunity to meet the market test competition. Consequently, we believe the $500,000 Univac supplemental discount should have been considered by EPA in the evaluation. When that additional discount is taken, of course, Univac's proposal is more favorable to the Government than Interscience's even if the engineering support factor is eliminated. Thus, the EPA decision that exercise of the options would be more advantageous than a purchase from Interscience is rationally founded and not subject to legal objection.

We recognize that, because Univac was not given the opportunity to participate in the market test and to meet whatever competition would result, Univac and those responding to the RFQ were not subject to the same rules. We think, to avoid even the appearance of impropriety, that it would be appropriate for the incumbent in this type of situation to be given the opportunity to respond to a market test solicitation so that all parties in competition are bound by the same procedures. We are therefore suggesting to GSA that it consider requiring agencies in similar situations to include the incumbent contractor as a participant whenever the market is to be tested through a solicitation.

The protest is denied.

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